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

<p>WESTERN WATERSHEDS PROJECT, et al.,</p> <p>Plaintiffs,</p> <p>v.</p> <p>SALAZAR, et al.,</p> <p>Defendants.</p>	<p>CV-09-159-M-CCL</p> <p><b>PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR INJUNCTION PENDING APPEAL</b></p>
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## I. INTRODUCTION

Pursuant to this Court's February 26, 2011 Order setting February 28 as the deadline for Plaintiffs to file a reply brief in this matter, Plaintiffs' hereby file this reply in support of their Motion for Injunction Pending Appeal. Dkt. 72 (Order setting reply deadline).

Plaintiffs are likely to prevail on the merits or have raised "serious questions" that they will prevail on the merits upon appeal of their claims. Plaintiffs are also likely to suffer irreparable harm should the Defendants choose to slaughter Yellowstone bison later this season, which remains a distinct possibility, as Defendants have not "ruled out" slaughter as an option. Dkt. 71-2 Dec. of P.J. White, par. 4. Additionally, the balance of harms and the public interest strongly favor granting an injunction pending appeal, so that hundreds of bison are not permanently removed from the population by the federal Defendants before the Ninth Circuit Court of Appeals has an opportunity to render a decision on the merits of Plaintiffs' appeal. Thus, this Court should issue an injunction pending appeal.

In relation to some of the Plaintiffs' NEPA allegations and one of their NFMA claims, this Court stated that Plaintiffs did not make required site-specific allegations. However, Plaintiffs challenge several decisions of Defendants that satisfy any concerns that may otherwise be raised based on

Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 64 (2004); Dkt. 64 at 29. First, Defendants have made several decisions and taken final actions since the IBMP was first adopted in 2000, thus there remain opportunities to challenge their actions that further implementation of the IBMP.

Regarding the NEPA claims, Defendants decided on multiple occasions that they would not prepare an SEIS – in written and signed responses to requests from Plaintiffs and others that the agencies prepare such analysis. NPS AR 7416, 7062, 6460. They have also issued a new permit for the Horse Butte capture facility, and adopted revised iterations of the IBMP that serve to re-adopt the plan and determine a (time period/annual?) decision regarding how to implement the plan. Each of these relates to the various items of new information and changed circumstances Plaintiffs assert necessitate an SEIS. Further, the GNF Forest Plan is challenged by way of many specific decisions made by the GNF, including revised iterations of the IBMP, the Horse Butte capture facility permit, the RTR fencing permit, and several grazing plans and authorizations as noted in Plaintiffs' complaint and elsewhere. Each of these is affected by or affects sagebrush habitat and species diversity, based on bison management or cattle management that prevents bison use of the GNF.

## ARGUMENT

### **A. Plaintiffs are likely to succeed on the merits of their appeal**

Plaintiffs are likely to succeed on the merits of their appeal because the district court made erroneous conclusions of law and findings of fact regarding Plaintiffs' claims.

#### **1. The Defendants arbitrarily and capriciously decided not to prepare a supplemental environmental impact statement for the IBMP and connected actions**

Defendants contend, and the Court concluded, that where an agency has reviewed the relevant factors of new information and changed circumstances, and makes a determination that supplementation is not necessary, a court "must defer to that informed discretion." Dkt. 71 at 7, citing Price Road Neighborhood Association v. Department of Transportation, 113 F.3d 1505, 1509-12 (9<sup>th</sup> Cir. 1997); also see Dkt. 64 at 25. However, this case is inapposite here, as Defendants have not examined any new information or changed circumstances based on the significance factors set out at 40 C.F.R. Sec. 1508.27. While Defendants may have reviewed new information, and referred to changes in making adaptive adjustments to IBMP management, nowhere in the administrative record is there indication they have actually considered such information and

circumstances per significance factors, as NEPA requires and the Ninth Circuit holds. See e.g. Ocean Advocates v. United States Army Corps of Engineers, 402 F.3d 846, 856 (9<sup>th</sup> Cir. 2005).

Defendants focus on six items of new information and changed circumstances, although Plaintiffs identified additional items in their complaint and summary judgment briefs, and other items of significant new information have otherwise been brought to the Defendants' attention. See e.g. Dkt. 49 at par. 122-125 (discussing new information related to bison as a food source for threatened grizzly bears). Even the six items focused on alone represent sufficient information that Defendants should have examined such information in terms of NEPA's significance factors, and decided to prepare an SEIS.

The Kilpatrick study, while suggesting some years will present higher transmission risk, represents the only quantification of transmission risk to be prepared – something thought impossible when the FEIS was prepared for the IBMP. NPS AR 511. It presents new and different information from that which formed the basis of IBMP analysis, in that it indicates in most years intensive management is unnecessary, and identifies alternatives to the IBMP that would be as effective and more cost efficient. Such information alters the very basis of alternatives comparison and cost-benefit analysis

conducted in the FEIS for the IBMP, and thus is significant new information. The Court thus erred in concluding the study does not present any new information requiring NEPA analysis. Dkt. 64 at 26-29.

Other information such as the increased or maintained level of seroprevalence in the bison population represents information that also significantly alters the comparison of alternatives, and impacts analysis as it affects the purpose and need of the IBMP.

The removal of cattle and land ownership changes in key IBMP management areas also represents significant new information that should be reviewed per significance factors and in an SEIS, and the Court erred in concluding otherwise. Dkt. 64 at 34. The Court only summarily addressed the changes in cattle grazing and land ownership, and overlooked the fact that prior land ownership and use formed the basis of alternatives, cost-benefit analysis, and impacts analysis in the IBMP. Dkt. 64 at 34-35. The changes thus represent significant new information, as they alter the very purpose and need of the IBMP, and alter the impacts to cattle operations, residents, and other factors considered under different circumstances in the IBMP FEIS. NPS AR 533.

Additionally, new genetic information represents a dramatic departure from the information available when the IBMP was adopted and the

agencies thought 580 bison would be sufficient to maintain a viable population. NPS AR 614-615. Even a recent study (not yet peer reviewed) and Park declarations referred to by the Court, indicate there are genetic differences between the breeding populations in the Park, and that well over 580 bison are necessary to maintain a viable population overall. Dkt. 64 at 32-34.

The study recommends maintaining 2,500-4,500 bison and an average *above 3,000*, but the IBMP does not provide for such management. Instead, the IBMP allows the population to drop to 2100 through management, and the population could drop even further due to stochastic events even if the agencies halt lethal management for a period of time. Nor does the IBMP provide any information or guidance regarding how the culls and other actions may impact the differing genetics of the breeding populations. NPS AR 958-967. Given this new information, and that even the unpublished study the agencies and Court rely on represents very different information than that forming the basis of the IBMP and its impacts analysis, the Court erred in concluding that simply because the agencies are aware of information and monitoring the population, that NEPA analysis is not necessary to understand the significance of the impacts associated with such new information.

The NEPA analysis is stale for these and other reasons as well, including the incorrect presumptions regarding brucellosis risk management as focused on bison but not elk. The Court misapprehended the information contained in the FEIS and Plaintiffs' argument regarding the same. The Court stated the FEIS "did not assume that elk were not responsible for any brucellosis disease transmission," relying on NPS AR 1265. Dkt. 64 at 35. However, examination of the study abstract mentioned on that page of the FEIS reveals it only concerned transmission between elk and bison, not transmission from elk to cattle. NPS AR 1265. When the FEIS was prepared, the agencies presumed elk were not likely to transmit brucellosis to cattle, and thus exclusive focus on bison was needed. NPS AR 9349; 533-534, 606-610, 653. The new information and circumstances regarding likelihood of brucellosis transmission from elk to cattle presents a factor that alters how and whether to focus on bison, and whether the IBMP goals and purposes can be accomplished absent a consideration of elk as a transmission factor. Thus, the Court erred in concluding elk transmissions and other new information does not render the FEIS stale and outdated.

The same new information and changed circumstances affect each additional, connected action of the agencies including the new Horse Butte permit, RTR funding and fencing permit, adaptive adjustments, and other



challenged actions that have not been based upon NEPA analysis and disclosure of impacts including all the new and changed information since 2000.

**2. The Forest Service arbitrarily and capriciously adopted bison and cattle management decisions and determined not to amend the GNF Forest Plan to provide standards and goals for bison and other species and sagebrush habitat type**

The Court again misapprehended the situation in concluding the GNF did not need to provide for *any* management direction for bison or sagebrush habitat and obligates in its Forest Plan. The Court suggested Plaintiffs' claims would require the GNF to *put* bison on the Forest in order to comply with NFMA's diversity and viability requirements, which the Court held was not required. Dkt. 64 at 45-46. However, the record indicates bison naturally migrate to the GNF, and attempt to use areas of the GNF. NPS AR 502, 507-508. Thus, the Forest would not need to put bison anywhere, but must provide habitat for bison sufficient to maintain diversity and a viable population of bison *on the forest*. See *eg Lands Council v. McNair*, 537 F.3d 981, 994 (9<sup>th</sup> Cir. 2008). This requires the GNF have some idea what habitat would be required to maintain a viable population – something the record shows no evidence of having ever been determined. *Id.*

The Court further erroneously concluded that the GNF could simply rely on the IBMP to conclude the GNF is not suitable for bison, based on

GNF's participation in the IBMP, cooperation with Montana, and commitment to multiple uses. Dkt. 64 at 46. However, absent any suitability and capability analysis, and absent any Forest Plan direction for determining what is suitable bison habitat to support a viable population on the Forest, this would be an arbitrary and capricious conclusion. Thus, Plaintiffs are likely to prevail on appeal of their NFMA claims.

**3. The Park Service is causing wanton destruction of bison and not preventing impairment and unacceptable impacts to bison and other Park resources**

The Court further misapprehended the authorities regarding Park capture and slaughter of bison. The Court first relied on its prior holding that the NPS Organic Act “allows NPS to determine whether *selective removal of individual bison* protects and conserves the YNP bison herd.” Dkt. 64 at 51 (emphasis supplied). However, the Court did not address Plaintiffs' arguments that the Park has not maintained the type of “selective” removal the Court expected would occur when it made its prior decision. Nor did the Court address the argument that the legislative history of the Organic Act suggests the Act serves to *limit* Park authority to kill the wildlife it is supposed to protect. Nor did the Court address the argument and evidence that the large-scale culls and other management actions are causing adverse impacts to bison. Dkt. 64 at 51-54.

Without addressing the Plaintiffs' arguments distinguishing the current situation from past discussions, the Court rested heavily on what it deemed statutory authority to sell or otherwise dispose of the surplus bison. 16 U.S.C. Sec. 36; Dkt. 64 at 51. However, as Plaintiffs' noted at oral argument, the legislative history of this statute suggests the authority to dispose of "surplus" bison applied to a different management scenario long past within YNP. The NPS recognized the limitations of the Act, and published regulations that prohibit disposing of bison to any party who intends to kill them, and prevents "giving" surplus bison to states (allowing it to private parties). 36 CFR Sec. 10.1, 10.3(d). Thus, it was erroneous to conclude that the Park has authority under this section to send bison to slaughter, and that such action does not constitute wanton destruction or impairment and unacceptable impacts. Plaintiffs are therefore likely to succeed on the merits of their appeal on these claims.

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

Even if Plaintiffs must show irreparable harm to the entire population of bison, rather than demonstrate harm *per se* through lethal removal, as Defendants contend, Dkt. 71 at 22, despite the Ninth Circuit's ruling in Humane Society of the United States v. Gutierrez, 527 F.3d 788, 790 (9<sup>th</sup> Cir. 2008), there is evidence such impairment will occur if large scale

removals are allowed. The Court and Defendants have erroneously ignored the record evidence wherein Park biologists indicate they have concerns regarding removals and the impacts to bison and other Park resources. NPS AR 7677.

Further new evidence discovered by Dr. Pringle also represents the type of information that should be regarded in terms of preventing irreparable loss of important genetic material. Defendants attempt to discredit Dr. Pringle and Plaintiffs' partial reliance on his findings by claiming Dr. Pringle released his findings for use in this litigation. Dkt. 71 at 23, FN2. However, Dr. Pringle has not stated this is the case, and it is mere speculation on Defendants' part to claim such.<sup>1</sup>

Given the concerns of the Park biologists in the administrative record, the new information revealed by Dr. Pringle, and Plaintiffs' stated interests in these bison, it is erroneous to conclude that no irreparable harm would occur if Defendants are allowed to kill hundreds of bison at some time this season.

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<sup>1</sup> Plaintiffs also note they did not intend to mislead the Court or Defendants in overlooking any need to disclose that Dr. Pringle provides scientific advice to Plaintiff WWP. Plaintiffs apologize for any oversight regarding such disclosure during their 24-hour turn-around for the reply brief in which they provided the just released findings of Dr. Pringle.

### **3. The balance of equities and public interest favor an injunction pending appeal**

Defendants still have not identified any harm that would befall them should they be prevented from slaughtering bison this season. Instead, they attempt to characterize it as a halt to the entire IBMP, and pass the buck on to Montana. They refer to a bill that has not even been enacted, and which the Governor may veto even if it is enacted, as evidence that bison may be killed even if the Defendants don't proactively kill them themselves. Dkt. 71 at 25-26.

The public has demanded the federal Defendants discontinue their enabling of mass slaughter of bison for years. The public clearly has an interest in natural regulation within the Park, habitat on GNF lands outside the Park, and advocacy by the federal Defendants for bison tolerance beyond YNP borders, as scientists have indicated such migrations and habitat access are necessary for the long-term survival of the bison population.

### **CONCLUSION**

For all these reasons, Plaintiffs respectfully request this Court grant their motion for an Injunction Pending Appeal.

Respectfully submitted this 28<sup>th</sup> 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 reply brief contains 2517 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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