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

WESTERN WATERSHEDS PROJECT, BUFFALO )  
FIELD CAMPAIGN, TATANKA OYATE, )  
GALLATIN WILDLIFE ASSOCIATION, NATIVE )  
ECOSYSTEMS COUNCIL, YELLOWSTONE )  
BUFFALO FOUNDATION, MEGHAN GILL, )  
CHARLES IRESTONE, and DANIEL BRISTER )

Plaintiffs,

vs.

KEN SALAZAR, Secretary of the Interior; SUZANNE )  
LEWIS, Park Superintendent, Yellowstone National )  
Park; NATIONAL PARK SERVICE, an agency of the )  
U.S. Department of Interior; LESLIE WELDON, )  
Regional Forester, US Forest Service Northern Region; )  
UNITED STATES FOREST SERVICE, an agency of )  
the U.S. Department of Agriculture; MARY )  
ERICKSON, Gallatin National Forest Supervisor )

Defendants.

No:  
**COMPLAINT FOR  
INJUNCTIVE AND  
DECLARATORY  
RELIEF**

## I. INTRODUCTION

1. This is a civil action for judicial review under the Administrative Procedure Act of U.S. Forest Service (Forest Service or USFS) decisions and actions which preclude native bison and associated species from occupying and using National Forest lands around Yellowstone National Park (YNP), such that the Forest Service is not providing for diversity of plant and animal species on the Gallatin National Forest (GNF), and is not ensuring viable populations of bison and other species including sage grouse exist on the GNF, and for review of National Park Service (Park Service or NPS) decisions and actions likely causing impairment to native bison populations and other resources by allowing the wanton destruction of bison and not conserving bison and other resources, and for review of both agencies' refusal to analyze and disclose new information and changed circumstances relating to bison management and brucellosis.

2. Plaintiffs Western Watersheds Project (WWP), Buffalo Field Campaign (BFC), Tatanka Oyate, Gallatin Wildlife Association (GWA), Native Ecosystems Council (NEC), Yellowstone Buffalo Foundation (YBF), Meghan Gill, Charles (Chuck) Irestone, and Daniel Brister, attest the final decisions of the Forest Service (referenced below) approving projects and actions that exclude bison from

National Forest lands and instead manage for domestic cattle livestock industry interests, and the final decisions of the Park Service (referenced below) which approve killing and otherwise impacting bison in and around Yellowstone National Park, including the decision to slaughter approximately 1434 bison in the spring of 2008, and the final decision of the agencies not to prepare a new or supplemental environmental impact statement for bison management or analysis for related actions, are arbitrary and capricious, an abuse of discretion, and/or otherwise not in accordance with law.

3. The Forest Service and Park Service are signatories to and participate in the Interagency Bison Management Plan (IBMP), and authorize and take management actions to slaughter over 3500 bison since the year 2000, that have caused adverse impacts to native bison populations which threaten their genetic viability, and that preclude bison from accessing and using suitable habitat in the Greater Yellowstone Ecosystem (GYE).

4. In various Forest Service decisions, beginning with the promulgation of the GNF Forest Plan (GNF Plan or Forest Plan) and continuing with implementation of that plan (e.g., through issuance of grazing permits, annual operating instructions, bison management decisions, etc.), the Forest Service has consistently refused to consider the importance of or manage for the native plains bison, a

subspecies of bison (*Bison bison bison*, also known as American buffalo) as a keystone species for purposes of providing diversity of plant and animal species. Instead, the Forest Service decides to manage the forests for the non-native, domesticated species *Bos taurus*, commonly known as the cow (pl. cattle), and to specifically exclude native bison from using National Forest lands.

5. Several specific decisions implemented under direction of the GNF Plan preclude native bison from using and occupying the forest in such a way as to support a viable bison population on the GNF, and which result in failure to provide appropriate plant and animal diversity. The forest plan and/or the specific decisions implementing the forest plan thus do not comply with NFMA's substantive obligations to protect native wildlife and plant and animal diversity. Specific decisions include the Forest Service's decisions:

- a. approving and adopting the Adaptive Management Plan to amend the IBMP in 2008;
- b. approving and adopting IBMP Operating Procedures in 2009 to implement the IBMP as amended;
- c. permitting a bison trap at Horse Butte on the Gallatin National Forest (GNF) with a renewed 10-year Special Use Permit in 2009;

- d. approving continued livestock grazing in suitable and capable bison habitat on the Gallatin National Forest, through Annual Operating Instructions or Management Plans (AOIs), and periodic NEPA documents;
- e. approving fence construction for the Royal Teton Ranch Lease (RTR Lease) to manage and limit bison movements on the GNF and private lands encumbered by a conservation easement managed by the USFS; and
- f. other decisions serving to preclude native bison and associated species from using USFS lands in the Greater Yellowstone Ecosystem in a manner that would allow them to fulfill their ecological role, would provide for the diversity of plant and animal species, and would maintain viable populations on the forests.

6. As a once widely ranging native species, wild bison are now almost exclusively limited to the GYE, and migrate to or attempt to migrate to forests in the ecosystem. As a unique and keystone species on such forests, their omission from Forest Plan guidance and analysis is conspicuous and capricious. Without managing for the viability of this keystone species, the Forest Service is not providing for adequate and appropriate diversity of plant and animal species.

7. Not only does the absence of bison from the GNF Plan and accompanying analysis render diversity incomplete and inadequate in and of itself, but bison's

absence also precludes the Forest Service from providing for diversity of other related plant and animal species appropriate for the GYE. For example, while bison and sage grouse co-evolved, the introduction of cattle onto public landscapes in place of bison, together with the conversion of private lands to agricultural uses, has resulted in a marked decline, and in many areas complete extirpation, of sage grouse populations.

8. Additionally, the Forest Service's exclusion of bison from National Forest lands adjoining YNP prevents the Forest Service from ensuring any viable populations of wild, native bison occur on the Gallatin National Forest, or other forests in the GYE. Indeed, IBMP management is causing or has likely caused adverse impacts to the genetic viability of the GYE bison populations, and according to the best available science, *infra.*, their viability is threatened. Throughout these decisions, and as a result of excluding bison and managing for domestic livestock, the Forest Service has also failed to ensure it can and is maintaining viable populations of other native species such as sage grouse, a key indicator for sagebrush obligate species.

9. In the winter/spring of 2007/2008 (hereinafter, 2008), the National Park Service, pursuant to the direction of YNP Superintendent Suzanne Lewis, oversaw and carried out the slaughter of approximately 1434 bison from YNP, which

represented approximately one third of the existing population of wild bison in the GYE. Such management, and ongoing commitment of NPS resources, severely restricts wild bison migrations, impacts their natural behaviors, maintains bison populations at artificially low numbers, and negatively influences the evolutionary potential of bison as a wildlife species in the ecosystem.

10. Since the IBMP was adopted in 2000, the Park Service has participated in capture, slaughter and other activities intended to prevent bison from establishing viable populations outside of YNP. These actions have the effect of impairing and not conserving bison in the GYE. Since 2000, hundreds of bison have been captured inside YNP, with many of those captured sent to slaughter. While the NPS claims to be acting in furtherance of one of the IBMP's two goals - "maintain a wild, free-ranging population of bison" – this goal has been undermined since the plan was adopted in 2000, and cannot be accomplished under the IBMP as presently designed, interpreted, and implemented.

11. The NPS' participation in the IBMP, bison hazing, capture, slaughter, and NPS authorizing and supporting other agencies' activities inside YNP, is resulting in the wanton destruction of native bison and causing impairment to native bison populations, and precluding bison from establishing viable populations on National Forest lands and other suitable habitats outside of YNP.

12. The Forest Service and Park Service repeatedly adopt and implement decisions of the IBMP and related actions without analyzing and disclosing significant environmental impacts, including relevant new information and changed circumstances. Analysis for the IBMP is outdated, and evidence indicates the IBMP goals are not being and cannot be met under current management, rendering new decisions to amend and implement the IBMP arbitrary and capricious.

13. The USFS and NPS have decided at various points, with the other IBMP agencies, not to analyze and disclose through new or supplemental NEPA analysis, new information and changed circumstances related to the IBMP. The agencies did not consider all relevant new information, nor prepare NEPA analysis when they completed a 5-year Status Review of the IBMP in 2005. The agencies also decided not to prepare NEPA analysis when requested by some of the plaintiffs and other concerned citizens to prepare new or supplemental NEPA analysis before amending the IBMP and adopting revised Operating Procedures.

14. The Defendants have also decided not to prepare adequate, new, or supplemental NEPA analysis for associated or tiered actions, including for the Horse Butte capture facility permit, the Royal Teton Ranch fencing and funding contributions, and domestic livestock grazing decisions. Without adequate

analysis and up to date understanding of the impacts of IBMP and related actions, the agencies cannot ensure they are meeting their substantive obligations to protect native wildlife, and preserve viable populations of same. Nor can the agencies ensure they are able to meet the goals of the IBMP through the current management regime.

15. The federal defendants' actions are arbitrary and capricious, represent an abuse of discretion, and are otherwise not in accord with the National Forest Management Act (NFMA) 16 U.S.C. Sec. 1600 et seq., the National Park Service Organic Act (NPSA), 16 U.S.C. Sec. 1 et seq., the Yellowstone National Park Organic Act (YNPA), 16 U.S.C. Sec. 21 et seq; the National Environmental Policy Act (NEPA), 42 U.S.C. Sec. 4331 et seq., the Administrative Procedure Act (APA), 5 U.S.C. Sec. 701 et seq., and the various rules, regulations, and policies interpreting and implementing these statutes, as specified herein.

16. Plaintiffs seek declaratory and injunctive relief to ensure that the agencies:

- a. comply with their statutory mandates to conserve and avoid impairing wildlife;
- b. provide for diversity of plant and animal species, and ensure viability of native species on our national forest lands;

- c. comply with NEPA's continuing obligation to consider and disclose the environmental impacts of their actions; and
- d. mitigate harm and prevent irreparable injury to the human environment, and protect plaintiffs' interests at law.

17. Plaintiffs also seek injunctive relief against lethal bison removals until the agencies complete full analysis of impacts based upon new information and changed circumstances, and until the agencies have scientifically determined what a minimum viable population of bison would be, what the scientific, ecological carrying capacity of the GYE is for bison that would ensure bison's ability to fulfill their evolutionary potential, and until the agencies analyze and disclose the impacts and impairments to bison of IBMP related management decisions and actions.

18. Plaintiffs also seek award of costs of suit, including attorney and expert witness fees pursuant to the Equal Access to Justice Act, 28 U.S.C. Sec. 2412, and such other relief as this Court deems just and proper.

## **II. JURISDICTION**

19. This action arises under the laws of the United States and involves the United States as a defendant. Therefore, this Court has subject matter jurisdiction over the claims specified in this Complaint pursuant to 28 U.S.C. §§ 1331, 1346.

20. An actual controversy exists between Plaintiffs and Defendants. Plaintiffs use and enjoy public lands within the GYE for hiking, fishing, hunting, camping, photographing scenery and wildlife, and engaging in other vocational, scientific, spiritual, and recreational activities. Plaintiffs' members particularly value and admire native, wild bison, and regularly visit public lands within the GYE specifically for purposes of attempting to view wild bison, sage grouse, and associated native wildlife in their native and historic habitat, and to advocate that bison be free to use such habitat. Plaintiffs' members intend to continue to use and enjoy the area frequently and on an ongoing basis in the future for these same and other activities.

21. The aesthetic, recreational, scientific, spiritual, and educational interests of Plaintiffs have been and will be adversely affected and irreparably injured if defendants fully implement the IBMP as amended by the AMP and implemented by the Operating Procedures. These same interests have been and will be adversely affected and irreparably injured if defendants fully implement other management actions that exclude native bison and other species from using public lands, and that do not consider but result in negative impacts on the bison populations, through slaughter and other activities, and through managing for domestic cattle in place of native, wild bison. These are actual, concrete injuries

caused by defendants' failure to comply with nondiscretionary duties under NEPA, NFMA, the NPSA, the YNPA, and the APA. The requested relief would redress these injuries and this Court has the authority to grant plaintiffs' requested relief under 28 U.S.C. §§ 2201 & 2202, and 5 U.S.C. §§ 705 & 706.

22. Plaintiffs have participated in agency decision-making public participation opportunities related to IBMP management implementation, and have otherwise exhausted the administrative remedies afforded them under the law. Plaintiffs have submitted comments, requested opportunities to comment or appeal decisions when no opportunity was provided, attended numerous public meetings, met with representatives of the agencies, and engaged in dialogue and correspondence with the agencies regarding bison management, brucellosis, the IBMP, livestock management, and other related decisions. The challenged Agency actions are final and subject to this court's review under the APA, 5 U.S.C. §§ 702, 704, and 706.

### **III. VENUE**

23. Venue in this case is proper in the United States District Court for the District of Montana, Missoula Division, under 28 U.S.C. § 1391(e) and Local Rule 1.11(a)(1). Defendant Leslie Weldon, an officer of the Forest Service with offices in Missoula, MT, resides within the Missoula Division of the United States District

Court for the District of Montana, and is the principal representative in this District of the Defendant United States Forest Service. The Regional Forester has reviewed and upheld forest-level decisions related to bison management and forest planning, including whether plaintiffs and the general public were granted opportunities to appeal particular decisions. Three plaintiffs also reside within the Missoula Division of the United States District Court for the District of Montana, including Meghan Gill and Chuck Irestone in Missoula, and Daniel Brister in Arlee, MT. Additionally, the WWP Montana office is located in Missoula.

#### **IV. THE PARTIES**

24. Plaintiff WESTERN WATERSHEDS PROJECT (“WWP”) is a regional, membership, not-for-profit conservation organization, dedicated to protecting and conserving the public lands and natural resources of watersheds in the American West. WWP has its headquarters at the Greenfire Preserve in Custer County, Idaho; and is supported by more than 1,400 members located throughout the United States, including in Montana.

25. WWP’s Montana office and its two Montana staff, are located in Missoula, Montana. WWP also has offices and other staff in Boise, Hailey, and Salmon, Idaho, Wyoming, Utah, Arizona, and California. Through these staff, and with the

assistance of numerous unpaid members and supporters, WWP is deeply involved in seeking to improve livestock grazing management on federal and state public lands, including on the federal lands at issue in this case. WWP is also involved in seeking to protect native wildlife and their habitat across the west, including bison and sage grouse.

26. WWP, as an organization and on behalf of its members, is concerned with and active in seeking to protect native, wild bison, and to protect and improve bison habitat in the Greater Yellowstone Ecosystem (GYE), which is at issue in this case. WWP is also active in reviewing and commenting upon agency decisions and actions, including those challenged here; and otherwise participating in efforts to eliminate conflicts between livestock and native wildlife such as bison; in publicizing accurate information about the minimal threat of brucellosis, promoting alternative management that would protect bison with minimal or no threat of brucellosis transmission; promoting and educating the public and government agencies about the ecological, economic, and other benefits of protecting wild, free-roaming bison and their habitat.

27. WWP, as an organization and on behalf of its members, is concerned with and active in seeking to protect sage grouse and their habitat across the west, including in the GYE. WWP is actively seeking Endangered Species Act (ESA)

protection for the imperiled sage grouse, and has litigated to enforce federal agency protective obligations in land management decisions.

28. Plaintiff BUFFALO FIELD CAMPAIGN (BFC) is a non-profit public interest organization founded in 1997 to stop the slaughter of Yellowstone's wild bison, protect the natural habitat of wild free-roaming bison and other native wildlife, and to work with people of all Nations to honor the sacredness of the wild bison. BFC has its headquarters in West Yellowstone, Gallatin County, Montana, and is supported by volunteers and participants around the world who value America's native wildlife and the ecosystems upon which they depend, and enjoy the natural wonders of our National Parks and Forests.

29. BFC has staff located in Arlee, Montana, Moiese, Montana, and West Yellowstone, Montana; and BFC has volunteers across Montana and the world. Through these staff, volunteers, and other supporters, BFC is a leader in advocating for viable, free-roaming populations of wild bison in the GYE and beyond.

30. BFC, as an organization and on behalf of its members, is concerned with and actively involved with protecting the last remaining descendants of the native plains bison on this continent, and advocating such bison be allowed to occupy

their original range in the GYE. BFC actively seeks to document and publicize the plight of the bison, to end their slaughter by government agencies, and to secure long-term protection for viable populations of wild bison and year-round habitat in the GYE. BFC actively engages the American public to honor cultural heritage by allowing wild bison to exist as an indigenous wildlife species and fulfill their inherent ecological role within their native range, and serve as the genetic wellspring for future, wild, free-ranging bison populations.

31. Plaintiff TATANKA OYATE is a project of the Seventh Generation Fund, an Indigenous nonprofit organization dedicated to promoting and maintaining the uniqueness of Native peoples throughout the Americas. Tatanka Oyate works to protect and restore the habitat of the last wild bison population in Yellowstone and create awareness for protecting and preserving sacred species in the plains region, an area of special significance to Native cultures. Tatanka Oyate was organized specifically to find the means to protect the genetically unique Yellowstone bison population.

32. Plaintiff GALLATIN WILDLIFE ASSOCIATION (GWA) is a non-profit wildlife conservation organization based in Gallatin County, Montana. GWA represents concerned hunters and anglers in Southwest Montana and elsewhere. GWA is an affiliate of the Montana Wildlife Federation, which is an affiliate of the

National Wildlife Federation.

33. GWA is supported and run by volunteers, who advocate for adequate habitat for native wildlife, and opportunities for the public to view, hunt, and otherwise enjoy such wildlife and public lands.

34. GWA, as an organization and on behalf of its members, is concerned with and actively involved with protecting the last remaining descendants of the native plains bison on this continent, in the GYE. GWA members visit historic and current bison habitat, and monitor land uses and other wildlife movements in such areas, in part to identify suitable bison habitat and corridors. GWA members also monitor and analyze scientific information about the GYE bison populations, threats to the populations, and conservation needs.

35. GWA works to protect habitat, including habitat for bison and other native wildlife, so fish and wildlife populations and hunting and fishing opportunities can be conserved for future generations. GWA supports sustainable management of fish and wildlife populations through fair chase regulation of public hunting and fishing opportunities.

36. Plaintiff NATIVE ECOSYSTEMS COUNCIL (NEC) is a non-profit Montana corporation with its principal place of business at Willow Creek, Gallatin

County. Native Ecosystems Council is dedicated to the conservation of natural resources and the preservation of the Gallatin National Forest. NEC has participated extensively in administrative actions to protect these forests from environmentally damaging plans and activities, and to protect native wildlife and their habitat.

37. NEC's members use and will continue to use the Gallatin National Forest for work and for outdoor recreation of all kinds, including fishing, hunting, hiking, horseback riding, and cross-country skiing. NEC brings this action on its own behalf and on behalf of its adversely affected members.

38. Plaintiff YELLOWSTONE BUFFALO FOUNDATION (YBF) is a non-profit public interest organization founded in 1991, with its headquarters in Bozeman, Montana in Gallatin County. ABF is committed to restoring wild bison on public lands managed by states and the federal government. ABF recognizes and values the unique importance of the Yellowstone area bison to bison restoration in general. On behalf of its members and itself, ABF advocates for wild bison habitat outside YNP, and for preservation of viable bison herds.

39. Plaintiff MEGHAN GILL is an individual who resides in Missoula, Montana in Missoula County. Plaintiff Gill is a former volunteer and staff member of the

Buffalo Field Campaign, and has been concerned about and involved with the issue of bison management for several years. Since 2000, Ms. Gill has annually visited areas in and around Yellowstone National Park for the express purpose of viewing bison and other native wildlife in their natural habitat, and for advocating for their right and need to have year-round access to habitat outside of YNP. Plaintiff Gill also visits these areas for purposes of viewing bison in the wild for aesthetic, spiritual, cultural, and recreational purposes. Ms. Gill intends to continue to visit these areas to view the bison and other native wildlife. Her interests are harmed by the agencies' management actions that kill wild bison and otherwise disturb and harm bison and other native species.

40. Plaintiff CHARLES (CHUCK) IRESTONE is an individual who resides in Missoula, Montana in Missoula County. Plaintiff Irestone has been involved with advocacy for bison and other native species since 1998. Mr. Irestone, through his web design business, conducts contract work for the Buffalo Field Campaign, maintaining and updating the BFC website. Mr. Irestone has visited Yellowstone National Park and the surrounding areas numerous times annually since 1994. Mr. Irestone considers the Yellowstone bison the iconic symbol of our nation and a guide to our path of sustainability. Wild bison in the GYE and Mr. Irestone's bison advocacy work inspired Mr. Irestone to cofound the Sustainable Business

Council in Missoula. Every year, Mr. Irestone hikes in the back country of Yellowstone to see the bison in their natural setting, and intends to continue to do so. Mr. Irestone considers the current management plan ineffective in its goals and a failure in protecting wild bison. His interests in observing, honoring, and finding inspiration from wild bison in a natural setting are harmed by current management actions of the USFS and NPS.

41. Plaintiff DANIEL BRISTER is an individual who resides in Arlee, Montana in Lake County. Plaintiff Brister is a staff member of the BFC, and has been involved with bison advocacy since December, 1997. Mr. Brister travels to West Yellowstone regularly to conduct work for BFC, and to view wild bison in their native habitat. Mr. Brister first visited YNP in 1992, and was particularly moved by seeing wild bison in the area. He derives aesthetic, spiritual, cultural, and recreational enjoyment and benefits from viewing wild bison undisturbed in their native habitat, and his interests and enjoyment of the wild bison are injured by the agencies' management actions that harm the bison, and threaten the future integrity of bison populations in the GYE.

42. Defendant KEN SALAZAR is the United States Secretary of the Interior, responsible for overseeing management of the National Park Service.

43. Defendant SUZANNE LEWIS is the Superintendent for Yellowstone

National Park, and in that capacity has responsibility for insuring decisions made at YNP are consistent with applicable laws, regulations, and official policies and procedures.

44. Defendant NATIONAL PARK SERVICE is an agency within the federal Department of the Interior, entrusted with the management and protection of our National Parks and resources.

45. Defendant LESLIE WELDON is the Regional Forester for the Northern Region of the U.S. Forest Service, and in that capacity has ultimate responsibility for insuring that decisions made at the National Forest level in the Northern Region are consistent with applicable laws, regulations, and official policies and procedures.

46. Defendant UNITED STATES FOREST SERVICE is an agency within the federal Department of Agriculture, entrusted with the management of our National Forests.

47. Defendant MARY ERICKSON is the Forest Supervisor for the Gallatin National Forest, and in that capacity is responsible for GNF level management decisions.

## **V. BACKGROUND: LEGAL AND PROCEDURAL FRAMEWORK**

48. The National Park Service Organic Act mandates the Service to “promote and regulate the use” of national parks “by such means and measures as conform to the *fundamental purpose*” of the parks, “which is to *conserve* the scenery and the natural and historic objects and the *wildlife therein* and to provide for the enjoyment of the same in such manner and by such means as will *leave them unimpaired* for the enjoyment of future generations.” (emphasis added) 16 U.S.C. Sec. 1.

49. The General Authorities Act of 1970, as amended in 1978, reaffirmed the mandate that national parks be managed to support their primary purpose – conservation and no impairment. The Act states: “Congress further reaffirms, declares, and directs that the promotion and regulation... [of parks] ... shall be consistent with and founded in the purpose [of the Organic Act provisions for conservation and no impairment], to the common benefit of all the people of the United States. . . The authorization of activities shall be construed and the *protection, management, and administration* of these areas shall be conducted in light of the high public value and integrity of the National Park System and *shall not be exercised in derogation of the values and purposes* for which [the parks] have been established, except as may have been or shall be directly and specifically provided by Congress.” (emphasis added) 16 U.S.C. Sec. 1a-1.

50. In 2000, NPS finalized its official interpretation of its no-impairment and conservation mandates. Notice of New Policy Interpreting the National Park Service (NPS) Organic Act, 65 Fed. Reg. 56,003 (Sept. 15, 2000). Section 1.4 of the Management Policies of 2006 is the NPS' official interpretation of the Organic Act conservation and no impairment mandates, which section NPS expects to be enforceable. Greater Yellowstone Coalition v. Kempthorne, 577 F. Supp. 2d 183, 190 FN1(D.D.C. 2008), and see MP 1.4.4 (indicating NPS discretion is limited by its statutory mandates, which are "generally enforceable by the federal courts").

51. The MP interpret the Organic and General Authorities Acts to provide two mandates or standards relating to resource protection. First, the no impairment and no derogation language of the Acts are considered to be a single standard prohibiting NPS from managing in such manner as would "impair" park resources (the no impairment mandate). MP 1.4.2. Second, NPS must conserve park resources and values, as that is its "fundamental purpose. . ." (the conservation mandate). MP 1.4.3. The conservation mandate "applies all the time with respect to all park resources and values, *even when there is no risk that any park resources or values may be impaired.*" MP 1.4.3. "NPS managers must always seek ways to avoid, or to minimize to the greatest extent practicable, adverse impacts on park

resources and values.” MP 1.4.3.

52. Pursuant to its MP, NPS may only allow impacts, otherwise inconsistent with conservation, if it is “necessary and appropriate to fulfill the purposes of a park”, and if such impacts do “not constitute impairment of the affected resource and values.” MP 1.4.3. Impacts such as wildlife and plant “destruction” may only be allowed when such animals or plants are “detrimental” to park use. 16 U.S.C. Sec. 3.

53. NPS may never allow impacts rising to the level of impairment, unless *directly and specifically* provided by Congress. 16 U.S.C. Sec. 1a-1. As the Park Service recognizes in its MP, agency “discretion is limited by the statutory requirement (generally enforceable by the federal courts) that the Park Service must leave park resources and values unimpaired unless a particular law directly and specifically provides otherwise.” MP 1.4.4.

54. Park resources and values include “wildlife” as well as other natural objects and “the processes and conditions that sustain them”, including “native plants and animals.” MP 1.4.6. Park resources and values additionally include “the park’s role in contributing to the national dignity, the high public value and integrity, and the superlative environmental quality of the national park system, and the benefit and inspiration provided to the American people by the national park system. . .”

MP 1.4.6.

55. To comply with these mandates, park managers are prohibited from approving any action that would lead either to an impairment or an “unacceptable impact” which impacts “fall short of impairment.” MP 1.4.7.

56. For each management decision, the responsible park official “must consider the impacts of the proposed action and make a written determination that the activity “*will not* lead to an impairment of park resources and values.” 1.4.7. Managers must conduct the same type of inquiry and make a determination regarding unacceptable impacts. 1.4.7.

57. When considering whether an impact is unacceptable or will impair resources or values, a manager should consider, among other things, anything required by NEPA, relevant scientific and scholarly studies, advice or insights from experts and those with relevant knowledge and experience, and results of public involvement. MP 1.4.7. (Also see MP 4.1.3, directing NPS to ensure a full and open evaluation including the public and various sources of information and expertise.) Every environmental analysis or impact statement “will include an *analysis of whether the impacts of a proposed activity constitute impairment of park natural resources and values,*” and every FONSI and ROD “will contain a

discrete certification that the impacts of the proposed activity will not impair park resources and values.” MP 4.1.3.

58. The duty to evaluate impacts and ensure no impairment occurs is ongoing, and whenever the NPS becomes aware an activity may have had or may be having an adverse impact on park resources, the manager “must investigate and determine if there is or will be an impairment.” If there is an impairment, the manager must “*take appropriate action. . . to eliminate the impairment. . . as soon as reasonably possible.*” MP 1.4.7.

59. Yellowstone National Park is the nation’s first national park, established in 1872. YNP was set aside to preserve unique and valuable resources and wildlife such as bison. The Yellowstone National Park Organic Act (YNPA) directs the Secretary to “provide against the wanton destruction of the fish and game found within the park, and against their capture or destruction for the purposes of merchandise or profit.” 16 U.S.C. Sec. 22. Further, “all hunting, or the killing, wounding, or capturing at any time of any bird or wild animal, except dangerous animals, *when it is necessary to prevent them from destroying human life or inflicting an injury*, is prohibited within the limits of said park . . .” 16 U.S.C. Sec. 26.

60. The Secretary was additionally directed to prevent wildlife from being captured or destroyed, or frightened or driven from the park, by promulgating regulations to that effect. 16 U.S.C. Sec. 26.

61. The National Parks Management Omnibus Act of 1998 directs the Park Service to manage park resources through the application of science and scientific principles to its decision making, using the highest quality science and information. 16 U.S.C. Sec. 5901 et seq. As the Park Service has recognized, *bison management* “*must be based upon science and scientific principles* and have the capacity to adapt as new research becomes available.” IBMP FEIS Vol. 1, page 376.

62. The Forest Service is mandated by the National Forest Management Act to *maintain viable populations of all native* and desired non-native vertebrate species. Pursuant to this mandate, the Forest Service is directed to identify potentially vulnerable species and take positive action to prevent declines that would result in listing of a species under the Endangered Species Act. Specifically, NFMA mandates that a forest plan must be designed to ensure continued diversity of plant and animal communities in the forest planning area. 16 U.S.C. § 1604(g)(3)(B).

63. Pursuant to this scientific approach to protecting species and species

diversity under which the challenged forest plans were promulgated, “fish and wildlife habitat shall be managed to maintain viable populations of species across the forest.” 36 CFR 219.19 (2000). Viability is defined as a population “which has the estimated numbers and distribution of reproductive individuals to *insure* its continued existence is well distributed in the planning area.” 36 CFR 219.19 (2000). “Planning area” is synonymous with the National Forest Unit for which a forest plan is developed.

64. The Gallatin National Forest (GNF) developed its forest plan pursuant to and consistent with the 1982 regulations, which set forth specific viability requirements as the means for providing diversity of plant and animal species. The Forest Service represents this forest plan as consistent with regulatory requirements to ensure viable populations of native species exist on the forests. The GNF’s Forest Plan states at the outset “This Forest Plan is in compliance with the National Forest Management Act of 1976 (NFMA); [and] the regulations for National Forest Land and Resource Management Planning (36 CFR Part 219). . .” GNF Plan at i.

65. The Gallatin National Forest also adopted a viability definition similar to the regulatory definition, which is represented as consistent with that definition. The GNF Forest Plan defines viable population as “a population which has adequate numbers and dispersion of reproductive individuals to ensure the continued

existence of the species population in the planning area.” VI-43.

66. The GNF Plan incorporated the obligation to ensure viability of native species, and directs GNF to “provide habitat for viable populations of *all indigenous wildlife species* and for *increasing populations* of big game animals.”

GNF Plan II-1 (emphasis added). The GNF treats bison as a big game animal, allowing annual hunts in cooperation with the state of Montana.

67. The Forest Service’s duty “to ensure viable, or self-sustaining, populations applies with special force to ‘sensitive species.’” *Inland Empire v. U.S.F.S.*, 88 F.3d at 759 (cites omitted). Sensitive species are “those species whose viability is of concern because they have significant current or predicted downward trends in numbers or density, or because there is a significant downward trend in their current or predicted habitat.” *Friends of the Wild Swan v. U.S. Forest Service*, 966 F.Supp. 1002, 1009 (D.Or. 1997).

68. Biodiversity (or biological diversity) is a term defined by the Office of Technology and Assessment as “the variety and variability among living organisms and the ecological complexes in which they occur” (Hann, 1990).

Biodiversity can be used as a measure of ecosystem health, and as such is often of

great interest to our public.

69. If a Forest Plan does not comply with NFMA, it can only be challenged through challenging site-specific actions that implement the Forest Plan. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 734 (U.S. 1998). Thus, in a site-specific NFMA challenge, plaintiffs may challenge whether the Forest Plan complies with NFMA, and whether the proposed action complies with the Forest Plan and NFMA. All forest decisions must comply with both the forest plan and NFMA, and the forest plan itself must comply with NFMA, for example by providing diversity and ensuring viability through its standards and direction for site-specific decisions.

70. NFMA requires the Secretary of Agriculture to promulgate regulations to enforce NFMA's requirements. 16 U.S.C. Sec. 1604(g). In November 2000, new NFMA regulations superseded the 1982 regulations, such that the 1982 regulations only applied to site-specific projects if incorporated into the relevant forest plan. 65 Fed. Reg. 67, 568 (Nov. 9, 2000). However, after further amendments and court challenges, a district court decision indicated the Forest Service could choose to reinstate the 1982 or 2000 regulations. Under a 2001 interpretive rule for the 2000

regulations, the Forest Service is directed to consider the “best available science” when implementing existing land and resource management plans. 36 C.F.R. Sec. 219.35 (2001). The Forest Service authorized continued use of the 1982 regulations, and plan revision under these regulations.

71. The GNF Plan was completed under the 1982 regulations. Thus, to conform with the forest plan and in turn, NFMA, GNF decisions and actions must ensure viable populations of native species exist on the forests. The Forest Service must also consider the best available science.

72. According to the best available science, a related concept to biological diversity is the role of “keystone species.” A keystone species is held to be a strongly interacting species whose top-down effect on species diversity and competition is large relative to its biomass dominance within a functional group.

*Davic, R. D.*, “Linking keystone species and functional groups: a new operational definition of the keystone species concept” *Conservation Ecology* 7(1): r11 (2003), [online] URL: <http://www.consecol.org/vol7/iss1/resp11/>.

73. The North American Bison is a textbook example of a “functional” keystone species which, through a variety of effects including migrating, grazing, trampling,

wallowing, horning, and deposition of feces, urine, and carcasses, positively impacts the biodiversity of a community, as well as the community's vertical and horizontal structure and heterogeneity. See, e.g.: *Van Dyke*, "Conservation Biology: Foundations, Concepts, Applications," 2d Ed., McGraw Hill (2008), at p. 110; *Fallon*, "The ecological importance of bison in mixed-grass prairie ecosystems" (unpublished). According to Dr. Fallon, the abundance and distribution of bison as a native food source supports the survival and perpetuation of birds, small mammals, gray wolves and grizzly bears.

74. According to Van Dyke, the effects of bison activities favor increased diversity of prairie vegetation rather than invasion by non-prairie vegetation. Managing for cattle, by comparison, favors decreased diversity of prairie vegetation and invasion by non-prairie vegetation, which in turn has had a significant adverse impact on sagebrush obligates like sage grouse, pygmy rabbits, Brewer's sparrow, sage thrashers, and many other species. Another example of bison effects on diversity is the mutually beneficial grazing association between bison and prairie dogs. *Id.* This is significant due to the near total dependence of the nearly extinct black-footed ferret on healthy prairie dog populations.

75. While sagebrush landscapes may appear relatively simple in comparison to forested and other landscapes, this simple structure masks complex community dynamics, disturbance regimes, and system resiliency, leading one Forest Service study to characterize sagebrush ecosystems as the “mother of biodiversity.” *Welch and Criddle* (2003). In fact, “[o]ver 350 species of flora and fauna depend on sagebrush habitats for all or part of their existence; a high proportion of the endemic and imperiled species in the western United States are found within the sagebrush distribution.” *Connelly et al.* (2004).

76. According to a Memorandum of Understanding entered into between the Forest Service and the Montana Department of Fish, Wildlife, and Parks, there are at least ten southwestern Montana wildlife species that depend upon sagebrush habitat for their viability: the sagebrush lizard, sagebrush vole, sage grouse, sage thrasher, sage sparrow, Merriam shrew, black-tailed jackrabbit, pygmy rabbit, least chipmunk, and Brewer’s sparrow. According to the same document, there are another 28 wildlife species that at least partially depend upon sagebrush for their viability, including the pronghorn sheep, mule deer, sharp-tailed grouse, Ferruginous hawk, golden eagle, prairie falcon, and loggerhead shrike; and, there are another 35 species that occur in sagebrush habitats, including the burrowing

owl. Of these, the sage grouse, loggerhead shrike, and burrowing owl are sensitive species. *Peterson* (1995); MOU between Beaverhead Deerlodge NF and Montana Fish, Wildlife and Parks (1998).

77. According to best available science, sage grouse populations have declined in southwestern Montana due to loss of winter range, degradation of habitat, and conversion of sagebrush habitat to agriculture use, *Crowley and Connelly* 1996; livestock grazing, burning (often associated with livestock management), and drought are thought to be the three major factors influencing the range-wide decline of sage grouse. *Connelly and Braun* (1997); *Beck and Mitchell* (2000); *Hockett* (2002). Intensive grazing by livestock has reduced the productivity of sage grouse habitat by reducing cover for concealment of sage grouse chicks, thus increasing risk of predation, and rendering native habitat unsuitable for supporting sage grouse populations. *Schroeder et al.* (2000); *Beck and Mitchell* (2000); *DeLong et al.* (1995).

78. In 2000, federal defendants entered into the Interagency Bison Management Plan (IBMP) with the State of Montana and federal Animal and Plant Health Inspection Service (APHIS), indicating its principal purpose is “to maintain a wild,

free-ranging population of bison and address the risk of brucellosis transmission to protect the economic interest and viability of the livestock industry in Montana.”

ROD at 22. The agencies entered the agreement after Montana pressured federal agencies to respond to fears of Montana’s livestock industry that “some bison have brucellosis and may transmit it to cattle outside the Park boundaries in Montana . . . [and] [t]ransmission of brucellosis from Yellowstone bison to cattle in Montana could have not only direct effects on local livestock operators, but also on the cattle industry statewide.” ROD at 21.

79. In response to such fears and pressure, the IBMP set forth management strategies designed to exclude bison from areas which cattle may seasonally inhabit. The ROD provides for “adaptive management” actions to be “phased in” as the agencies reach identified goals in bison management and research. The IBMP “primarily relies on the spatial and temporal separation of bison from an affected herd and cattle. The agencies will not allow bison to intermingle with cattle.” ROD at 11. Under the IBMP, the agencies prevent bison from using otherwise appropriate habitat areas, including when cattle are not present, nor will ever be present, by hazing, capturing, slaughtering or shooting bison, inside YNP and outside YNP including on GNF lands.

80. Brucellosis is a bacterial disease that causes weight loss, abortion, and reduced milk production in cattle. It was passed to the YNP bison by cattle sometime early in the last century.

76. The actual threat of brucellosis transmission from bison to livestock is very low, according to the best available science. In fact, brucellosis-infected bison and cattle have had regular contact for decades in Wyoming, and there has never been a single reported case of transmission resulting from this contact.

77. All recent documented instances of brucellosis transmission to domestic livestock in the states surrounding Yellowstone National Park are known *not* to have been due to bison, and are thought to be due to either elk (likely from feedgrounds where disease is more prevalent and more easily transferred among wildlife) or from other cattle.

78. Brucellosis transmission to domestic livestock primarily occurs when livestock consume infected birthing materials such as afterbirth or aborted fetus. Thus, transmission from wild bison would require a series of time and place events - a female bison would have to be infected, the infection would have to occur in her reproductive organs, she would have to give birth or abort a fetus in the area of

domestic livestock, the birthing material would have to remain and the bison would have to fail to clean it up for a period of time and in climatic and sunlight conditions that would allow the bacteria to persist, and a domestic cow would have to consume the infected birthing material within that time and before it was consumed by a scavenger.

79. While GNF continues to permit domestic livestock grazing in habitat that would otherwise be suitable and capable for supporting bison, many of the habitats bison currently attempt to use contain no domestic cattle on public lands. For example, on Horse Butte, a peninsula encompassing nearly 10,000 acres of National Forest habitat that is also home to local residents and villagers who support wild bison inhabiting and migrating across private lands. Even where cattle are grazed on public or private lands, they are only present in a few fenced enclosures during summer months, due to harsh and prolonged winter conditions in the GYE. Given these circumstances, little opportunity exists for the precise series of time and place events necessary for brucellosis transmission from bison to cattle to occur in these areas.

80. According to an Associated Press Article by Susan Gallagher entitled “FWP

Commission approves bison on ranch”, Montana Fish, Wildlife & Parks

Commissioner Vic Workman admitted “that the issue in the bison controversy is not brucellosis, but whether bison should be kept off rangeland that livestock producers want for their cattle.”

81. Bison that have been exposed to brucellosis but that are not infected with brucellosis pose zero threat of transmission to domestic livestock. Even bison infected with brucellosis are not known to transmit the bacteria in a natural setting, as noted above (cattle and bison have mingled for decades in Wyoming without a transmission incident from bison).

82. Best available science indicates no management of bison is necessary to prevent transmission to domestic livestock. Kilpatrick 2009. Additionally, scientists now recognize brucellosis is endemic to the GYE, occurring in elk and a variety of other wildlife, on a variety of land ownerships. Keiter 1997; Hamlin and Cunningham 2009. Thus, *brucellosis cannot be contained by controlling and otherwise managing bison for this purpose.*

83. Despite evidence the IBMP will not and cannot accomplish brucellosis “protection” and that current bison management is an unnecessary, costly, and

ineffective way to address actual risks of brucellosis transmission, the agencies continue to intensively and intrusively manage bison behavior and disrupt bison's natural selection and evolutionary potential under the IBMP. The agencies refuse to alter the management regime to reflect changed circumstances, best available science, and new information that has become available since 2000. Moreover, they have failed to even analyze significant new information and changed circumstances relevant to the impacts and effectiveness of IBMP and related bison management on bison and fulfillment of the IBMP goals.

84. The IBMP prescribed zones in areas bison migrate out of YNP (including the western side (West Yellowstone), northern/east side (Eagle Creek/Bear Creek), and northern/west side (Reese Creek to Yankee Jim Canyon)), in which bison are either "tolerated" by the agencies or subject to a variety of management responses to prevent them migrating to or occupying such areas. Management responses include hazing (bison are forced to flee), capture, blood testing, collaring, vaccination, vaginal telemetry, and transport to slaughter houses or quarantine sites by the agencies. Zone 1 is within YNP, where bison are "tolerated" but subject to spring hazing when bison from Zone 2 are returned to the park to maintain 45 days separation between bison and cattle. Bison in Zone 1 are also subject to repeated

hazing to enforce numerical limits imposed by the agencies for zone management. Zone 2 is Forest Service winter habitat where bison are managed for numerical bison “tolerance” limits set forth in the IBMP’s Step 2 (and now as set forth in the Adaptive Management Plan adopted in 2008). Zone 3 is a zero tolerance area because of the likelihood cattle will be grazed in those areas, and bison are subjected to shooting when they enter Zone 3.

85. The IBMP did not impose any numerical tolerance limits or migratory restrictions on elk. Elk also harbor the brucellosis organism, and freely traverse the habitats bison are denied access to under the IBMP.

86. The IBMP agencies also expected to advance through three steps per the adaptive management direction, with each step providing some increase in tolerance for bison outside YNP. However, each step - including the final step - involves hazing, capturing, testing for brucellosis exposure, and slaughtering bison.

87. In both Step 1 and Step 2, the IBMP includes capture, test, and slaughter of all seropositive bison (that is, bison that have been exposed to brucellosis bacteria, but are not necessarily infected) on both the west and north boundaries. Step 2

would allow limited numbers of untested bison out on limited areas for limited times of the year. The IBMP thus anticipates testing all bison for exposure to brucellosis before relegating to slaughter those testing positive.

88. Under Step 3, if reached, the agencies would allow up to 100 untested bison to range in the western and northern boundary areas. However, the agencies would continue to haze all bison back into YNP in the spring, and would not allow any bison above 100 outside YNP freely. Additionally, the agencies would continue to capture bison on both boundary areas, to artificially limit the population to 3000 animals total.

89. One prerequisite set by the agencies to implement Step 2 on the northern boundary was for the Church Universal and Triumphant (CUT) to remove cattle from its Royal Teton Ranch (RTR). In 1999, the Rocky Mountain Elk Foundation purchased lands and a conservation easement (the Devil's Slide Conservation Easement) on CUT lands for \$13 million. The Foundation subsequently assigned and sold the easement to the Forest Service. A primary purpose of acquiring and conserving the lands through an easement was to provide habitat for bison and other native wildlife.

90. Under the IBMP, bison are prohibited from accessing these easement lands until cattle are removed. The original \$13 million habitat acquisition and easement agreement provided the parties were to develop a related agreement to remove cattle. No such agreement was reached until the proposed Lease Agreement (RTR Lease) was developed in 2008. Under the RTR Lease, CUT would agree to remove livestock from the RTR for 30 years, and would receive from federal and state agencies and non-governmental groups, an initial payment of \$1,876,500 followed by 19 years of annual payments of \$76,500. The National Park Service committed to pay \$1 million or more of this amount.

91. The RTR Lease is linked to the IBMP, and serves to further implement IBMP management which restricts bison movements and access to habitat, and which limits the bison population. The RTR Lease provides only 25 bison will initially be allowed access to lands purchased for wildlife, and that such bison must first be captured, tested for exposure to brucellosis, shipped to slaughter if bison do not meet agency eligibility criteria, and female bison fitted with vaginal transmitters. See RTR Lease.

92. The Park Service did not conduct environmental analysis before committing

to fund the RTR Lease project in the amount of one million or more dollars. The Park Service declined to conduct new or supplemental analysis for the RTR Lease or IBMP and AMP, when citizen organizations requested it do so. Instead, the only analysis completed was under the Montana Environmental Policy Act and prepared by the Montana Department of Fish, Wildlife and Parks, which tiered its analysis to the FEIS for the IBMP. The IBMP FEIS anticipated the life of the IBMP and the relevancy of the analysis would end 15 years from the IBMP's adoption, or in 2015. The RTR Lease is not supported with adequate, up to date analysis, and the analysis it is tiered to is set to expire many years before the 30 year lease expires.

93. To support implementing the RTR Lease plan and IBMP management, the Forest Service issued a Special Use Permit to the Montana Department of Fish, Wildlife and Parks (FWP), for construction of approximately 4900 feet of four strand wire fence on USFS lands, and approval for CUT to construct 2.2 miles of four strand fence on private lands encumbered by the easement administered by the Forest Service, to support the Royal Teton Ranch lease as part of Step 2 of the IBMP. See: GNF SOPA & RTR Fencing Decision Memo. The Forest Service indicated in its decision the fencing is "necessary to keep bison in acceptable areas

as described in the [IBMP].” See DM at 3, and RTR Lease.

94. Also in relation to IBMP management direction, the Forest Service continues to issue to the Montana Department of Livestock (MDOL) a Special Use Permit to construct and operate a bison capture facility at Horse Butte on the GNF for 10 years. Although initially evaluated with its own Environmental Assessment, the Forest Service justifies authorizing the permit by referring to the IBMP, and IBMP activities “designed to manage migrating bison.” The January 23, 2009 Decision Memo renewing the permit stated “capturing bison is a management tool which can be used to help reduce the risk of transmission of brucellosis from bison to cattle. Capturing bison allows for them to be handled to determine if individual animals will be released or removed.” Horse Butte DM at 2. Authorization and use of the facility effectively excludes bison from using otherwise suitable and capable habitat at Horse Butte, where no cattle are present year round and where local resident and villager support exists for bison to occupy and migrate across private lands.

95. In December 2008, the IBMP agencies signed an agreement amending the IBMP to implement some adaptive management provisions. In this decision, the

agencies specified they would continue managing within the IBMP “adaptive management” framework, continue managing for spatial and temporal separation between bison and domestic cattle, and indicated they would monitor and complete future research to assist in future potential adaptations. Portions of the amendments purported to increase tolerance for bison outside YNP; however, management remains restrictive, and bison remain largely excluded from areas outside YNP. For example, even prescribed groups of bison allowed west of YNP untested must be hazed back into YNP in spring, numbers tolerated may be adjusted by the Montana State Veterinarian, and bison breaching prescribed perimeters will be hazed, captured, or shot. North of YNP, bison would continue to be captured, tested, and shipped to slaughter houses, and the Stephens Creek facility would be used to “provide” 25 bison for adaptive management use of northern Zone 2, including the National Forest and conservation easement lands managed pursuant to the RTR Lease.

96. Pursuant to the IBMP, the agencies additionally developed Operating Procedures to implement IBMP management. These Operating Procedures were most recently updated February 5, 2009, and are designed “to be consistent with the IBMP, and the IBMP Adaptive Management Plan as adopted December 17,

2008.” The Procedures specify management structure, and identify each agency’s roles.

97. Under the IBMP and Operating Procedures, the NPS has lead responsibility for management inside YNP, including operating and maintaining a capture facility inside the northern boundary of YNP (the Stephens Creek capture facility), capture, test, and slaughter operations for bison captured within YNP, hazing to prevent bison leaving YNP, hazing to move bison back into or further into YNP, and other actions. NPS may request assistance from any other agency, including USFS.

98. While MDOL has lead responsibility outside YNP, MDOL may request assistance from any other agency, including USFS and NPS. The Operating Procedures provide: “All agencies involved have agreed upon a plan to manage bison in Yellowstone National Park and Montana as set forth in the IBMP contained in the Records of Decision. Outside the park, MDOL has the lead responsibility for all bison management actions and may request assistance from MFWP, USFS, APHIS and NPS. USFS personnel will be responsible for federal resource related violations on national forest system (NFS) lands as defined under

36 CFR 261. . . When violations of state law occur on National Forest System lands, and upon request from MDOL, through the Gallatin and/or Park County Sheriffs Office, USFS law enforcement personnel will provide public safety assistance related to on-going for [sic] hazing, capture and removal operations. MFWP and MDOL both have responsibility regarding the Montana bison hunt as directed by State statute. Inside the park, NPS has the lead responsibility for all bison management actions.” Operating Procedures at 1.

99. Under the IBMP amendments and Operating Procedures, the agencies are continuing to direct intensive management towards bison, based on the continuing assertion that such management is necessary to protect against brucellosis transmission to domestic cattle.

100. The agencies decided, in adopting the 2008 AMP, and with the updated Operating Procedures, to continue such bison management without new analysis, and contrary to new scientific information (Kilpatrick et al. 2009) that: the risk of transmission is zero in most years, and limited to predictable hot spots in others; and, that bison management is ineffective for preventing brucellosis transmission to livestock because brucellosis is endemic to the GYE and is much more likely to

be transmitted to livestock from other sources, and in fact has been so transmitted.

The agencies also chose to continue IBMP management, and to adopt new decisions for such management, without analyzing and disclosing the environmental impacts based upon new information and changed circumstances, and without considering new evidence that adverse consequences are occurring that were not anticipated when the IMBP was adopted in 2000.

101. Pursuant to such decisions, the Park Service directed and carried out the slaughter of over 1400 bison in the spring of 2008. Additional bison have been slaughtered or injured by agency actions, and have been removed from habitat outside YNP, under these recent decisions.

102. In a 2008 report to Congress, the Government Accountability Office (GAO) found that the IBMP agencies “lack accountability among themselves and to the public.”

103. The GAO further found that, contrary to sound principles that define adaptive management, the IBMP “does not have clearly defined, measurable objectives, and the partner agencies share no common view of the objectives. Consequently, the agencies have *no sound basis for making decisions or*

*measuring the success of their efforts.”*

104. The GAO found that the agencies have not “set forth a coordinated research agenda to resolve remaining critical uncertainties related to bison and brucellosis-related issues,” thus creating the very real prospect of bison slaughter without end. “In the absence of a systematic monitoring program, the agencies have lost opportunities to collect data that could help resolve important uncertainties.”

105. The GAO report found that the agencies are failing to follow their promise to test bison destined for slaughter and resolve uncertainties in their testing, which still does not reliably determine infection or the health of bison: “According to the U.S. Geological Survey, a published study by researchers at the Idaho National Engineering and Environmental Laboratory... has shown that it is possible to detect *Brucella abortus* DNA in blood samples, rather than antibodies to *Brucella abortus*, and thereby determine actual infections. Current brucellosis tests involve determining whether a blood sample taken from an animal contains antibodies to the brucellosis bacterium. The presence of these antibodies indicates that the animal has been exposed to the bacterium in quantities sufficient to trigger antibody production, but does not necessarily mean the animal is infected with, or

ill from, the disease itself."

106. According to one of the scientists involved in the development of the INEEL blood test, who was a YNP biologist at the time the test was being developed, field testing on about 500 bison slaughtered in the late 1990s - before the IBMP was adopted - showed that only about 2-3% of the slaughtered bison actually were infected, compared to the much higher levels of bison that have been exposed to brucella and thus carry the antibodies - the criteria adopted in the IBMP governing slaughter determinations.

107. Had the agencies chosen to adopt the INEEL blood test in the IBMP for purposes of determining whether a bison poses an actual threat of disease transmission to cattle, as recommended by their biologist involved in developing the test, they would have been forced to justify most of the slaughter of bison under the IBMP pursuant to a "population control" rationale that would have made clear what a Montana Fish, Wildlife and Parks Commissioner only recently admitted – that the purpose of the IBMP is to limit bison access to public lands grazing in deference to Montana's livestock industry. In other words, the NEPA process was flawed, and the agencies intentionally mislead the public as to the true

purpose of bison management outside YNP.

108. While the agencies were to have proceeded to step two of their adaptive management regime by the winter of 2002-03, they still operate under step one nine years into the plan, despite adopting amendments to allow some adaptations to the management regime. Step one is the most deadly and intrusive management regime that has led to the slaughter of over 3,300 bison since 2000, and they have no timeline on how to progress beyond this phase. According to the GAO, "[t]he agencies have no estimate regarding how long it will take to meet the conditions for starting step two, nor have they revised their estimated dates for reaching *step three*, which was expected by winter 2005-2006." (Emphasis added)

109. While the IBMP is supposedly based on adaptive management, the GAO found that it did not conform to the most basic, commonly accepted principles of adaptive management. The GAO notes: "The plan specifically states that it does not identify how the agencies will measure success or failure. In fact, several agency officials acknowledged that they had not identified metrics or parameters for measuring how well they are meeting the plan's stated goals." According to the GAO, the bison plan is nearly all paid for by American taxpayers with U.S.

treasury expenditures of \$3,222,345 in fiscal year 2006.

110. Anonymous agency officials admitted to GAO that, eight years into the Plan, they still “generally operate in a reactive, crisis-management mode when dealing with spring bison migrations from the park.”

111. Given the systematic failures of the IBMP, the GAO recommended the Department of Agriculture and Interior “refine, revise, or replace the plan” with clear objectives that can be met. The agencies responded with a series of meetings, and by adopting the AMP and updated Operating Procedures to further implement the IBMP as initially prescribed, rather than replacing or significantly refining or revising the plan.

112. In addition to the GAO Report, a number of circumstances have changed, and significant new information has arisen, as repeatedly brought to the agencies’ attention by Plaintiff organizations and others, since the agencies first signed the IBMP in 2000. The agencies have not fully addressed, analyzed and disclosed these changed circumstances and new information, in any public review, IBMP amendments, or Operating Procedures.

113. Initial assertions that the agencies are complying with their statutory

mandates to provide diversity and ensure viability, and to conserve and not impair wildlife and other resources, are no longer valid, even assuming that they were initially, as the agencies have not fully analyzed new information indicating adverse and unexpected impacts are occurring.

114. Pursuant to 40 C.F.R. 1502.9(c), federal “agencies: (1) Shall prepare supplements to either draft or final environmental impact statements if: (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”

115. The agencies have not addressed in any new or supplemental NEPA analysis whether or how the IBMP can accomplish its purposes, what impacts management is having on bison and other resources, and whether there is a rational connection between brucellosis transmission concerns and the management decisions of the IBMP agencies, given new information and changed circumstances since 2000. Nor have the agencies conducted supplemental NEPA analysis to determine what impacts are occurring, based on new information and changed circumstances

indicating presumptions and predictions of the IBMP in 2000 were inaccurate or no longer accurate.

116. In 2005, the agencies conducted a Status Review to determine how the adaptive management approach was working. Although the review indicated some changed circumstances and new information existed, the Review did not fully consider important new information. The agencies decided not to conduct any new or supplemental NEPA analysis at the time.

117. On or about October 15, 2008, and then again on or about January 9, 2009, Plaintiffs and others formally requested federal defendants to supplement the Environmental Impact Statement for the IBMP based on a long list of changed circumstances and new information (detailed, *infra.*), including the 2008 GAO Report, the 2008 slaughter of bison, new information about multiple, genetically distinct populations in YNP (the IBMP presumed it was just one population), and new science quantifying the minimal risk posed to livestock by brucellosis-infected bison. In both instances, the defendants decided not to supplement the EIS, finding no significant new information or changed circumstances.

## VI. FURTHER FACTUAL ALLEGATIONS

### A. Bison in the GYE & Impacts of IBMP Management on Bison, Other Species, and the Ecosystem

118. Plains bison once numbered in the range of 30-60 million across North America. They were nearly extirpated by the end of the 19<sup>th</sup> century, and only 23 native, wild bison survived in the remote Pelican Valley of Yellowstone National Park (YNP).

119. A few individuals had the foresight to protect and restore the remaining wild bison population. The small surviving YNP population was supplemented with other bison from the original populations that had been captured and held for some period of time. With the addition to their population, and governmental protections, the bison population was able to survive, and to recover to some extent.

120. Plains bison numbers and distribution have never recovered anywhere near what they once were. In fact, YNP indicates the YNP population has never grown to more than four thousand nine hundred animals since they were rescued from near-extinction.

121. The drop from 30-60 million animals to 23 in the late 19<sup>th</sup> century indicates a severe population bottleneck, which may have lowered the genetic diversity of extant bison populations compared to pre-decline populations. Boyd and Gates 2006, Freese et al. 2007. Alternatively, the brevity of the bottleneck may have prevented significant erosion in bison since nuclear genetic variation in the species is generally greater than other mammalian species that have also gone through bottlenecks (McCleneghan et al. 1990, Stormont 1993) and appears to be similar to other wild ungulates (Wilson and Stroebeck 1999, Halbert 2003).

122. Genetic diversity provides a species with the ability to adapt. Allendorf and Leary 1986, Meffe and Carroll 1994, Chambers 1998. Reduced genetic diversity can cause reduction in fitness, decreased growth, increased mortality, increased susceptibility to disease, and a reduction in the flexibility of individual animals to adapt to evolutionary changes. Ballou and Ralls 1982, Mitton and Grant 1984, Alloendorf and Leary 1986, Berger and Cunningham 1994.

123. Genetic diversity can be reduced as a product of hybridization (e.g. with cattle), inbreeding, founder effects, genetic drift, and as a consequence of domestication where purposeful selection will favor some morphological,

behavioral, and/or physiological traits over others, ultimately leading to genomic extinction. Freese et al. 2007.

124. Genetic diversity within a species or population is generally measured by examining heterozygosity (versus homozygosity) and/or by determining allelic diversity. A measure of heterozygosity refers to the proportional amount of genetic variance at a locus while allelic diversity refers to the actual number of alleles at an individual locus. Heterozygosity is a good predictor of the potential of a population to evolve in the immediate future following a recent bottleneck, while allelic diversity is important for the long-term response to selection and survival of populations and species (Allendorf 1986, Amos and Balmford 2001, Petit et al. 1998, Gross et al. 2006).

125. Best available science indicates a minimum viable population must be determined based on a variety of factors for a species in order to ensure its survival in the long term (Traill et al. 2007), and that a minimum viable population must include thousands - not hundreds - of individual animals for such population “to have an acceptable probability of riding-out environmental fluctuation and catastrophic events, and ensuring the continuation of evolutionary processes.”

(Traill et al. 2009).

126. Scientists indicate that while plains bison “barely escaped” extinction in the 19<sup>th</sup> century, the species is now ecologically extinct in its original range, due to domestication and anthropomorphic selection and cattle gene introgression. Freese et al. 2007. These same and other factors also threaten the genetic viability and long-term survival of bison.

127. A total of about 500,000 plains bison exist today, but only 1.5% are likely free of cattle genes, and most of these animals are not only hybridized, but are managed as domestic, commercial herds.

128. The bison in the GYE are particularly important to preserving the species and its genetic diversity because the YNP area bison are one of few “conservation herds” remaining that show no evidence of cattle introgression or hybridization. YNP bison are also unique and important as the only population that has continuously occupied its original range in a relatively wild, free-roaming state.

129. Although the Park Service asserted in the IBMP that no impairment to bison would occur, it did not specifically analyze impairment in the FEIS or any other document. IBMP ROD page 40. Nor did the Forest Service or any of the IBMP

agencies determine what would be required to maintain viable populations of bison. The agencies did acknowledge that “management prescriptions that result in nonrandom selective removal of bison from the population through lethal and non-lethal mechanisms. . . can negatively influence the resultant genetic integrity and viability of a population” FEIS at 288 (emphasis added).

130. The IBMP provides for significant, non-random slaughter of bison, and other intensive management techniques leading to unnatural selection and domestication of a native wildlife species.

131. Overall bison population numbers have been able to recover from small and even larger scale slaughters in recent decades, given necessary conditions and management in years following a removal. However, overall population numbers alone do not ensure genetic diversity and viability. Instead, best available science indicates not only that other factors are critical in determining impacts to the bison population and its viability, but also that multiple genetically distinct populations exist in the GYE population, which must be separately managed both for population numbers and other factors to ensure the genetic diversity and viability of each subpopulation and the overall population is maintained.

132. Science that has become available since the agencies adopted the IBMP provides new information about bison genetics, population structure, and other factors that indicate IBMP management is negatively impacting bison genetic diversity and viability, and may threaten the species' long-term survival. The inadequate analysis supporting the original IBMP conclusions that no impairment would occur, and that the IBMP could maintain a viable bison population, is called into question by this significant new information and changed circumstances.

133. For example, the IBMP presumed only one indistinct population of bison existed in the GYE (IBMP FEIS vol. 1 page 30), but current best available science indicates two or more genetically distinct subpopulations exist in YNP. Halbert 2003, Gardipee 2007, Christianson et al. 2005, Olexa and Gogan 2005, Gogan et al. 2005. All projected impacts to bison were based on the presumption only one indistinct population existed, and the FEIS and IBMP did not consider how IBMP management would impact genetic viability and other factors for distinct bison populations.

134. Best available science also indicates *at least* 2000 bison must be retained *in each distinct population* to preserve 95% of genetic diversity, and thus population survival, over 200 years. See Gross and Wang 2005, Gross et al. 2006.

135. Best available science further indicates factors other than population numbers affect genetic viability, and must be addressed for *each distinct population*. Such factors include lifetime male breeding success, non-random killing of likely related bison groups with emphasis on cows and calves, generation times, and population interchange. Park biologists have indicated management actions, including slaughtering bison, have altered these factors. For example, when the IBMP was adopted, 12 to 13 year old bison were fairly common, but now it is rare to find an animal older than 8 years (Rick Wallen, Park biologist at IBMP meeting August 2008).

136. Emphasis on removing older bison has reduced lifetime breeding success of individual bison and jeopardizes the retention of genetic diversity.

137. Bison movements are different than presumed when the IBMP was adopted, and/or bison movements and behaviors have changed in response to management slaughters and other disruptions. (Rick Wallen IBMP report). The IBMP's analysis of bison movements within YNP was inaccurate. New and ongoing research demonstrates bison from the Central Herd routinely move north using the road corridors from Madison Junction through Norris and to Mammoth, which

facilitates their movements into the Gardiner Basin and toward the northern boundary of YNP. As a result, the Central Herd of bison has disproportionately borne the brunt of slaughter operations undertaken pursuant to the IBMP. See IBMP Briefing Statement, YNP, Bison Population Status (Aug. 7, 2008). These movement patterns have direct implications to the genetic health of Yellowstone's Central range bison population.

138. Without acknowledging, analyzing, and managing for impacts to and preservation of minimum numbers and other factors for *each distinct bison subpopulation* in YNP, the agencies are irreparably jeopardizing the long-term genetic health of these subpopulations and compromising the genetic fitness of bison by reducing the allelic diversity of the current bison populations.

139. Despite being made aware of such evidence indicating that IBMP management actions are likely impairing bison genetic viability and long-term survival, the Park Service has not completed and disclosed analysis, or investigated and determined if there is now or will likely be impairment of bison. Indeed, developing "minimum viable population" and "ecologically viable population" sizes accounting for genetic viability was one of several high priorities and "major

gaps in the present understanding of bison management, continuing data needs, and the necessity of improving management” identified by the agencies in advancing “scientifically sound bison and brucellosis management.” Appendix D FEIS Volume I pgs 728-732.

140. Without considering best available science, new information and changed circumstances undermining the assumptions upon which the IBMP was based, as necessary to make an impairment determination in the first instance, the Park Service is unable to take “appropriate action” to “eliminate the impairment” as soon as reasonably possible. MP 1.4.7. The IBMP agencies have refused to re-open the NEPA process for the purpose of considering such information, nor have they incorporated it into IBMP amendments and Operating Procedures.

141. Instead of analyzing impacts and impairment, and responding to eliminate such effects, the Park Service continues to participate in the IBMP and activities that slaughter and otherwise impact bison. The Park Service directs and participates in activities in the park, and lend their assistance and support to activities outside of the park, including bison hazing, capture, and slaughter activities. At the direction of MDOL, the Park Service hazes bison several miles

into YNP, using helicopters, snowmobiles, and/or horses. All of these activities have directly and indirectly led to unforeseen, uncertain impacts up to and including impairment.

142. For example, per IBMP direction, the Park Service has installed and operated a bison capture facility inside the park at Stephens Creek. Thousands of bison have been captured in the Stephens Creek facility over the years, with many sent to slaughter. Other bison have been held in captivity until the following spring, and then released. Others have been sent to a quarantine project (where several continue to be held, and may ultimately be slaughtered).

143. Capture, slaughter, and hazing operations all have adverse impacts to bison populations, other wildlife, and the ecosystem. Impacts include but are not limited to direct removal of bison from the population to slaughter or quarantine, disturbing and changing bison movements and other behaviors, depleting wildlife energy reserves, causing injuries to calves and adult bison particularly during large-scale hazing operations, indiscriminately disrupting other wildlife present during bison management operations, and adverse impacts such as loss of food sources for birds, small mammals, gray wolves and grizzly bears, and disruption of

ecosystem function and processes.

**B. Diversity of Plants and Animals  
and Viability of Bison and Sage Grouse on the Gallatin National Forest**

144. Just as the IBMP management is causing impairment to bison inside YNP, the IBMP and Forest Service management decisions are preventing viable populations from existing on the Gallatin National Forest (GNF), and precluding appropriate diversity of plant and animal species on the forest. Due to the same factors and information described above, and the fact bison are excluded from almost all of the GNF, the Forest Service cannot ensure a viable population of bison exists on the GNF under its current management actions and decisions. Nor is the Forest Service ensuring viable populations of sage grouse exist on the GNF.

145. Plains bison (*bison bison*) historically occurred on lands that are now the GNF, and continue to access portions of the GNF adjacent to YNP.

146. Although the Forest Service's "primary role" in the IBMP is to "provide habitat" to bison, its primary legal obligation under NFMA is to provide for diversity of plant and animal species, including but not limited to ensuring the viability of native species like the bison. Despite this obligation, the Forest Service has effectively prevented bison from occupying any habitat on the GNF in any

meaningful way, and refuses to allow a viable population to inhabit the Forest.

147. Per the IBMP, IBMP amendments, and IBMP Operating Procedures, the Forest Service directly and indirectly participates in capturing, slaughtering, hazing, and otherwise impacting bison by providing law enforcement and other assistance during such operations.

148. The Forest Service makes additional forest management decisions that preclude bison from occupying suitable and capable habitat, often by deferring to the IBMP and IBMP agencies. Examples include issuing a permit to construct and operate a bison capture facility on Horse Butte, continuing to approve domestic livestock grazing to the exclusion of bison on GNF lands in otherwise suitable and capable bison habitat, and approving several miles of fence on GNF lands to restrict bison movements and numbers. *Infra*.

149. The Forest Service's decisions and actions under the IBMP, and related actions, are directed by its Forest Plan and NFMA. Indeed, the Forest Service indicated in the IBMP that "no decision by the Gallatin National Forest, USDA Forest Service, is required to implement the Forest Service roles of providing habitat and cooperating with other agencies in the management of bison and

disease. The 1987 Land and Resource Management Plan for the Gallatin National Forest is sufficient to guide proposed actions and activities in facilitating implementation of the Joint Management Plan.” Federal ROD at 14.

150. The GNF Forest Plan contains *no direction specific to bison*. While the GNF Plan seeks to “[p]rovide habitat for viable populations of all indigenous wildlife species and increasing populations of big game animals,” the Forest Service did not acknowledge in the Gallatin Forest Plan or the EIS for the Plan that bison historically occurred on the GNF, nor does the Forest Service explain why bison would not be considered a keystone species. While bison are clearly an indigenous wildlife species on the GNF, the Forest Plan does not address impacts of management on the viability of bison in the GNF, and the crucial role of bison in providing diversity.

151. The GNF Plan does not list every species that occurred or occurs on the Forest; however, it addresses many of the key species *except bison*. The Plan also recognized the uniqueness of the Greater Yellowstone Ecosystem, and the wildlife species the area supports, and the need to coordinate with other land and wildlife management agencies in the GYE to preserve the unique wildlife and habitat

heritage. However, in such discussions, and in the entire Forest Plan and EIS for that matter, *the GNF never mentions bison and the unique existence of wild bison in the GYE.*

152. At no time during the implementation of the GNF Plan has the Forest Service provided or maintained a viable population of bison on the forest, nor has it even determined what a minimum viable population would be. To the contrary, the Forest Service has taken actions and participated in efforts designed to prevent viable populations of indigenous bison from inhabiting the GNF.

153. The Gallatin Forest Plan identifies elk as the Indicator Species for “big game.” Big game is defined as “Those species of large mammals normally managed as a sport hunting resource.” The Forest Plan does not specify whether bison are considered big game, although bison are currently treated as big game, as they are subject to public hunting as overseen by the State of Montana.

Additionally, elk migrations in the forest may be a valid indicator of potential bison habitat as well as those areas to which bison attempt to migrate and use.

154. However, the Forest Service has consistently refused bison meaningful use of GNF lands, and excluded them from otherwise suitable and capable habitat.

The Forest Service has not applied any apparently applicable management direction to provide for bison populations or habitat. For example, the Forest Service is not providing for increasing populations of bison on the forest, nor is it managing for unique habitats such as wallows created by bison.

155. With the exception of Eagle Creek, a wintering range for bison groups subject to hunting and used by some bulls in the fall/summer, the GNF only allows bison to inhabit small portions of the GNF for limited times of the year and in limited numbers. No population of bison is allowed year-round access, or access such that it would support a full population, and allow breeding and birthing, and other activities indicative of a viable population. Even this limited habitat availability is allowed only at the discretion of the Montana State Veterinarian, thus GNF does not guarantee it will continue to provide even limited access to habitat by any bison on the GNF.

156. The Forest Service approves and allows domestic livestock grazing on areas of the GNF otherwise suitable for and capable of supporting bison. When it approves and/or analyzes grazing activities, the Forest Service consistently declines to consider making the land available to bison instead of cattle, or to

consider the impacts of the particular grazing decision on bison.

157. The Forest Service has never analyzed or even disclosed the impacts of managing bison habitat for cattle on the diversity of plants and animals that would otherwise be associated with bison habitat. Nor has the Forest Service ever explained how it can provide for appropriate diversity in the absence of bison. Nor has the Forest Service addressed the issue of ensuring a viable population of bison will be maintained on the forest, when its habitat is instead occupied by domestic cattle.

158. When declining to analyze and disclose such impacts in approving land uses that preclude bison from accessing and using the Forest, the Forest Service continuously defers its obligations to provide for diversity and ensure viability to other agencies and the IBMP.

159. For example, the Forest Service completed an Environmental Assessment (EA) and issued a Decision Notice (DN) and Finding of No Significant Impact (FONSI) for re-approving grazing cattle on the Cache-Eldridge allotment in the Taylor Fork area of the Gallatin National Forest, for which it received several comments suggesting changes to accommodate bison use of the Forest, and the

need to analyze bison-related issues. In the EA, DN, and Responses to Comments, the Forest Service failed to address its own duties regarding diversity and viability, and instead avoided such issues by deferring to the IBMP agencies and plan. A few selections from the EA and DN demonstrate how the Forest Service implements its Forest Plan and its role in the IBMP, to continuously preclude native bison from Forest lands and defer to other interests and other agencies:

- a. “The Gallatin National Forest (GNF) recognizes that the Taylor Fork is biologically suitable habitat for bison. Bison are known to have occupied the Taylor Fork historically and there are no natural barriers precluding bison from entering the Taylor Fork today. The Forest Service was a member of the interagency group which developed the Interagency Bison Management Plan. This document dictates how bison are to be managed, and offers “adaptive management” possibilities for the future management of bison. The GNF does not deny that bison management may change in the future, and that political, social, and biological solutions may allow bison to occupy the Taylor Fork someday. However, the timing and nature of those changes are completely unknown at this time. An accurate analysis of bison in the Taylor Fork is not possible without information such as the population size of the bison herd in the Taylor Fork, when they would be present, and where they would be tolerated. Answers to those questions must come from the interagency group when/if they change bison management in the Yellowstone area.”
- b. “One of the comments suggests a “chicken and egg” scenario where changes in bison management have to be made through changing the IBMP (not an allotment management plan update), but on the other hand, the IBMP says that bison cannot be in the Taylor Fork because of the presence of livestock. The GNF believes that the decision associated with this EA is not a barrier to bison occupancy of the Taylor Fork, especially considering the tools

described above to accommodate changes in bison management. However, this EA is not the forum to change bison management.”

- c. Response to comment that EA did not analyze impacts of grazing to bison: “In reviewing the preliminary NEPA issue of ‘the potential effects that proposed livestock grazing on the Cache-Eldridge Allotment could have on bison’ the Forest Service first looked at the question of how could livestock grazing impact bison. Hypothetically, if cattle and bison were to occupy the same area, the potential effect of cattle grazing to bison (not bison to cattle) would be through forage competition and/or possibly cross-breeding. However, since bison are precluded from occupying this area, these potential effects cannot occur. It is on that basis that the District Ranger concluded that this was not a significant issue in terms of environmental impact and therefore it was eliminated from detailed study in the Cache-Eldridge EA.”

160. In another example, the Forest Service began but later abandoned the NEPA process for the Wapiti allotment in the Taylor Fork area of GNF, when it conducted scoping in 2008. During scoping, the Forest Service indicated it would not even consider impacts of re-approving domestic grazing on bison, again ignoring its duties to provide for diversity of plant and animal species, and to ensure viable populations of native species exist on the Forest. In its scoping notice, the Forest Service stated:

“This analysis and the subsequent decision on the Wapiti Allotment will not include consideration of bison issues in the Taylor Fork area. Currently, the management of bison in Montana falls within the jurisdiction of the Montana Department of Livestock, Montana Fish, Wildlife, & Parks, and USDA Animal & Plant Health Inspection Service. Management actions are guided by the Interagency Bison

Management Plan (IBMP). The IBMP currently specifies that bison are not allowed to occupy the Taylor Fork drainage. If the cooperating agencies in the IBMP consider changes in bison management policy that favors the establishment of areas outside Yellowstone National Park where bison can be allowed to migrate freely, and if one candidate area is the Taylor Fork drainage, we would have the ability to modify or cancel the grazing permit at that time to accommodate use of the Wapiti area by bison. This would also be true should the Gallatin Forest Plan be amended or revised to no longer emphasize livestock in this area.”

161. According to the best available science, there are significant impacts associated with excluding bison in favor of cattle on landscapes commonly associated with bison, such as prairie grasslands and sagebrush ecosystems, including but not limited to the introduction of invasive species of weed, the prevalence of prairie dogs (and thus the endangered black-footed ferret), and the viability of the many plants and animals that depend in whole or in part on sagebrush habitat, including the sage grouse, Brewer’s sparrow, and pygmy rabbit. See, e.g., *supra.* at para. 66-70.

162. Sage-grouse populations typically inhabit large, interconnected expanses of sagebrush, and thus have been characterized as a “landscape-scale species.” *Connelly et al* (2004). Causes for habitat loss, fragmentation, and degradation in sagebrush ecosystems include sagebrush control and eradication efforts, “inappropriate livestock management,” changes in natural fire regimes, including

prescribed fire, and the use of herbicides and insecticides to promote cattle (and sometimes sheep) grazing. *Id.*

163. There are three primary effects on sage-grouse habitat associated with livestock grazing: i) changes in composition, density and structure of vegetation; ii) disturbance of nesting hens and possible trampling of nests; and, iii) removal of brood forage and cover. *Call & Maser* (1985).

164. According to best available science, “Sage-grouse populations [in Montana] declined at an overall rate of 1.6% per year from 1965 to 2003,” or just over 60% total. *Connelly et al.* (2004).

165. For southwest Montana generally, where the forest lands at issue in this case are situated, *Crowley and Connelly* (1996) documented downward trends in sage-grouse populations, including a steady decline during the decade from the time of adoption of the first forest plans up to the time of the report. The reasons for sage-grouse population declines in southwestern Montana include loss of winter range, degradation of habitat, and conversion of sagebrush habitat to agriculture use. *Ibid.*

166. In addition to the impacts of excluding bison in favor of cattle on the

diversity of terrestrial plants and animals, there are also significant impacts to aquatic species associated with the differences in grazing habits and even hooves of bison in relation to cattle. *Ketcham*, “They Shoot Buffalo, Don’t They”, p. 70, *Harpers Magazine* (June 2008).

167. Instead of analyzing domestic grazing impacts on bison and the viability or lack of viability of bison on the GNF, the Forest Service indicates the IBMP is the governing document, using it as a shield that somehow excuses it from complying with NFMA and NEPA in relation to the biological diversity of indigenous plants and animals.

168. Additionally, the Forest Service’s decisions related to the IBMP and bison management specifically exclude bison from appropriate habitat on the GNF, and prevent the Forest Service from ensuring a viable population exists on the GNF, and from providing for appropriate diversity. For example, each decision discussed above in relation to the IBMP is part of the bison management regime designed to exclude bison from the GNF, including the IBMP as amended in 2008, the Operating Procedures signed in 2009, the RTR Lease fencing permit, and the Horse Butte bison trap permit. In each of these decisions, the Forest Service

indicates it will continue to prohibit bison from occupying and using GNF lands, and continue subjecting bison to intensive management actions including hazing, capturing, slaughtering, and quarantine.

169. By continuing to prioritize and authorize livestock grazing and excluding bison from habitat suitable for bison and sagebrush obligate species, the Forest Service is failing to fulfill Forest Plan direction which requires the GNF to coordinate allotment management plans with big game habitat needs, to manage big game winter range to meet forage and cover needs of big game species, and to emphasize special and unique habitats such as wallows (which bison create and which benefit other species). GNF FP at II-18.

170. Several livestock grazing allotments are of concern as they exist within suitable and capable bison habitat, and suffer resource damage in addition to being the basis of GNF's exclusion of bison and other native species. The Forest Service refuses to even consider making these lands available for bison, to analyze impacts of such grazing on bison, species diversity on the forest, and viability of bison, sage grouse, and associated species' populations. Grazing permits, annual operating plans (or annual operating instructions), and underlying NEPA are

additionally insufficient to address resource concerns affecting diversity and viability.

171. In the Hebgen Ranger District, cattle allotments in potential bison habitat include Watkins Creek and South Fork, Sheep/Mile, Basin, and Sulphur Spring. The Wapiti and Cache-Eldridge allotments are also of concern, and may continue to have cattle grazing, as the Forest Service has not retired the allotments.

172. In the Gardiner Ranger District, several allotments are situated in bison habitat, and include Tom Miner and Ramshorn, Wigwam, Horse Creek/Reeder Creek (which contains horses and cattle), Slip and Slide, Green Lake, Mill Creek, and Section 22.

173. In the Livingston Ranger District, several allotments are situated in bison habitat, and include Big Creek, Pole Gulch, Lewis Creek, Sunny Brook, Dry Creek, Sixmile North, Sixmile, Elbow, Mission Creek, West Pine, Trail Creek, and Fridley.

174. In the Bozeman Ranger District, several allotments are situated in bison habitat, and include Bear Canyon, Trail Creek On & Off (on the Beaverhead-Deerlodge National Forest but included in GNF analysis), Red Knob, Big Bear,

Yankee, and Moose Creek.

175. In the Big Timber Ranger District, several allotments are situated in bison habitat, and include Blind Bridger, West Bridger, Lodgepole, Hubble, Deer Creek (cattle and horse), Dry Fork (cattle and horse), Hawley (cattle and horse), Lost Creek, and Carey Gulch.

176. For all of the allotments mentioned above, the GNF has recently issued annual operating plans/instructions without considering the needs of bison for purposes of providing biodiversity or viable populations.

177. Due to managing these allotments for cattle instead of bison, the GNF is failing to provide for diversity of plant and animal species for which bison can be considered a keystone species, including sage grouse and other sagebrush dependent species, or to ensure that a viable population of such indigenous species exist on the forest. Indeed, when requested to disclose monitoring data collected since the GNF Forest Plan was adopted concerning the greater sage grouse, loggerhead shrike, pygmy rabbit, burrowing owl, and pronghorn antelope, the GNF responded it had no records responsive to this request.

### **C. Additional Significant New Information and Changed Circumstances**

178. In addition to new information and changed circumstances discussed above - relating to genetic and population structure of the bison populations, subpopulation movements, and issues related to hybridization/introgression and genetic variability- several other aspects of bison and brucellosis management have been significantly altered since 2000. The agencies have failed to fully analyze and disclose the new information and changed circumstances, and to gather public input. Thus, the agencies no longer have current or accurate information upon which to base their decisions or to predict impacts of the amended IBMP, or the Operating Procedures, and other related decisions including the RTR Lease and fencing permit, and the Horse Butte capture facility permit. New information and changed circumstances include, but are not limited to, those described in the following paragraphs.

179. Since 2000, it has become clear the IBMP goal to “protect” Montana’s brucellosis class-free status has not and cannot be reached through bison management under the IBMP. Montana lost its brucellosis class-free status in September 2008 due to two cattle herd infections in the state. Other GYE states,

Idaho and Wyoming, were also downgraded in status due to infections in some cattle herds in those states. Best available science indicates the infections in the cattle herds in all three states were *not due to bison*, and were likely from either elk or other cattle.

180. The IBMP anticipated large economic costs for a state losing its brucellosis class-free status, and the IBMP declined to analyze or address other potential or more likely sources than bison for brucellosis transmission. Since the states lost their respective brucellosis class-free status classifications, the IBMP agencies have not analyzed and disclosed the actual economic costs, and have not analyzed whether bison management under the IBMP has any bearing on brucellosis transmissions and status. Nor have the agencies considered new information published which indicates the risk of brucellosis transfer between bison and cattle is minimal, and which recommends reasonable, safe, and cost-effective alternatives to the current intensive management regime. Kilpatrick et al. 2009.

181. Evidence suggests IBMP management and large scale bison slaughters may be increasing the brucellosis seroprevalence level in bison, a result the IBMP did not anticipate or desire. See Status - Yellowstone Bison Population, August 2008

powerpoint presentation by Rick Wallen, NPS biologist, slide 20. Bison developing an immunity to the bacterium from previous exposure are sent to slaughter when captured and tested for exposure; such management killing increases the proportion of immunologically naive animals who have developed an immunity to the bacterium and increases the potential for intra and inter specific disease transmission. The agencies have not analyzed and responded to this information, nor have they analyzed and considered using new diagnostic tools, such as the polymerase chain reaction (PCR) test developed by Idaho National Laboratory.

182. The IBMP did not anticipate the large scale bison slaughters that have occurred since the IBMP was adopted, or the full range of environmental impacts associated with long-term confinement in the Stephens Creek capture facility in the north area of YNP. The large scale slaughters may be affecting bison population and breeding structure, dynamics, movements, and other factors not initially considered or anticipated.

183. Impacts from long-term confinement in the capture facility, including through calving season, are unknown, and include potential impacts such as

habituation to supplemental feed, increased disease transmission, and altering movements due to the aforementioned factors and due to female fidelity to specific birthing areas.

184. New information about bison movements indicates the analysis of same in the IBMP was inaccurate, and impacts of IBMP management on bison movements, genetics, and population structure are thus unknown or inaccurate. New and ongoing research demonstrates bison from the Central Herd routinely move north using the road corridors from Madison Junction through Norris and to Mammoth which facilitates their movements into the Gardiner Basin and toward the northern boundary of YNP. As a result, the Central Herd of bison has disproportionately borne the brunt of slaughtering operations undertaken through the IBMP, and has direct implications for the genetic health of these populations.

185. The agencies have not analyzed the physiological impacts of hazing on bison and other wildlife disturbed by hazing events.

186. The agencies did not analyze or implement actions to sustain a year-round population outside YNP when Montana implemented a public bison hunt.

187. The IBMP did not anticipate the termination of grazing on private land on

Horse Butte west of YNP, or closure of a public land grazing allotment on Horse Butte; nor did it anticipate potential retirement of grazing allotments north of the park. The agencies have not analyzed the implications of cattle removal from these areas to bison management, or the reduced likelihood of transmission of brucellosis from bison to cattle in these areas where no cattle, or few cattle, are grazed.

188. Nor did the Forest Service prepare new or supplemental analysis for its decision to renew the special use permit for the Horse Butte bison trap, despite changes in the area, and other new information and changed circumstances described herein related to overall bison management which provides the basis for renewing the permit.

189. The IBMP did not anticipate the long delay in removing cattle from the RTR and providing some access for bison. Nor did any analysis for the RTR Lease incorporate new information and changed circumstances described herein, nor was it tiered to or based upon analysis relevant for the life of the Lease.

190. The Forest Service did not conduct any environmental analysis for its RTR fencing permit decision, nor did the Park Service conduct environmental analysis

for its financial contribution enabling the RTR Lease to go into effect. Both decisions are without adequate analysis, and without analysis that would reflect other new information and changed circumstances relating to IBMP management as specified herein.

## **CLAIMS FOR RELIEF**

### **FIRST CLAIM FOR RELIEF**

The Forest Service and National Park Service violated NEPA and the APA by failing to conduct new or supplemental analysis for the IBMP, Adaptive Management Plan, and Operating Procedures, and related federal decisions including approval of the Horse Butte bison trap permit, and the RTR Lease and fencing permit, given an array of significant new information and changed circumstances.

191. Plaintiffs re-allege each preceding paragraph as though stated in full herein.

192. The agencies arbitrarily and capriciously declined to supplement the 2000 IBMP FEIS after a five-year review conducted in 2005.

193. Again, in response to specific requests from Plaintiff organizations and other concerned citizens, the agencies have declined to conduct new or supplemental analysis for the IBMP and the amendments adopted in 2008, and the Operating Procedures updated in 2009.

194. Significant new information and changed circumstances demonstrate unanticipated and adverse results are occurring due to IBMP management, and that the IBMP is failing to meet any of its stated goals. The agencies and public are not currently informed about significant environmental impacts of bison and brucellosis management, nor can the agencies ensure they are able to maintain viable bison populations under the IBMP without fully analyzing and disclosing the impacts of the new information and changed circumstances. The agencies' decision not to prepare any new or supplemental analysis for the IBMP is arbitrary, capricious, and not in accordance with NEPA requirements.

195. The National Park Service did not conduct NEPA analysis for the RTR Lease which implements restrictive bison management and bison slaughter or other removal under the IBMP, even though it committed at least one million dollars to fund the project. The RTR Lease is not only without adequate analysis, it will be without any relevant NEPA analysis for several years of its 30 year life. The decision not to prepare NEPA analysis for the RTR Lease is arbitrary, capricious, and not in accordance with the Park Service's NEPA obligations.

196. The Forest Service did not conduct new or supplemental NEPA analysis for

the fencing special use permit to implement the RTR Lease, nor did it conduct new or supplemental analysis for the Horse Butte special use permit for the bison trap operated by Montana Department of Livestock and other IBMP agencies. The Forest Service did not consider significant new information and changed circumstances on Horse Butte or the northern boundary. The decision not to prepare new or supplemental NEPA analysis for the Horse Butte bison trap permit is arbitrary, capricious, and not in accordance with the Forest Service's NEPA obligations.

## SECOND CLAIM FOR RELIEF

The National Park Service violated the National Park Organic Act and its Management Policies interpreting its Organic Act duties of conservation and no impairment, and the Yellowstone National Park Organic Act and regulations, and the APA by failing to conserve bison as a park resource and failing to ensure no impairment to the bison populations occurs through bison and brucellosis management, and by failing to analyze and make a rational written determination based upon required analysis ensuring its management decisions under the IBMP, AMP, Operating Procedures, and RTR Lease will not impair bison or other park resources, and for failing to provide against the wanton destruction of bison.

197. Plaintiffs re-allege each preceding paragraph as though stated in full herein.

198. The National Park Service never conducted analysis specifically determining

whether unacceptable impacts or impairment would occur to bison and other park resources through IBMP management actions, and related actions including the RTR Lease. Information has become available indicating such management is likely impairing the genetic diversity and viability of bison, and having other unacceptable impacts and impairment to park resources. When approving and adopting the IBMP/AMP, Operating Procedures, and RTR funding, the Park Service did not analyze new information, make a discrete written statement regarding current understandings of impacts and impairment, or take action to eliminate such impacts and impairments.

199. The failure to comply with its own Management Policies which are the official interpretation of the conservation and no impairment statutory mandates, and allowing and participating in the destruction of bison and other resources inside and outside of YNP, including but not limited to the unprecedented slaughter of bison in 2008, constitutes arbitrary and capricious action by the Park Service, and is resulting in the wanton destruction of bison, unacceptable impacts and impairment in violation of the National Park Service Organic Act, Yellowstone National Park Organic Act, and regulatory mandates to protect wildlife and other park resources.

### THIRD CLAIM FOR RELIEF

The Forest Service is violating NFMA, NEPA, and the APA by failing to provide for diversity of plant and animal species and failing to ensure bison population viability, by not determining what a minimum viable bison population would be, and by excluding native wild bison from occupying any significant portion of the GNF year-round.

200. Plaintiffs re-allege each preceding paragraph as though stated in full herein.

201. The Forest Service violated NFMA, NEPA, and the APA by approving the IBMP AMP and the Operating Procedures, by approving the RTR Lease fencing to support implementing the RTR Lease and restrict bison movements, and by approving the Horse Butte bison trap permit. The Forest Service did not consider for any of these decisions and management actions significant new information and changed circumstances, did not provide habitat for bison, did not eliminate conflicts to allow bison access to the forest, and did not alter management to respond to minimized brucellosis transmission risks (for example, due to the absence of cattle at Horse Butte). Nor did the Forest Service determine for any of these decisions and management actions what a minimum viable bison population would be. Additionally, the Forest Service did not manage for increasing

populations of bison on the GNF, or viable populations of bison on the GNF.

202. Under these decisions and actions, the Forest Service continues to arbitrarily and capriciously exclude native wild bison and associated species from the GNF, and participate in management activities that impair the genetic viability of the species and its ability to persist.

#### **FOURTH CLAIM FOR RELIEF**

The Forest Service is violating NFMA, NEPA, and the APA by failing to analyze the impacts of livestock management on bison and bison habitat for IBMP management or other site-specific actions and decisions.

203. Plaintiffs re-allege each preceding paragraph as though stated in full herein.

204. The Forest Service violated NFMA, NEPA, and the APA by continuously managing for domestic livestock to the exclusion of native bison and associated plant and animal species. The Forest Service continues to approve cattle grazing allotments and other decisions without analyzing the impacts on bison population viability or bison habitat on the forests. Allotment AOIs (or other annual operating plans) and underlying NEPA documents are inadequate to remedy adverse resource impacts caused by domestic cattle grazing, and to ensure bison habitat is

maintained and occupied by native bison, and that appropriate diversity is achieved.

### **FIFTH CLAIM FOR RELIEF**

The Forest Service is violating NFMA, NEPA, and the APA by failing to provide for diversity of plant and animal species and failing to ensure sage grouse population viability.

205. Plaintiffs re-allege each preceding paragraph as though stated in full herein.

206. Evidence demonstrates sage grouse populations are declining across southwest Montana. The GNF has not monitored sage grouse and other native species since it adopted its Forest Plan, nor does it provide management direction to ensure viable populations of such species exist on the Forest.

207. The Forest Service is managing the GNF so as to prevent viable populations of sage grouse from existing, by excluding the keystone species bison as described supra, and by instead managing for domestic livestock such that conditions do not support sage grouse habitat and population viability. In decisions to manage for domestic cattle and to exclude bison from the GNF, the Forest Service fails to analyze the impacts on sage grouse of excluding bison, and fails to provide for

diversity and viability. The AOIs and underlying NEPA documents for grazing allotments are insufficient to address resource damage and loss of diversity.

### **SIXTH CLAIM FOR RELIEF**

The Forest Service and Park Service decisions to adopt the AMP and Operating Procedures, to fund the RTR Lease and to implement the RTR Lease through the fencing project, and to issue the Horse Butte capture facility permit are arbitrary and capricious.

208. Best available science indicates the agencies' actions restricting bison movements and population numbers pursuant to IBMP direction, have no appreciable or positive effect on "protecting" Montana's livestock industry from incidences of brucellosis transmission, as brucellosis is endemic to the GYE, and is transmitted to cattle by elk or other cattle, and is not likely to be transmitted by wild bison.

209. Best available science indicates the agencies' actions restricting bison movements and population numbers, and removing large numbers of bison from the population, cannot and do not maintain viable, free-roaming bison populations. Instead, such actions are likely resulting in impairment of the GYE bison's genetic variability and viability, and impairing the bison's ability to survive in the future.

210. The agencies continue to test only for exposure to brucellosis, and wantonly slaughter bison from the population either without testing, or testing only for exposure to brucellosis and not testing for actual infection. Evidence indicates the agencies' actions are resulting in unanticipated and undesired impacts such as increasing seroprevalence, altering population structure and dynamics, and eliminating bison that have potentially developed a natural immunity to brucellosis.

211. The inability of the agencies to satisfy their stated goals of the IBMP under current management, and the unanticipated and undesired impacts upon the bison and brucellosis presence renders the agencies' decisions to repeatedly haze, capture, test, and slaughter (or to slaughter in high numbers without testing) bison in the GYE, arbitrary and capricious, an abuse of discretion, and not in accordance with law.

### **REQUEST FOR RELIEF**

A. Declare the Forest Service and National Park Service are not complying with NEPA and the APA, and that the agencies must prepare an SEIS, due to significant new information and changed circumstances relevant to the impacts

of agency decisions implementing the IBMP, the Five-Year Status Review, the AMP amendments to the IBMP, IBMP Operating Procedures, and related bison and brucellosis management decisions.

B. Declare the agencies' decisions adopting and implementing the IBMP amendments and Operating Procedures, and related management actions, and decisions to limit bison distribution and numbers, are arbitrary and capricious, an abuse of discretion and not in accordance with law; and declare the agencies have not demonstrated IBMP management is achieving IBMP goals and avoiding impairing the bison's genetic viability and ability to survive long term; and the agencies have not demonstrated IBMP management can "protect" the livestock industry from brucellosis transmissions or incidents.

C. Declare the National Park Service acted arbitrarily and capriciously by directing the slaughter of bison in 2008 and cumulatively since 2000. Further declare the NPS is violating the National Park Service Organic Act, the Yellowstone National Park Organic Act, regulations, and the APA, by failing to determine whether decisions such as amending and implementing the IBMP, the RTR Lease, and specific actions including large-scale bison slaughters, are

conserving and not impairing bison and other park resources, by failing to provide against the wanton destruction of bison inside YNP and instead providing bison for slaughter, and by failing to take appropriate action to eliminate impacts and impairment occurring to the bison populations and other park resources.

D. Declare the Forest Service is violating NFMA, NEPA, and the APA, for failure to provide for appropriate diversity of plant and animal species on the GNF, by excluding the keystone species bison from the forests through IBMP management, and thereby likely excluding or diminishing populations of associated species.

E. Declare the Forest Service is violating NFMA, NEPA, and the APA for failure to ensure viable bison populations exist on the GNF, by excluding bison from meaningful and year-round use of the forest, and by failing to determine what a minimum viable population of bison would be.

E. Declare the Forest Service is violating NFMA, NEPA and the APA for failure to provide for appropriate diversity, by allocating otherwise suitable bison habitat to domestic cattle grazing, resulting in loss of or diminished

numbers of species associated with bison, and failing to analyze impacts to bison of IBMP management decisions and grazing decisions which result in excluding bison from the forest.

F. Declare the Forest Service is violating NFMA, NEPA, and the APA for failure to ensure viable populations of sage grouse exist on the GNF, by managing for domestic livestock instead of the keystone species bison, and failing to analyze the impacts of such management on sage grouse habitat and populations.

G. Enjoin the Park Service and Forest Service in their respective jurisdictions, from approving, participating in, or conducting lethal bison management actions, until they have determined based upon best available science what a minimum viable population is and the scientific, ecological carrying capacity of the GYE that would ensure the bison's ability to fulfill its evolutionary potential, and until they have made habitat available to bison to support viable bison populations on National Forest lands, and determined the impacts and impairments likely occurring to bison and the GYE, based upon new information and changed circumstances since the IBMP was adopted in 2000.

H. Enjoin the Park Service and Forest Service, in their respective jurisdictions, from approving, allowing, or conducting use of bison capture facilities to trap bison for slaughter, with or without testing for exposure to brucellosis, for holding long-term, or for removal to other management areas including quarantine facilities, until the agencies have completed new or supplemental NEPA analysis for all IBMP related decisions, and disclosed the impacts of such activities on the bison populations.

DATED this 9<sup>th</sup> day of November, 2009.

/s/ Summer Nelson

Summer Nelson

Western Watersheds Project

Montana Legal Counsel

Attorney for Plaintiffs