

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

BUFFALO FIELD CAMPAIGN )  
14365 Hebgen Lake Road )  
West Yellowstone, MT 59758 )

Civ. No. \_\_\_\_\_

WESTERN WATERSHEDS PROJECT )  
126 S. Main Street, Suite B2 )  
Hailey, ID 83333 )

FRIENDS OF ANIMALS )  
777 Post Road, Suite 205 )  
Darien, CT 06820 )

Plaintiffs, )

v. )

SALLY JEWELL, in her official )  
capacity as the Secretary of the Interior, )  
U.S. Department of the Interior )  
1849 C Street, N.W. )  
Washington, D.C. 20240 )

DANIEL ASHE, in his official )  
capacity as Director of the U.S. Fish and )  
Wildlife Service, )  
U.S. Department of the Interior )  
1849 C Street, N.W., Room 331 )  
Washington, D.C. 20240 )

U.S. FISH AND WILDLIFE SERVICE, an )  
agency of the United States )  
1849 C Street, N.W. )  
Washington, D.C. 20240 )

Defendants. )

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**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

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**INTRODUCTION**

1. Plaintiffs bring this action against Defendants Sally Jewell and Daniel Ashe, in their official capacities as Secretary of the Interior and Director of the U.S. Fish and Wildlife Service, respectively, for the decision to not undertake a status review of the potential listing of a distinct population segment (DPS) of bison occurring in and around Yellowstone National Park as threatened or endangered. *See* Endangered and Threatened Wildlife and Plants: 90-Day Findings on 17 Petitions, Evaluation of a Petition to List the Yellowstone Bison as an Endangered or Threatened Species Under the Act, 81 Fed. Reg. 1368, 1375 (Jan. 12, 2016) (hereinafter, “90-Day Bison Finding”).

2. The intentional killing of bison is the primary reason for the near extinction of the North American bison population. In the 90-Day Bison Finding, the U.S. Fish and Wildlife Service (FWS) does not deny (nor can it deny) that intentional killing—whether called culling or hunting—of Yellowstone bison continues today. In fact, management “culling” is the dominant source of mortality for Yellowstone bison. Given the relatively small size of the Yellowstone bison population, the loss of bison associated with intentional killing is significant. For example, during 2007-2008 alone, hunting and culling removed at least 1,716 Yellowstone bison. More than 1,000 bison were also killed during 2005-2006. And, it is estimated that in 1996-1997, culling of Yellowstone bison removed 57% of the entire Northern subpopulation and 20% of the Central subpopulation.

3. This culling threatens the Yellowstone bison by preventing the species from occupying the full extent of its range as well as by posing a potential harm to the genetic qualities and diversity that make these bison so unique.

4. Even so, the Defendants issued a negative determination on two citizen petitions to list the Yellowstone bison (*Bison bison bison*) as a threatened or endangered DPS under the Endangered Species Act (ESA).

5. The Defendants' determination violated the ESA, 16 U.S.C. § 1531 *et seq.*, and is arbitrary, capricious, and contrary to law within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701–706.

6. In making the negative 90-Day Bison Finding, Defendants: (1) ignored the plain language of the ESA, which requires that a species be listed if it is sufficiently threatened by any of the five factors identified in the ESA; (2) failed to abide by the ESA's directive that such determinations shall be made "solely on the basis of the best scientific and commercial data available . . . ." 16 U.S.C. § 1533(b)(1)(A); and (3) applied an arbitrary evidentiary standard in violation of the ESA.

7. The Buffalo Field Campaign, Western Watersheds Project, and Friends of Animals (hereinafter, "Plaintiffs") seek declaratory and injunctive relief reversing and remanding the negative 90-Day Bison Finding and directing Defendants to proceed with a full status review for the Yellowstone bison.

### **JURISDICTION AND VENUE**

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (United States as a defendant), 28 U.S.C. §§ 2201–2202 (declaratory and injunctive relief), 16 U.S.C. §§ 1540(c) and (g) (action arising under the ESA and citizen suit provision), and the APA, 5 U.S.C. §§ 701–706.

9. This Court has authority to grant Plaintiffs' requested relief pursuant to 28 U.S.C. §§ 2201–2202 (declaratory and injunctive relief), 5 U.S.C. §§ 701–706 (APA), and U.S.C. § 1540(g) (ESA).

10. Pursuant to the ESA citizen suit provision, Plaintiffs sent Defendants notice of their intent to sue ("Notice") on July 11, 2016. *See* 16 U.S.C. § 1540(g)(2).

11. Defendants received Plaintiffs' Notice on July 18, 2016.

12. More than sixty (60) days have passed since Defendants received Plaintiffs' Notice.

13. Defendants responded to Plaintiffs' notice of intent to sue in a letter dated September 19, 2016.

14. Plaintiffs received Defendants' response letter on September 21, 2016.

15. Defendants have not remedied the violations of the ESA and APA. Therefore, an actual controversy exists between the parties.

16. Venue is proper in this Court pursuant to the ESA, 16 U.S.C. § 1540(g)(3)(A), and 28 U.S.C. § 1391, because Defendants reside in the District of Columbia, and Defendants, as officers and employees of the United States, were acting in their official capacities or under color of legal authority in the events or omissions giving rise to Plaintiffs' claims.

### **PARTIES**

17. Plaintiff Buffalo Field Campaign (hereinafter, "BFC") is a not-for-profit regional conservation organization that is incorporated and headquartered in the state of Montana. The mission of BFC is to stop the slaughter of America's last wild bison, as well as to advocate for their lasting protection, to protect the natural habitat of wild free-roaming bison and native wildlife, and to work with people of all Nations to honor the sacredness of the wild bison. BFC's board members, volunteers, supporters, and staff are injured by Defendants' negative 90-Day Bison Finding which prevented a twelve-month conservation status review of the Yellowstone bison, a necessary step in listing the species under the ESA. Central to BFC's purpose is the daily operation of volunteer patrols along the bison's migration corridors during the fall, winter, and spring. BFC's volunteers' direct field experience fosters relationships with the bison and their habitat, which in turn, inspires volunteers to return to the field campaign and become advocates for the bison and the habitat upon which they depend. Without ESA protection, the Yellowstone bison will continue to be harmed and destroyed by the government in their original range and habitat, and the species' habitat will continue to decline and be at risk of loss to further

development. BFC's board members, volunteers, supporters and staff are injured by Defendants' failure to list the Yellowstone bison under the ESA.

18. Plaintiff Western Watersheds Project is a regional not-for-profit conservation organization headquartered in Hailey, Idaho, with offices in Montana, Wyoming, Idaho, Arizona, California, and Oregon. The mission of Western Watersheds Project is to protect and restore watersheds and wildlife habitats on the nation's public lands through education, scientific study, public policy initiatives, and litigation. Without protection under the ESA, the natural habitat of the Yellowstone bison continues to be destroyed and used for cattle grazing, while Yellowstone bison are prevented from living in the entirety of their natural range. Western Watershed Project's members and staff are injured by Defendants' failure to list the Yellowstone bison under the ESA.

19. Plaintiff Friends of Animals is a not-for-profit international advocacy organization incorporated in the state of New York since 1957. Friends of Animals seeks to free animals from cruelty and exploitation around the world, and to promote a respectful view of non-human, free-living and domestic animals. Friends of Animals engages in a variety of advocacy programs in support of these goals. Friends of Animals informs its members about animal advocacy issues as well as the organization's progress in addressing these issues through its magazine called *ActionLine*, its website, and other reports. Friends of Animals has published articles and information advocating for the protection of wildlife species so that they can live unfettered in their natural habitats. In the absence of proper protection under the ESA, Yellowstone bison are subject to habitat destruction and curtailment, as well as roundups, capture, and culling that prevent them from roaming freely throughout their range. Friends of Animals' members and staff are injured by Defendants' refusal to list the Yellowstone bison under the ESA.

20. Plaintiffs sue on behalf of themselves and on behalf of their adversely affected members and supporters. Plaintiffs have invested time and resources to protect

bison, including advocating for the conservation of the species, and the Yellowstone population segment in particular, and for listing the Yellowstone bison as threatened or endangered under the ESA. In addition, Plaintiffs work to educate their members, supporters, and the public about the status of the species and threats it faces.

21. Plaintiffs have members and supporters who live near or frequently visit Yellowstone bison habitat in and around Yellowstone National Park. They use public land in and around Yellowstone for recreational pursuits such as camping, hiking, wildlife viewing, photography, and aesthetic enjoyment. These members seek to view Yellowstone bison throughout their range, and Defendants' refusal to list the Yellowstone bison under the ESA interferes with members' opportunities to do so. In addition to causing irreparable ecological harm to much of the Yellowstone bison's natural habitat, the decision to deny ESA protections for Yellowstone bison will cause direct injury to the aesthetic, recreational, scientific, conservation, educational, and cultural interests that the plaintiff organizations and their members maintain in the continued existence, observation, and study of bison.

22. The aesthetic, cultural, recreational, scientific, educational, and other interests of Plaintiffs and their members and supporters have been, are being, and, unless the relief requested is granted, will continue to be adversely and irreparably injured by Defendants' failure to comply with federal law and refusal to list the Yellowstone bison as a protected DPS under the ESA. These are actual, concrete injuries to Plaintiffs, caused by Defendants' failure to comply with the ESA and its implementing regulations and policies. These injuries would be redressed by the relief requested in this Complaint.

23. Defendant Sally Jewell, in her capacity as Secretary of the Interior, has ultimate responsibility for the implementation of the ESA, through the U.S. Fish and Wildlife Service, with respect to terrestrial species such as the Yellowstone bison. The Secretary is also responsible for the actions of her delegate, the U.S. Fish and Wildlife

Service, including that delegate's negative 90-Day Bison Finding. Defendant Jewell is sued in her official capacity.

24. Defendant Daniel Ashe, in his capacity as Director of the U.S. Fish and Wildlife Service (FWS), an agency within the U.S. Department of the Interior, shares responsibility for the actions of FWS and is responsible for complying with all federal laws, including the ESA.<sup>1</sup> Defendant Ashe is sued in his official capacity.

25. Defendant United States Fish and Wildlife Service is a federal agency within the Department of the Interior. FWS is responsible for implementing and administering the ESA with respect to terrestrial wildlife such as Yellowstone bison.

#### **STATUTORY AND REGULATORY FRAMEWORK OF THE ENDANGERED SPECIES ACT**

26. The purposes of the ESA are "to provide a program for the conservation of . . . endangered and threatened species" and to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b).

27. In order for a species or its habitat to be protected under the ESA, the species must first be listed by the Secretary of the Interior (hereinafter, "Secretary") as either "threatened" or "endangered." *Id.* § 1533(d). Under the statutory definition, a species is "endangered" if it "is in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(6). A species is considered to be "threatened" under the statute if it is "likely to become an endangered species in the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20).

28. The Secretary must list a species under the ESA if it is threatened or endangered by any one or more of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

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<sup>1</sup> Hereinafter, the term "FWS" shall be used to refer to the Secretary of the Interior, her delegate the U.S. Fish and Wildlife Service, and its Director.

- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1).

29. The Secretary's discretion in deciding whether to list a species is limited solely to consideration of these five factors. In considering these factors, the Secretary's determinations are to be made only on the basis of "the best available scientific and commercial information regarding a species' status, without reference to possible economic or other impacts of such determination." 50 C.F.R. § 424.11(b); 16 U.S.C. § 1533(b)(1)(A).

30. The ESA defines the term "species" to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." *Id.* § 1532(16).

31. Under the ESA, FWS may list a vulnerable distinct population segment (DPS) of a vertebrate species for protection, even if the species, when taken as a whole, would not be considered threatened or endangered. The independent listing of a threatened DPS is intended to be a preemptive measure to "protect and conserve species and the ecosystems upon which they depend before largescale decline occurs that would necessitate listing a species or subspecies throughout its entire range." 61 Fed. Reg. 4722, 4725 (Feb. 7, 1996).

32. FWS's decisions to designate a DPS under the ESA are guided by the joint policy adopted in 1996 by FWS and the National Marine Fisheries Service ("DPS Policy"). *Id.*

33. The DPS Policy sets forth three elements that are considered in decisions regarding the status of a possible DPS as endangered or threatened:

- (1) Discreteness of the population segment in relation to the remainder of the species to which it belongs;
- (2) The significance of the population segment to the species to which it belongs; and



(3) The population segment's conservation status in relation to the Act's standards for listing (i.e., is the population segment, when treated as if it were a species, endangered or threatened?).

61 Fed. Reg. 4725 (Feb. 7, 1996).

34. Under the DPS Policy, a population segment is considered "discrete" if it is "markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors," or is delimited by international governmental boundaries within which significant differences in conservation, management, and regulation of the species exist. 61 Fed. Reg. 4725 (Feb. 7, 1996).

35. Under the DPS Policy, if a population is considered discrete, then its biological and ecological significance will be considered. This consideration includes, but is not limited to, the following factors:

- (1) Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon,
- (2) Evidence that loss of the discrete population segment would result in a significant gap in the range of a taxon,
- (3) Evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range, or
- (4) Evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

61 Fed. Reg. 4725 (Feb. 7, 1996).

36. The DPS Policy recognizes that "it may be appropriate to assign different classifications to different DPS's of the same vertebrate taxon." *Id.*

37. The ESA gives interested persons the right to petition the Secretary to add a species to, remove a species from, or change a listed species' status under either the threatened or endangered listings. 5 U.S.C. § 553(e); 50 C.F.R. § 434.14. Upon receipt of such a petition, the Secretary is required, to the maximum extent practicable within 90 days, to "make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action **may** be warranted." 16 U.S.C.

§ 1533(b)(3)(A) (emphasis added). This preliminary finding is known as a “90-day finding.”

38. The Secretary, by regulation, has stated that a petition is deemed to contain substantial scientific or commercial information if it contains “information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.” 50 C.F.R. § 424.14(b)(1). At the 90-day finding stage, the Secretary does not “subject the petition to critical review.” 71 Fed. Reg. 66298 (Nov. 14, 2006). “A petition need not establish a ‘strong likelihood’ or a ‘high probability’ that a species is either threatened or endangered to support a positive 90-day finding.” 79 Fed. Reg. 4877 (Jan. 30, 2014).

39. If the Secretary issues a “positive” 90-day finding, concluding that listing may be warranted, then the Secretary must commence a status review of the species, to be completed within one year. 16 U.S.C. §§ 1533(b)(3)(A)–(B).

40. After the completion of the status review, the Secretary is required to make, and publish in the Federal Register, a “twelve-month finding” that either: (1) the petitioned action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned action is warranted, but presently precluded by other pending proposals to list species of higher priority, provided that expeditious progress is being made in listing other species. 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14(b)(3).

41. The information relied upon for final listing decisions should be peer reviewed. 59 Fed. Reg. 34270 (July 1, 1994).

42. The decision to not list a species is subject to judicial review. 16 U.S.C. § 1533(b)(3)(C)(ii).

43. When a species is listed as threatened or endangered, the ESA requires that the Secretary designate critical habitat concurrently with the listing. 16 U.S.C. §§ 1533(a)(3), (f).

44. The ESA makes it unlawful for any person to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect a listed species, or attempt to engage in any of the foregoing actions, unless the action is specifically permitted by a special rule or permit issued by the Secretary. 16 U.S.C. §§ 1538–1539. The ESA also requires that all federal agencies “carry out programs for the conservation” of threatened and endangered species and consult with the Secretary in order to ensure that their actions are “not likely to jeopardize the continued existence” of such species or “result in the destruction or adverse modification” of their critical habitat. 16 U.S.C. §§ 1536(a)(1), (2).

### **FACTS GIVING RISE TO PLAINTIFFS’ CLAIMS**

#### **A. Yellowstone Bison**

45. The bison holds a position of paramount importance in American culture and history, as recognized by its recent designation as the National Mammal of the United States.

46. Bison have persisted in North America since the last ice age. They are the largest land animals in the United States, with adult males weighing up to, and sometimes exceeding, 2,000 pounds.

47. Bison play an important keystone role in the ecosystems of the Great Plains and American West. Unlike livestock that are confined to one area, mowing it to a uniform height, bison move continuously as they graze. This patchy grazing pattern leaves behind a mosaic of grass heights and habitat structures that provides nesting cover for many prairie-dwelling birds and supports a diversity of plant and animal life. Bison’s “wallowing” behavior, in which they roll around and pack down the soil in depressions in the ground, creates natural water pools in the wallows that support a diversity of amphibian life across the landscape. Without bison wallows to hold water at the surface, amphibian habitat would be limited to naturally occurring ponds and streams. In winter, bison’s large heads

and shoulders allow them to carve paths through deep snow that are then used as corridors for other animals, including antelope and elk.

48. Bison were once abundant throughout all of the continental United States and Canada, and their population was estimated at 30–60 million prior to westward colonial expansion in the 18th and 19th centuries. But by the early 1800s, bison were driven to extinction west of the Rocky Mountains and east of the Mississippi River. And by the turn of the 20th century, their population consisted of merely 500 total animals, with 25 individuals persisting in the Pelican Valley of Yellowstone National Park.

49. The Yellowstone bison population is regarded as the last remaining population of genetically intact bison in North America. It is one of the few bison populations in which no evidence has been found of introgression of cattle DNA, and it is the only known herd in the United States to have even partially persisted in its original habitat in the wild.

50. The Yellowstone bison are unique among other extant conservation herds in that they still exhibit migratory behavior. A significant portion of crucial winter range for the Yellowstone bison is located west and north of Yellowstone National Park outside Park boundaries.

51. The Yellowstone bison population consists of at least two geographically and genetically distinct subpopulations—the Central range herd and the Northern range herd.

52. The Northern range herd generally ruts in the Lamar Valley and Mirror Plateau and migrates in the winter to the northern Park boundary in the vicinity of Gardiner. The Central range herd roams between Pelican Valley, Hayden Valley, Mary Mountain, Firehole River Basin, and Madison Junction, and migrates to winter ranges beyond the west and north boundaries of Yellowstone National Park.

53. The existence of this population substructure contributes to the maintenance of overall genetic diversity within the Yellowstone bison population.

54. Disproportionate culling of the genetically distinct subpopulations threatens the viability of the Yellowstone bison as a whole through the loss of unique genetic qualities and genetic diversity.

55. During winter months, migratory Yellowstone bison are captured and killed at the Park's boundaries. Once they leave the Park, they may be killed by hunters and are culled by Montana state agencies in accordance with the Interagency Bison Management Plan (IBMP).

56. While bison killed at the western Park boundary in the vicinity of West Yellowstone come from the Central subpopulation, those killed at the northern Park boundary in the vicinity of Gardiner may originate from either the Central or Northern subpopulation.

57. It is not possible to differentiate between or separate bison from the Central and Northern range herds at the northern Park boundary without using invasive methods such as permanent identification markers or on-site genetic analysis.

58. Because bison from the Central range herd are killed at both the western and northern Park boundaries, the Central subpopulation is disproportionately impacted by hunting.

59. As a result of culling and hunting, between 2011 and 2014, the Northern subpopulation increased by 1,200 (an increase of 52%), while the Central subpopulation remained the same.

60. In order to avoid inbreeding depression and maintain genetic variation, each subpopulation should have an "effective population" of 1,000 bison, which translates to an overall subpopulation size of 2,000 to 3,000 bison.

61. Available information indicates that the size of the Northern range herd is marginal and that the Central range herd is below an effective population size of 1,000.

62. Between 2005 and 2014, the Central range herd declined from 3,531 to 1,400 bison, or by roughly 60%.

63. The IBMP currently dominates bison management within Yellowstone National Park and beyond, on National Forest system lands. The IBMP's managing body is comprised of an amalgam of government agencies with differing purposes and mandates: the National Park Service, U.S. Forest Service, U.S. Department of Agriculture Animal and Plant Health Inspection Service, Montana Department of Livestock, and Montana Department of Fish, Wildlife and Parks.

64. The IBMP was first adopted in the year 2000 after a legal dispute between the state of Montana, the U.S. Department of Agriculture, and the National Park Service regarding the impact of bison management on maintaining Montana cattle producers' "brucellosis-free" status.

65. A primary purpose of the IBMP is to address the risk of brucellosis transmission from bison to domestic livestock to protect the economic interests of the livestock industry in the state of Montana.

66. Under the IBMP, bison are intensively managed to protect against the perceived threat of brucellosis from bison, though no cases of such transmission to cattle have ever been documented in the field.

67. There is no comparable management plan for elk, a native species that harbors brucellosis and yet freely roams the same range where bison are destroyed, despite elk being implicated in transmitting brucellosis to cattle.

68. The IBMP intentionally halts the migrations of Yellowstone bison and subjects them to pressures of artificial selection and domestication. Actions undertaken through the IBMP include: hunting Yellowstone bison, capturing migratory Yellowstone bison for slaughter, permanently removing Yellowstone bison to quarantine facilities, and hazing Yellowstone bison off of their habitat on federal, state, and private land.

69. The IBMP authorizes the annual culling of the Yellowstone bison population through both hunting outside of the Park and capturing migratory bison at the Park boundaries for slaughter.

70. The population thresholds set forth in the IBMP, which serve as triggers for culling, were not based on a population viability analysis, and do not account for the population substructure of the Yellowstone bison.

#### **B. Petitions to List the Yellowstone Bison**

71. On November 13, 2014, Western Watersheds Project and the Buffalo Field Campaign submitted a petition to Defendants to list the Yellowstone bison as a threatened or endangered DPS under the ESA.

72. On March 2, 2015, Defendants received a second petition from Mr. James A. Horsley requesting that the Yellowstone bison be listed as threatened or endangered under the ESA.<sup>2</sup>

73. The Petitions presented evidence that the Yellowstone bison may be threatened or endangered because its habitat and range has historically been, and continues to be, destroyed, modified, and curtailed.

74. The Petitions presented evidence that the range of the Yellowstone bison spans an area of approximately 20,000 km<sup>2</sup> within and surrounding the northern Greater Yellowstone Area but that Yellowstone bison herds are restricted to the use of a 3,175 km<sup>2</sup>-habitat within the Park, a mere 15% of their historic range.

75. The Petitions presented evidence that in many years, the Yellowstone bison seasonally attempt to occupy their historic range and migratory routes that stretch beyond the human-defined Park boundaries, but that the bison are prevented from doing so

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<sup>2</sup> Because the petitions were addressed jointly in the 90-Day Bison Finding, they will be referred to jointly here as “the Petitions.”

because they are hazed back into the Park or killed in accordance with the IBMP to prevent them from accessing their historic habitat, which is used for cattle grazing.

76. The Petitions presented evidence that the prioritization of the use of public lands surrounding Yellowstone National Park as cattle grazing allotments rather than as bison habitat is a present, continuous, and ongoing threat that may endanger the survival and genetic integrity of the Yellowstone bison population.

77. The Petitions provided information that continued culling may degrade the viability of the Yellowstone bison through the loss of genetic heterogeneity and loss of ability to migrate.

78. The Petitions presented scientific information that continued culling may lead to loss of migratory behavior, which in turn may reduce the overall health and resilience of the Yellowstone bison.

79. The Petitions documented that culling can have a differential effect on the Yellowstone bison subpopulations.

80. The Petitions provided evidence that indiscriminant hunting and culling are impacting the ability of the Yellowstone bison to maintain effective subpopulation sizes in at least two ways. First, the Central and Northern subpopulations have been disproportionately impacted by IBMP culling. Second, IBMP management practices have brought about adverse demographic changes including differential impacts on cows and bulls and loss of family groups.

81. The Petitions presented evidence that the Yellowstone bison may be threatened or endangered due to the hunting of Yellowstone bison between fall and spring in the Gardiner Basin area north of the Park and Hebgen Basin area west of the Park.

82. The Petitions presented evidence that the Yellowstone bison may be threatened or endangered due to culls authorized by the IBMP using capture facilities at the northern and western borders of the Park.



83. The Petitions presented evidence that the genetic compositions of the Yellowstone bison subpopulations are being altered by the IBMP's selective culling of bison, which may in turn reduce the health, resilience, and defining characteristics of the herds.

84. The Petitions presented evidence that the Yellowstone bison's Central subpopulation falls significantly short of an effective population size of 1,000, and that the Northern subpopulation is marginal based on the definition of an effective population size.

85. The Petitions documented that the IBMP has neglected to conduct a population viability study for the Yellowstone bison to determine the probability of extinction, despite its designation as a high priority research need.

86. The Petitions presented substantial evidence that the Yellowstone bison may be threatened or endangered as a result of the inadequacy of existing regulatory mechanisms.

87. The major management and regulatory mechanism managing the Yellowstone bison in Montana is the IBMP.

88. The Petitions presented evidence that the IBMP is a mechanism designed to keep bison out of their habitat inside and beyond the Park (both by physically halting their migration and by keeping their populations sufficiently low so as to reduce the number of possible out-of-park migrants) and may threaten or endanger the population.

### **C. History and Relevant Prior Findings and Analyses**

89. In 2007, Defendants made a finding on Mr. James Horsley's January 5, 1999 petition to list the Yellowstone bison herds as endangered. *See* 72 Fed. Reg. 45717-45722 (Aug. 15, 2007).

90. In the 2007 finding, Defendants concluded there was substantial information that the Yellowstone bison herds may be discrete and significant within the meaning of the DPS Policy, and therefore may constitute a DPS.

91. In 2011, Defendants made a negative 90-day finding on a subsequent petition to list the wild plains bison or each of four distinct population segments as threatened under the ESA. *See* 76 Fed. Reg. 10299–10310 (Feb. 24, 2011). Rather than replicating the detail of the 2011 finding, the 2016 negative 90-Day Bison Finding purported to supplement it with analyses of new information presented by Petitioners.

#### **D. The Challenged Negative 90-Day Bison Finding**

92. On January 12, 2016, Defendants published the negative 90-Day Bison Finding in response to the Petitions.

93. In the 90-day Bison Finding, Defendants agreed with Plaintiffs that the Petitions provided substantial scientific or commercial information indicating the Yellowstone bison qualifies as a DPS.

94. Despite concluding that the Petitions presented substantial information indicating that the Yellowstone bison qualifies as a DPS, Defendants concluded that the Petitions failed to present substantial information to support a claim that listing the DPS as threatened or endangered may be warranted.

95. In so doing, Defendants applied incorrect legal standards and methodologies, failed to base their conclusions on the best available scientific and commercial data, and defied the evidence.

96. In the negative 90-Day Bison Finding, Defendants recognized that the natural range of the Yellowstone bison spanned an area of approximately 20,000 km<sup>2</sup> within and surrounding the northern Greater Yellowstone Area. Defendants also recognized that presently, Yellowstone bison herds are curtailed to use of a 3,175 km<sup>2</sup>-habitat within the Park, a mere 15% of their former range.

97. Defendants failed to analyze information presented in the Petitions about the destruction, modification, or curtailment of the Yellowstone bison habitat and range.

98. While Defendants' 90-Day Bison Finding recognized both the curtailed size of the Yellowstone bison range (from 20,000 km<sup>2</sup> to 3,175 km<sup>2</sup>—an 85% reduction) and the causal role of the IBMP's annual culling and hazing in preventing the Yellowstone bison population from accessing habitat areas beyond the park and within their natural range, Defendants failed to make a determination under the ESA of whether or not these factors are significant in determining whether listing the bison might be warranted.

99. Defendants failed to consider whether this past and present curtailment of habitat may constitute a basis for listing the Yellowstone bison. Instead, Defendants claimed that the Yellowstone population appeared "stable" and dismissed curtailment evidence as insubstantial.

100. Furthermore, Defendants' 90-Day Bison Finding relied upon a study that predated new genetic data presented in the Petitions to conclude that there is no evidence that culling has impacted the long-term genetic viability or persistence of the Yellowstone bison population.

101. However, Defendants completely failed to justify their reliance on the earlier study in light of the newer population-based genetic data presented in the Petitions.

102. In their discussion of the potential adverse genetic effects of culling, Defendants acknowledged that certain deleterious mutations in the mitochondrial genome have been found in the Yellowstone bison herds and stated that these defects are thought to have arisen from the initial population bottleneck that reduced the North American bison population to 25 animals in Yellowstone.

103. However, Defendants asserted, without any reasoning, that any deleterious genetic effects of the bottleneck would **not necessarily** be exacerbated by present culling management regimes.

104. The 90-Day Bison Finding concluded that there is no evidence that culling has impacted the long-term genetic viability or persistence of the Yellowstone bison. But

the finding does not account for available information regarding the effects that culling and hunting have already had. Defendants additionally failed to justify their conclusion in light of the available scientific data and statistics on the disparate impacts of culling and hunting on the subpopulations.

105. The 90-Day Bison Finding's conclusion that culling does not threaten the existence of Yellowstone bison is based on a model that assumes random culling and hunting strategies, and is arbitrary in light of the systematic and planned culling and hunting that actually occurs. The model also assumes the Yellowstone bison population lacks the subpopulation structure evidenced by researchers. Thus, the Finding contradicts peer-reviewed studies indicating that the continued practice of culling Yellowstone bison without regard to possible subpopulation structure has the potentially negative long-term consequences of reducing genetic diversity and permanently changing the genetic constitution within subpopulations and across the Yellowstone bison population.

106. In the 90-Day Bison Finding, the Defendants placed the burden on the Petitioners to prove that culling and hunting are threatening the continued existence of the Yellowstone bison to an extent that listing is mandatory. Yet, the Petitioners were required to show only that based on the information provided, Yellowstone bison may warrant protection under the ESA.

107. The 90-Day Bison Finding's assertion that future culling will not pose a threat to the Yellowstone bison is based on FWS's misunderstanding of the role of the IBMP. The finding states that in implementing the IBMP, an approximately equal number of bulls and cows are culled, and that sex composition surveys are conducted to optimize culling goals for the current population structure. This is factually incorrect. The IBMP manages for a single population without regard to either breeding groups or the subpopulations.

108. Pursuant to the ESA citizen suit provision, 16 U.S.C. § 1540(g)(2), Plaintiffs sent Defendants notice of their intent to sue on July 11, 2016.

109. Defendants received Plaintiffs' notice of intent to sue on July 18, 2016, more than sixty days ago.

110. Defendants responded to Plaintiffs' notice of intent to sue, denying any violations of the ESA, in a letter dated September 19, 2016.

**CLAIM FOR RELIEF**  
**(Defendants' Negative 90-Day Bison Finding Violates the Endangered Species Act and is Otherwise Arbitrary and Capricious)**

111. Plaintiffs herein incorporate all information and allegations contained in the preceding paragraphs.

112. The Defendants' negative 90-Day Bison Finding: (1) fails to properly consider present habitat curtailment; (2) is not based on best available science, including new genetic information since 2011; (3) applies incorrect legal standards, repeatedly requiring a higher burden of proof from Plaintiffs than is required under the applicable standard of "substantial . . . information indicating that the petitioned action may be warranted," 16 U.S.C. § 1533(b)(3)(A); (4) is contrary to the evidence; (5) improperly relies on the IBMP as a substantive source of regulatory protection; and (6) is otherwise arbitrary, capricious, and contrary to law in violation of the ESA within the meaning of the APA. 16 U.S.C. § 1533(b); 5 U.S.C. §§ 701–706.

**PRAYER FOR RELIEF**

Plaintiffs respectfully request that this Court enter judgment providing the following relief:

1. Declare that Defendants violated the ESA and APA by issuing the unlawful negative 90-Day Bison Finding on Petitions to list the Yellowstone bison as threatened or endangered;
2. Order Defendants to withdraw the unlawful negative 90-Day Bison Finding and issue a new finding within sixty (60) days;

3. Award Plaintiffs' costs, including reasonable attorney fees pursuant to the ESA, 16 U.S.C. § 1540(g)(4), and/or the Equal Access to Justice Act, 28 U.S.C. § 2412; and
4. Grant Plaintiffs such other relief as the Court deems just and proper.

Dated: September \_\_, 2016

Respectfully Submitted,

/s/ Michael Harris  
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