DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

GREG GIANFORTE, GOVERNOR

1539 ELEVENTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-2074
FAX: (406) 444-2684

PO BOX 201601
HELENA, MONTANA 59620-1601

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John Mehlhoff
State Director, Montana/Dakotas
Bureau of Land Management
5001 Southgate Drive
Billings, MT 59101

Tom Darrington
Malta Field Office
Bureau of Land Management
501 South 2nd Street
Malta, MT 59538

Re: Draft Environmental Assessment (EA) for the American Prairie Reserve Bison Change of Use (DOI-BLM-L010-2018-0007-EA)

Mr. Mehlhoff and Mr. Darrington:

The Montana Department of Natural Resources and Conservation (DNRC) has reviewed the Bureau of Land Management's (BLM) draft environmental assessment (EA) for the American Prairie Reserve Bison Change of Use (DOI-BLM-L010-2018-0007-EA). The DNRC offers the following comments in response to the analysis.

Within the proposed project area analyzed by the BLM (specifically Telegraph Creek, Box Elder, Flat Creek, Whiterock Coulee, East Dry Fork, French Coulee, and Garey Coulee allotments, collectively referred to as "Allotments"), DNRC manages 4,950 acres of school trust lands ("Trust Lands"). These Trust Lands are located in a checkerboard pattern of ownership, intermixed with 63,496 acres of BLM and 86,526 acres of private deeded land. Together, these mixed ownerships form allotments, the use of which have traditionally been governed by allotment management plans (AMPs). APR currently holds livestock grazing leases authorizing use of the Trust Lands subject to DNRC's management.

The DNRC's Trust Lands have historically been utilized in a rotational manner with other allotment lands and, in some instances, been fenced into BLM and private lands to accommodate topography and maximize forage and water availability. Decisions regarding change of livestock class, season of use, and fence removal may affect the Trust Lands parcels that have historically been managed in common with private and federal lands. For this reason, DNRC itself will need

to evaluate the impact of APR's proposal on the Trust Lands, pursuant to the Montana Environmental Policy Act (MEPA), prior to making a determination as to the proposed action the BLM is currently considering.

In the past, the DNRC has looked to the BLM's National Environmental Policy Act (NEPA) analysis of proposed permit alterations in fulfilling its own MEPA obligations. However, after reviewing the BLM's analysis, the DNRC has identified significant concerns that presently preclude such coordination.

1. **Converting permits from cattle to "bison," "indigenous animals," "domestic indigenous animals," "indigenous livestock," or "cattle and/or indigenous animals (bison)" is not allowed under applicable federal grazing law or regulations.**

The EA uses the terms "bison," "indigenous animals," "domestic indigenous animals," and "indigenous livestock" interchangeably, throughout. The EA states that the "proposal to graze domestic indigenous animals is consistent with the authorities in the [Taylor Grazing Act]" and that 43 CFR 4130.3-2 provides the opportunity to issue permits or leases for grazing indigenous animals. EA at 1-3. This is a misstatement of applicable federal law.

Nothing in the Taylor Grazing Act (TGA) contemplates issuance of grazing permits to "indigenous" animals or a non-production bison operation. The TGA only contemplates grazing district use by livestock. Specifically, the TGA was an act "[t]o stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, and to ***stabilize the livestock industry*** dependent upon the public range...." TGA Pmble, 48 Stat. 1269, ch. 865 (1934) (emphasis added). Under the TGA, the Secretary of Interior was directed to establish grazing districts from vacant, unappropriated, and unreserved public domain determined to be chiefly valuable for grazing and raising forage crops. These districts were to be established to promote the highest use of the public lands. 43 U.S.C. § 315. To this end, the Secretary of the Interior was to make provision for the "protection, administration, regulation, and improvement of such grazing districts," to do any and all things necessary to accomplish the purposes of the Act, and

> ...to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to ***provide for the orderly use, improvement, and development of the range***...

43 U.S.C. § 315(a) (emphasis added). The Secretary was authorized to issue "***permits to graze livestock*** on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range...." 43 U.S.C. § 315(b) (emphasis added).

The Federal Land Policy and Management Act (FLPMA) contemplates a similar limitation, defining grazing permits and leases as those documents "authorizing use of public lands or lands in National Forests in the eleven contiguous western States for the purpose of ***grazing domestic livestock***." 43 U.S.C. § 1702(p) (emphasis added).

The grazing regulations mirror the tenets of TGA and FLPMA and leave no latitude for the BLM to issue the grazing permit contemplated in the preferred alternative. An objective of the rules is:

> ...to promote healthy sustainable rangeland ecosystems; to accelerate restoration and improvement of public rangelands to properly functioning conditions; to ***promote the orderly use, improvement and development of the public lands***; to establish efficient and effective administration of grazing of public rangelands; and to ***provide for the sustainability of the western livestock industry and communities that are dependent upon productive, healthy public rangelands***.

43 CFR § 4100.0-2 (emphasis added). The grazing regulations define "livestock or kind of livestock" as "species of domestic livestock---cattle, sheep, horses, burros, and goats." 43 CFR § 4100.0-5. Grazing permits and leases "authorize use on the public lands and other BLM-administered lands that are designated in land use plans as available for ***livestock*** grazing." 43 CFR § 4130.2(a) (emphasis added). Bison, especially those in non-production herds, are not included in the definition of livestock and their owners are unable to obtain grazing permits and leases that enable bison to graze on the Allotments.

"Indigenous animals" are only referenced in grazing regulations in relation to *special* grazing permits or leases. While the EA cites to 43 CFR § 4130.6-4 which addresses special grazing permits, a special grazing permit is not what APR has requested or what the BLM has analyzed in its EA. 43 CFR § 4130.6-4 states "special grazing permits or leases authorizing grazing use by privately owned or controlled indigenous animals may be issued at the discretion of the authorized officer. This use shall be consistent with multiple-use objectives. These permits or leases shall be issued for a term deemed appropriate by the authorized officer not to exceed 10 years." Special grazing permits or leases, unlike regular permits, "**have no priority for renewal and cannot be transferred or assigned**." 43 CFR § 4130.6 (emphasis added). Such a permit is not only improper in this situation but seems to run contrary to the pillars of the TGA and FLPMA.

While the BLM may consider bison in private ownership to be livestock, that understanding does not comport with over 80 years of law, regulation, and interpretive caselaw governing management of BLM lands.

2. **Even if the BLM had the authority to issue the requested grazing permit to APR, such issuance would be improper given the insufficiency of the BLM's NEPA analysis.**

Assuming, momentarily, that the BLM had the authority to grant APR the requested permit, such issuance would still be improper as the BLM's EA fails to fully assess the proposal in compliance with NEPA.

a. *The EA does not sufficiently analyze the economic impacts of the proposed alternative.*

As pointed out in the EA, agricultural employment in Phillips County is almost five times higher than the state average. EA at 3-37. Reviewing the National Agricultural Statistics Service numbers for Phillips County, as cited in the EA, it is undeniable that agriculture is the major component in the county's socioeconomic climate. Those not directly involved in agriculture are certainly supported tangentially in related businesses, whether it be ranch supply, veterinary services, farm machinery sales, livestock marketing, or freight and trucking companies. The BLM seems to acknowledge some of these related markets in Appendix D of the EA.

The EA's shortcoming, however, is in that it analyzes APR's operation under a production agriculture model, even though the EA states that APR's operation is *non*-production in nature and that APR try to treat bison as wildlife. *Id.* at 3-42, and Appx. D. APR does not sell an annual bison calf crop, provide supplemental feed, or ship to packing houses the same way a production livestock operation would. As such, in replacing cattle with bison on these Allotments, a number of ag-related businesses could be negatively impacted. This would be in contravention to the TGA and current grazing regulations which mandate the sustainability of the livestock industry and communities dependent on ***productive*** public rangelands. *See, supra.* These potential impacts must be acknowledged and fully analyzed to make an informed decision. Similarly, the BLM should also consider whether there are cumulative economic impacts, given that APR has successfully requested changes on other allotments in the area.

b. *The EA should address applicable AMPs and deviations therefrom.*

As previously mentioned, there is no acknowledgement in the EA that several of the Allotments are governed by AMPs. While AMPs can certainly change, it would be important for the agency in this circumstance to 1) acknowledge their existence, 2) address how they govern current land management practices on the Allotment, 3) explain how AMP land management prescriptions were chosen and the benefit they provided to the permittee and the resource, and 4) analyze whether the proposed deviation from the AMP principles are in keeping with BLM's mandates.

c. *Reliance upon Hi-Line RMP is misplaced.*

The EA states that the proposed action is in conformance with the Hi-Line District Resource Management Plan (RMP). EA at 1-2. This can only be true if the RMP's definition of "livestock" includes bison. If that is the case, the RMP does not conform to BLM grazing regulations (specifically 43 CFR § 4100.0-5). *See, supra.*

d. *DNRC encourages the BLM to require tagging and identification of APR's bison, annual actual use reports, and a population reduction plan to ensure population management and accountability.*

The proposed alternative would grant APR's tenancy on BLM lands under the purview of a permit for bison grazing. Given the non-production model under which APR operates, it would

be appropriate for BLM to require tagging and identification and annual submission of Actual Livestock Grazing Use reports as a condition of the permit.

It would also be appropriate to require APR to produce and, when appropriate, implement a population reduction plan. These requirements would allow the BLM and DNRC to confirm that bison stocking rates conform with authorized grazing levels and ensure that authorized animal units (AU) and animal unit months (AUM) are not exceeded over time.

During the BLM's scoping period of the APR's initial proposal, the DNRC requested the following additional information:

- A plan for annual AUM accountability, by allotment.
- The projected growth rate of the APR bison herd without human intervention.
- APR bison contraception efforts and the projected herd growth rate with contraception.
- A projection, by allotment, of annual bison population growth and an allotment stocking plan that corresponds to the annual bison population growth projection.
- Trigger points for bison removal, so that when an allotment reaches its authorized capacity, population control measures can be implemented.
- A description of proposed bison population control methods.
- If APR plans to transfer or move bison once capacity is reached, the location and capacity of bison handling facilities.
- A description of bison handling equipment necessary to manage the permitted AUs.

The EA does not address these requests, let alone include or analyze any proposals addressing the same.

AU/AUM accountability and management is important when considering changes to traditional use dates and fencing patterns. Accountability and management specifics are especially important here, given APR's goal of treating its bison as "wildlife." The EA is deficient in that it does not identify specific accountability measures and only requires a report of Actual Livestock Grazing Use "upon request" of the BLM. EA at 2-7. The DNRC requests that if the proposed alternative is adopted, the BLM require:

- Actual Livestock Grazing Use reports, submitted annually.
- Tagging/identification to enable accurate animal counts.
- A concrete animal reduction plan that contains population triggers and delineates subsequent actions.

e. Change from cattle to "cattle and/or bison" requires specificity and analysis.

At several points throughout the EA, the document refers to changing the permit from cattle to "cattle and/or bison." It is unclear what, precisely, the BLM contemplates in this regard and specificity is necessary for there to be sufficient analysis. Does APR anticipate running cattle and bison together? More cattle? More bison?

Running the two species concurrently impacts the analysis that BLM has set forth in the EA. For example, the EA states that when "[c]ompared to cattle, bison do not demonstrate a strong

selection for riparian areas, lowlands, and water resources." *Id.* at 3-47. If this is correct, interior fence removal might be feasible. However, under the described permit, APR could still run cattle on the allotment, in which case interior fence removal might be inappropriate. Because APR has not specified its proposed management action in this regard, the BLM has not done this crucial analysis.

f. The EA fails to analyze the removal of existing permit terms and conditions.

Pages 2-2 and 2-3 of the EA set forth numerous terms and conditions which exist on the current permit. Specifically, "terms and conditions" numbers 1-10 include, but are not limited to, terms that address permit cancellation, AMP compliance, control over livestock, tagging, and billing. These same terms and conditions are not proposed for a permit issued under the preferred condition. The BLM should address this deviation from status quo, explaining why it is proposed and analyzing potential effects of failing to implement those permit terms and conditions.

g. "Additional terms and conditions" are not identified, let alone analyzed.

At various times throughout, the EA states that "additional terms and conditions" would either apply or be the same as under another alternative. EA at 2-8, 2-13, 3-10, 3-26, 3-33, 3-43, and 3-48. However, the EA fails to specifically identify those "additional terms and conditions," let alone analyze their impacts. DNRC would ask the BLM to be specific as to what "additional term and conditions" apply in those contexts and supplement its analysis accordingly.

h. The removal of range improvements is problematic and contrary to federal authorities.

On allotments, it is not uncommon for Trust Lands to be fenced in common with BLM and private pastures. Consequently, internal fences are frequently used to change grazing pressure on an allotment scale, regardless of land ownership type.

The DNRC has an obligation to manage Trust Lands in a manner that ensures long-term sustainability. If DNRC's MEPA analysis determines that the proposed action will detrimentally impact the Trust Lands, the State may be forced to require APR to fence the Trust Lands separately from other lands in the Allotments. This is not a desired outcome, given that these lands have been managed in common for decades.

Beyond triggering Trust Land management duties, fence removal does not appear to meet the objectives of federal land management authority. One of the guiding objectives of the TGA was the "protection, administration, regulation, and ***improvement***" of grazing districts. 43 U.S.C. § 315(a) (emphasis added). The Secretary of the Interior was to provide for the "orderly use, ***improvement***, and development of the range...." *Id.* (emphasis added). "Fences, wells, reservoirs, and other ***improvements*** necessary to the care and management of the permitted livestock" could be constructed to this end. 43 U.S.C. § 315(c) (emphasis added).

FLPMA reinvigorated the federal stance on improvements. "Congress finds that a substantial amount of the Federal range lands is deteriorating in quality, and that ***installation of additional range improvements*** could arrest much of the continuing deterioration and could lead to substantial betterment of forage conditions with resulting benefits to wildlife, watershed protection, and livestock production." 43 U.S.C. § 1751(b)(1) (emphasis added).

The Public Rangelands Improvement Act of 1978 also bolstered the need for range improvements, defining range improvements as "any activity or program on or relating to rangelands which is designed to improve production of forage; change vegetative composition; control patterns of use; provide water; stabilize soil and water conditions; and provide habitat for livestock and wildlife. ***The term includes, but is not limited to, structures, treatment projects, and use of mechanical means to accomplish the desired results***." 43 USC § 1902(f) (emphasis added).

Federal land management authorities contemplate "range improvements" as being physical actions taken or objects installed on the landscape by humans. They are characterized as being necessary and encouraged for successful management on Allotment landscapes. Permitting APR to remove these same range improvements seems to run contrary to decades of federal authority and practice.

3. **The impacts on the Trust Lands administered by DNRC are not evaluated in the EA.**

The BLM characterizes the decision area as being limited to the BLM-administered lands within the Allotments. EA at 1-1. That may be the extent of the BLM's analysis, but it is by no means the geographic limit of the preferred alternative's impacts.

The Allotments are comprised of private, federal, and Trust Lands and were generally formed in the mid-1900s. Because of the interrelated nature of allotment parcels, ownership entities developed ways to communicate and co-manage affected properties. A primary management tool developed to assist in co-management were AMPs, which governed the number of AUMs an Allotment could sustain and prescribed how those AUMs would be rotated to responsibly maximize the resource. State and federal land management agencies also entered memoranda of understanding, which set forth shared goals and committed to certain actions to ensure coordinated management. For example, the BLM and Montana Grass Conservation Commission entered into a 2003 Memorandum of Understanding in which the BLM committed to consult, cooperate, and coordinate when authorizing grazing on intermingled lands. Mem. of Understanding between Mont. Grass Conservation Comm'n and BLM, 3 (BLM-MOU-MT923-0318) (Dec. 2003).

The EA fails to mention, let alone analyze, existing AMPs for the Allotments or how deviation from those AMP goals advances allotment health or resource maximization, which in and of itself creates weakness in the BLM's analysis. The EA also fails to address measures taken to honor existing intergovernmental MOUs.

Because Trust Lands are not addressed in the EA, the State will independently conduct its own environmental review to the extent required by, and in accordance with, MEPA. Given the interwoven nature of the various land ownerships, it is possible that portions of the State's analysis would prove relevant contributions to the BLM's NEPA analysis and decision. The DNRC asks that the BLM stay its decision on the pending request until such time as it has completed its own MEPA review. In the alternative, the DNRC requests that upon completion of its MEPA process, the BLM commit to considering DNRC's findings in a supplemental EA.

4. **The BLM has not provided an adequate opportunity for the affected public to comment on the EA.**

The BLM failed to provide an adequate opportunity for public comment in the communities that will be impacted by the chosen alternative. The BLM held but a single virtual meeting on the draft EA and proposed alternative, which was held mid-afternoon, in the middle of the work week, during the summer when a large number of stakeholders were working. Requests for in-person hearings were made, and the BLM declined. The need to comment was so great that affected stakeholders in one community organized their own comment opportunity.

Public comment gathered after release of a draft EA and draft FONSI are an invaluable opportunity to identify holes in analysis and contradictory information. By failing to hold in-person hearings in the affected communities, BLM has made its EA vulnerable to criticism and failed to fully engage.

In closing, the DNRC encourages the BLM to re-evaluate the proposed alternative identified in the draft EA, both from a position of procedure and substance. The BLM does not have the authority to grant the proposed permit to APR. The plain language of federal land use statutes and rules do not give the BLM the authority to grant the permit APR seeks for bison grazing. Even if the BLM had the authority, the EA's analysis fails for lack of sufficiency, as discussed above. To the extent the DNRC is required to conduct an independent MEPA analysis of the proposed action, the DNRC requests that the BLM stay its decision until such time as the State has conducted a MEPA review, or commit to considering the DNRC's findings in a supplemental EA.

Sincerely,

Shawn Thomas
Division Administrator, Trust Land Management