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**UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
DEPARTMENTAL CASES HEARINGS DIVISION**

STATE OF MONTANA, BY AND
THROUGH ITS GOVERNOR, MONTANA
DEPARTMENT OF AGRICULTURE,
MONTANA DEPARTMENT OF
LIVESTOCK, MONTANA DEPARTMENT
OF NATURAL RESOURCES AND
CONSERVATION, AND MONTANA
DEPARTMENT OF FISH, WILDLIFE AND
PARKS,

Appellant,

v.

BUREAU OF LAND MANAGEMENT,

Respondent.

Docket No. _____

Appeal of July 28, 2022 Final Decision for
Telegraph Creek (05654), Box Elder (15634),
Flat Creek (15439), White Rock Coulee
(15417), East Dry Fork (05617), French
Coulee (05616), and Garey Coulee
Allotments (05447) (DOI-BLM-MT-L010-
2018-0007-EA)

**NOTICE OF APPEAL, STATEMENT OF
REASONS, AND PETITION FOR STAY**

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Exhibit 3: American Prairie Reserve Letter to Former Governor Bullock (Sept. 5, 2017)
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I. NOTICE OF APPEAL

Pursuant to the regulations at 43 C.F.R. Part 4, the State of Montana, by and through its governor and above-captioned agencies (State), hereby timely appeals the United States Bureau of Land Management's (BLM) final decision, dated July 28, 2022 (Decision), to issue grazing permits for the above-captioned allotments (DOI-BLM-MT-L010-2018-0007-EA). Pursuant to 43 C.F.R. § 4.470(b) (2022), the State includes its Statement of Reasons and, pursuant to 43 C.F.R. §§ 4.21(a)(2) and 4.471(a), its Petition for Stay along with this Notice of Appeal. The Notice of Appeal, Statement of Reasons, and Petition for Stay are filed within thirty days of the issuance of the Decision.

II. STATEMENT OF REASONS

A. Introduction.

"Any applicant, permittee, lessee, or other person whose interest is adversely affected by a final BLM grazing decision may appeal the decision..." 43 C.F.R. § 4.470(a). The Decision here, which exceeds BLM authority and is premised on deficient National Environmental Policy Act (NEPA) analysis, is unreasonable, arbitrary, capricious, and unlawful. The State appeals that Decision in advancement and protection of the State's legal obligations, interests, and duties. In particular:

Governor Greg Gianforte is the "sole official organ of communication between the government of this state and the government of...the United States." Mont. Code Ann. § 2-15-201(3) (2021). As governor, he is vested with the executive power and "shall see that the laws are faithfully executed." Mont. Const. art. VI, § 4(1). He is "the chief executive officer of the state," tasked with "formulat[ing] and administer[ing] the policies of the executive branch of state government." Mont. Code Ann. § 2-15-103. He "has full power [to] supervis[e], approv[e],

direct[], and appoint” all departments and their units, and “shall...supervise the official conduct of all executive and ministerial officers....” Mont. Code Ann. §§ 2-15-103, 2-15-201(a). Because the Decision fails to comply with federal law, it unlawfully interferes with the Governor’s ability to carry out his constitutional and statutory duties, and so he appeals the Decision and seeks its vacature.

The Department of Natural Resources and Conservation (DNRC) is tasked with the administration of state lands. *See generally* Mont. Code Ann. § 77-1-101, *et seq.* Included in DNRC’s duties are the oversight, leasing, and management of all State trust land¹, including the parcels that are the subject of this appeal. Mont. Code Ann. § 77-1-301(1). Because the Decision fails to comply with federal law, it unlawfully interferes with DNRC’s ability to carry out its statutory obligations, and so DNRC also appeals the Decision and seeks its vacature.

The Montana Department of Agriculture (MAGR) shall “encourage and promote the interests of agriculture, including horticulture and apiculture, and all other allied industries....” Mont. Code Ann. § 80-1-102(1). MAGR gathers and disseminates information concerning “supply, demand, prevailing prices, and commercial movement of farm products” in the State of Montana. Mont. Code Ann. § 80-1-102(7). MAGR has the authority to enforce all laws for the protection and regulation of Montana agriculture. Mont. Code Ann. § 80-1-102(13). Because the Decision fails to comply with federal law, it unlawfully interferes with MAGR’s ability to carry out its statutory obligations, and so MAGR also appeals the Decision and seeks its vacature.

The Montana Department of Livestock (MDOL) shall “exercise general supervision over and, so far as possible, protect the livestock interests of the state from theft and disease....”

¹ “‘State trust land’ means land or property interests held in trust by the state: (a) under Article X, sections 2 and 11, of the Montana constitution; (b) through The Enabling Act of Congress (approved February 22, 1889, 25 Stat. 676), as amended; and (c) through the operation of law for specified beneficiaries.” Mont. Code Ann. § 77-1-101(9).

Mont. Code Ann. § 81-1-102(1). To this end, MDOL oversees testing and vaccination, branding and identification, and containment requirements for Montana livestock. *See generally* Mont. Code Ann. § 81-1-101, *et seq.* Because the Decision fails to comply with federal law, it unlawfully interferes with MDOL’s ability to carry out its statutory obligations, and so MDOL also appeals the Decision and seeks its vacature.

The Montana Department of Fish, Wildlife and Parks (MFWP) “shall supervise all the wildlife, fish, game, game and nongame birds, waterfowl, and the game and fur-bearing animals of the state....” Mont. Code Ann. § 87-1-201(1). “[T]he department shall enforce all the laws of the state regarding the protection, preservation, and propagation of fish, game, fur-bearing animals, and game and nongame birds within the state.” Mont. Code Ann. § 87-1-201(2). Because the Decision fails to comply with federal law, it unlawfully interferes with MFWP’s ability to carry out these statutory obligations, and so MFWP appeals the Decision and seeks a stay.

B. Factual Background.

In January 2017, American Prairie Reserve (APR) submitted a proposed action for BLM consideration. To date, the State is unclear as to the content of that proposal, given it is not publicly available on BLM’s NEPA database and only referenced in a “Revised Proposed Action” submitted by APR on November 20, 2017. *See* APR Proposal Nov. 2017.² The 2017 Revised Proposed Action sought 10-year grazing permits for 18 allotments in BLM’s Glasgow, Lewistown, and Malta Field Offices and Upper Missouri River Breaks National Monument. *See* Proposed_Action_Handout_final. The requested permit terms included:

- Changing the livestock type from cattle to “indigenous animals”
- Changing the season of use to year-round continuous grazing

² All referenced documents are located on BLM’s National NEPA Register, eplanning.blm.gov/eplanning-ui/project/103543/570. Any additional referenced documents are either attached as exhibits or publicly available.

- General removal of interior allotment fencing
- Electrification of perimeter allotment fencing

Id. As characterized by BLM, this proposal affected 260,893 acres of BLM land and 29,309 acres of State land. *Id.* BLM conducted scoping on the Revised Proposed Action in 2018. *See* APR_Final Scoping Report_December 2018.

On September 24, 2019, APR officially withdrew its Revised Proposed Action and submitted a “New Grazing Proposal.” *See* APR New Grazing Proposal Sept. 2019, 1. This proposal pertained to seven allotments: Box Elder, Telegraph Creek, Flat Creek, White Rock Coulee, East Dry Fork, French Coulee, and Garey Coulee Allotments. The requested permit terms included:

- Permit issuance for “Indigenous Animals (Bison) and Cattle on all permits.” *Id.* at 2.
- Year-long continuous bison grazing on three allotments; modified periods of use (4/1-9/30) on remaining allotments.³ *Id.* at 1.
- Removal of some interior fencing. *Id.* at 1-2.
- Construction, reconstruction, or modification of some interior and exterior fencing to MFWP’s “wildlife friendly standards with a four-wire fence, with a second from the top high tensile electric wire and the installation of solar charging panels.” *Id.* at 1-2.

The New Grazing Proposal was in response to “public concerns related to bison year-long continuous grazing” and better reflected APR’s stocking and operational goals. *Id.* at 1.

APR’s previous grazing request [Revised Proposed Action] was based upon advice by the BLM to help ensure a thorough cumulative effects analysis. We are confident the agency can ensure the cumulative effects analysis is adequate, even with this change in APR’s request.

Id. No public scoping occurred after the New Grazing Proposal was submitted.

On July 1, 2021, BLM issued a Draft Environmental Assessment (DEA) and Draft Finding of No Significant Impacts (DFONSI), to which the State submitted comment on September 28, 2021. *See* APR Draft FONSI and APR Draft EA; *see also* St. of Mont. Cmts.,

³ Year-round bison grazing had previously been approved on Box Elder and Telegraph Creek allotments.

attached hereto as Ex. 1. BLM conducted one virtual meeting on the DEA and DFONSI on Wednesday, July 21, 2021, from 1-4 p.m. *See* News Release APR EA and Draft FONSI July 2021. Requests for other meeting opportunities, timed to accommodate rural work schedules, were denied. *See*, Ex. 1 at Gov. Gianforte Cmt.:3 (“During the public comment period, I wrote to BLM officials twice, asking that it hold in-person, public hearings at each affected location so that Montanans could meaningfully engage on this matter. The BLM declined, limiting public comment to one remote meeting, held in the middle of a summer afternoon when the vast majority of those affected were trying to wrest their livelihoods from a devastating drought.”) A total of 2,748 comment submissions were received by BLM during the public comment period following the DEA. *See* Mar. 2022 Pub. Cmt. Rep., 1-2. BLM addressed these comments in a truncated, 25-page table. *Id.* at App. A.

The comments received by BLM led to a total of six changes in the Environmental Assessment (EA) issued, along with a Finding of No Significant Impact (FONSI), and Public Comment Report, on March 25, 2022. *See* Mar. 2022 Env'tl. Assessment with Apps. (“EA”); Mar. 2022 FONSI; and Mar. 2022 Pub. Cmt. Rep., A-25. On March 29, 2022, BLM issued a Notice of Proposed Decision. *See* Mar. 2022 Proposed Dec. Rec. The State filed a protest on April 12, 2022, pursuant to 43 C.F.R. § 4160.2, to clarify its comment and correct some of the mischaracterizations made by BLM in its Public Comment Report. *See* Ltr. of Protest (Apr. 12, 2022), attached hereto as Ex. 2. On July 28, 2022, BLM issued its Final Decision Record. *See*, July 2022 APR Final Dec. Rec.

The Decision implements Alternative C for East Dry Fork, French Coulee, and Garey Coulee allotments, and implements Alternative B for Box Elder, Telegraph Creek, Flat Creek, and White Rock Coulee. *See generally id.* Except for Telegraph Creek allotment, each of the

foregoing allotments include State trust land. EA, App. A. In White Rock Coulee Allotment, a State trust parcel is the primary corridor connecting either end of the allotment. *Id.* at App. A: White Rock Unit Alt. B map.

BLM characterizes APR's bison herd as a "conservation-based" herd or "non-production-oriented, wildlife management focused" herd. *See* EA, 3-39, 3-44 n. 11, and App. D: D-1. APR does not operate for the purpose of raising bison to market. *Id.* at App. D. Indeed, APR has repeatedly characterized its herd as "wild" and expressed an ongoing desire that its herd achieve "wildlife" status. In a September 5, 2017, letter from APR CEO Sean Garrity to Former Montana Governor Steve Bullock, APR expressed its desire to "create the largest nature reserve in the continental United States..." replete with bison to be treated as "wild animals." *See* Protest of Fergus Cty. Comm'r, Attachment I (Apr. 13, 2022), attached hereto, in part, as Ex. 3.

C. Standard of Review

A BLM decision adjudicating grazing privileges must be set aside under the Administrative Procedures Act if it is arbitrary, capricious, constitutes an abuse of discretion, or is not in compliance with law. 5 U.S.C. § 706(2)(A) (2022); *see also* *BLM v. W. Watersheds Project & Wild Utah Project* ("WWP/Wild Utah"), 191 IBLA 144, 179-180 (2017). Agency decisions will be reversed if the agency "relied on factors Congress did not intend it to consider, 'entirely failed to consider an important aspect of the problem,' or offered an explanation 'that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (citations omitted). A decision that is not "reasonable" or that fails to substantially comply with the Taylor Grazing Act (TGA) and its implementing regulations is arbitrary and capricious. *WWP/Wild Utah*, 191 IBLA at 179 (citing 4 C.F.R. § 4.480(b)).

In this case, the challenged decision must be set aside because it runs afoul of both federal law and the BLM's own implementing regulations. Similarly, BLM's decision and associated analysis failed to comply with the environmental review mandates of NEPA. For these reasons, as more fully set forth below, the Decision must be reversed and the requested permits set aside.

D. **Argument**

1. **BLM Lacks Authority to Issue the Permit.**

Throughout the above-captioned matter, the animal herd in question has been given different labels. Regardless of whether BLM labels the herd "indigenous animals,"⁴ "indigenous livestock,"⁵ "domestic indigenous animals,"⁶ or "domestic indigenous livestock"⁷ the agency's action exceeds its authority, violating statute and rule. The herd in question is not livestock under federal law and the permit contemplated cannot be authorized.

i. ***Issuing any permits to a "non-production-oriented, wildlife management focused" conservation bison herd violates statute.***

Issuance of the permits in this matter is contrary to applicable statute. The Secretary of the Interior may only issue grazing permits for livestock grazing.

Per the 1934 TGA,

The Secretary of the Interior is authorized to issue or cause to be issued **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, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time in accordance with governing law.

⁴ APR Proposal Nov. 2017, 1, and APR New Grazing Proposal, 1.

⁵ APR Draft EA, iv, 1-2.

⁶ *Id.* at 1-3;

⁷ EA, iv, 1-2 through 1-4.

43 U.S.C. § 315b. The Federal Land Policy and Management Act (FLPMA), enacted in 1976, did not repeal TGA, but it did give additional management direction. 43 U.S.C. § 1701(b); *Pub. Lands Council, et al. (“PLC”) v. Babbitt, et al.*, 529 U.S. 728, 738 (2000); *see also Corrigan v. Bernhardt*, 2020 U.S. Dist. LEXIS 33989, *5 (D. Idaho 2020). In fact, FLPMA specifically embraces permits and leases for “**domestic livestock** grazing.” 43 U.S.C. § 1752 (emphasis added). Similarly, the Public Rangelands Improvement Act (PRIA), enacted in 1978, defined “grazing permit and lease” as “any document authorizing use of public lands or lands in national forests in the sixteen contiguous Western States for the purpose of grazing **domestic livestock**.” 43 U.S.C. § 1902(c) (emphasis added).

The laws governing BLM lands are very clear. Grazing permits may only be issued for livestock grazing. Permit issuance for a “non-production-oriented, wildlife management focused” bison herd contradicts the express language of the law.

Permit issuance also contradicts the purpose of the TGA. The 1934 TGA seeks to “promote the highest use of the public lands.” 43 U.S.C. § 315. “Its specific goals are to ‘stop injury’ to the lands from ‘overgrazing and soil deterioration,’ to ‘provide for their use, improvement and development,’ and ‘**to stabilize the livestock industry dependent on the public range.**’” *PLC*, 529 U.S. at 733 (quoting 48 Stat. 1269) (emphasis added). A primary tenet of the act was stabilization of the livestock industry. Issuing grazing permits to a “non-production-oriented, wildlife management focused” bison herd, as BLM proposes, is contrary to that mandate. APR’s bison herd is not raised or marketed for any industrial food or fiber purpose. To the contrary, APR has repeatedly characterized its herd as “wild” and expressed an ongoing desire to create a wild nature reserve.

The BLM's EA acknowledges that a "conservation-based" bison herd does not contribute to the livestock industry as a livestock ranch would. BLM acknowledges that any economic value realized by a "non-production-oriented, wildlife management focused" bison herd would be recreational. *See* EA, 3-39 (emphasis added). There would be no benefit, or "stabilization" of the livestock industry as is required by the TGA. *PLC*, 529 US at 741-742.

The permitted use contemplated in this matter is not dissimilar from the "conservation use" struck down by the 10th Circuit in *PLC v. Babbitt*. The question before the Court in that instance was whether "conservation use permits" that excluded livestock grazing exceeded the Secretary of Interior's authority. *PLC, et al. v. Babbitt, et al.*, 167 F.3d 1287, 1307 (10th Cir. 1999). The Court ruled in the affirmative, resting its decision on the plain language of the TGA, FLPMA, and PRIA. *Id.* at 1307-1308.

The TGA provides the Secretary with authority to issue "permits to graze livestock on ... grazing districts." That statute does not authorize permits for any other type of use of the lands in the grazing districts. FLPMA and PRIA confirm that grazing permits are intended for grazing purposes only. Both those statutes define "grazing permit and lease" as "any document authorizing use of public lands ... *for the purpose of grazing domestic livestock.*" ***Thus, the TGA, FLPMA, and PRIA each unambiguously reflect Congress's intent that the Secretary's authority to issue "grazing permits" be limited to permits issued "for the purpose of grazing domestic livestock."*** None of these statutes authorizes permits intended exclusively for "conservation use."

Id. (internal citations omitted) (emphasis added). This ruling was not appealed to the United States Supreme Court in *PLC*, 529 US 728 (2000).

While the 10th Circuit addressed the impropriety of completely removing grazing from the lands in question, the same analysis applies to the BLM's present decision to permit a "non-production-oriented, wildlife management focused" bison herd. To permit a "conservation based" bison herd, as BLM has done, is in violation of federal statute. The permits should be set aside.

ii. ***Permit issuance violates BLM's own regulations.***

Even if BLM had the authority to issue grazing permits to “non-production-oriented, wildlife management focused” bison, issuance of the permits in this matter is contrary to BLM’s own regulatory scheme. BLM regulations contemplate different types of grazing permits. The first class is a traditional grazing permit, which is limited to *livestock* grazing. 43 C.F.R. § 4130.2(a). “Livestock” or “kind of livestock” is specifically defined in rule as “species of domestic livestock—cattle, sheep, horses, burros, and goats.” 43 C.F.R. § 4100.0-5. This definition does not include bison.

Per regulation, the “term of grazing permits or leases authorizing *livestock* grazing” on BLM lands is generally 10 years. 43 C.F.R. § 4130.2(d) (emphasis added). These livestock grazing permits have renewal priority if:

- (1) The lands for which the permit or lease is issued remain available for *domestic livestock* grazing;
- (2) The permittee or lessee is in compliance with the rules and regulations and the terms and conditions in the permit or lease; and
- (3) The permittee or lessee accepts the terms and conditions to be included by the authorized officer in the new permit or lease.

43 C.F.R. § 4130.2(e) (emphasis added).

A second subset of permits, called “special grazing permits,” are specifically addressed by separate regulation, 43 C.F.R. § 4130.6-4. These permits are designated for “privately owned or controlled indigenous animals,” ***have no renewal priority, and cannot be transferred or assigned. Id.; see also*** 43 C.F.R. § 4130.6.

Assuming, *arguendo*, that BLM’s regulatory scheme aligns with the mandates of the TGA, agency rules only contemplate issuance of special grazing permits for indigenous animals. This is clear on the face of the rules and in accord with how BLM has long interpreted its rules. In 1984, when BLM amended 43 C.F.R. § 4100.0-5, it removed the definition of “indigenous

animal,”⁸ ironically because it was a term in common use and “well understood by the general public.” Amends. to the Grazing Regulations, 48 Fed. Reg. 21820, 21820 (May 13, 1983). In adopting the final rule, BLM addressed criticism that deleting the term would mean “that wildlife would not be considered during the development of allotment management plans.” Grazing Admin., Exclusive of Alaska; Final Rulemaking, 49 Fed. Reg. 6440, 6441 (Feb. 21, 1984). BLM responded by stating

It is the policy of the Department of the Interior that requirements for wildlife habitat be considered during the development of land use plans and allotment management plans. *The reference to indigenous animals in subpart 4100 of this title addresses only the issuance of special grazing permits, or leases for privately owned or controlled indigenous animals and does not refer to those wildlife managed by State game and fish departments or to endangered species for which the Department of the Interior has responsibility.*

Id. at 6441-6442 (emphasis added). This reading of the rules, and BLM’s policy as to their application, is borne out in Interior Board of Land Appeals (IBLA) caselaw. In *Hampton Sheep Co. v. BLM*, the authorization issued to Hampton for bison was a “special land use permit.” See *Hampton Sheep Co.*, WYO 1-74-1 (1975) (IBLA ruling that bison could be granted a special grazing permit as they were maintained and substantially treated as livestock).

Similarly, when APR submitted its Revised Proposed Action in 2017, BLM understood that a “special grazing permit” was the only feasible permit option under its rules. In summarizing APR’s 2017 request to convert the species type from cattle to bison, BLM stated

BLM grazing regulations allow for the issuance of permits authorizing grazing by privately owned or controlled indigenous animals, including bison, through a *special grazing permit or lease*. See 43 CFR sec. 4130.6-4.

⁸ From 1978 until its deletion in 1984, “indigenous animal” was defined as “an animal which is or was part of the original fauna of the area in question.” Grazing Admin. and Trespass Regulations, 43 Fed. Reg. 29058, 29068 (July 5, 1978).

See Proposed_Action_Handout, n. 1(emphasis added). BLM cannot now evade its clear regulatory scheme and over 38 years of agency interpretation by re-labeling the herd at issue “domestic indigenous livestock” to justify issuance of a traditional grazing permit that is not contemplated in statute and definitely not contemplated by BLM’s own rules.

The grazing permits must be set aside, as their issuance is in excess of BLM’s authority and erroneous as a matter of law.

2. **BLM’s NEPA Review Was Deficient.**

NEPA serves twin functions, the first being to support informed decision-making by “ensur[ing] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts....” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-350 (1989). The second function of NEPA is to guarantee informed public participation in governmental decisions by requiring full disclosure of relevant information and opportunities for the public to participate. *Id.* “An agency, when preparing an EA, must provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process.” *Bering Strait Citizens for Responsible Res. Dev v. U.S. Army Corps of Eng’rs*, 524 F.3d 938, 953 (9th Cir. 2008). Together, these two functions ensure the presentation of “complete and accurate information to decision makers and to the public to allow an informed comparison of the alternatives considered in the [EA].” *Nat. Res. Def. Council (NRDC) v. U.S. Forest Serv.*, 421 F.3d 797, 813 (9th Cir. 2005).

BLM’s NEPA analysis is fundamentally flawed because it does not take the requisite “hard look” at APR’s proposal. *Robertson*, 490 U.S. at 350 (citation omitted). “A properly prepared [EA] ensures that federal agencies have sufficiently detailed information to decide

whether to proceed with an action in light of potential environmental consequences.” *Wilderness Soc’y v. BLM*, 822 F. Supp. 2d 933, 936-937 (D. Ariz. 2011) (quoting *Or. Envtl. Counsel v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1986)). BLM’s EA lacks “sufficiently detailed information,” making improper assumptions about: (i) socioeconomic impact; (ii) fencing; (iii) disease; (iv) allotment management plans (AMPs); (v) inclusion of State trust lands; and (vi) recreation.⁹

Finally, BLM failed to guarantee informed public participation in its decision-making. The agency both failed to disclose relevant information and failed to provide adequate public participation opportunities in the course of conducting its analysis. For these reasons, the analysis is deficient, and the permits should be set aside.

i. BLM’s socioeconomic impact analysis was deficient.

APR does not sell an annual bison calf crop, provide supplemental feed, administer veterinary healthcare, or ship to feed lots or packing houses the same way a production livestock operation would. Because the herd is not “farmed,” the herd does not use or generate traditional production agricultural inputs and outputs. As such, by putting non-production bison on allotments historically utilized by traditional production agriculture, a number of ag-related businesses could be negatively impacted.

The EA’s economic analysis is insufficient because it uses an antiquated, inapplicable model that equates production bison herds with APR’s “non-production” herd. Specifically, the EA uses 2001 market “bison farm” inputs and outputs to simulate the economic effects of each alternative. EA at App. D. The EA admits the deficiency of this comparison when it states:

⁹ The State raises a number of additional issues, regarding NEPA sufficiency, in its comment. *See* Ex. 1. For the sake of brevity, only a few of the issues raised in those letters are restated here as examples of the EA’s insufficiency, but all are incorporated herein by reference.

The model inputs described below are based on a standard bison farm budget. It should be noted that this source is based on a production-oriented enterprise and is likely to overestimate the potential effects from non-production-oriented, wildlife management focused bison grazing on APR lands. As such, limitations exist in the application of a standard bison farm budget given that APR does not operate exclusively for the purpose of raising bison to market...

Id. at D-1. By incorporating such assumptions into its analysis, and finding “no impact,” the EA ignores potentially significant, and maybe even devastating, impacts on a local level.

The BLM notes the ill-suited nature of the analysis as it assumes a “production-oriented enterprise and is likely to overestimate the potential effects from non-production-oriented, wildlife management focused bison grazing....” *Id.* at 3-44 n. 11. In short, the BLM failed to conduct an analysis that assesses economic impact from a “non-production-oriented, wildlife management focused” herd on local businesses and communities.

The local communities most directly affected by the chosen alternative are ag-centric. The infrastructure and social constructs of the region are based on the day-to-day realities of the production livestock industry. *See* Ex. 1 at MAGR Cmt.: 2. The proposed alternative removes approximately 63,065 acres of BLM land from production agriculture. EA, 1-2. Doing so will decrease agricultural production revenue and may impact support industries. *See*, Ex. 1 at MAGR Cmt.: 2.

Depending on the severity of these impacts, the State could also witness a decrease in the affected population base and a shift away from present socio-cultural characteristics, which the EA failed to analyze. *Id.* Once agricultural producers and support businesses leave, severing long-standing ancestral connections to the area, it could be very difficult to restore those rural communities to their former economic or socio-cultural status. The EA fails to recognize, let alone analyze, this eventuality. *Id.*

The EA is deficient in that it assigns the same economic inputs and outputs to APR's herd as it would a marketed production bison or cattle herd. In doing so, it fails to meet the mandates of NEPA and the Decision should be vacated.

ii. BLM's fencing analysis was deficient.

The EA is deficient as it lacks requisite specificity and analysis of fencing. The EA and Decision are both unclear as to what type of fencing will exist on each allotment, and fail to address how existing fencing will accommodate the change from cattle to bison. *See generally* EA, App. A maps for selected alternatives. The EA also contains inherent contradiction, as it contemplates fencing that is both "wildlife friendly" and capable of containing bison. If fencing is permeable by smaller wildlife, like antelope and deer (as is the purpose of it being wildlife friendly), then it is also permeable by bigger, heavier, and more powerful bison. Conversely, fencing that can contain all sex and age classes of bison will challenge, if not completely deter, other wildlife. The EA entirely fails to address this contradiction.

The EA's numerous failures with respect to fencing necessitate vacating the final decision.

a. BLM fails to clearly identify, let alone analyze, the fencing types and locations contemplated in the EA and Decision.

While some fences would be modified, the EA and Decision clearly contemplate retention of existing allotment fencing, which BLM fails to adequately analyze in terms of bison containment. APR describes the fencing to be used on the allotments in its 2019 New Grazing Proposal.

On all other allotments - fence and maintain fences as shown on fence maps. Construct, reconstruct, or modify interior and exterior fences to MTFWP's wildlife friendly standards with a four-wire fence, with a second from the top high tensile electric wire and the installation of solar charging panels. Electric fence

notification signs required at gates and cattle guards. Replace single cattleguards with double cattleguards.

APR New Grazing Proposal Sept. 2019, 2. The maps attached to APR's proposal delineate the fences on each allotment that it intends to "Retain and Maintain," "Reconstruct & Electrify & Maintain," or "Construct & Electrify & Maintain." *Id.* at 4-7. The maps indicate (in blue) that APR intends to "Retain and Maintain" most exterior fences on each allotment. *Id.* The fence lines marked with "Electrify" are primarily internal. *Id.* No allotment would be entirely bordered by electrified fence. *Id.* APR, therefore, does not appear to contemplate "wildlife friendly... four-wire fence, with a second from the top high tensile electric wire" on *all* its fences—and certainly not on all *exterior fences*. In fact, it is unclear exactly what fencing would exist at the "Retain and Maintain" locations, as the EA never describes the fencing that already exists, or provides any detail of the fencing it will modify or construct.

Contradiction and confusion persist throughout the EA, as the document later says,

Current fencing structures... would remain, and the BLM would allow APR to upgrade to electrical fencing to ensure bison containment.

EA, 2-11 through 2-12. BLM thus recognizes that fencing "upgrades" are necessary to contain bison, but simultaneously says that current fencing will be retained (as shown in the maps and fencing calculations). It is unclear from this statement whether the EA contemplates *all* fences be "upgraded" (in contradiction to the Appendix A maps) or whether it intends to allow the current, status quo cattle fencing to remain untouched as contemplated in the Appendix A maps. Because the EA does not analyze the impacts of the existing fencing depicted on the maps, it does not adequately analyze the environmental impacts of BLM's action—i.e., the impacts of containing, or more likely *not* containing, bison with the existing, unelectrified perimeter fencing.

Appendix A map 2-5 depicting the White Rock Unit fencing under Alternative B depicts this point of contradiction. *Id.* at App. A: A-7. The entire southwestern portion of the outer perimeter fence is marked in pink as “retain.” This means that, according to the map, the entire southwestern portion of this allotment will *not* be “reconstruct[ed]” (red), “construct[ed]” (yellow), or “electrified” (green). The public does not know—because it has no information about the existing fence that will be retained—what this fence will look like under the Decision, let alone the impacts of the Decision. Similarly, the public does not know if this is one of the fencing segments contemplated for “upgrade” at some undisclosed, future date.

The opacity of the proposed action, combined with BLM’s failure to clearly identify existing conditions and analyze the same, violate NEPA and the decision should be vacated.

- b. *BLM fails to reconcile the contradiction of using “wildlife friendly” fencing to contain a “non-production-oriented, wildlife management focused” bison herd.*

The proposed use of “wildlife friendly” fencing presents significant contradiction, which BLM fails to recognize, let alone address.

The EA and Decision state that 79.6 miles of fence will be modified—some of it electrified and some not—to “meet specific standards according to MFWP’s wildlife friendly standards (Appendix B, Fence Design and Maintenance)...” EA, 3-10; *see also* July 2022 APR Final Dec. R., 10. Appendix B is a document prepared by MFWP, one of the Montana agencies participating in this appeal. Appendix B’s specifications for what constitutes “wildlife friendly” fencing include many features that would make such fences incapable of containing a “non-production-oriented, wildlife management focused” bison herd.

For example, Appendix B states that, for fencing to be “wildlife friendly”:

The top wire or rail should be low enough for adult animals to jump over, preferably 40” or less, and no more than 42” high... the bottom wire or rail should

be high enough for a adult pronghorn and young wild ungulates to crawl under. The bottom wire should be a minimum of 16” from the ground and preferably at least 18.”

EA at App. B: 10. In other sections, Appendix B describes how fences can be pinched, opened, laid down, or lowered to allow for seasonal wildlife passage. *Id.* at 40. The guide also describes different materials (*e.g.* pvc piping vs. smooth wire) and the different methods that each require, emphasizing flexibility and breakability as keys to preventing animals from getting caught or injured. *Id.* at 5-7. Wildlife friendly fencing is, by its very nature, something that can be easily jumped, stretched, or moved. Appendix B describes specifications for fence that can be breached by animals like deer, who are smaller and less powerful than bison.

By comparison, fences that are designed to contain domestic bison are higher and stronger. As opposed to 42”, these fences are usually 8’ tall. This height is necessary because bison can jump up to 5-6 feet. Further, the fence must be high enough that, if winter snow buries the bottom 12” of the fence (effectively raising the “ground level” and shortening the fence by 12”) the fence can still contain the bison. Rather than being made to be flexible, wires are stretched tight to make them unbreakable, even by a bison’s bulk. Instead of 18” of space between the bottom wire and the ground, domestic bison are usually contained by a fence with mesh wire at the bottom. These are all standard practices for *production* bison. As is made clear in BLM’s NEPA Register documents, APR and BLM do not contemplate a domestic herd, but rather “non-production-oriented, wildlife management focused” bison, which can be expected to behave differently (discussed further, *infra*, in Section II.D.2.vi, regarding recreation).

In the State’s 2021 comments, it raised the issue of fencing and specifically stated that the DEA was insufficient because it did not take a hard enough look at fencing. *See* Ex. 1 at MFWP Cmt.: 1-2. MFWP specifically stated “it may be unreasonable to expect a wildlife-friendly fence

to contain bison that are purposely managed as if they were wildlife.” *Id.* MFWP pointed out the necessity for further detail and consideration in the EA, stating:

This additional analysis should consider: herd demographics, including numbers and ages of bulls relative to the number of cows and calves and the overall number of bison; forage abundance and quality; and time of year. Analysis should also assess the potential for the foregoing variables to influence the frequency with which bison challenge the fence or escape, due to inherent dispersal behavior or need for additional forage resources.

Id. However, BLM never responded to this portion of the State’s comment and did not modify the EA to supply any such additional analysis.

BLM did respond to other commentators, Roger and Robin Peters, who also stated

There is NOT a fence they can build to allow wildlife passage while holding a bison. Wildlife friendly fences are a maximum of 42” high and the bottom wire is 18” off the ground to allow antelope under. How is that going to keep bison in?

July 2022 APR Final Dec. Rec. at Protest Resps.: 6. BLM responded by re-stating the amount of fence that was to be reconstructed/constructed and asserting, without citation or support, that “properly constructed and maintained electrified 3-, 4-, and 5-wire high-tensile fencing is highly effective in containing captive bison herds.” *Id.* BLM does not explain, however, how existing fencing (which is not high-tensile) or one-electrified-wire fencing (as proposed for some fences) will contain bison. BLM states the efficacy of something it has not evaluated.

BLM also states, “When evaluating a fence’s ability to contain domestic bison, consideration is given to the ability of the herd to access the proper quality and quantity of food and water (MFWP 2012).” *Id.* The document BLM cited, contained in the EA’s References, is MFWP’s “Executive Summary... Background Information on Issues of Concern for Montana: Plains Bison Ecology, Management, and Conservation.” In that document, MFWP states that the high-tensile fencing BLM discusses (which is not what APR proposes) is only effective on “captive” bison, i.e. *production* bison, not “wild” bison or “wildlife managed” bison. MFWP

2012 at 7. MFWP also explains that “[o]ne of the main concerns with high-tensile wire is that it tends to stretch, and therefore does not readily break when an animal becomes entangled.” *Id.*

The document goes on to state:

Due to the limited number of free-ranging bison herds, there is a general lack of specific information on the impact that free-ranging bison have on fences. Additional observations of the few existing free-ranging herds and their impact on fencing are needed to develop creative management solutions.

Id. Finally, MFWP 2012 states that “woven wire fencing that is 48 inches high with two or three barbed wire strands at the top has also proven successful in containing captive bison. However, woven wire creates a complete barrier to other wildlife species that are not able to jump or slip through.” *Id.* The very document BLM cites in its comment response undermines their conclusion, and leads back to the basic contradiction BLM does not solve: fencing either contains bison and excludes wildlife, or allows for wildlife passage and does not contain bison.

Finally, BLM fails to adequately analyze fencing impacts on sage-grouse, which are a Special Status Species. EA, Tables 3 and 5, 3-6 to 3-7. With respect to fencing, BLM only states that “Per Appendix B of the HiLine RMP (BLM 2015a), all fences within 1.2 miles of Greater Sage-Grouse leks should be marked to decrease the chance of Sage-Grouse collisions.” *Id.* at 2-7, 2-13, 2-4. Appendix B of the EA (at 12-13) describes marking lower wires of smooth or barbed wire fences with small flags to avoid collisions. However, the photographs and diagrams of those pages of Appendix B show 4-wire fences of standard height (approximately 42”). *Id.* at App. B: 12-13. Those fences are not sufficient to contain bison, and do not resemble the electrified, high-tensile wire fences with mesh that would be necessary for containment.

Because the EA fails to identify fences sufficient for bison containment, the EA does not evaluate the effect of those fences on sage-grouse habitat, movement, and population. As it is unclear exactly what type of fence APR intends to use that can be both wildlife-friendly and

bison-containing, there is no analysis as to whether said fence is permeable enough to allow sage-grouse to reach their leks or sufficiently marked to prevent collisions.

For the foregoing reasons, BLM's NEPA efforts are insufficient and the decision should be vacated.

iii. BLM's disease impact analysis was deficient.

BLM failed to analyze the impacts of increased fence permeability on disease transmission, and should therefore be set aside as NEPA deficient.

Removing fences or having wildlife friendly fences, as the Decision allows, generally reduces habitat fragmentation and increases big game movement. EA, 3-10. However, having permeable fences that either allow bison escape or increased wildlife presence means that bison increasingly interact with wildlife and livestock. The EA recognizes that "the transmission of disease from domestic livestock to wildlife, were it to occur, would result in adverse impacts on big game species." *Id.* at 3-11. However, the EA does not recognize that increased big game movements may foster increased commingling between wildlife and bison. This, in turn, would increase the potential spread of any diseases present, in either the bison or the passing wildlife. In whichever order it occurs, there will certainly be increased risk of disease exposure to all species with the approved alternative, and the EA fails to sufficiently consider this increased risk.

The EA only discusses disease transfer in two locations. On page 3-11, the EA discusses the transfer of brucellosis and bovine tuberculosis from livestock to wildlife. On page 3-14 of the EA, a number of diseases are listed that could infect bison and which can be transmitted to other livestock. The EA states that APR has committed to conducting limited disease testing, at a decreasing rate, for the next 10 years. *Id.* at 3-15. There is no discussion of diseases that area wildlife might transfer to bison, or which bison may transfer to area wildlife.

Also, the EA again fails to consider the “non-production-oriented, wildlife management focused” nature of APR’s herd and what implications that management style, as opposed to traditional production agriculture, may have for disease transfer. For example, traditional production livestock operations implement annual vaccination and cull/replacement programs. APR, however, does not cull or sell animals in the same manner production operations do, leading to older herd individuals that have potential to contract and harbor disease for a longer period of time. Additionally, shipping and market processes are major disease checkpoints in a production operation, testing and identifying diseases in individuals and herds. The testing APR proposes is not as rigorous or as regular as those of a production operation subject to these checkpoints. Production management actions create an element of disease prevention or elimination that may not be present in APR’s herd.

BLM’s failure to evaluate the absence of these more intensive management practices associated with production herds, as opposed to the non-production herd APR contemplates, makes the EA deficient. The EA should analyze whether the risk of disease contraction and transference escalate within the bison herd, area livestock, and resident wildlife, as a product of management practices and fencing. The EA’s failure to conduct such analysis renders the Decision deficient, and it should be vacated.

iv. BLM failed to analyze relevant AMPs.

BLM fails to analyze, let alone recognize as substantive planning documents, four AMPs relevant to the above-captioned action: 1) Telegraph Creek AMP (implemented in 1970 and subsequently amended), 2) Flat Creek AMP (implemented in 1974), 3) East Dry Fork AMP (implemented in 1982) and 4) White Rock Coulee AMP (implemented in 1975). As such, the Decision must be set aside as it violates NEPA.

AMPs are documents prepared in consultation with allotment permittees, which apply to livestock operations on public lands like those at issue here. 43 U.S.C. § 1702(k). AMPs have been described as “‘the penultimate step in the multiple use planning process’ and as ‘basically land use plans tailored to specific grazing permits.’” *NRDC v. Hodel*, 618 F. Supp. 848, 859 (E.D. Cal. 1985) (internal citation omitted). An AMP

- (1) prescribes the manner in, and extent to, which *livestock operations* will be conducted in order to meet the multiple-use, sustained-yield, economic and other needs and objectives as determined for the lands by the Secretary concerned; and
- (2) describes the type, location, ownership, and general specifications for the range improvements to be installed and maintained on the lands to meet the *livestock grazing* and other objectives of land management; and
- (3) contains such other provisions relating to *livestock grazing* and other objectives found by the Secretary concerned to be consistent with the provisions of this Act and other applicable law.

43 U.S.C. § 1702(k) (emphasis added). They are prepared after “careful and considered consultation, cooperation, and coordination with affected permittees or lessees, landowners involved, the resource advisory council, any State having lands or responsible for managing resources within the area to be covered by such a plan, and the interested public” and may be revised after the same consultation, cooperation, and coordination with the foregoing entities. 43 C.F.R. § 4120.2(a) and (e); *see also* 43 U.S.C. § 1752(d). The plans must include terms and conditions required by rule, prescribe livestock grazing practices necessary to meet resource objectives, specify the limits of flexibility within which the permittees or lessees may adjust operations without prior approval, and provide for monitoring to evaluate management actions taken to meet specific resource objectives. *Id.* Private and State lands may be included in AMPs. 43 C.F.R. § 4120.2(b). As a term and condition of a grazing permit or lease, a permittee or lessee shall be required to conform with a completed AMP. 43 C.F.R. § 4120.2(d).

BLM mentions each of the four AMPs only once in the EA, failing to discuss them in depth or even set forth their basic contents and directives. Particularly concerning, BLM fails to acknowledge these plans as substantive planning documents with which this Decision must comply. *See* EA, 1-3 (“Relationship to Statutes, Regulations, Other Plans, or Other National Environmental Policy Act Documents”).

As rationale for failing to include AMP analysis, BLM states:

For the purposes of the BLM NEPA analysis, AMPs were not specifically analyzed as an issue because historical AMPs, which have been maintained to varying degrees, do not contain relevant indicators necessary to make a reasoned choice between alternatives. Provisions of AMPs, or a functional equivalent [sic], are contained in the terms and conditions of grazing permits. Environmental effects of those terms and conditions measure against the baseline conditions existing on these allotments have been fully analyzed in Chapter 3 of the EA. Alternative A represents the current management and conditions that would persist if the proposal were not approved which includes existing AMPs.

See July 2022 APR Final Dec. Rec. at Protest Resps.: 6.

This response is concerning for several reasons. First, it appears that Alternative A (no action) is the only alternative that maintains the existing AMPs, with other alternatives incorporating only parts of the AMPs. 43 C.F.R. § 4120.2(d) requires permittees to comply with whole AMPs, not portions. Second, BLM states that the AMPs have not been fully maintained. If BLM believes the AMP to be incomplete or stale, it is incumbent upon the agency to engage with appropriate stakeholders and refresh the plan. It is not acceptable, nor is it contemplated by statute or regulation, that the agency should cherry-pick portions of the AMP for incorporation into the permit.

In addition to the foregoing infirmities, the action contemplated is in direct contradiction to the actions authorized in the AMPs. On the State’s own initiative, it obtained copies of the pertinent AMPs. Each of the existing AMPs contemplates allotment use by *livestock*. As

explained previously, bison are not livestock and the AMPs do not contemplate usage by a “non-production-oriented, wildlife management focused” bison herd.

AMPs are designed to be collaborative guidance documents between BLM, permittees, landowners, resource advisory councils, States, and any other interested member of the public, due in part to the complex landownership and jurisdictional patterns that frequently appear within allotments, like those at issue in this case. BLM’s decision fails to analyze these plans or their impacts on the contemplated action, fails to adhere to statute and rule guiding AMP use, and contradicts express language within the AMPs. For these reasons, the decision should be set aside.

v. BLM’s analysis improperly presumes State acquiescence and inclusion of State trust lands.

While the EA properly limits its NEPA review to BLM-administered lands within the project area, the EA improperly presumes that the permitted actions comply with Montana law and that the State will continue as a participant in the allotment, complementary to the terms of the permits at issue. In doing so, BLM fails to apprehend the full impacts of its Decision, and it should be set aside.

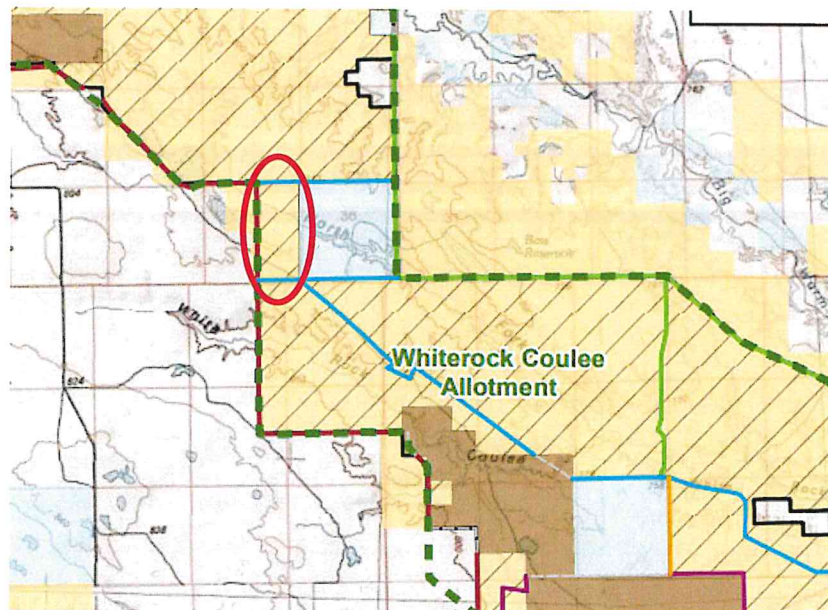
In 1889, under the Montana Enabling Act, the federal government granted to Montana the sixteenth and thirty-sixth sections in each township “for the support of common schools.” *Montanans for the Responsible Use of the Sch. Tr. v. St. ex rel. Bd. of Land Comm’rs, et al.* (“MONTRUST”), 1999 MT 263, ¶ 13, 296 Mont. 402, 989 P.3d 800 (citing ¶ 10 of the Enabling Act). That grant of lands constitutes a trust, the terms of which are set forth in Mont. Const. art. X, § 11(1) (said federal lands “shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted...”) and the Enabling Act. *Id.* The State of Montana is the trustee of those State trust lands, owing a fiduciary

duty to secure the largest measure of legitimate advantage to the beneficiary. *Id.* at ¶ 14. While the Montana Board of Land Commissioners and DNRC have discretion in administering State trust lands, that discretion is not unlimited and must conform to the requirements of the trust. *Id.* ¶ 32.

The EA is limited in its review to BLM-administered lands within the project area. EA, 1-1. However, the project area also includes approximately 5,830 acres of State trust land administered by the DNRC. *Id.* at 1-2. These State trust lands are fenced in common with BLM-administered and private lands. *Id.* at App. A: Alt. A maps. Given the magnitude of change embraced by the Decision, specifically in terms of species and management style, the State is unable to allow said actions to occur on State trust land until it conducts its own Montana Environmental Policy Act (MEPA) analysis. While variations in period of use, grazing, and fencing modifications rarely warrant such analysis, the type of change contemplated by the Decision and the shift from production livestock to a “non-production-oriented, wildlife management focused” bison herd is significant on these allotments. This shift raises specific questions for State lands including, but not limited to, 1) how grazing pressure will be controlled on Trust lands, 2) how AUM caps will be monitored and enforced given the non-production nature of the herd, 3) whether and how growth rates will be monitored given the non-production nature of the herd, and 4) plans for bison removal.

The State is unable to portend whether the proposed activity is in accordance with its trust management mandates. If, however, the State concludes that it cannot permit such activity, the absence of its land from the allotments at issue will be marked and dramatic. White Rock Coulee is but one example of how removing State land (depicted as blue parcel, below) would

affect utilization of BLM land, leaving a narrow corridor of BLM land to connect either end of the allotment (circled in red, below).



EA at App. A: A-7

The EA only analyzes BLM land within the allotment, but in reality, the presence of other lands within that allotment impacts utilization of those BLM lands. Failure to address, let alone analyze, any impacts caused by the absence of those lands is a violation of NEPA, and the Decision should be set aside.

vi. BLM's recreational impact analysis was deficient, if not absent.

BLM's failure to adequately analyze the recreational impacts of the permits renders the Decision NEPA deficient, and it should be set aside.

The EA states that "Recreational opportunities were not raised as issues during the public or internal scoping processes." EA, 1-8. This is simply incorrect. MFWP stated in its comment letter as follows:

4) *The EA does not analyze potential impacts to recreational opportunities that may be associated with a bison herd managed as wildlife.*

In analyzing impacts to the recreating public, the EA states that potential for bison/recreationalist encounters would be low, and that “members of the general public could encounter bison when engaged in recreational activities such as hunting and hiking, just as they might encounter other livestock such as cattle.” *See*, EA at 3-20. This analysis presumes that the bison are treated as, and will act as, domestic cattle.

However, the EA notes that APR manages their bison as if they are wildlife, a fact that runs contrary to the EA’s conclusion on this point. As such, a correct impact analysis would identify and assess impacts to recreation on the basis that these bison would **not** be managed as most domestic livestock herds are.

See, Ex. 1 at MFWP Cmt.: 3. BLM has flatly ignored MFWP’s comment and failed to address, *at all*, the potential impacts to recreation that result from the Decision—especially the differences between production and “non-production-oriented, wildlife management focused” bison. This failure necessitates vacature.

The EA recognizes that “bison in private herds account for over 93 percent of bison in North America” and therefore there is little information regarding how non-production bison interact with people. EA, 3-18. The obvious exception is in Yellowstone National Park (YNP), where “wild” bison and people meet. The EA discusses YNP specifically in an attempt to contrast it to the present proposal:

[B]ison may be dangerous to humans and can charge and gore people if approached too closely. Such incidents of human injury are most common in areas with high levels of visitation, such as Yellowstone National Park (YNP), where bison constitute a major visitor attraction. Because bison, like other prey species, perceive human disturbances as analogous to predation risks, the likelihood of bison reacting with physical force increases with increased human disturbance. Reported bison encounters at YNP between 2000 and 2015 resulted in injuries to persons in cases where human proximity to bison before injury ranged from 0.1 to 20 feet and averaged 11 feet (Cherry et al. 2018). By contrast to YNP, Phillips County receives comparably much lower levels of visitation on BLM administered lands.

Id. BLM argues that because fewer people visit Phillips County than YNP, there will be less danger to humans. *Id.*

However, BLM's own statement belies this conclusion: YNP has high visitation, which means that bison in YNP are *more exposed* and accustomed to humans than any other "wild" bison—arguably more exposed than even most production herds. And yet, there are many instances of bison goring humans in YNP every year. So many, in fact, that researchers can measure the average distance of the gorings. *Id.*

Similarly, the EA does not contemplate that a "wildlife managed" herd of bison in Phillips County may become its own visitor attraction. In fact, APR intends the herd to be exactly that. *See* Ex. 3 ("As you know, the mission of American Prairie Reserve is to create the largest nature reserve in the continental United States, a refuge for people and wildlife preserved forever as part of America's heritage.") If this goal is met, human interaction with the bison will increase, therefore increasing the potential for injuries. However, it remains unlikely that visitation rates will ever reach or surpass that occurring in YNP. The combination means that APR bison may encounter enough people to increase conflict without decreasing the animal's sensitivity.

The EA misconstrues and misapplies what little information there may be on the impacts such a bison herd would have on recreationalists. BLM failed to take a hard look at the real potential dangers of the interactions between recreationalists and the APR bison. The EA should therefore be vacated while BLM appropriately evaluates that danger.

vii. BLM's decision is the result of insufficient and ill-informed public participation.

The 2018 public scoping period and in-person meetings touted by BLM were not held in association with this Decision. The public involvement opportunities that were associated with

this Decision were abbreviated and failed to account for limited resources in the affected communities. As such, the Decision is the result of insufficient public participation, in violation of NEPA.

BLM claims to have fully met its public participation obligations, citing a one-month public scoping period and four in-person open house meetings in Winnett, Winifred, Malta, and Glasgow held in spring of 2018. EA, 1-1 through 1-2. However, all of these scoping opportunities were conducted in association with APR's 2017 Revised Proposed Action, which was unequivocally withdrawn by APR on September 24, 2019, at which time APR submitted its New Grazing Proposal. See APR_Final Scoping Report_December 2018, 5-6; APR New Grazing Proposal Sept. 2019, 1. It is the 2019 New Grazing Proposal, and not the 2017 Revised Proposed Action, which is the subject of the Decision.

The public must

be given as much environmental information as is practicable, prior to completion of the EA, so that the public has a sufficient basis to address those subject areas that the agency must consider in preparing the EA. Depending on the circumstances, the agency could provide adequate information through public meetings or by a reasonably thorough scoping notice.

Bering Strait, 524 F.3d at 953 (citation omitted). Only two comment opportunities were afforded the public in relation to the Decision: (1) a 60-day comment period, which was eventually extended to 90-days after vociferous requests from the State and public, and (2) one public meeting. Both of these opportunities came after the DEA was released on July 1, 2021.

Similarly, the singular *virtual* public meeting opportunity was not sufficient for the affected communities. The Council on Environmental Quality's NEPA regulations state that agencies shall

[h]old or sponsor public hearings, public meetings, or other opportunities for public involvement whenever appropriate or in accordance with statutory requirements

applicable to the agency. Agencies may conduct public hearings and public meetings by means of electronic communication except where another format is required by law.

When selecting appropriate methods for public involvement, agencies shall consider the ability of affected entities to access electronic media.

40 C.F.R. § 1506.6(c) (emphasis added). Despite ***multiple*** requests from the State that it hold in-person, public hearings at affected rural locations, the BLM declined, limiting public comment to one virtual meeting. This meeting was held in the middle of a summer afternoon, when the vast majority of those affected were in the fields. *See* Ex. 1 at Gov. Gianforte Cmt.: 3.

BLM's Decision was made in a public participation vacuum. All scoping meetings BLM cites were held in relation to a different proposal. Limited opportunities to comment on the relevant proposal came after the DEA was already drafted, and were held during a drought by electronic means difficult to manage for working, rural residents. For these reasons, the Decision is deficient and should be vacated.

III. PETITION FOR STAY

The State petitions for a stay of BLM's Decision pending appeal. 43 C.F.R. § 4.470-472. Petitions to stay a final BLM grazing decision, pending appeal, "must show sufficient justification based on the following standards":

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) The likelihood of the appellant's success on the merits;
- (3) The likelihood of immediate and irreparable harm if the stay is not granted;
- and
- (4) Whether the public interest favors granting the stay.

43 C.F.R. § 4.471(c); *see also W. Watersheds Project, et al. v. BLM*, 195 IBLA 115, 130 (2020).

The State can show "sufficient justification," based on the four-factor test, to justify the stay requested.

A. None of the Parties Will Be Harmed if the Stay is Granted.

Preservation of the status quo, through issuance of a stay, will not harm any party in the above-captioned matter.

APR has made it clear this is a “non-production” herd. Therefore, APR will lose no income if a stay is granted. APR will not lose its current grazing permits or suffer any other damage from the delay necessary to resolve the foregoing issues or complete an appropriate NEPA review.

By contrast, as explained *infra*, the State will suffer immediate and irreparable harm without a stay of the Decision.

B. The State is Likely to Succeed on the Merits.

In stay proceedings, a relaxed standard applies to the State’s burden to show a likelihood of success on the merits. The State need only raise questions that are “serious, substantial, difficult and doubtful” regarding the merits to make them fair game for litigation. *Wyo. Outdoor Council, et al.*, 153 IBLA 379, 388 (2000) (quoting *Sierra Club, et al.*, 108 IBLA 381, 384-85 (1989)). “A stay may be granted when substantial questions are raised for our deciding an appeal that require careful consideration, provided the other three stay criteria are met.” *Tenn. Gas Pipeline Co., L.L.C.*, 189 IBLA 108, 110 (2016); *see also, Wyo. Outdoor Council*, 153 IBLA at 379 (granting a stay when consideration of the merits requires “careful consideration”).

To avoid redundancy, the State incorporates by reference its Statement of Reasons here, to demonstrate the likelihood of its success on the merits. As stated, the above-captioned decision is in violation of statute and regulation governing BLM activities. Issuance of any permits to a “non-production-oriented, wildlife management focused” conservation bison herd violates the express language the TGA, FLPMA, and PRIA, and especially runs afoul of the

TGA's purpose to "stabilize the livestock industry dependent on the public range." Issuing the contemplated grazing permit also deviates from BLM's own regulations governing grazing permits, special grazing permits, livestock, and "indigenous animals."

Also explained in the Statement of Reasons, there are very substantial deficiencies within the BLM's NEPA analysis. First, the EA used "production herd" models, assumptions, and data throughout its analysis, when APR expressly states that its bison herd is a "non-production" herd. Second, the EA completely fails to fully explain the fencing changes contemplated, analyze current fencing that will be retained around the perimeter of the allotments, and examine the impacts of permitting bison in allotments with that existing fencing. The EA is unclear and contradictory regarding whether fencing will be "wildlife friendly" or capable of containing bison. Third, the EA fails to fully address the impacts to disease transference between bison, livestock, and other wildlife that may result as a product of APR's bison management model and fencing changes. Fourth, the EA entirely fails to address existing AMPs, whether the proposed actions deviate from those AMPs and any impacts from those deviations, or whether deviations from existing AMPs are even contemplated under the law. Fifth, the EA improperly presumes the continued inclusion of State trust lands within the allotments at issue, declining to assess any impacts or shifted burdens caused by their potential removal. Sixth, the EA does not fully analyze impacts to recreation caused by the presence of a "non-production-oriented, wildlife management focused" conservation bison herd. Finally, the Decision is the result of insufficient and ill-informed public participation, which the State repeatedly implored BLM to cure, to no avail.

The Decision does not address its legal failures, raised by the State in its comments and explained more fully in the Statement of Reasons. The deficiencies within the Decision and the

EA are numerous, obvious, and substantial. The arguments above establish that the State has a strong likelihood of success on the merits, certainly sufficient to justify a stay.

C. The State Will Suffer Immediate and Irreparable Harm if the Stay is Denied.

The State will suffer immediate and irreparable harm without a stay. There are immediate dangers to the health and safety of recreationalists, cattle, and wildlife presented by these bison, particularly because there is no clear, adequate plan regarding fencing.

Perhaps most important and emergent is the threat to State trust lands that may result from denial of a stay. *See generally* Decl. of Clive Rooney, attached hereto as Ex. 4. The State has a fiduciary obligation in the management of State trust lands. *Id.* at ¶ 4; *see also, supra*. Releasing a “conservation-based” or “non-production-oriented, wildlife management focused” bison herd on those parcels, without adequate analysis or management guidelines, places the State in danger of potentially failing to meet this obligation. Ex. 4 at ¶ 10.

None of the concerns raised by the State during the public comment period, both as to State trust lands or other issues, were adequately addressed in the EA, and the possible impacts to the environment and Montana are real. *Id.* at ¶¶ 9-10. Until an appropriate NEPA analysis is complete, the State and its residents are left to guess, and brace for, unanalyzed impacts that will have serious consequences. Disease, trespass, goring, and land deterioration are not hypothetical damages, but real and immediate threats. A stay is appropriate, as no one will be harmed by a stay and as there is great potential for harm without the stay.

D. The Public Interest Weighs in Favor of a Stay.

It is in the public’s interest to stay this Decision pending appeal. The fact that the State and multiple non-governmental organizations are both (separately) appealing BLM’s Decision indicates the extent to which the affected residents and governments believe the public interest

will be harmed by this Decision. Granting a stay of the BLM's Decision is in the public's interest.

The public has an interest in having Federal Administrative Agencies follow the law. *Jung Park d/b/a Inland RV Rental LLC*, 2012 WL 1184347, *6 (IBLA 2012-64). Further, "the public has an interest in preserving the status quo until the merits of a serious controversy can be decided." *W. Watersheds Project*, 195 IBLA at 137 n. 136 (citing the ALJ order's reference to *Valdez v. Applegate*, 616 F.2d 570, 572–73 (10th Cir. 1980)). In *Valdez*, the court held that:

The public has an interest in protecting the range from overgrazing. The public also has an interest in the economic stability of the area and plaintiffs assert that such stability will be damaged by loss of property values, the effect of the herds, the combination of individual holdings, and exercise of control over private and state lands. Also, the public has an interest in "preserving the *status quo ante litem* until the merits of a serious controversy can be fully considered before a trial court."

616 F.2d at 572–73 (quoting *Blackwelder Furniture Co. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189, 197 (4th Cir. 1977)).

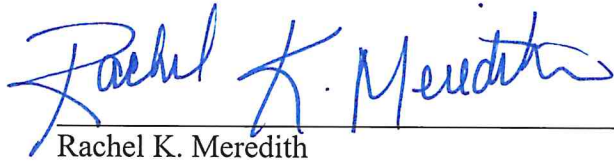
In this case, preserving the status quo preserves the local and State economy, rangeland health, the integrity of State trust lands, human safety, and cattle and public wildlife in the ecosystem. To upend any of these fragile systems by introducing a herd of "non-production-oriented, wildlife management focused" bison that may or may not be successfully contained is not in the public interest. The people of the State of Montana have an interest in preserving their way of life, and an interest in ensuring that BLM follows the law. Neither is possible without a stay.

E. Conclusion.

The Decision violates BLM's obligations under federal statutory and regulatory authorities and under NEPA. The Decision, if made effective, will cause immediate and

irreparable harm to the State and to the public. Therefore, the Decision should be stayed pending appeal.

Respectfully submitted this 25th day of August, 2022.

A handwritten signature in blue ink, reading "Rachel K. Meredith". The signature is fluid and cursive, with a horizontal line drawn underneath it.

Rachel K. Meredith
Counsel for Appellant

OFFICE OF THE GOVERNOR
STATE OF MONTANA

GREG GIANFORTE
GOVERNOR



KRISTEN JURAS
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September 28, 2021

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Re: Draft Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) for American Prairie Reserve's Bison Change of Use (DOI-BLM-L010-2018-007-EA)

Messrs. Mehlhoff and Darrington:

Thank you for the opportunity to offer comment on the U.S. Bureau of Land Management's (BLM) draft American Prairie Reserve (APR) Bison Change of Use EA (DOI-BLM-L0010-2018-0007-EA) and associated Finding of No Significant Impact (FONSI).

After reviewing the Draft EA and FONSI, the State of Montana has numerous concerns which prevent it from endorsing the BLM's preferred alternative. The Montana Department of Fish, Wildlife and Parks (FWP), Montana Department of Natural Resources and Conservation (DNRC), Montana Department of Agriculture (AGR), and Montana Department of Livestock (DOL) have all submitted comments addressing the proposal and highlighting issues specific to their agency. While the substance of those comments is incorporated herein by reference, I take this opportunity to reiterate the following.

1. The permit identified in the proposed alternative is beyond the BLM's authority to issue.

The BLM lacks the statutory authority to issue the proposed permit. Regardless of whether the BLM labels APR's herd "bison," "domestic indigenous animals," or "indigenous livestock,"

Exhibit 1

neither federal statute nor rule define bison as “livestock.” As such, they are ineligible for the permit contemplated by the BLM in the Draft EA and FONSI.

The allotments at issue were formed in accordance with the Taylor Grazing Act (TGA) of 1934. That law specifically established grazing districts and their use by livestock with an eye toward preventing resource deterioration, providing for the orderly use, improvement, and development of public grazing lands, and stabilizing the livestock industry dependent on the range. To this end, the Secretary of the Department of the Interior was authorized to issue permits to graze livestock. The TGA does not condone grazing permits for non-production, non-livestock species, especially if such an authorization were found to be in derogation of the livestock industry and local economy.

Nothing in the Federal Land Policy and Management Act of 1976, nor the Public Rangelands Improvement Act of 1978, changes the TGA’s land management objectives for the parcels at issue. In fact, both laws codify and affirm Congress’s intent that grazing permits be limited for the purpose of grazing domestic livestock.

Federal grazing rules mirror the intent of the TGA, FLPMA, and PRIA, identifying the sustainability of the livestock industry and associated communities as a primary goal. 43 CFR § 4100.0-2. The rules also limit grazing permits like those at issue here to livestock, which are defined as a “species of domestic livestock—cattle, sheep, horses, burros, and goats.” 43 CFR §§ 4130.2(a) and 4100.0-5.

“Indigenous animals” are referred to in the grazing rules in relation to *special* grazing permits or leases. 43 CFR § 4130.6-4. However, those permits are not what APR has requested, nor what the BLM proposes to grant, given that their issuance is subject to different analysis and that those permits may not be renewed, transferred, or assigned. 43 CFR § 4130.6-4 and § 4130.6.

The BLM’s Draft EA and FONSI mix and match terminology, impermissibly cross-pollinating regulatory concepts in a manner that offends decades of established statute and rule. For this reason, the proposed permit cannot issue.

2. The Draft EA and FONSI do not analyze the full range of potential impacts associated with the proposed alternative, especially economic impact.

Even if the proposed action was legally correct, the Draft EA and FONSI fail to fully analyze potential impacts associated with each alternative. FWP, DOL, DNRC, and AGR each articulate weaknesses within the Draft EA and FONSI that they find particularly concerning. The BLM’s insufficient economic analysis, however, is unanimously problematic.

The proposed alternative would remove production agriculture from the BLM lands in question and authorize use by a “non-production-oriented, wildlife management focused” bison herd. Draft EA at 3-42. This is a change from the status quo, which could create material economic impact.

Agriculture is Montana’s largest industry. It not only provides economic stability for our families, but serves as the cultural backbone of our state. Any action that could threaten the stability of our Montana’s livestock industry, its ability to market healthy products, or the strength of its socioeconomic fabric deserves to be fully vetted and analyzed in an honest, thorough manner.

The Draft EA analyzes APR's bison operation under a production agriculture model. Specifically, the Draft EA uses market "bison farm" inputs and outputs to simulate economic effects of each alternative. *See, id.* at Appx. D. This is problematic, given that APR's herd is not "farmed" and does not share traditional production agricultural inputs and outputs. The BLM notes the ill-suited nature of the analysis as it assumes a "production-oriented enterprise and is likely to overestimate the potential effects from non-production-oriented, wildlife management focused bison grazing..." *Id.* at 3-42.

The BLM's determination to use such an inappropriate model is a disservice to the National Environmental Policy Act (NEPA) process as well as to the fragile communities to whom agriculture is lifeblood. The BLM should revisit its Draft EA and conduct an analysis that assesses how any economic impact a "non-production-oriented, wildlife management focused" might have on local businesses and communities.

3. Montana requests that the BLM hold any permit until such time as the State has conducted and completed its Montana Environmental Policy Act (MEPA) analysis.

For decades, the allotments at issue in the Draft EA have been comprised of state, federal, and private lands. While this composition has created management challenges, each entity has historically found a way to communicate and co-manage cooperatively within the allotment. A number of creative planning and management tools have been used to this end, including allotment management plans (AMPs) and fencing patterns based on geography and land utilization rather than ownership.

Given the change sought by APR, that the BLM's analysis is limited to BLM lands, and the number of insufficiencies in the Draft EA and FONSI identified by DNRC, FWP, DOL, and AGR, Montana will independently conduct its own environmental review to the extent required, and in accordance with, MEPA. It is possible that Montana's MEPA analysis may prove relevant to BLM's own NEPA process. As such, and given the interrelated character of the parcel ownerships, I formally request that the BLM stay any decision to issue the requested permit until such time as Montana has conducted and completed its MEPA analysis. Alternatively, I ask that BLM commit to considering DNRC's findings in a supplemental EA upon DNRC's completion of MEPA.

4. The comment opportunity the BLM afforded to the public was woefully insufficient.

On July 1, 2021, immediately before the long holiday weekend, the BLM released the Draft EA and FONSI for public review and comment. The BLM also announced one public comment opportunity, a virtual meeting to be held from 1-4 pm on Wednesday, July 21.

During the public comment period, I wrote to BLM officials twice, asking that it hold in-person, public hearings at each affected location so that Montanans could meaningfully engage on this matter. The BLM declined, limiting public comment to one remote meeting, held in the middle of a summer afternoon when the vast majority of those affected were trying to wrest their livelihoods from a devastating drought.

One of the primary purposes of the NEPA is to ensure that proposed actions are appropriate given the backdrop of people and place. By limiting public participation to a single, virtual event at a

time when affected communities could not attend, the BLM failed to fulfill the spirit and intent of NEPA. Montanans thirst to have their voices heard. The desire to comment on this issue is so great that residents of Phillips County, with the assistance of the Montana attorney general, organized their own public comment opportunity. Residents from across Montana travelled to Malta so that they could speak and be heard.

Of equal concern is the apparent removal of two related decisions from the BLM National NEPA Register: 1) Change in Class of Livestock EA MT-090-04-026 for Telegraph Creek Allotment, and 2) Change in Livestock Use EA MT-090-08-019 for Middle Box Elder Allotment. These decisions are referenced in the present Draft EA, and the fact that they are inaccessible to the public only compounds the limitations on participation experienced to date.

The very fact that Montanans have been forced to organize their own hearing opportunities is evidence that the BLM's process, to date, has failed its mandate. I ask, yet again, that the BLM extend the comment period to hold in-person hearings in the affected communities. I also ask that the two referenced EA's be made available on the register to allow the public an opportunity to consider all relevant information.

I thank you again for your time and attention and look forward to working with you on this matter in the days, weeks, and months to come.

Sincerely,

A handwritten signature in blue ink, appearing to read "Greg Gianforte". The signature is stylized with a large, looped "G" and a trailing flourish.

Greg Gianforte
Governor

DEPARTMENT OF NATURAL RESOURCES
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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

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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 Preamble, 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



Director's Office
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Helena, MT 59620-0701
(406) 444-3186
Fax (406) 444-4952
Ref: D0239-21
September 28, 2021

John Mehlhoff
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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) and Finding of No Significant Impact (FONSI) for Change of Use
DOI-BLM-L010-2018-007-EA

Dear Mr. Mehlhoff and Mr. Darrington;

It is the duty of the Montana Department of Fish, Wildlife & Parks (FWP) to supervise and manage matters of fish and wildlife in the State of Montana. As such, FWP thanks the United States Bureau of Land Management (BLM) for the opportunity to comment on the draft EA and FONSI for the above-captioned change of use request. American Prairie Reserve (APR) seeks authorization to change interior and exterior allotment fencing, change permitted species from cattle to "cattle and/or bison," and alter the periods of use on seven BLM allotments in the Malta Field Office. After reviewing both the EA and FONSI, FWP has several concerns, largely centered on the depth of analysis set forth in the EA.

1) The EA does not fully analyze potential impacts to containment associated with implementation of wildlife-friendly fencing.

APR proposes changing a portion of the allotments' fences to a four-wire fence. The second wire from the top of the fence would be a high tensile electric wire. See, EA at 2-9. BLM's EA references and include as an appendix, FWP's publication "A Landowner's Guide to Wildlife Friendly Fences: How to Build Fence with Wildlife in Mind."

Consistent safe passage across Montana's landscape is critical to wildlife traveling between daily feeding and resting areas, as well as to and from seasonal ranges. These routes are no less important than the destinations. FWP is grateful to landowners and land users when they take measures to accommodate traveling wildlife.

FWP's publication was drafted, largely, with containment of domestic livestock in mind. FWP recognizes a measure of success, both insofar as traditional domestic livestock containment and wildlife passage, when the fences described in the publication are utilized. Success may decrease significantly when the target of containment is a "non-production-oriented, wildlife management focused" bison herd, such as that belonging to APR. *See*, EA at 3-42. Indeed, it may be unreasonable to expect a wildlife-friendly fence to contain bison that are purposely managed as if they were wildlife.

Insufficient fencing could lead to bison escape, especially during high snow years that reduce fence efficacy. These escapes create burden for surrounding landowners as well as FWP's sister agency, Montana Department of Livestock. *See*, Mont. Code Ann. § 81-4-601, *et seq.* With the foregoing in mind, FWP would ask that BLM fully analyze whether the proposed fencing will be adequate to contain APR's bison, given that they are not managed as domestic livestock would be in a production operation. This additional analysis should consider: herd demographics, including numbers and ages of bulls relative to the number of cows and calves and the overall number of bison; forage abundance and quality; and time of year. Analysis should also assess the potential for the foregoing variables to influence the frequency with which bison challenge the fence or escape, due to inherent dispersal behavior or need for additional forage resources.

2) The EA does not analyze potential disease impacts associated with increased commingling between wildlife and bison.

As recognized in the EA, fence removal generally reduces habitat fragmentation and increases big game movements. *See*, EA at 3-10. However, the EA does not recognize that increased big game movements may foster increased commingling between wildlife and bison. This, in turn, would increase the potential for spreading any diseases present, in either the bison or the passing wildlife.

The EA only discusses disease transfer in two locations. On page 3-11, the EA discusses the transfer of brucellosis and bovine tuberculosis from livestock to wildlife. On page 3-14 of the EA, a number of diseases are listed that could infect bison and which can be transmitted to other livestock. The EA states that APR has committed to conducting limited disease testing, at a decreasing rate, for the next 10 years. *See*, EA at 3-15. There is no discussion of diseases that area wildlife might transfer to bison, and there is no analysis as to how APR's herd management goals might impact disease transfer, either to other livestock or to wildlife.

Specifically, the EA does not consider the "non-production-oriented, wildlife management focused" nature of APR's herd and what implications that management style, as opposed to traditional production agriculture, may have for disease transfer. For example, traditional livestock operations implement annual vaccination and cull/replacement programs. These management actions create an element of disease prevention or elimination that may not be present in APR's herd. If APR chooses not to employ these more intensive management methods, the EA should analyze whether disease contraction and transference escalate, both within the herd and within resident wildlife. While FWP conducts various health monitoring efforts, there are currently no long-term repeat captures of wildlife for disease surveillance in this area.

3) The EA does not analyze potential land and forage resource impacts from mixed domestic bison and cattle.

The EA is not clear to what extent bison and cattle might be mixed on the allotments. If both were present, interior fence removals justified or motivated by a land use pattern exhibited by bison may not address a

different tendency for cattle. The EA points to different selection by bison and cattle for riparian habitats. In this context, adjustments to interior fences that make riparian areas more vulnerable to grazing would be misguided if cattle were also present. For wildlife and other reasons, healthy riparian habitats are high value landscape features.

4) *The EA does not analyze potential impacts to recreational opportunities that may be associated with a bison herd managed as wildlife.*

In analyzing impacts to the recreating public, the EA states that potential for bison/recreationalist encounters would be low, and that "members of the general public could encounter bison when engaged in recreational activities such as hunting and hiking, just as they might encounter other livestock such as cattle." See, EA at 3-20. This analysis presumes that the bison are treated as, and will act as, domestic cattle.

However, the EA notes that APR manages their bison as if they are wildlife, a fact that runs contrary to the EA's conclusion on this point. As such, a correct impact analysis would identify and assess impacts to recreation on the basis that these bison would *not* be managed as most domestic livestock herds are.

5) *The EA fails to discuss Allotment Management Plans (AMPs), which have previously applied on the relative allotments, or how the preferred alternative may preserve, or deviate from, AMP management objectives.*

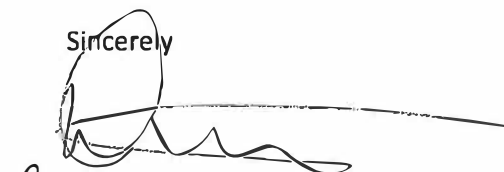
Several of the allotments at issue have historically been managed in accordance with an AMP. These AMPs contained information and goals specific to wildlife management and habitat on the allotments. The EA does not mention these AMPs. There is no discussion as to whether AMP goals have changed and, if so, why. A complete EA would include this analysis.

6) *The EA does not discuss the removal of permit terms and conditions that exist on the current permit.*

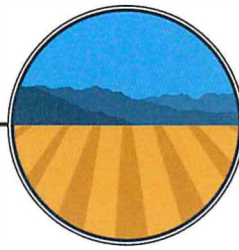
The present permits for the allotments at issue contain a number of "terms and conditions" which address permit cancellation and AMP compliance. See, EA at 2-2 and 2-3. However, the proposed permit does not incorporate the same terms. A sufficient EA would address and explain the deviation from existing terms and also analyze the impacts of removing those terms from the proposed permit.

FWP thanks BLM, again, for the opportunity to participate in the NEPA process. FWP would respectfully reiterate the importance of a considered and fully analyzed EA, and an appropriate decision made in accordance thereof.

Sincerely



Hank Worsech
Director



September 28, 2021

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

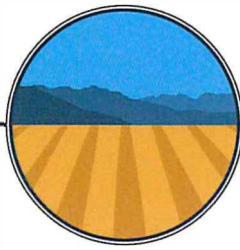
Tom Darrington
Malta Field Office
Bureau of Land Management
501 South 2nd Street
Malta, MT 59538

Re: The United States Bureau of Land Management's draft environmental assessment (EA) for the American Prairie Reserve Bison Change of Use (DOI-BLM-L010-2018-0007-EA) and Finding of No Significant Impact (FONSI)

Mr. Mehlhoff and Mr. Darrington:

The Montana Department of Agriculture (AGR) has reviewed the United States Bureau of Land Management's (BLM) draft EA and FONSI for the American Prairie Reserve (APR) Bison Change of Use (DOI-BLM-L010-2018-0007-EA), and thanks BLM for the opportunity to submit comment.

The AGR is statutorily charged to encourage and promote the interests of agriculture and other allied industries and collect and publish statistical information related to agricultural production in the State of Montana. In reviewing the EA, proposed alternative, and FONSI, the AGR has identified several areas of significant concern which it submits to BLM. Specifically, the AGR asserts that BLM lacks the legal authority to issue the permit APR seeks. Even if BLM had the authority, AGR is particularly concerned with the EA's failure to analyze economic harm that could occur in the affected communities in association with the preferred alternative.



1. The proposed alternative is in violation of legal authorities governing grazing permits.

Under federal statutes and rules governing grazing permits, bison do not constitute “livestock” for which grazing permits can be given. While the EA references “bison” and “indigenous animals” interchangeably, neither are defined as “livestock” under 43 CFR § 4100.0-5. One of the purposes of the grazing regulations is 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. The grazing regulations do not contemplate a “non-production-oriented, wildlife management focused” bison herd. EA at 3-42.

The Taylor Grazing Act (TGA) was clear in its mandate that grazing districts be permitted for **livestock** grazing. One of the primary purposes of TGA was to stabilize the livestock industry dependent upon the public range. As such, the Secretary of the Department of the Interior was directed to establish grazing districts from public domain determined to be “chiefly valuable for grazing” and raising forage crops. Taylor Grazing Act of 1934, 43 U.S.C. § 315. The Secretary was similarly imbued with the power to issue permits to graze **livestock** on those grazing districts. *Id.* at § 315(b). The Federal Land Policy and Management Act (FLPMA) renewed this targeted intent, as it defines grazing permits as authorizations for using public lands in the eleven contiguous western States for the purpose of “**grazing domestic livestock.**” Federal Land Policy and Management Act of 1976, 43 USC § 1702(p) (emphasis added).

The EA characterizes APR’s bison herd as a “non-production-oriented, wildlife management focused” herd. EA at 3-42. Awarding a permit to APR, which allows them to graze bison on lands originally withdrawn under the TGA, runs contrary to stated laws and regulations and afoul of the spirit of the TGA, which was to stabilize the production livestock industry.

The only point at which the grazing rules reference “indigenous animals” is at 43 CFR § 4130.6-4, which addresses **special** grazing permits. That rule states that “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.” However, APR has not requested, and the EA does not analyze, a **special** grazing permit. Special grazing permits, as opposed to regular permits, have no renewal priority, and cannot be assigned or transferred. 43 CFR § 4130.6.

In short, BLM lacks the authority to select the preferred alternative set forth in the EA. Such a permit runs contrary to federal statutes and rules governing these public grazing lands.



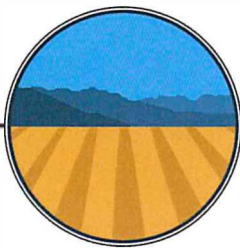
2. Assuming, for the sake of argument, that BLM has the authority to grant the requested permits, the EA's economic analysis is insufficient.

The EA's analysis focuses on the inputs associated with a production bison herd. That is not an accurate analysis of the impacts associated with the actual proposal at issue. By incorporating such assumptions into its analysis, and finding "no impact," the EA ignores what could potentially be very significant, and maybe even devastating, impacts on a local level.

The communities affected by the proposed alternative are ag-centric. The infrastructure and social constructs of the region, from feed stores to county fairs, are based on the day-to-day realities of the production livestock industry. The proposed alternative removes large chunks of land from production agriculture. Doing so will certainly decrease agricultural production revenue, but may also impact support industries, such as feed suppliers, ranch laborers, machinery sales and repair businesses, livestock veterinarians, etc. Depending on the severity of these impacts, the State could also witness a decrease in the affected population base and a shift away from present socio-cultural characteristics.

Similarly, it would be important for the EA to explore the temporal characteristics of any economic impacts, specifically addressing the possibility that once done, any potential damage could be irrevocable. Phillips County is an extraordinarily rural area of Montana. Many of the ranches in the Phillips County community are generational, with direct ancestral connection to original homesteaders. Should these ranchers leave, or community members close their businesses, it could be very difficult to restore those rural communities to their former economic, or socio-cultural, status. Unsubstantiated conclusory statements of "no impact" or future benefit do not constitute a sufficient or realistic review in accordance with the National Environmental Policy Act. The insufficiency is especially apparent when viewed through the lens of the communities most likely to be affected, given the potential change to their livelihoods and the potential long-term economic harms that could result.

The need for an economic analysis is particularly appropriate given that these lands are subject to the TGA, the purpose of which was to stabilize livestock industry and the communities supported by it. Any decision reached by BLM needs to be in full compliance with its statutory mandate and not in derogation to it.



AGR would strongly encourage BLM to re-evaluate the proposed alternative and FONSI. After reviewing the relevant authorities, allowing APR's bison on the subject lands is an impermissible contortion of federal law, rule, and intent. Even if BLM had the authority to grant the requested permit, the analysis conducted in the EA is insufficient as it does not properly review the potential economic impacts.

Sincerely,

Christy Clark

A handwritten signature in black ink that reads "Christy Clark". The signature is fluid and cursive, with the first name and last name clearly distinguishable.

Acting Director, Montana Department of Agriculture (AGR)

STATE OF MONTANA

GREG GIANFORTE, GOVERNOR

DEPARTMENT OF LIVESTOCK

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September 28, 2021

John Mehlhoff
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Tom Darrington
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RE: Comments on draft environmental assessment (EA) and Finding of No Significant Impact (FONSI) for the American Prairie Reserve Bison Change of Use (DOI-BLM-L010-2018-0007-EA)

Mr. Mehlhoff and Mr. Darrington:

The Montana Department of Livestock (MDOL) welcomes the opportunity to comment on the draft EA and FONSI pertaining to the American Prairie Reserve's (APR) requested change of use on seven allotments in the Malta Field Office. This request seeks authorization to change the permitted species to include bison and significantly change allotment fencing.

The MDOL is the state agency responsible for regulating the movement and identification of livestock, protection of livestock from disease, containment of livestock, and prevention of livestock theft and fraud. Considering the EA in conjunction with these duties, the MDOL has several concerns with the proposed alternative and the precedent it threatens to set for the administration of public grazing lands in Montana. MDOL's concerns are focused on the legal propriety of issuing the requested permit, the manner in which the proposed alternative affects MDOL's ability to adequately regulate livestock, and the areas of insufficient analysis contained within the EA.

1. Federal grazing statutes and rules do not give BLM the authority to change permits from cattle to bison.

Regardless of whether BLM uses the term "bison," "indigenous animals," or "indigenous livestock," federal land management statutes and regulations do not provide BLM the authority to grant the permit APR seeks. The express language of the Taylor Grazing Act (TGA) permits grazing district use by livestock, the definition of which does not include bison.

One of the stated purposes of permitting livestock use on grazing district land is to prevent overgrazing and soil deterioration, provide for the orderly use, improvement, and development of the land, and to “stabilize the livestock industry.” TGA Pmble, 48 Stat. 1269, ch. 865 (1934). The Federal Land Management and Policy Act (FLPMA) mirrors the TGA in this regard, as it defines a grazing permit to be the documents authorizing use of “public lands or lands in National Forests in the eleven contiguous western States for the purpose of *grazing domestic livestock*.” FLPMA, 43 USC 1702(p) (emphasis added). Unsurprisingly, the rules implementing the TGA and FLPMA reflect these same limitations. 43 CFR § 4100.0-5 specifically defines “livestock or kind of livestock” as a “species of domestic livestock—cattle, sheep, horses, burros, and goats.” *See also*, 43 CFR § 4130.2(a). A non-production herd of bison is not considered “livestock” under applicable federal law and BLM cannot issue the permit APR seeks.

The EA references 43 CFR § 4130.6-4, which addresses *special* grazing permits. However, APR has not requested a *special* grazing permit and the EA’s analysis is not specific to a *special* grazing permit. Such a permit is not only misapplied to the request at issue here, but also seems to run afoul of the TGA and FLPMA.

2. Even if the permit were proper, MDOL is concerned that proposed fencing alterations could be insufficient to contain bison, increasing the burden on MDOL and area livestock producers.

APR seeks authorization to construct, reconstruct, or modify a significant amount of interior and exterior fencing on the allotment to a four-wire fence. The second wire from the top would be high tensile electric wire. The EA cites the Montana Department of Fish, Wildlife, and Parks’ (FWP) wildlife friendly fencing guidance for this design. EA at 2-9 and Appx. B.

The fencing concepts set forth in Appendix B may be acceptable for containing cattle and sheep, while still allowing wildlife to permeate, but these concepts may not be sufficient for bison containment on the allotments. It has been MDOL’s experience when managing wild buffalo or bison in the Greater Yellowstone Area that such a fence would *not* achieve containment.

State law prohibits domestic bison from running at large. Mont. Code Ann. § 81-4-201. It has yet to be seen whether APR’s bison would respect the fence proposed. As APR tries to treat its bison as wildlife, it might be unreasonable to expect said bison to respect a “wildlife friendly” fence.

Given APR’s stated goal of treating these bison as wildlife, it is rash to permit the whole-sale fence modifications as requested. Rather, MDOL would propose a more prudent approach which 1) phases fence modifications in a manner allowing cessation should the fences prove inadequate, and 2) establishes a threshold of escapes which, if reached, would require APR to return fences to their original, pre-permit condition.

3. The proposed alternative complicates MDOL’s ability to fulfill its statutory duties.

MDOL is responsible for regulating the movement, containment, and identification of livestock within the state. These regulations are intended to protect domestic livestock owners from theft, conduct animal disease traces during outbreaks of animal disease, and identify those responsible for domestic livestock running at large. Traditionally, BLM grazing lands in Montana have been used for commercial production herds of domestic cattle and/or sheep. These species and herds generally employ a robust identification system that includes, but is not limited to, livestock brands, vaccination

tags, ranch tags, and tattoos, all of which allow MDOL to easily establish ownership of those livestock when they are transferred or in the event that they escape.

The leaseholder of the allotments addressed in the proposed alternative own domestic bison as defined by state law (Mont. Code Ann. § 81-1-101), but manage those animals in a “non-production-oriented, wildlife management focused” manner. As such, a number of these animals lack the identification that would typically be associated with domestic livestock on public grazing lands. These animals would be categorized as “estrays” in the event of escape, which MDOL has the authority to gather and dispose of in accordance with Mont. Code Ann. § 81-4-601, *et seq.*

The necessity for identification is only underscored by the fact that tribal bison exist in this region of Montana, and the United States Department of the Interior has historically indicated interest in putting bison on the CMR Wildlife Refuge. An inability to quickly identify ownership of domestic bison, especially in the event that they coningle with other bison, would make it incredibly difficult for the MDOL to serve its mission as required by Montana law.

Both identification and annual actual use reporting requirements would help MDOL identify the proper location of bison in the event of their escape, and MDOL respectfully requests that BLM mandate both tools as conditions on any permit granted, for the foregoing reasons.

4. The proposed alternative threatens to undermine Montana’s livestock industry and economy in ways not examined by the EA.

MDOL strives to foster the livestock industry and its interests. To that end, it is unclear how the proposed alternative would be in the best interest of the industry and the economic viability of the affected rural communities. The proposed alternative would remove commercial production agriculture from the allotments and authorize a non-production use. This has very real economic consequences to the surrounding communities and to the State as a whole, given the potential reduction or complete elimination of agricultural inputs to (*i.e.* feeds, farm equipment, veterinary services, etc.) and economic outputs (*i.e.* feeder cattle, breeding stock, etc.) from, the operation.

BLM’s economic impact analysis in the EA is insufficient. The analysis conducted by BLM is based on a *production* bison operation, which has different inputs and outputs than a *non-production* bison herd. BLM acknowledges as much in the EA.

The model inputs described below are based on a standard bison farm budget. It should be noted that this source is based on a production-oriented enterprise and is likely to overestimate the potential effects from non-production-oriented, wildlife management focused bison grazing on APR lands.

EA at Appx. D.

It is incumbent upon BLM to fully analyze the impacts of the alternatives assessed. The “economic analysis” provided in the EA falls short.

If this proposed change in use sets precedent for future decisions on public lands that allow more non-production or non-commercial activity, the economic impact to the state could be significant and could disproportionately affect rural communities that have a limited tax base to provide services to their

community. A proper analysis would recognize and analyze any cumulative impacts resulting from APR's previous allotment changes, in conjunction with those at issue now.

5. The EA fails to analyze any disease impacts that could be associated with increased commingling between wildlife and a non-production herd of bison.

The EA analyzes possible disease transmission in a very limited manner. On page 3-11, the EA discusses the transfer of brucellosis and bovine tuberculosis from domestic livestock to wildlife, and on page 3-14, the EA lists a number of diseases that could infect bison and which are transmissible to other livestock. The EA also mentions that APR has committed to conducting limited disease testing for the next 10 years. *Id.* at 3-15.

The EA does not address the non-production, conservation nature of the APR herd or how that important factor may play into any disease prevalence or exchange between bison, livestock, and wildlife. For example, because APR strives to treat its herd like wildlife, it does not implement a comprehensive vaccination plan as many traditional production livestock operations do. Similarly, APR does not cull or sell animals in the same manner production operations do, leading to older herd individuals that have potential to contract and harbor disease for a longer period of time. The EA should assess whether these differences, in conjunction with increased wildlife interaction via new wildlife-friendly fencing, create an elevated risk of disease to either APR's bison, neighboring livestock, or area wildlife.

6. The EA does not sufficiently describe or analyze a change in use from "cattle" to "cattle and/or bison."

The EA characterizes the change sought by APR as being from cattle to "cattle and/or bison." It is unclear what this means. Will APR be running bison and cattle concurrently? Will bison and cattle be fenced separately or grazed in common? Several of the assumptions upon which the proposed alternative is based seem specific to bison. For example, the EA draws distinctions between how bison and cattle graze and utilize riparian areas. If the permit contemplates grazing bison and cattle together, however, does removal of interior fencing still protect riparian areas? The EA needs to specifically identify what precise action is contemplated and analyze accordingly.

7. The EA fails to analyze the removal of terms and conditions on existing permits.

The EA identifies several terms and conditions which currently apply to the present permit. *Id.* at 2-2, 2-3. However, a number of those terms (1-10) which address permit cancellation, control over livestock, stocking accountability, and identification, are not identified on the permit described in the proposed alternative. BLM should address why these terms and conditions will no longer apply and analyze the potential impacts of removing those items from APR's permit.

In reviewing the federal statutes and rules that govern grazing permits, it does not appear that BLM has the authority to grant the permit presently sought by APR. In the event that BLM is found to have such authority, the MDOL respectfully requests that BLM address the aforementioned insufficiencies in the EA analysis and implement appropriate permit conditions so that MDOL can continue to do its part to enforce state law and foster a robust livestock industry and rural economy.

Sincerely,



Mike Honeycutt

Executive Officer, Montana Department of Livestock

OFFICE OF THE GOVERNOR
STATE OF MONTANA

GREG GIANFORTE
GOVERNOR



KRISTEN JURAS
LT. GOVERNOR

April 12, 2022

Tom Darrington, Field Manager
Bureau of Land Management
Malta Field Office
501 South Second Street East
Malta, MT 59538
tdarrington@blm.gov

Re: Letter of Protest (DOI-BLM-L010-2018-0007-EA)

Mr. Darrington:

We have received and reviewed the Notice of Proposed Decision, Public Comment Report, Environmental Assessment, and Finding of No Significant Impact (FONSI) issued March 30, 2022, regarding the American Prairie Reserve (APR) Bison Change of Use proposal DOI-BLM-L010-2018-0007-EA.

On September 28, 2021, Governor Gianforte, as well as the Montana Department of Fish, Wildlife and Parks (FWP), Montana Department of Natural Resources and Conservation (DNRC), Montana Department of Agriculture (AGR), and Montana Department of Livestock (MDOL) (collectively, "State") made substantive comment on the Draft EA (DEA) and FONSI issued by the United States Bureau of Land Management (BLM) in the above-captioned matter. After reviewing documents released on March 30, 2022, the concerns identified in the State's comments persist and remain unresolved. The State reserves these concerns for the purposes of appeal.

For the purposes of protest, as the same is contemplated in 43 CFR §4160.2, the State takes this opportunity to identify several of the State's comments that BLM either misinterpreted or mischaracterized in its Public Comment Report.

Concern ID #19, page A-10: "Commenters expressed concern that APR has been in non-compliance with Allotment Management Plans, including those which govern school trust lands managed by DNRC, and questioned their ability to manage future allotments."

BLM attributes this comment to several entities, including DNRC and FWP. However, this was not the comment made by those agencies. Rather, DNRC's comment, in relation to allotment management plans (AMPs) was as follows:

Exhibit 2

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.

Similarly, FWP's comment with respect to AMPs was as follows:

Several of the allotments at issue have historically been managed in accordance with an AMP. These AMPs contained information and goals specific to wildlife management and habitat on the allotments. The EA does not mention these AMPs. There is no discussion as to whether AMP goals have changed and, if so, why. A complete EA would include this analysis.

Neither DNRC nor FWP's comment alleged that APR violated AMPs related to the allotments or trust lands. Rather, the State's comment pertained to the fact that the DEA and FONSI lacked discussion of historic AMPs, assessment of how the proposed alternative differs from historic AMPs, and analysis of impacts created from such a change.

To the extent that BLM's mischaracterization of the State's comments informed the Final EA and FONSI, the State asks BLM to reconsider its decision and analysis accordingly.

Concern ID #25, page A-12: *"Commenters noted that removal of rangeland improvements such as fencing and water features would result in impacts that have not been adequately analyzed in the EA."*

BLM attributes this comment to several entities, including DNRC. DNRC does have several concerns about the analysis in relation to improvement removal. However, one of the broader concerns DNRC raised, and which the Report fails to reflect, was that improvement removal runs contrary to federal authorities, specifically the Taylor Grazing Act, Federal Land Policy and Management Act, and the Public Rangelands Improvement Act. This concern is specifically raised on pages 6-7 of DNRC's comment. To the extent that BLM based its decision on a misinterpretation of DNRC's comment, the State asks BLM to re-read that comment and reconsider its decision and analysis accordingly.

Concern ID #9, page A-6: *"Commenters expressed concern that removal of internal fences under the proposed action would allow for overgrazing in certain areas of the allotments, thereby damaging land resources, and that allowing removal of interior fences to create a larger pasture would be contradictory to 'rest rotation' schedules established to ensure resource protection."*


BLM attributes this comment to several entities, including FWP. This does not accurately reflect FWP's comment, which was:

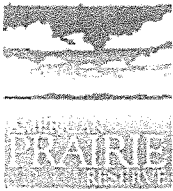
The EA is not clear to what extent bison and cattle might be mixed on the allotments. If both were present, interior fence removals justified or motivated by a land use pattern exhibited by bison may not address a different tendency for cattle. The EA points to different selection by bison and cattle for riparian habitats. In this context, adjustments to interior fences that make riparian areas more vulnerable to grazing would be misguided if cattle were also present. For wildlife and other reasons, healthy riparian habitats are high value landscape features.

To the extent that BLM based its decision on a misinterpretation of FWP's comment, the State asks BLM to revisit FWP's comment, reconsidering its analysis and decision accordingly.

The State thanks BLM for its time and attention to the matters raised in this protest.

Sincerely,


Anita Milanovich, General Counsel
Office of the Governor



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SEP 07 2017

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September 5, 2017

The Honorable Steve Bullock and Director Martha Williams
Office of the Governor
State Capitol, Room 204
P.O. Box 200801
Helena, MT 59620-0801

Dear Governor Bullock and Director Williams,

Thank you for taking the time to visit American Prairie Reserve this summer. I appreciated the opportunity to share a project update with you, introduce you to some of the APR team, and show you around the Reserve. As a follow-up to our conversation that day, I am writing to reiterate American Prairie Reserve's interest in helping to advance a decision on Montana's *Draft Environmental Impact Statement for Bison Conservation and Management*. APR will be pleased to engage with principles from any relevant parties, including the Charles M. Russell National Wildlife Refuge (CMR) and the State of Montana, to explore a cooperative arrangement that advances an alternative that will result in wild bison one day inhabiting the Charles M. Russell National Wildlife Refuge and, eventually, the surrounding areas.

As you know, the mission of American Prairie Reserve is to create the largest nature reserve in the continental United States, a refuge for people and wildlife preserved forever as part of America's heritage.

Among American Prairie Reserve's primary objectives is the development of the largest, most genetically-diverse conservation bison herd in North America. In 2005, we began this effort with the introduction of sixteen bison imported from Wind Cave National Park. Today, due to natural growth rates and additional imports from Canada's Elk Island National Park, our herd numbers close to 1,000 animals. Our herd is free of all reportable diseases and currently resides on three separate parcels including the Sun Prairie, Sun Prairie North, and Dry Fork management units. (See attached map.) On Sun Prairie alone, we have removed more than fifteen miles of interior fencing, allowing bison to graze naturally and wildlife to move throughout the 31,000 acres with minimal hindrance. As our bison population grows, we will expand the land base to keep pace with our progress toward our minimum goal of 10,000 bison.

In the past decade, American Prairie Reserve's bison management track record is known for its lack of contention with our neighbors. In fact, most of them consider American Prairie Reserve an excellent example of how bison can be managed effectively on a relatively large landscape with no negative effects on nearby livestock operations. This speaks to American Prairie Reserve's effective and responsible management as well as our demonstrated commitment to securing the resources necessary to nurture and grow this herd.

Exhibit 3

As a way of contributing to the potential of wild bison inhabiting the CMR and surrounding areas, American Prairie Reserve is willing to:

- Provide, free of charge to the State of Montana, an ecologically significant number of bison to occupy, as wild animals, an appropriately large area of the UL Bend Wilderness or some other suitably large area in the CMR. The yet-to-be-determined number of bison will be large enough to assure genetic diversity is maintained.
- Participate in frequent evaluations conducted by a management team made up of representatives from FWP, the CMR, and American Prairie Reserve to evaluate progress and identify continuous improvement opportunities.
- Commit the financial and human resources necessary to construct wildlife-friendly fencing and other infrastructure on the CMR, which has been successfully used and refined since 2005 on American Prairie Reserve lands, including those along the boundary of Sun Prairie and the Refuge. We also commit to allocating American Prairie Reserve staff time and equipment to conduct research and co-manage this effort.
- Participate with collaborators such as the National Wildlife Federation, Natural Resources Defense Council, Defenders of Wildlife, and others to work on a coordinated, multi-year effort to increase social acceptance for bison in the six-county area surrounding the CMR.
- Commit to contributing future instalments of APR bison as requested to augment the CMR's population.
- At the discretion of Fish, Wildlife and Parks and the Charles M. Russell National Wildlife Refuge, we will take back the bison and reestablish them on American Prairie Reserve private lands in the event of the project's failure.
- Finally, commit to the intent to donate all of APR's bison herd to Montana Fish, Wildlife and Parks for a future, larger, regional wild bison herd to be managed in the public trust. (APR's current bison population, commercially valued at an estimated \$1500-\$2500 per animal, has a total value of nearly \$2,000,000.)

At the same time that a new wild herd is growing on the C.M. Russell Wildlife Refuge, APR will continue to build its bison population north and south of the Refuge using our combined 400,000 acres of private, BLM, and State land sections. Importantly, at such time that the state of Montana is ready to begin the process of converting all of APR's remaining bison into wild animals to be managed by Fish, Wildlife and Parks, APR stands ready to participate. The main requirement APR has to begin this conversion process is a written commitment from Fish, Wildlife and Parks agreeing to maintain, in perpetuity, a minimum population of ten thousand wild bison in the

immediate region of the American Prairie Reserve, a number that represents an "extraordinary" contribution to conservation as defined by Eric Sanderson et al (see enclosed article).

American Prairie Reserve is a uniquely-suited collaborator. We have more than a decade of proven success restoring, researching, monitoring, and managing bison in this region of Montana. Our positive reputation with neighbors and federal and state land management partners has been earned over many years of doing what we say we are going to do.

We believe we have not only the best source herd of bison in the nation – including genetic diversity, no detectable cattle gene introgression, no Department of Livestock reportable diseases, and already on the particular prairie landscape under natural management conditions – but also the talent, resources, and organizational willingness and enthusiasm to help make this effort a stunning and highly appreciated success for future generations of Montanans.

We are excited that the time finally appears to be upon us for Montana to act boldly in establishing new, landscape-scale habitat for our national mammal. Further, the American public's knowledge and appreciation for bison's important ecological role on our country's grasslands is growing steadily and Montana's Native American tribes are expressing more hope and gratitude than ever that bison may finally be coming back and be on their way to taking their rightful place in the cherished, and globally admired, phenomenon that is Montana's reverence for wildlife and nature.

We are enormously appreciative of the Bullock administration's willingness to think big and to emerge as the progressive thought-leader on bison in the American West. Montana's future generations will look back on this period in history as an incredible point of pride.

We are delighted to be a part of this unfolding process and are eager to hear your thoughts on how we can best assist you and participate most productively in this effort. Thank you for considering us a partner and collaborator. We look forward to working with you over the next few years.

Sincerely,



Sean Gerrity
CEO

CC

Mr. Mike Volesky, Chief of Operations, Montana Department of Fish, Wildlife, and Parks
Mr. Paul Santavy, Project Leader, Charles M. Russell National Wildlife Refuge
Mr. Tom France and Mrs. Tracy Stone-Manning, National Wildlife Federation
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**UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
DEPARTMENTAL CASES HEARINGS DIVISION**

STATE OF MONTANA, BY AND
THROUGH ITS GOVERNOR, MONTANA
DEPARTMENT OF AGRICULTURE,
MONTANA DEPARTMENT OF
LIVESTOCK, MONTANA DEPARTMENT
OF NATURAL RESOURCES AND
CONSERVATION, AND MONTANA
DEPARTMENT OF FISH, WILDLIFE AND
PARKS,

Appellant,

v.

BUREAU OF LAND MANAGEMENT,

Respondent.

Docket No. _____

Appeal of July 28, 2022 Final Decision for
Telegraph Creek (05654), Box Elder (15634),
Flat Creek (15439), White Rock Coulee
(15417), East Dry Fork (05617), French
Coulee (05616), and Garey Coulee
Allotments (05447) (DOI-BLM-MT-L010-
2018-0007-EA)

DECLARATION OF CLIVE ROONEY

I, Clive Rooney, declare as follows:

Exhibit 4

1. I have been employed with the Montana Department of Natural Resources and Conservation (“DNRC”), from May 2, 1994 through the present. I have served as the Northeastern Land Office Area Manager since January 20, 2002. In that capacity I have knowledge of the following facts.
2. I reviewed the Bureau of Land Management’s (BLM) March 29, 2022, Notice of Proposed Decision, and Finding of No Significant Impact (FONSI), and July 28, 2022, Notice of Final Decision related to the above-captioned matter and specifically concerning seven BLM grazing allotments administered by the Malta Field Office in Phillips County, Montana. The seven allotments are Telegraph Creek (allotment #05654), Box Elder (allotment #15634), Flat Creek (allotment #15439), Whiterock Coulee (allotment #15417), East Dry Fork (allotment #05617), French Coulee (allotment #05616), and Garey Coulee (allotment #05447).
3. Box Elder, Flat Creek, Whiterock Coulee, East Dry Fork, French Coulee, and Garey Coulee allotments all contain “State Trust Lands.”
4. “State Trust Land” is defined by Montana law to include those properties held in trust by the State under (1) Article X, sections 2 and 11 of the Montana Constitution, (2) the Enabling Act of Congress (approved February 22, 1889), and (3) through the operation of law for specified trust beneficiaries. *See*, Mont. Code Ann. § 77-1-101(9). DNRC manages these lands to generate revenue to fund the school trust. DNRC functions as a trustee and has a fiduciary obligation to the school trust beneficiaries. Within the parameters of this Constitutional trust obligation, the Montana legislature enacted statutes delegating and prescribing DNRC’s management obligations consistent with the fiduciary duty owed to the school trust beneficiaries.

5. DNRC is required by law to appraise State Trust Lands classified for grazing as to their animal-unit-month carrying capacity (AUM). AUM means that amount of natural feed necessary for the complete subsistence of one animal unit for 1 month. Mont. Code Ann. §§ 77-6-201, 77-6-507. In appraising these grazing lands, the following factors must be considered:

- the quantity, quality, accessibility and usability of forage resources;
- soil condition;
- other related resources, such as timber, game, and watershed condition;
- needed improvements and facilities, including but not limited to, stock water, revegetation, trails, fences, and the like;
- pertinent facts and figures submitted by area stockmen and directors of state grazing districts including the land, or in its vicinity;
- carrying capacity set for similarly situated land in the state grazing district.

See, Mont. Code Ann. § 77-6-201.

6. AUM accountability is important for purposes of the long-term land management goals of DNRC and long-term revenue generation on grazing acres. AUM accountability is critical when considering any grazing related management decision, including but not limited to changes of use dates and fencing patterns.

7. The American Prairie Reserve (APR) currently leases approximately 5,776.5 acres of State Trust Land for grazing purposes. This land is interspersed in a checkerboard pattern of ownership with approximately 63,496 BLM acres and approximately 86,426 APR deeded acres. Specifically, these leases include:

State Lease 8171 consists of 640 acres of State Trust Land within the Flat Creek Allotment. State Lease 8171 authorizes 26 AUMs.

State Lease 9361 consists of 3,651.5 acres of State Trust Land within the White Rock Allotment. State Lease 9361 authorizes 613 AUMs.

State Lease 8124 consists of 640 acres of State Trust Land within the Box Elder Allotment. State Lease 8124 authorizes 104 AUMs.

State Lease 8160 consists of 640 acres of State Trust Land within the French Coulee Allotment. State Lease 8160 authorizes 119 AUMs.

State Lease 9266 consists of 640 acres State Trust Land, 45 acres of which are located within the East Dry Fork Allotment. State Lease 9266 authorizes 6 AUMs.

State Lease 9267 consists of 640 acres State Trust Land, 160 acres of which are located within the East Dry Fork Allotment. State Lease 9267 authorizes 29 AUMs.

8. State Trust Lands in the allotments identified in Paragraph 2 have historically been utilized in a rotational manner with other allotment lands. In many instances, State Trust Lands have been fenced in common with BLM and private lands to accommodate topography and maximize forage and water availability.
9. Decisions regarding change of livestock class, season of use, and fence removal on BLM lands may significantly affect the State Trust Land parcels that have historically been managed in common with private and federal lands. Similarly, the non-production nature of the herd creates questions as to 1) annual AUM accountability by allotment, 2) projected herd growth without human intervention, 3) benchmarks for bison removal, 4) bison population control methods, and 5) location and capacity of any bison handling facilities necessary for management, transfer, or removal. These questions were not addressed or analyzed in the EA.
10. The failure to adequately analyze the changes to the existing allotments and failure to consider APR's bison management strategies creates uncertainty regarding the impact of the proposed actions on State Trust Land, and places the State in danger of potentially failing to meet its management obligations.

Pursuant to 28 U.S. Code § 1746 and § 1-6-105, Mont. Code Ann., I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 24, 2022.

A handwritten signature in black ink, appearing to read 'Clive Rooney', is positioned above a horizontal line.

Clive Rooney
Northeastern Land Office Area Manager
Montana Department of Natural Resources and
Conservation
613 NE MAIN ST
LEWISTOWN MT 59457-2081

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2022, the foregoing *Notice of Appeal, Statement of Reasons, and Petition for Stay* was filed via certified mail, postage prepaid, return receipt requested, upon:

Tom Darrington, Field Manager
Bureau of Land Management
Malta Field Office
501 South Second Street East
Malta, MT 59538

and that a copy was served on the following by certified mail, postage prepaid, return receipt requested, upon:

Office of the Solicitor, Billings Field Office
Rocky Mountain Region, Department of the Interior
2021 4th Avenue North, Suite 112
Billings, MT 59101

and that a copy was served by certified mail, postage prepaid, return receipt requested, on those individuals or entities identified in the decision and listed on the tables attached hereto.

DATED: August 26, 2022



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Paralegal

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