Anita Y. Milanovich
Rachel K. Meredith
Office of the Governor
1301 E. 6th Avenue
PO Box 200801
Helena, MT 59620-0801
Phone: 406-444-5503
Email: anita.milanovich@mt.gov
rachel.meredith@mt.gov
Counsel for Appellants

Brian C. Bramblett
Chief Legal Counsel
Montana Department of Natural Resources and Conservation
PO Box 201601
Helena, MT 59620-1601
Telephone: (406) 444-9758
Email: bbramblett@mt.gov
Counsel for Appellants

Sarah M. Clerget
Chief Legal Counsel
Montana Department of Fish, Wildlife and Parks
PO Box 200701
Helena, MT 59620-0701
Phone: (406) 444-4047
Email: sclerget@mt.gov
Counsel for Appellants

Cort Jensen
Chief Legal Counsel
Montana Department of Agriculture
302 North Roberts
Helena, MT 59620
Phone: (406) 444-5402
Email: cojensen@mt.gov
Counsel for Appellants

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS

IBLA 2023-48 STATE OF MONTANA, BY AND THROUGH ITS GOVERNOR *ET AL.*	DCHD-2022-0068 | MT-010-22-01 LIVESTOCK GRAZING
IBLA 2023-49 STATE OF MONTANA, BY AND THROUGH ITS GOVERNOR *ET AL.*	DCHD-2022-0067 | MT-010-22-02 LIVESTOCK GRAZING
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THE STATE OF MONTANA, BY AND THROUGH ITS GOVERNOR *ET AL.*'S, STATEMENT OF REASONS

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Pursuant to 43 C.F.R. § 4.411, the State of Montana, by and through its Governor, the Montana Department of Agriculture, the Montana Department of Livestock, the Montana Department of Natural Resources and Conservation (DNRC), and the Montana Department of Fish, Wildlife and Parks (MFWP) (collectively, Executive) timely files its *Statement of Reasons* in support of the *Notice of Appeal* filed by the same on November 14, 2022.

In issuing its *Order Denying Petitions for Stay* (*Order*) on October 13, 2022, the Departmental Cases Hearings Division (DCHD) failed to correctly analyze the Executive's legal arguments and appreciate the harm and public interest implicated in denying the requested stay. As such, it is proper for the Interior Board of Land Appeals (IBLA) to reverse and issue said stay.

I. FACTUAL BACKGROUND

In January 2017, American Prairie Reserve (APR) submitted a proposed action for the United States Bureau of Land Management's (BLM) consideration. AR 2.1.03. On or around November 20, 2017, APR revised its proposed action (Revised Proposed Action). AR 2.1.01. The 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. AR 2.2.04. The requested permit terms included:

- Changing the livestock type from cattle to "indigenous animals;"
- Changing the season of use to year-round continuous grazing;
- General removal of interior allotment fencing; and
- 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. AR 2.2.01 ("2018_December APR_Final_Scoping_Report").[1]

On September 24, 2019, APR officially withdrew its Revised Proposed Action and submitted a "New Grazing Proposal." AR 2.1.02 at 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. *Id.* 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.[2] *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 Executive submitted comment on September 28, 2021. AR 2.3.02; AR 2.3.01; AR 4.02 at Ex. 1. BLM conducted one virtual meeting on the DEA and DFONSI on Wednesday, July 21, 2021, from 1-4 p.m. AR 2.4.02 at 1-2. Requests for other meeting opportunities, timed to accommodate rural work schedules, were

[1] There are multiple documents in the AR listed as "2.2.01." Where a given AR number is repeated, the Executive will list the title of the referenced document in parentheses after the AR number.
[2] Year-round bison grazing had previously been approved on Box Elder and Telegraph Creek allotments.

denied. AR 4.02 at Ex. 1 at Gov. Gianforte Cmt. p. 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. AR 2.4.02 at 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, and Public Comment Report, on March 25, 2022. *Id.* at A-25; AR 2.5.01; AR 2.5.02. On March 29, 2022, BLM issued a Notice of Proposed Decision. AR 2.6.01. The Executive 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. AR 2.7.09. On July 28, 2022, BLM issued its Final Decision. AR 2.8.01.

The Final 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 Allotments. *Id.* at 2. Except for Telegraph Creek Allotment, each of the foregoing allotments include State trust parcels (State Trust Land). AR 4.02 at Ex. 4, ¶ 3; AR 2.5.01 at A-3, A-7, A-10, A-13. In White Rock Coulee Allotment, a State Trust parcel is the primary corridor connecting either end of the allotment. AR 4.02 at 27; AR 2.5.01 at A-7.

The Executive appealed the Final Decision on August 26, 2022. In that same filing, the Executive also petitioned DCHD for a stay of the Final Decision pending appeal. AR 4.02. On October 13, 2022, DCHD issued its *Order*.

On October 27, 2022, DNRC issued a letter to APR notifying it that bison are not presently authorized to graze on State Trust Lands contained in Flat Creek and White Rock Coulee Allotments (State Lease Nos. 8171 and 9361). *See,* Decl. Clive Rooney ¶ 2, Dec. 20, 2022, attached hereto as Ex. 1. This denial precludes bison grazing on the relevant portions of §§ 11, 12, 13, 16, 17, 20, 24, and 36, T27N R28E and §§ 16 and 36, T26N R29E in White Rock Coulee Allotment, and § 16, T25N R31E in Flat Creek Allotment.[3] *Id.* at ¶ 3 and Attach. B. In its notification, DNRC asked APR to provide its stocking plan for the BLM allotments during the pendency of the appeal of the Final Decision. *Id.* at ¶ 4. DNRC also asked APR to detail how it would prevent bison from grazing State Trust Lands on Flat Creek and White Rock Coulee Allotments. *Id.*

On November 17, 2022, APR responded to DNRC's inquiries. *Id.* at ¶ 5. APR stated that it "has no immediate plans" to graze bison on the Flat Creek Allotment (State Lease No. 4873). *Id.* at Attach. C. If APR changes it plans and implements the Final Decision on Flat Creek Allotment, § 16, T25N R31E will be exposed to unauthorized bison grazing. AR 2.5.01 at A-13.

With regard to White Rock Coulee Allotment:

- APR indicates it will leave the existing fence along the southern boundary of §§ 35 and 36, T27N R28E to exclude bison from the northern end of the White Rock Coulee Allotment. *Id.* at ¶ 6 and Attach. C. APR states that it "has no plans to graze the north pasture as there is no effective way to keep bison from grazing the DNRC lands." *Id* at Attach. C. The fence along the southern boundary of §§ 35 and 36, T27N R28E was to be removed under the Final Decision. AR 2.8.01 at 4; AR 2.5.01 at A-7.

[3] A portion of Lease No. 9061 (pertaining to § 7, T24N R31E) is fenced into the Flat Creek Allotment. That lease is not held by APR. Ex. 1 at ¶ 3.

- APR states it will fence off § 16, T26N R29E, by constructing fences on the east and west sides and leaving existing fences on the north and south sides of that section. *Id.* at ¶ 7 and Attach. C.

> The west fence will be on [APR] Deeded Lands and the east fence was approved with the BLMs [sic] decision and will be on BLM lands within the White Rock Coulee Allotment. The north and south fences are present and will remain and be maintained by American Prairie.

Id. at Attach. C. The north fence is to be removed under the Final Decision. AR 2.8.01 at 4; AR 2.5.01 at A-7. The Final Decision did not contemplate a fence on the west side of the section. *Id.*

- APR provides no plan for how it intends to keep bison off § 36, T26N R29E, which is depicted in the Final Decision as having no existing perimeter fence. *Id.* at ¶ 8 and Attach. B; AR 2.8.01 at 4; AR 2.5.01 at A-7. Records maintained by DNRC reflect a boundary fence on the west side of § 36 and a fence along the south half of the eastern boundary. Ex. 1 at ¶ 8. However, there is no record of exclusionary fencing on the northern, southern, or north half of the eastern boundary of § 36. *Id.*

APR's November 17, 2022 correspondence describes a use of White Rock Coulee Allotment that is not contemplated or authorized in the Final Decision. *Id.* at ¶ 9. APR proposes a fencing, pasture, and stocking configuration not analyzed or approved by BLM. AR 2.8.01 at 4; AR 2.5.01 at A-7; Ex. 1 at Attach. C ("Bison will be present in the South, East and Central pastures throughout 2023. The rotation and stocking rates will be determined by the BLM....The calculated AUMs below are estimates and have not been approved by the BLM but were calculated from the previous pasture configuration and stocking rates.")

BLM characterizes APR's bison herd as a "conservation-based" herd or "non-production-oriented, wildlife management focused" herd. AR 2.5.01 at 3-39, 3-44 n. 11, and D-1. APR does not operate for the purpose of raising bison to market. *Id.* at D-1. Indeed, APR has repeatedly characterized its herd as "wild" and expressed an ongoing desire that its herd achieve "wildlife"

status.[4] APR distinguishes its "conservation herd" from other "commercial" bison herds.[5] 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." AR 4.02 at Ex. 3. True to this goal, bison are "hunted" on APR land holdings to "mimic[s] natural predation."[6]

II. STANDARD OF REVIEW

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. (WWP) v. BLM*, 195 IBLA 115, 130 (2020). Petitioners need not "prove with certainty each criterion. Instead, a petitioner must show that it likely meets each criterion." *Pueblo of San Felipe*, 187 IBLA 342, 345 (2016). However, the four-part test "is not a wooden one, for….relief may be granted 'with either a high probability of success and some injury, or vice versa.'" *Or. Nat. Desert Ass'n,* 135 IBLA 389, 393 (1996) (quoting *Nat. Res. Def. Council v. U.S. Envtl. Prot. Agency*, 806 F. Supp. 275, 277 (D.D.C. 1992)).

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[4] Wildlife Restoration, American Prairie (last accessed Dec. 22, 2022), https://www.americanprairie.org/wildlife-restoration; Bison Report 2016-2017, American Prairie (last accessed Dec. 22, 2022), https://www.americanprairie.org/sites/default/files/APR_Bison%20Report_16_17.pdf (Page 14—"Our mission is to create and manage a prairie-based wildlife reserve that, when combined with public lands already devoted to wildlife, will protect a unique natural habitat, provide lasting economic benefits and improve public access to and enjoyment of the prairie landscape.")

[5] Bison Restoration, American Prairie (last accessed Dec. 22, 2022), https://www.americanprairie.org/project/bison-restoration.

[6] Bison Harvest, American Prairie (last accessed Dec. 22, 2022), https://americanprairie.org/bison-harvest.

A party may appeal to the IBLA from an Administrative Law Judge (ALJ) order granting or denying a stay of a final BLM grazing decision. 43 C.F.R. § 4.478(a). To prevail on appeal to IBLA, "the party bears the burden to demonstrate a material error of fact or law in the ALJ's order." *WWP*, 195 IBLA at 121.

> While the scope of our review authority is *de novo*, we will reverse the ALJ only if he abused his discretion by making a material error of law, relying on a material fact without substantial evidence, or failing to demonstrate a rational connection between the facts found and the decision made.

Id.

III. **ARGUMENT**

In reviewing the Executive's *Petition for Stay,* DCHD found that the Executive "ha[d] raised significant doubts about the adequacy of BLM's analysis and the sufficiency of the public's opportunity to meaningfully participate in the process and inform BLM's ultimate decision with regards [sic] to fencing," establishing a likelihood of success on the merits. *Or.* at 16-20. However, DCHD ultimately held that the Executive failed to demonstrate "harm that is likely, immediate, and irreparable if a stay is not granted." *Id.* at 41.

Denial of the Executive's *Petition for Stay* was improper as the Executive fulfilled each prong set forth in 43 C.F.R. § 4.471(c). The DCHD failed to adequately address the merits of the Executive's arguments and grasp the magnitude of harm the Executive now incurs without the stay. As such, the *Order* contains material legal errors, relies on material facts without substantial evidence, and fails to demonstrate a rational connection between the facts and decision.

A. **Summary Denial of the Executive's Legal Arguments was a Material Legal Error.**

On appeal, the Executive reasserts that the BLM lacks authority to issue the permits APR seeks.[7] Specifically, the Executive argues that issuing grazing permits to "non-production-oriented, wildlife management focused" conservation herds like those at issue exceeds statutory and regulatory authority. AR 4.02 at 7-12.

In the 41-page *Order*, the DCHD acknowledges these arguments and summarily dismisses them in two sentences:

> Appellants also raise spirited arguments that the change of use from cattle only to cattle and bison violates the Taylor Grazing Act (TGA), the Federal Land Policy and Management Act (FLPMA), and the Public Rangelands Improvement Act (PRIA), and that this change of use and the changes to fencing will lead to increased disease transmission to cattle and to socioeconomic impacts that were not properly considered in the NEPA process. However, they fail to marshal facts or legal authority to show that these inadequacies would be successful in a merits review.

Or. Den. Pets. for Stay, 20 (Oct. 13, 2022) (*Or.*). This summary denial inadequately addresses the Executive's statutory authority arguments and completely ignores the Executive's regulatory authority arguments. Both of these arguments are founded in law, rather than fact, making the DCHD's conclusions all the more puzzling.

BLM's decision to issue the above-captioned permits is in excess of statutory and regulatory authority and therefore arbitrary, capricious, and not in accordance with the law. While DCHD did recognize that the Executive had established success on the merits as to a NEPA argument, DCHD's failure to fully analyze the Executive's legal arguments glosses over the threshold question of whether BLM has the authority to issue the permits at all.

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[7] While the Executive disagrees with the ALJ's analysis of its remaining NEPA arguments, more fully articulated in its *Notice of Appeal, Statement of Reasons, and Petition for Stay* filed on August 26, 2022, it chooses to address this incorrect analysis at subsequent proceedings before the ALJ. To that end, the merits discussion in the appeal before IBLA focuses on the legal authority arguments made by the Executive in its *Petition*, which were summarily rejected by DCHD. *See,* Or. at 41.

1. ***Issuance of Any Grazing Permits to a "Non-Production-Oriented, Wildlife Management Focused" Conservation Bison Herd Contradicts the Express Language and Purpose of the Taylor Grazing Act (TGA), the Federal Land Policy and Management Act (FLPMA), and the Public Rangelands Improvement Act (PRIA).***

Pursuant to the TGA, FLPMA, and PRIA, the Secretary of the Interior may only issue grazing permits for livestock grazing. Permits may not be issued for "non-production-oriented, wildlife management focused" conservation herds like those at issue in this case.

The specific purpose of the TGA is

> 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.***"

Pub. Lands Council v. Babbitt (*PLC*), 529 U.S. 728, 733 (2000) (quoting TGA, Pub. L. No. 73-482, 48 Stat. 1269, 1269 (1934)) (emphasis added). The judiciary has recognized, time and again, the TGA's resolve to stabilize the livestock industry utilizing the public range. *Chournos v. U.S.*, 193 F.2d 321, 323 (10th Cir. 1951) (cert denied, 343 U.S. 977 (1952)) ("The purpose of the [TGA] is to stabilize the livestock industry and to permit the use of the public range according to the needs and the qualifications of the livestock operators with base holdings."); *U.S. v. Fuller*, 442 F.2d 504, 507 (9th Cir. 1971) (reversed on other grounds, 409 US 488 (1973)) ("The purpose of the [TGA] was to develop and stabilize the western cattle business."); *Faulkner v. Watt*, 661 F.2d 809, 812 (9th Cir. 1981) ("The purpose of the [TGA] is to stabilize the livestock industry and protect the rights of sheep and cattle growers from interference.") BLM's own regulations similarly recognize the economic objectives behind issuing grazing permits. 43 C.F.R. § 4100.0-2 ("(a) The objectives of these regulations are…to provide for the sustainability of the western livestock industry and communities that are dependent upon productive, healthy

public rangelands. (b) These objectives will be realized in a manner consistent with...economic and other objectives stated in the Taylor Grazing Act....").

To accomplish these purposes, the TGA specifically authorizes the Secretary of Interior

> 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.

43 U.S.C. § 315b (emphasis added).

FLPMA, enacted in 1976, bolstered the TGA and specifically embraced permits and leases for "domestic livestock grazing." FLPMA, Pub. L. No. 94-579, 90 Stat. 2745 (1976); *see also,* 43 U.S.C. § 1752. The law defined "grazing permit and lease" to mean "any document authorizing use of public lands or lands in National Forests in the eleven contiguous western States for the purpose of ***grazing domestic livestock***." 90 Stat. at 2747 (codified at 43 U.S.C. § 1702(p)) (emphasis added). The law also mandated that the Secretaries of the Interior and Agriculture conduct a valuation study to establish equitable grazing fees for "domestic livestock grazing." *Id.* at 2772 (codified at 43 U.S.C. § 1751). In doing so, the Secretaries were specifically directed to "take into consideration the costs of production normally associated with domestic livestock grazing in the eleven Western States...." *Id.*

PRIA, enacted in 1978, perpetuated the same grazing authorizations for domestic livestock. PRIA, Pub. L. No. 95-514, 92 Stat. 1803 (1978). PRIA adopted FLPMA's definition of a "grazing permit and lease," but broadened the geographic scope to "the sixteen contiguous Western States for the purpose of grazing domestic livestock." 92 Stat. at 1804 (codified at 43 U.S.C. § 1902(c)). PRIA also defined "rangelands" or "public rangelands" to mean "lands administered by the Secretary of the Interior through the Bureau of Land Management or the

Secretary of Agriculture through the Forest Service in the sixteen contiguous Western States ***on which there is domestic livestock grazing*** or which the Secretary concerned determines may be ***suitable for domestic livestock grazing***." *Id.* (codified at 43 U.S.C. § 1902(a)) (emphasis added). While PRIA altered the grazing fee structure, it still considered livestock industry price indexing and specified that the fees be charged for "domestic livestock grazing on the public rangelands….." 92 Stat. at 1806 (codified at 43 U.S.C. § 1905).

BLM cannot permit APR to graze a "non-production-oriented, wildlife management focused" conservation bison herd because grazing permits are statutorily limited to "livestock." APR has repeatedly characterized its bison herd as "wild" or "wildlife."[8] APR's mission is to "create the largest nature reserve in the continental United States…" with a herd of bison to be treated as "wild animals." AR 4.02 at Ex. 3. APR itself even draws a distinction between its own "conservation herd" and other "commercial" bison herds.[9]

Furthermore, issuing grazing permits to a "non-production-oriented, wildlife management focused" conservation bison herd runs afoul of the TGA's purpose to stabilize the livestock industry. APR touts ecologic, conservation, and recreation-based benefits associated with their wild bison. APR's Resp. to Pet. for Stay, 2-7 (Sept. 12, 2022) (APR Resp.). Even if these statements are taken as truth, they are insufficient homage to the TGA's mandate that TGA lands be used, in part, to ***stabilize the livestock industry***. The only activity APR engages in that could be interpreted as supporting the livestock industry is its alleged lease of "thousands of acres to

[8] Wildlife Restoration, American Prairie (last accessed Dec. 22, 2022), https://www.americanprairie.org/wildlife-restoration; Bison Report 2016-2017, American Prairie (last accessed Dec. 22, 2022), https://www.americanprairie.org/sites/default/files/APR_Bison%20Report_16_17.pdf at page 14.
[9] Bison Restoration, American Prairie (last accessed Dec. 22, 2022), https://www.americanprairie.org/project/bison-restoration.

local ranchers, who graze over 10,000 cattle" on APR's deeded and leased properties…an activity that has no relation to, and may even be reduced by, the Final Decision. *Id.* at 2.

"Non-production-oriented, wildlife management focused" conservation bison herds are not "domestic livestock" for which federal grazing permits can issue. As such, BLM's issuance of grazing permits is in violation of federal statute.

2. ***Permits Excluding Livestock Grazing for the Benefit of Conservation Have Been Stricken Down by the Courts.***

Permitting "non-production-oriented, wildlife management focused" conservation bison herds to graze the above-captioned allotments, to the exclusion of livestock, fits squarely within the "conservation use" rule struck down by the 10th Circuit in *Pub. Lands Council v. Babbitt* (*PLC*). The Executive respectfully requests that the IBLA see these grazing permits for what they are—an attempt to resurrect the 1994 "conservation use" rule, in contravention to federal authority and governing legal precedence.

In *PLC,* the Court ruled that the Secretary had exceeded statutory authority in allowing the issuance of ten-year permits for "conservation use" purposes. "Conservation use" was defined in the stricken rule as "'an activity, ***excluding livestock grazing***, on all or a portion of an allotment' for conservation purposes." *PLC*, 167 F.3d 1287, 1307 (10th Cir. 1999) (quoting 43 C.F.R. § 4100.0-5 (1995)). The Secretary argued that the rule was well within his discretion, as resting land was an acceptable range management practice, and that such a permit was fully consistent with the multiple-use, sustained yield mandates of FLPMA and PRIA. *Id.* The 10th Circuit rejected this argument, relying on the plain language of TGA, FLPMA, and PRIA.

> 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."

Id. at 1307-1308 (internal citations omitted). While the 10th Circuit was addressing a permit that would have eliminated all grazing for its term, the Court's strict construction must be applied here with equal consideration. Even though APR would still graze the parcels in question, said grazing would occur to the exclusion of grazing domestic livestock, in contravention to TGA, FLPMA, and PRIA. TGA, FLPMA, and PRIA only authorize grazing permits for domestic livestock grazing on these lands.

APR argues that it need not be "'engaged in the livestock business' to secure a grazing permit," referring to the Supreme Court's holding in *PLC* that upheld elimination of the requirement that a grazing applicant be "engaged in the livestock business." APR Resp. at 31 (citing *PLC*, 529 US at 745).[10] That is indeed true. However, the IBLA should not confuse the criteria for ***applying*** for a grazing permit with the limited ***purpose*** of the permit itself. While APR need not be "engaged in the livestock business" to apply for and secure a permit, it is required to use the permit for domestic livestock grazing.

The challenge analyzed by the Supreme Court in *PLC*, to which APR refers, centered on a 1994 regulatory revision to 43 C.F.R. § 4110.1 which eliminated the requirement that a permit applicant be "engaged in the livestock business." *PLC*, 529 US at 745 (citing 43 C.F.R. § 4110.1(a)(1995)).[11] After analyzing the interplay between the regulatory change and the directives of the TGA, the Supreme Court concluded that "nothing in the change to § 4110.1(a)

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[10] BLM makes a similar argument, pointing to 43 C.F.R. § 4110.1, which states that " '...to qualify for grazing use on the public lands an applicant must own or control land or water base property, and must be...a corporation authorized to conduct business in the state in which the grazing use is sought....'" BLM Resp. at 13 (quoting 43 C.F.R. § 4110.1). BLM states that the rule does not require the permittee to produce livestock. *Id.*

[11] Prior to the amendment, the rule read, in part "Except as provided under §§ 4130.3 and 4130.4-3, to qualify for grazing use on the public lands an applicant must be engaged in the livestock business, must own or control land or water base property, and must be:..." 43 C.F.R. § 4110.1 (1995).

undermines the Taylor act's requirement that the Secretary grant permits 'to graze livestock.'" *Id.* at 748. Just because a grazing permit can be issued to those engaged in other business endeavors does not mean that the grazing permit itself can be used for something other than livestock grazing.

The 10th Circuit has already determined that grazing permits cannot be issued for conservation purposes. Attempts to circumvent that precedent should not be embraced by IBLA.

3. ***Permit Issuance Contradicts the Agency's Own Regulatory Scheme.***

a. Grazing permits cannot issue as bison are not "livestock" under BLM's regulation.

In issuing permits to APR's "non-production-oriented, wildlife management focused" conservation bison herd, BLM fails to comply with its own regulations. 43 C.F.R. § 4130.2 governs grazing permit and lease issuance and states that

> 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 C.F.R. § 4130.2(a) (emphasis added). The "term of grazing permits or leases authorizing ***livestock*** grazing" on the relevant lands shall generally be for a period of 10 years, and those holding such permits shall be given first priority for their reissuance 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(d) and (e) (emphasis added). Each grazing permit or lease "shall specify the kind and number of livestock, the period(s) of use, the allotment(s) to be used, and the amount of use...." 43 C.F.R. § 4130.3-1(a).

Livestock or "kind of livestock" is specifically defined by regulation to mean "species of domestic livestock—cattle, sheep horses, burros, and goats." 43 C.F.R. § 4100.0-5.

APR argues that the list of animals contained in the definition of livestock is not "exclusive." APR Resp. at 28. However, APR's argument is not founded in law, and runs contrary to the interpretive canon *expressio unius exclusio alterius:* "expressing one item of [an] associated group or series excludes another left unmentioned." *Chevron v. Echazabal*, 536 U.S. 73, 80 (2002). In specifically listing cattle, sheep, horses, burros, and goats as "livestock," the absence of "bison" must be interpreted as being excluded from the definition...particularly if those bison are in a "non-production-oriented, wildlife management focused" conservation bison herd.

APR also argues that the BLM regulation authorizes either a "special grazing permit" or a "general grazing permit" in this circumstance. APR Resp. at 29. APR seems to rely on 43 C.F.R. § 4130.3-2, which outlines "other terms and conditions" an authorized officer may specify in issuing grazing permits or leases, for this premise. *Id.* The rule specifically focuses on livestock, but includes one provision stating that the authorized officer ***may*** specify "the kinds of indigenous animals authorized to graze under specific terms and conditions." 43 C.F.R. § 4130.3-2(e).

It is not reasonable or proper to read this provision in a vacuum, to the end APR proposes, in light of the broader regulatory and statutory scheme. *Norfolk Energy, Inc. v. Hodel*, 898 F.2d 1436, 1441-1442 (9th Cir. 1990) ("In discerning the meaning of regulatory language, 'our task is to interpret the regulation as a whole, in light of the overall statutory and regulatory scheme, and not to give force to one phrase in isolation.'") The term "indigenous animals" is used twice in Title 43 of the CFRs—once in 4130.3-2(e), and once in 4130.6-4, which

contemplates ***special*** grazing permits or leases for said animals. "Indigenous animals" is ***not*** included in TGA, FLPMA, or PRIA. Inclusion of a minor discretionary provision in 43 C.F.R. § 4130.3-2(e) cannot change the mandatory terms and conditions outlined in 43 C.F.R. §§ 4130.2, 4130.3, and 4130.3-1, or the express definitions of 43 C.F.R. § 4100.0-5, which make clear that standard grazing permits are for livestock only. *See, supra.* BLM and APR's interpretation of the provision certainly cannot stand when it finds no support in, and indeed contradicts, TGA, FLPMA, or PRIA.

b. Even if TGA, FLPMA, and PRIA contemplated permit issuance to indigenous animals, BLM has failed to issue the permit specified by its own rules.

BLM's labels for both APR's bison and the contemplated permits have evolved over the course of its review under the National Environmental Policy Act (NEPA), resulting in a failure to follow the agency's own regulations.

Where general grazing permits are designated for grazing livestock, "***special*** grazing permits or leases" authorize grazing by "privately owned or controlled indigenous animals...." 43 C.F.R. § 4130.6-4 (emphasis added). Assuming this rule were properly founded on statutory authority (a specious premise, given that grazing permits can only be issued to domestic livestock pursuant to the TGA, FLPMA, and PRIA), BLM has here issued "grazing permits" rather than the "special grazing permits" mandated by its own rules. The difference is not without distinction, as agency rules further provide that "special grazing permits," unlike regular grazing permits, have no renewal priority and cannot be transferred or assigned. 43 C.F.R. § 4130.6.

In 2018, BLM recognized that its rules only contemplated issuance of special grazing permits or leases to the bison at issue in this case. AR 2.2.04 at FN1 ("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") (emphasis added). BLM's 2018 position was in accord with how the agency had long interpreted its rules. In 1984, for example, when BLM amended 43 C.F.R. § 4100.0-5 to remove the definition of "indigenous animal,"[12] the agency stated:

> 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.
>
> Grazing Admin., Exclusive of Alaska; Final Rulemaking, 49 Fed. Reg. 6440, 6441-6442 (Feb. 21, 1984) (emphasis added).

This regulatory interpretation persisted in BLM's 2006 rulemaking efforts as well.[13] There, segments of the public encouraged BLM to extend grazing preference to "buffalo ranchers" under 43 C.F.R. § 4110.2-2. In *declining* to extend preference, the agency said

> BLM has no authority to give priority to buffalo ranchers when issuing grazing permits or leases. The TGA requires that when issuing grazing permits, the Secretary must give preference to landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water, or water rights owned, occupied, or leased by them. (Grazing permits authorize grazing use on lands within grazing districts established under Section 1 of the Act.) The Act also requires that when issuing grazing leases, the Secretary must give preference to owners, homesteaders, lessees, or other lawful occupants of lands contiguous to the public lands available for lease, to the extent necessary to permit proper use of such contiguous lands, with certain exceptions. (Grazing leases authorize grazing on public lands outside grazing districts.) Therefore, under the TGA, the kind of animal an applicant for a permit or lease wishes to graze on public lands has no bearing on

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[12] 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).

[13] The 2006 rules were permanently enjoined. *W. Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302 (D. Idaho 2007); aff'd in 620 F.3d 1187 (9th Cir. 2010); cert denied in *Pub. Lands Council v. W. Watersheds Project*, 565 US 928 (2011).

> whether the applicant has or will be granted preference for a grazing permit or lease. ***BLM may issue permits to graze privately owned or controlled buffalo under the regulations that provide for "Special Grazing Permits or Leases" for indigenous animals (section 4130.6–4), so long as the use is consistent with multiple use objectives expressed in land use plans***.

BLM, Final Rule, Grazing Administration—Exclusive of Alaska, 71 Fed. Reg. 39402, 39447-39448 (July 12, 2006) (emphasis added). Again, while the Executive maintains that there is insufficient statutory authority to issue any permits for non-livestock grazing, this passage illustrates BLM's long-standing interpretation of its own regulations—only ***special*** grazing permits or leases can be issued for bison.

4. ***Previous Decisions are Not Persuasive, as They Misapply the Law and Concern Substantially Different Circumstances.***

In defending the agency's excessive action, APR and BLM both argue that permit issuance is consistent with the agency's historic treatment of bison as livestock, and therefore within the purview of statute and regulation. APR Resp. at 10, 27-28, 33-34; BLM Resp. to Pet. for Stay, 15-16 (Sept. 16, 2022) (BLM Resp.). Both BLM and APR cite general issuance of grazing permits to other bison producers, and reference *Norman and Norman v. BLM*, CO-01-99-02 (Nov. 15, 2000) and *Hampton Sheep Co. v. BLM*, WYO 1-74-1 (Sept. 26, 1975) as precedence. However, past misapplications of law cannot justify future deviations, and these arguments are not persuasive.

Both *Norman* and *Hampton*, unappealed decisions issued by Administrative Law Judge Sweitzer, address circumstances much different than those here. In *Hampton*, a case decided in 1975 before BLM promulgated a regulatory definition for "livestock", the ALJ determined that

> animals normally classified as "wildlife" may be "livestock" for a purpose such as application of Section 3 of the [TGA], when in substantial respects they are treated as livestock and have characteristics in common with livestock.

Hampton at 13. In finding the bison in that case to be "livestock," the ALJ found it probative that there had been no complaints from adjacent operators about escaped bison or bison interbreeding with livestock, that the herd was "virtually brucellosis free" and facilities for continued testing were available, and that the bison were compatible with other livestock and wildlife utilizing the allotment. *Id.* The bison in that case were handled, trucked, and fed at a feed lot on the allotment. *Id.* at 4. While the Hamptons identified tourism as a benefit, they also expressed a goal of utilizing the buffalo for meat production "similar to the manner in which cattle are utilized...." *Id.* at 5.

Norman was decided in 2000. There, the ALJ's analysis began with *Hampton*'s holding that wildlife could be characterized as "livestock" for the purposes of issuing grazing permits if they were treated substantially similar to, and had substantially similar characteristics as, livestock. *Norman* at 6. The ALJ recognized that subsequent to *Hampton*, FLPMA and PRIA had underscored the issuance of permits for "domestic livestock" grazing, and that in 1978, BLM had defined "livestock" or "kind of livestock" as "species of domestic livestock—cattle, sheep, horses, burros, and goats." *Id.* at 7 (quoting 43 C.F.R. § 4100.0-5(r)(1978)). The ALJ also recognized the regulatory amendment "allowing the grant of permits or leases to authorize grazing use by privately owned or controlled 'indigenous animals'" so long as that grazing use was consistent with multiple use objectives. *Id.* He concluded that

> Whether or not grazing use by bison may still be permitted as grazing use by "livestock" or "domestic livestock," it is clear that the regulations also allow for the permitting of grazing use by indigenous animals, which would include bison, so long as that use is consistent with multiple use objectives.

Id.

The ALJ's conclusion in *Hampton* is understandable, given that there was no regulatory guidance as to what constituted "livestock," and that the bison in that case were substantially

treated as livestock and shared characteristics with livestock. The ALJ's conclusion in *Norman* is more fraught, as it is inconsistent with the express regulatory definition of "livestock" and fails to address the legal infirmities of permitting "indigenous animals."

Assuming, *arguendo*, that both *Norman* and *Hampton* were properly decided, they are both factually dissimilar from the above-captioned matter. Unlike those cases, APR's "non-production-oriented, wildlife management focused" conservation bison herd is not "substantially treated as livestock."

APR argues that its bison are defined as "livestock" under Montana statute to deflect from its own repeated characterization of its herd as "wild" or "wildlife." APR Resp. at 4-5; *see also*, BLM Resp. at 15.[14,15] APR's mission is to "create the largest nature reserve in the continental United States…" with a herd of bison to be treated as "wild animals." AR 4.02 at Ex. 3. APR itself acknowledges it is not a "commercial" bison operation.[16] APR's bison are not marketed, managed, or produced for food or fiber purposes. They are not shipped to feedlots for finishing or to slaughter for food markets. Rather, these bison are "hunted" on APR's land holdings in a way that "mimic[s] natural predation."[17] Others are transported to supplement tribal and conservation herds. APR Resp. at 4.

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[14] BLM argued that "Here, the bison are treated as livestock, the State of Montana includes bison in its definition of livestock, they are contained, moved in a pasture rotation, are a seminal part of APR's business, ear-tagged, branded, and tested for disease in accordance with the Phillips County District Settlement Agreement." BLM Resp. at 15. BLM's statement mischaracterizes the facts, however. The Phillips County District Settlement Agreement requires limited and decreasing disease testing of a fraction of APR's bison for a 10-year period, which expires 2030. AR 3.3.01 at 3-4. Only those bison tested will be tagged. *Id.* at 5. The agreement does not require branding.

[15] Wildlife Restoration, American Prairie (last accessed Dec. 22, 2022), https://www.americanprairie.org/wildlife-restoration; Bison Report 2016-2017, American Prairie (last accessed Dec. 22, 2022), https://www.americanprairie.org/sites/default/files/APR_Bison%20Report_16_17.pdf at page 14.

[16] Bison Restoration, American Prairie (last accessed Dec. 22, 2022), https://www.americanprairie.org/project/bison-restoration.

[17] Bison Harvest, American Prairie (last accessed Dec. 22, 2022), https://americanprairie.org/bison-harvest.

While the ALJ found the bison in *Hampton* and *Norman* were managed substantially similar to livestock, the same does not hold true for APR's conservation herd. For this reason, and those previously discussed, *Hampton* and *Norman* are not persuasive.

5. Compliance with a Resource Management Plan (RMP) Does Not Excuse Violation of the TGA, FLPMA, and PRIA.

Compliance with a broader planning document does not create compliance with the law. Both BLM and APR assert that the Final Decision is consistent with the 2005 HiLine RMP, implying that the decision must therefore be compliant with the law. BLM Resp. at 17-18, 29; APR Resp. at 33. The HiLine RMP states "the BLM is responsible for administering livestock grazing on BLM lands in the planning area. Livestock grazing can include the grazing of cattle, sheep, horses, goats, and bison." BLM Resp. at 17, FN 76 (quoting AR 2.10.01 at 311). While the Final Decision may indeed be consistent with the 2015 HiLine RMP, that consistency does nothing to remedy its legal infirmities and, in fact, only highlights the same legal infirmities in the RMP.

APR argues that FLPMA and PRIA's multiple-use considerations downgrade the livestock grazing purpose of the TGA. APR Resp. at 32-33. APR states,

> While FLPMA identifies 'domestic livestock grazing' as one among several 'principal or major uses' of BLM lands, FLPMA's *multiple use* mandate expressed in this provision lays to rest any notion that livestock grazing is the only proper use of such lands.

Id. at 32 (internal citations omitted). While subsequent Congressional enactments like FLPMA and PRIA have declared additional management considerations for TGA lands and facilitated the creation of broad-based planning (*i.e.* RMPs), these enactments have not repealed TGA's "primary purpose to manage grazing lands so as to stabilize and preserve the livestock industry." *Fallini, et al. v. BLM*, 162 IBLA 10, 18 (2004) (aff'd *Fallini v. Hodel*, 725 F. Supp. 1113 (Nev. 1989) and 963 F.2d 275 (9th Cir. 1992)). As explained above, both the express

language of FLPMA or PRIA, and subsequently promulgated regulations, have only bolstered the basic principle that 1) the Secretary of Interior may only issue grazing permits to domestic livestock, and 2) that such issuance is done, in part, to preserve and stabilize the livestock industry. To the extent that provisions of the RMP exist in conflict with these authorities, they are as legally erroneous as the Final Decision at issue here.

B. **The *Order* Failed to Appreciate the Magnitude of Harm to the State.**

1. ***The Order's Limited Review of Harm Constitutes Legal Error.***

The *Order* is founded on legal error, as it improperly limited the scope of its review of harm to one allotment, rather than all allotments affected by the Final Decision. *Or.* at 21 ("The analysis of the likelihood of an irreparable harm that will occur immediately as a result of converting to bison grazing is guided by the fact that only one allotment—the Whiterock Coulee Allotment—will be immediately converted.") The *Order* criticizes the Executive's demonstration of harm as being too broadly based, declaring that the only relevant analysis is limited to White Rock Coulee Allotment, as it is "the only place where bison will be added immediately." *Id.* at 22-23 (citing APR Resp., Ex. 1).

The Final Decision authorizes permits for bison on six different allotments. At no point in the administrative record did APR state, or did BLM analyze, APR's come lately plan to stock only White Rock Coulee Allotment. In fact, the first time that this was announced was in APR's response brief opposing the Executive's request for stay. APR Resp. at Ex. 1 at ¶ 25.

The *Order*'s limited analysis is not only legally infirm, but has puzzling implications for the Executive's ability to secure a stay on the remaining five allotments. Ad hoc statements by APR that it only plans to stock White Rock Coulee Allotment "at this time" can easily be changed, with no notice to the Executive, at which point the Executive is left to scramble for

another stay. This truth has borne out since denial of the stay, as in its November 17, 2022 letter, APR now contemplates using only ***part*** of White Rock Coulee Allotment and implementing a fencing scheme not contemplated in the Final Decision. *See generally*, Ex. 1. The fact that APR is unable to implement the Final Decision on White Rock Coulee Allotment without the State's acquiescence, and now seeks to implement a different, unanalyzed action, is a clear indication that a stay pending appeal is proper.

The Final Decision authorizes permits on all allotments in this case. The Executive requested a stay of the Final Decision in its entirety—not just those portions APR feels inclined to effect on a given day. To find otherwise subjects the Executive to an untenable game of whack-a-mole. The Executive respectfully requests that a stay issue.

2. *Denial of a Stay Infringes the State's Ability to Manage State Trust Lands, Causing Actual, Unconstitutional Harm to the State.*

Since denial of the stay, the harm forecasted by the Executive has borne out. As such, the denial should be reversed, and the stay granted.

In its petition, the Executive identified the threat to State Trust Lands that could result from denial of the stay. Specifically, the Executive said

> 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.

AR 4.02 at 34.

By sworn declaration, Clive Rooney, the Northeastern Land Office Area Manager for DNRC explained the importance of managing State Trust Lands for the benefit of school trust beneficiaries. *See generally*, AR 4.02 at Ex. 4. DNRC acts as a trustee for these parcels, owing a

fiduciary obligation in its management actions. *Id.* at ¶ 4; *see also*, *Montanans for the Responsible Use of the School Trust v. St. ex rel. Bd. of Land Comm'rs* (*MONTRUST*), 1999 MT 263, ¶ 14, 296 Mont. 402, 989 P.2d 800.[18] This fiduciary obligation is rooted in the Act of February 22, 1889 ("Enabling Act"), ch. 180, 25 Stat. 676 (1889), in which the federal government granted §§ 16 and 36 in each township to the State of Montana "for the support of common schools." Enabling Act at § 10 (25 Stat. 679). "The federal government's grant of those lands to Montana constitutes a trust...." *MONTRUST* at ¶ 13. The terms of that trust were originally set forth in Montana's 1889 Constitution, which provided that these grants "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...." Mont. Const. Art. XVII, § 1 (1889); *see also*, Mont. Const. Art. X, § 11 (1973).

The Montana Supreme Court has, on several occasions, examined the significance of the State's managerial authority on State Trust Lands, most notably in *In re Powder River Drainage Area* (*Pettibone*), 216 Mont. 361, 702 P.2d 948 (1985) and *Jerke v. St. Dept. of Lands*, 182 Mont. 294, 597 P.2d 49 (1979). In both cases, the Court took exception to infringement upon the State's managerial prerogative, finding such incursion to be unconstitutional. *Pettibone*, 216 Mont. at 370-371, 702 P.2d at 953-954; *Jerke*, 182 Mont. at 297, 597 P.2d at 51. Only the State of Montana can act as the trustee of State Trust Lands as it is the only entity endowed with the fiduciary obligations of a trustee.

The State Trust Lands in the above-captioned allotments are generally fenced in common with BLM lands in the above-captioned allotments. AR 4.02 at Ex. 4, ¶ 8; *see also*, AR 2.5.01 at

[18] Throughout this section, the Executive references several Montana Supreme Court cases regarding the nature of its fiduciary obligations in managing State Trust Lands. The Executive recognizes that the Board may not find these persuasive, but offers these authorities to underscore the severity of the harm the State faces in this case absent a stay.

A-4, A-7, A-13. At this time, if APR turns bison out onto allotments in accordance with the Final Decision, there will be no fences to exclude the bison from State trust parcels. AR 4.02 at Ex. 4, ¶¶ 8-10. In other words, absent a stay, unauthorized bison grazing on State Trust Lands is inevitable. As authorized by the Final Decision, there need be no "breaking [of] fences and running amok" as there will be no fences in place to prevent bison from grazing on the State Trust Land. APR Resp. at 40. Given the State's heightened duty to manage these trust parcels, this unauthorized bison grazing cannot be tolerated as it violates the State's managerial prerogatives and, indeed, infringes State sovereignty. This must be afforded deference in any harm analysis.

In its response opposing the Executive's request for stay, BLM stated

> Implementation of the Final Decision would not preclude the Appellants' authority to manage, permit and bill DNRC lands accordingly to meet its fiduciary responsibility, as they have inevitably been doing with the Box Elder allotment. ***BLM's analysis showed that there would be no adverse environmental effects that would damage state lands or reduce carrying capacity or violate state or other laws***.

BLM Resp. at 10 (emphasis added); *see also*, APR Resp. at 19, 48 ("First, contrary to Petitioners' conclusory claims that a stay would preserve rangeland health, human safety, cattle, wildlife etc., BLM carefully considered each of these concerns in the Final EA and determined that American Prairie's operations sufficiently mitigate against any such harm."). This argument is utterly without foundation, as the BLM's NEPA analysis "addresse[d] only those public lands administered by the BLM." AR 2.5.01 at 1-2.[19] This argument also fails to appreciate the extent of the harm the Executive argued, which included an impairment of the State's managerial prerogative.

[19] If BLM and APR now hold the Final Decision out as a product of NEPA analysis on both federal **and** State Trust Lands, the EA and Final Decision are even more improper, deficient, and legally flawed than the Executive initially asserted.

The *Order* found that the Executive had failed to provide evidence of harm.

> [T]his Order has already addressed all these alleged threats [disease, trespass, goring, and land deterioration] and concluded that no immediate and irreparable harm is likely to result. Consequently, there is no likelihood of immediate and irreparable harm to the ability of the State to meet its fiduciary obligation.

Or. at 40. While the Executive disagrees with the *Order*'s conclusions, it is more concerned with its failure to appreciate the clearest harm of all—the infringement upon the State's property rights and ability to manage its own property in accordance with its Constitutional and statutory mandates. Whether APR implements the Final Decision, or the new plan it articulated in its November 17, 2022 correspondence to DNRC (which still allows bison to access State Trust Lands), the infringement is an unacceptable encroachment upon the State's fiduciary obligation, installing BLM as the *de facto* Trustee rather than the State. *Pettibone*, 216 Mont. at 370-371, 702 P.2d at 953-954 (citing *Jerke*, 182 Mont. at 297, 597 P.2d at 51). It is for this reason the *Order* should be overturned and a stay granted.

C. **The *Order* Failed to Analyze Public Interest, Which Weighs in Favor of a Stay.**

1. Public Interest Weighs Against Usurping the State's Authority over State Trust Lands.

When considering a petition for stay, the arbiter must weigh "whether the public interest favors granting the stay." 43 C.F.R. § 4.471(c). The *Order* fails to address the public interest prong, which weighs in favor of issuing the requested stay. The infringement upon the State's managerial prerogative is not in the public interest, given the strict Constitutional and statutory duties the State must honor in its management.

In its *Statement of Reasons* on appeal, the Executive relied on *W. Watersheds Project,* 195 IBLA 115, 137 (2020) and *Valdez, et al. v. Applegate, et al.*, 616 F.2d 570, 572-73 (10th Cir. 1980) in asserting that the status quo properly preserves the local and State economy, rangeland

health, human safety, livestock, wildlife, and "the integrity of State trust lands." AR 4.02 at 35. In *Valdez*, BLM issued an environmental impact statement and adopted a grazing management program that triggered grazing reductions. Plaintiffs sued to enjoin the implementation of the program. *Valdez,* 616 F.2d at 571. In reversing the district court's denial of preliminary injunction, the 10th Circuit held

> 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 "preserve the status quo ante litem until the merits of a serious controversy can be fully considered before a trial court."

Id. at 572 (quoting *Blackwelder Furniture Co. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189, 197 (4th Cir. 1977)) (emphasis added).[20]

Denial of a stay in the above-captioned matter deprives the State control over its own lands. In allowing APR to graze bison and remove fences, State Trust Lands are exposed to grazing which is not authorized by the State. *See generally,* AR 4.02 at Ex. 4; Ex. 1. Depriving any landowner control over their property is not only legally problematic, but against the public interest. The impertinence of such a deprivation, and consequent impact to public interest, is only heightened when the land in question is State Trust Land, managed for the benefit of the State's educational institutions, and the deprived landowner is the State.

2. <u>The Public has an Interest in Federal Administrative Agencies Following the Law.</u>

In its *Petition for Stay* pending appeal, the Executive relied upon *Jung Park d/b/a Inland RV Rental LLC*, 2012 WL 1184347, *6 (IBLA 2012-64) in asserting that the public has an interest in having federal administrative agencies follow the law. AR 4.02 at 35. In *Jung Park*,

[20] While *Valdez* was reviewing preliminary injunction factors, those factors are the same for the stay sought by the Executive and the 10th Circuit's discussion is equally relevant.

petitioners sought a stay from BLM's decision revoking a commercial special recreation permit for operation of a commercial rental business on public lands. *Jung Park* at *2. In granting that stay, the ALJ stated

> Since we hold that Inland is likely to succeed in establishing that BLM failed to adhere to the applicable law concerning proper administration of SRPs, we think that the public interest weighs in favor of staying, and thus precluding, the effect of BLM's decision, until the appeal can be finally resolved.

Id. at *6; *see also*, *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash 1991) (aff'd, 952 F.2d 297 (9th Cir. 1991)) ("The problem here has not been any shortcomings in the laws, but simply a refusal of administrative agencies to comply with them.... This invokes a public interest of the highest order: the interest in having government officials act in accordance with law.").

Similar to *Jung Park*, the public has a strong interest in BLM complying with TGA, FLPMA, and PRIA, as well as its own regulations governing issuance of grazing permits. Similar to *Jung Park,* the Executive is likely to prevail in its argument that BLM has exceeded its statutory and regulatory authority in issuing the above-captioned permits. BLM's refusal to comply with the law implicates a public interest of the highest order.

The *Order*'s failure to analyze the impact of a stay on the public interest was legal error. Such an analysis weighs in favor of granting a stay, given the importance of the State maintaining management authority over its own lands and the public interest in having BLM officials act in accordance with the law. As such, a stay is proper.

3. ***APR's Planned Deviation from the Final Decision is an Affront to the Public Interest***.

In response to the DNRC's October 27, 2022 letter denying authorization to graze bison on State Trust Lands, APR identified a course of action which does not comply with the Final

Decision and which was not analyzed under NEPA. In an effort to avoid State Trust Lands, APR plans to stock only that portion of the White Rock Coulee Allotment south of § 36, T27N R28E, leave fences it had committed to removing, and add fences unauthorized by the decision. This new grazing plan not only leaves State Trust Lands (*see* Ex. 1) exposed to unauthorized grazing, but it was ***not*** an alternative analyzed in the FEIS, and was ***not*** authorized by the Final Decision.

> NEPA serves two principal purposes.
>
> It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Robertson v. Methow Valley Citizens Council, 490 US 332, 349 (1989). While the level of public participation mandated under NEPA is an area overwrought with litigation, an agency 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 (9th Cir. 2008).

The Final EA examined four alternatives to the APR's proposal to graze bison on the allotments at issue. None of the alternatives examined or proposed the fencing, rotation, and stocking plan APR now plans to implement. Ex. 1 at ¶ 9 and Attach. C; *see also*, AR 2.5.01 at 2-1 through 2-13, A-3 through A-14. Allowing APR to proceed in deviation from a contested Final Decision, in the absence of analysis and public involvement, is not only legally fraught but disingenuous to the process leading to the Final Decision. It is not in the public interest to permit such an offense to persist, especially pending appeal.

IV. **CONCLUSION**

The law and factual circumstances relevant to this case support issuance of a stay pending appeal, which was improperly denied by DCHD. In denying the stay, DCHD failed to apprehend and give proper weight to the Executive's legal arguments. The *Order* also failed to appreciate the magnitude of harm incurred by the State, particularly to its constitutional duty as Trustee for State Trust Lands. Finally, the *Order* did not analyze impact to the public interest, which weighs in favor of issuing a stay. While the Executive set forth the basis for stay in its *Petition for Stay*, and met the requisite criteria, the need for stay has since been exacerbated by APR's disclosure of plans to deviate from the Final Decision.

Denial of the stay was material legal error, failed to apprehend the facts, and failed to demonstrate a rational connection between the facts and decision. For these reasons, the Executive respectfully requests that IBLA issue of stay of the Final Decision, pending resolution of its appeal.

Respectfully submitted this 22nd day of December, 2022.

Rachel K. Meredith
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2022, I emailed the foregoing *Statement of Reasons* in accordance with 43 C.F.R. § 4.401(c), the Departmental Case Hearings Division's Amended COVID-19 Pandemic Procedures, and the Interior Board of Land Appeals October 5, 2021 *Order Permitting Filing by Email*, as follows:

Veronica I. Larvie
Administrative Law Judge
United States Department of Interior
Office of Hearings and Appeals
Departmental Cases Hearing Division
351 South West Temple, Suite 6.300
Salt Lake City, UT 84101
dchd@oha.doi.gov

Lisa Bruno, Esq.
U.S. Department of the Interior
Office of the Field Solicitor
Billings Field Office
2021 4th Avenue North, Suite 112
Billings, MT 59101
Email: lisa.bruno@sol.doi.gov
Counsel for BLM

Montana Attorney General Austin Knudsen, Esq.
Solicitor General David M.S. Dewhirst, Esq.
Assistant Solicitor General Kathleen L. Smithgall, Esq.
Montana Department of Justice
P.O. Box 201401
Helena, MT 59620-1401
Email: austin.knudsen@mt.gov
david.dewhirst@mt.gov
kathleen.smithgall@mt.gov
Counsel for State of Montana, by and through the Montana Attorney General

Karen Budd-Falen, Esq.
Rachael L. Buzanowski
Budd-Falen Law Offices, LLC
Email: karen@buddfalen.com
rachael@buddfalen.com
Counsel for North Phillips County Cooperative State Grazing District, South Phillips County Cooperative State Grazing District, and Montana Stockgrowers Association

Mary Cochenour, Esq.
Jenny Harbine, Esq.
Amanda D. Galvan, Esq.
Earthjustice
Email: mcochenour@earthjustice.org
jharbine@earthjustice.org
agalvan@earthjustice.org
Counsel for Intervenor American Prairie Reserve

Hertha L. Lund
Peter B. Taylor
Lund Law, PLLC
662 S. Ferguson Ave., Unit 2
Bozeman, MT 59718
Email: Lund@Lund-Law.com
Taylor@Lund-Law.com
Counsel for Intervenors Montana Farm Bureau Federation and Phillips County Farm Bureau

Rachel K. Meredith