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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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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 land[1], 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…."

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[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 Envtl. 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 commentors, 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 equivelent [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.

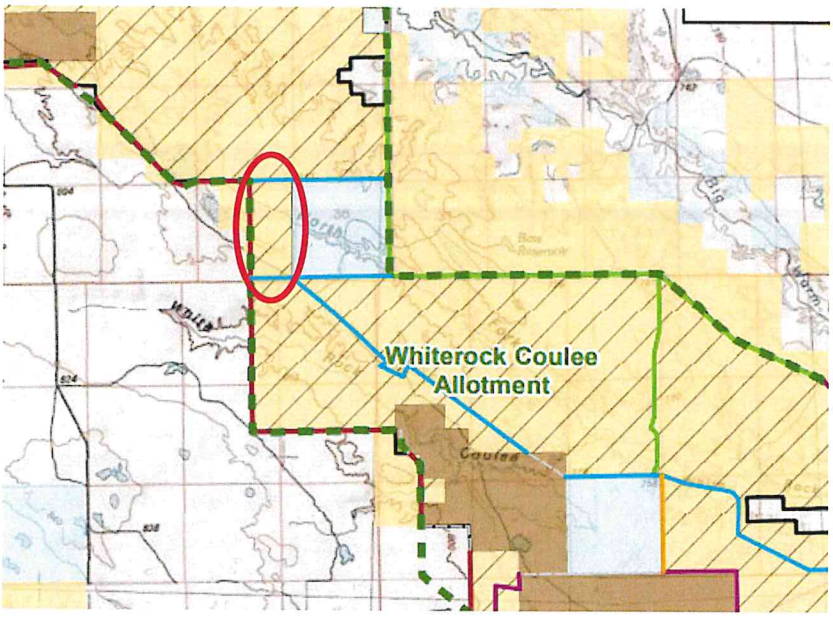
In 1889, under the Montana Enabling Act, the federal government granted to Montana the sixteenth and thirty-sixth sections in each township "for the support of common schools." *Montanans for the Responsible Use of the Sch. Tr. v. St. ex rel. Bd. of Land Comm'rs, et al. ("MONTRUST")*, 1999 MT 263, ¶ 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. <u>Conclusion.</u>

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.

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