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

Messrs. Mehlhoff and Darrington:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Greg Gianforte
Governor

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

Mr. Mehlhoff and Mr. Darrington:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

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

Dear Mr. Mehlhoff and Mr. Darrington;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely

Hank Worsech
Director

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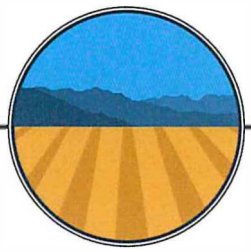

September 28, 2021

John Mehlhoff
State Director, Montana/Dakotas
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Malta Field Office
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Re: The United States Bureau of Land Management's draft environmental assessment (EA) for the American Prairie Reserve Bison Change of Use (DOI-BLM-L010-2018-0007-EA) and Finding of No Significant Impact (FONSI)

Mr. Mehlhoff and Mr. Darrington:

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

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

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

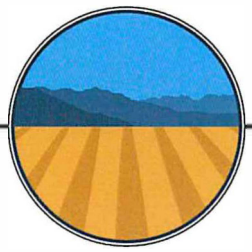
Under federal statutes and rules governing grazing permits, bison do not constitute "livestock" for which grazing permits can be given. While the EA references "bison" and "indigenous animals" interchangeably, neither are defined as "livestock" under 43 CFR § 4100.0-5. One of the purposes of the grazing regulations is to "provide for the sustainability of the western livestock industry and communities that are dependent upon productive, healthy public rangelands." 43 CFR § 4100.0-2. The grazing regulations do not contemplate a "non-production-oriented, wildlife management focused" bison herd. EA at 3-42.

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

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

The only point at which the grazing rules reference "indigenous animals" is at 43 CFR § 4130.6-4, which addresses **special** grazing permits. That rule states that "special grazing permits or leases authorizing grazing use by privately owned or controlled indigenous animals may be issued at the discretion of the authorized officer. This use shall be consistent with multiple-use objectives. These permits or leases shall be issued for a term deemed appropriate by the authorized officer not to exceed 10 years." However, APR has not requested, and the EA does not analyze, a **special** grazing permit. Special grazing permits, as opposed to regular permits, have no renewal priority, and cannot be assigned or transferred. 43 CFR § 4130.6.

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



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

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

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

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

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

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

Sincerely,

Christy Clark

Acting Director, Montana Department of Agriculture (AGR)

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September 28, 2021

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

Mr. Mehlhoff and Mr. Darrington:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EA at Appx. D.

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Mike Honeycutt
Executive Officer, Montana Department of Livestock