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MONTANA TENTH JUDICIAL DISTRICT COURT, FERGUS COUNTY

UNITED PROPERTY OWNERS OF
MONTANA, INC., a Montana non-profit
corporation,

Plaintiff,

vs.

MONTANA DEPARTMENT OF FISH
WILDLIFE & PARKS, an Agency of
the State of Montana,

Defendant.

Cause No.: DR-2020-30

Judge: Jon A. Oldenburg

SUMMONS

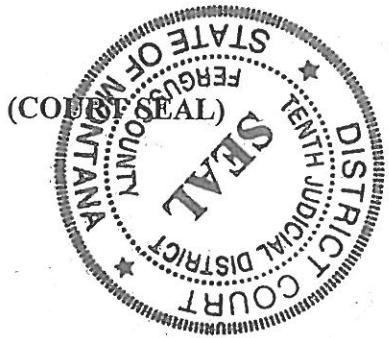
THE STATE OF MONTANA TO:

Montana Department of Fish Wildlife & Parks
c/o Timothy C. Fox, Attorney General of the State of Montana
215 North Sanders
Helena, MT 59601

YOU ARE HEREBY SUMMONED to answer the Complaint for Declaratory and
Injunctive Relief, which is filed in the office of the Clerk of this Court, a copy of which is
herewith served upon you, and to file your answer and serve a copy thereof upon Plaintiffs'
attorney within forty-two (42) days after the service of this Summons, exclusive of the day of

service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the Complaint for Declaratory and Injunctive Relief.

WITNESS my hand and the seal of said Court, this 9th day of March,
2020.



CLERK OF DISTRICT COURT

By: Brenda Snapp
Deputy Clerk

Jacqueline R. Papez
Jack G. Connors
Rachel K. Meredith
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Attorneys for Plaintiff United Property Owners of Montana, Inc.

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UNITED PROPERTY OWNERS OF
MONTANA, INC., a Montana non-profit
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Plaintiff,
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Cause No.: _____

Judge: Jon Oldenburg

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

COMES NOW Plaintiff United Property Owners of Montana, Inc. (hereinafter referred to as "UPOM" or "Plaintiff"), on behalf of its members, by and through its undersigned counsel, and pursuant to Mont. Code Ann. §§ 27-8-101, *et seq.* (declaratory relief); Mont. Code Ann. §§ 27-19-101, *et seq.* (injunctive relief); Mont. Code Ann. §§ 2-4-101, *et seq.* (Montana Administrative Procedures Act or "MAPA"); and Mont. Code Ann. §§ 75-1-101, *et seq.* (Montana Environmental Policy Act or "MEPA") and for its causes of action against the

Montana Department of Fish, Wildlife and Parks (hereinafter referred to as “FWP” or “Defendant”), hereby incorporates fully the facts and allegations made in this Complaint alleging as follows:

INTRODUCTION

1. This is an action for declaratory and injunctive relief related to the Final Programmatic Environmental Impact Statement for Bison Conservation and Management in Montana (“Final EIS”) and associated Record of Decision (“ROD”). Plaintiff seeks a declaration that the Final EIS and ROD have been formulated and adopted arbitrarily and capriciously in violation of MAPA, in violation of environmental impact review requirements imposed by MEPA, in excess of the authority conferred upon the Defendant by the Montana State Legislature, and in violation of the statutory mandates set forth upon the Defendant by the Montana State Legislature. For all of these reasons, Plaintiff seeks declaratory and injunctive relief permanently enjoining implementation of the existing Final EIS and ROD and requiring Defendant to develop and adopt a Final EIS and ROD based on sound science, following an adequate environmental review, and which complies with Montana law.

PARTIES

2. Plaintiff UPOM is a Montana non-profit organization comprised of Montana landowners, livestock producers, businesses, and community organizations located throughout Montana. UPOM brings this action on behalf of its members. UPOM members are interested in preserving private property rights and the responsible management of Montana’s natural resources. UPOM and its membership stand to be significantly injured by mismanagement of bison. Both UPOM and its members participated in FWP’s EIS process, submitting comments and attending public hearings.

3. Plaintiff has no administrative remedies available to it to prohibit solicitation of bison relocation proposals by Defendant. The only form of relief available to Plaintiff is to seek relief, on behalf of its members, from this Court for Defendant's illegal actions in adopting Alternatives 2, 3, and 4 as set forth in the ROD.

4. Defendant FWP is a state administrative agency charged with the protection of Montana's fish and wildlife resources. Its powers and duties are set forth in Mont. Code Ann. § 87-1-201. FWP's specific duties with regard to bison are set forth in Mont. Code Ann. §§ 87-1-216 and 87-2-730.

JURISDICTION AND VENUE

5. Jurisdiction is proper in this Court pursuant to Mont. Code Ann. §§ 2-4-701, 27-8-201, 27-19-101, and 75-1-201; and the general original jurisdiction of this Court under Mont. Code Ann. § 3-5-302 and the inherent power of this Court to review state agency decisions and actions and to issue appropriate relief.

6. Venue is proper in Fergus County because the proper place of trial for an action against the state is in the county where the cause or some part thereof arose. Venue is further proper in Fergus County because when an action is brought by a resident of Montana against the State of Montana, the county of the party's residence is a proper place of trial. Mont. Code Ann. § 25-2-126. Plaintiff is headquartered in Fergus County.

FACTUAL BACKGROUND

7. In 2010, FWP began the process of evaluating opportunities for relocating a "wild" bison population somewhere within the state of Montana. *See*, Final EIS, 19. To initiate this process, FWP drafted "Background Information on Issues of Concern for Montana: Plains Bison Ecology, Management, and Conservation," ("Background Information"), which was to

serve as the background document compiling the current body of knowledge pertaining to bison.

Id.

8. In 2012, FWP began to explore bison restoration opportunities. *See*, Final EIS Record of Decision (“ROD”), 1 (January 7, 2020). FWP formed a Bison Discussion Group, which met several times over an 18-month period to discuss potential bison restoration opportunities and alternatives. *Id.* FWP finalized a Draft Environmental Impact Statement for Bison Conservation and Management (“Draft EIS”) in June of 2015. *Id.* at 3. The Draft EIS was released for a 90-day comment period and public hearings, which ended in September 2015. *Id.* UPOM, as well as several individual UPOM members, filed comments to the Draft EIS and attended and provided public comment at said hearings.

9. On January 7, 2020, FWP released the Final EIS. FWP Director Martha Williams signed the ROD on the same day. *Id.* The ROD states that

State law (§87-1-201 MCA) provides that Montana Fish, Wildlife and Parks (FWP) has the responsibility to manage wildlife in a manner that assists in the maintenance or recovery of species. Montana statute also requires FWP to manage wildlife, fish, game, and nongame animals in a manner that prevents the need for listing under the state list of endangered species (§ 87-5-10 MCA) [sic] or under the federal Endangered Species Act (16 U.S.C 1531, et seq.).

ROD at 1. The Final EIS also cites the foregoing authorities as the impetus to “evaluate potential opportunities for bison restoration.” *See*, Final EIS at 4, 9. However, bison do not appear on either Montana’s endangered species list or the federal endangered species list. The federal government considered listing bison in 1999, 2009, 2014, 2015, and 2018, deciding each time that listing was not warranted.

10. The stated objectives of FWP’s Final EIS were as follows:

- Evaluate which method(s) for a pilot bison restoration effort may be appropriate, if any.
- Evaluate potential landownership scenarios where a restoration effort may be

- feasible.
- Evaluate potential costs and benefits of a restoration program.

ROD at 2; Final EIS at 4. The alternatives evaluated during the EIS process were as follows:

- Alternative #1: No Action.
- Alternative #2: Restoration of a Publicly Managed Bison Herd on the Private and/or Public Lands of Willing Landowner(s)
- Alternative #3: Restoration of a Publicly Managed Bison Herd on Tribal Lands
- Alternative #4: Restoration of a Publicly Managed Bison Herd on a Large Landscape Where there are Minimal Conflicts with Livestock

Id.

11. The EIS “did not address site specific details...” of a particular relocation proposal. ROD at 2, 6. Instead, the EIS reviewed “case studies” for each alternative. These case studies “illustrate a real life scenario that fits the general criteria” of each alternative. Final EIS, 63. Even though no site-specific proposal is considered by FWP in the Final EIS, the ROD concludes that Alternatives 2, 3, and 4 are appropriate. ROD at 3. The only alternative not chosen by the ROD was “Alternative #1: No Action.” *Id.*

12. The Final EIS incorporates information not present in the Draft EIS. As the first page of the Final EIS states, large portions of text were added to the Final EIS which were not included in the Draft EIS. The Final EIS also notes that the review is “programmatic,” a label not utilized by the Draft EIS. In formulating and adopting the Final EIS, FWP also solicited input and statements from Sean Gerrity of the American Prairie Reserve (“APR”), to which members of the public were never given the opportunity to respond.

13. The Final EIS discusses a number of diseases that can be contracted and/or carried by bison. Those diseases include anthrax, bluetongue, bovine anaplasmosis, bovine brucellosis, bovine spongiform encephalopathy (“BSE”), bovine tuberculosis, bovine viral diarrhea, Johne’s Disease, and malignant catarrhal fever. Final EIS at 30-41. The Final EIS does

not contain any discussion of Chronic Wasting Disease (“CWD”) or how relocation efforts might avoid the spread of CWD to, between, or from, relocated bison.

14. The Final EIS notes that within Montana, “the wild bison of YNP are considered to be chronically infected with brucellosis....” *Id.* at 35. The Final EIS states that quarantine procedures implemented at a quarantine facility in Corwin Springs, Montana, have yielded brucellosis-free YNP bison “suitable for the establishment of new herds or to augment existing populations....” *Id.* at 36. Nevertheless, bison that participate in quarantine procedures have still been exposed to disease and latent infection could be an significant issue.

15. In discussing guidelines for a bison source herd, the Final EIS states that

Only bison that are certified as free of reportable diseases by the state veterinarian of Montana could be used for reintroduction. Wild or domestic, bison may carry a number of pathogens or parasites (internal citation omitted) but many of the restoration herds are free of reportable diseases of concern, and source bison can be obtained that are free of reportable diseases. Diseases of concern can be managed within restoration herds and are often absent in wild bison populations.

Final EIS, 66 (emphasis added). The Final EIS contemplates relocation of YNP bison that have gone through the quarantine process to other areas of Montana.

16. In discussing the requirements of a successful bison relocation proposal, the Final EIS states that a proposed containment strategy “must describe the following per §87-1-216(5ci) [sic, -216(5)(i)] MCA:”

The specific area where the bison are to be contained; 2) fencing or other containment measures to be used to contain the herd; 3) a contingency plan to expeditiously relocate bison that enter lands where they are not allowed; 4) a contingency escape; and 5) a contingency plan to eliminate or decrease the size of designated areas, including the expeditious relocation of bison if the FWP is unable to effectively manage or contain the bison. FWP is liable for all costs incurred, including costs arising from protecting public safety, and any damage to private property that occurs as a result of FWP’s failure to meet the requirements of containment (§87-1-216(7) MCA). **FWP is only liable for damage when all efforts to follow a management plan endorsed by the local citizen working group have not been made.**

Final EIS, 70 (emphasis added).

17. The Final EIS contemplates application of existing game damage programs to resolve damage conflicts between bison and private landowners. Final EIS at 75-76. However, game damage assistance does not apply to wildlife consumption of pastureland, and will only be provided if a landowner provides certain levels of hunting access on their property. *Id.*

CLAIMS FOR RELIEF

Count One—Judicial Review, Declaratory, and Injunctive Relief—Violation of MEPA

18. Plaintiff incorporates the foregoing facts and allegations as if set forth fully here.

19. MEPA is designed to provide for adequate environmental review of state actions in order to ensure that environmental attributes are fully considered. *See*, Mont. Code Ann. § 75-1-102. FWP's formulation and adoption of the Final EIS and ROD violated MEPA in a number of ways.

20. FWP arbitrarily and capriciously rejected the “no-action” alternative and thereby committed itself to bison relocation in violation of MEPA. FWP has an obligation to examine the relevant data and articulate a satisfactory explanation for its decision, including a rational connection between the facts found and the choice made. Unfortunately, FWP rejected the “no-action” alternative without making a rational connection between the decision and the factual record. The Final EIS acknowledges inherent risks associated with each alternative, but only rejected the “no-action” alternative — the only alternative designed to maintain the status quo. The rejection of the “no-action” alternative is an irreversible commitment to relocating additional bison into the State and, absent a specific relocation proposal, the decision was arbitrary, capricious, unlawful, and not supported by substantial evidence.

21. FWP failed to take the requisite “hard look” at the risks of disease transmission between reintroduced bison, livestock, and other wildlife. While FWP acknowledges the risk of disease transmission from reintroduced bison to wildlife and livestock, it did not give the issue a significant “hard look.” The Final EIS does not analyze or discuss disease prevalence rates in bison that could be relocated to Montana with the implementation of the Final EIS. The Final EIS also fails to examine diseases that can be transmitted to relocated bison or discuss prevention and vaccination requirements. Merely acknowledging that bison may have diseases — without addressing the actual disease prevalence, transmission rates, and prevention of transmission — is not enough to satisfy MEPA’s hard look requirement. FWP’s adoption of the Final EIS and ROD, absent this hard look, was arbitrary, capricious, and unlawful.

22. FWP’s consideration of new information after the Draft EIS, absent public comment on the same, violates MEPA. In adopting the Final EIS, FWP made significant changes to the Draft EIS, which the public was not allowed to comment on. The Final EIS also states that it is “programmatic,” a term not utilized in the Draft EIS. A programmatic EIS may only be used when “the agency is contemplating a series of agency-initiated actions, programs, or policies, which, in part or in total, may constitute a major state action significantly affecting the human environment. . .” Mont. Admin. R. 12.2.444(1). Since the Draft EIS was not labeled “programmatic,” the public had no notice that FWP was planning “a series of agency-initiated actions, programs, or policies” related to bison. FWP mislead the public regarding the purpose of the Draft EIS, preventing the public from providing appropriate comments regarding the scope of FWP’s proposal.

23. After the Draft EIS was issued, FWP actively solicited new information from bison reintroduction advocates, but not from people and groups opposed to reintroduction. In the

Final EIS, FWP cites personal communications the agency had with the founder of American Prairie Reserve (“APR”), Sean Gerrity. Had FWP included Mr. Gerrity’s self-serving statements in the Draft EIS, the public would have had the opportunity to respond appropriately.

24. FWP arbitrarily and capriciously relied upon stale information and data in its Final EIS. FWP allowed almost five years to pass between the Draft EIS and public comment period, and the issuance of the Final EIS. During this period, the information FWP relied upon became outdated. Since the Draft EIS and public comment period, new information has come to light regarding bison populations and disease, damage to private property caused by bison, the inability to control disease within “conservation” bison herds, and the necessity for relocating or “restoring” bison. The Final EIS relies on outdated studies and data. A number of website links referenced in the Final EIS no longer work because they are relics from the Draft EIS. Without the ability to review the material upon which the ROD and Final EIS are based, the public has no ability to review whether FWP accurately expressed the information on the formerly existent website, and/or whether the information has been updated, corrected, or suppressed. FWP’s reliance on stale data is arbitrary, capricious, and unlawful.

25. Under MEPA and the related regulations, FWP was required to prepare a supplemental environmental impact statement, but failed to do so. FWP considered and relied upon new information provided after the Draft EIS public comment period closed, but did not prepare a supplemental environmental impact statement or allow additional public comment on the new information it considered. Moreover, FWP did not consider or address the significant new, updated, and changed information regarding bison, which has accumulated in the extended period of time between the Draft EIS and the Final EIS. FWP’s failure to pursue a supplemental environmental impact statement was arbitrary, capricious, and unlawful.

26. FWP's failure to give due consideration to opposing views was arbitrary, capricious, and unlawful. FWP began its analysis on the false premise that Montana *must* relocate additional bison into the state, beyond the burgeoning population in the Yellowstone area. FWP then failed to address and respond to public comments, scientific studies, and other evidence to the contrary. For example, FWP found that bison "containment strategies" that limited bison to "small landscapes" would not be acceptable. However, this conflicts with the findings made by the Montana Legislature, which "[f]ound] that significant potential exists for the spread of contagious disease to persons or livestock in Montana and for damage to persons and property by wild buffalo or bison." Mont. Code Ann. § 87-1-216(1). The Legislature specifically mandated "animal containment measures that ensure [that bison] will be contained in designated areas." *Id.* Plaintiff expressed similar views regarding the risks of bison relocation, which were ignored by FWP. Plaintiff, its members, and the public at large had the right to expect FWP would give due consideration to their public comments and the requirements of Montana law. FWP's failure to do so was arbitrary, capricious, and unlawful.

27. FWP's reliance on public opinion surveys to support the adoption of Alternatives 2, 3, and 4, was arbitrary, capricious, and unlawful. The environmental review process is not a popularity contest. FWP acted arbitrarily in relying on the survey data prepared by groups in favor of bison relocation at the expense of scientific evidence. MEPA and the relevant regulations define what information FWP can rely on during the EIS process. The laws do not include public opinion surveys on the popularity of the proposed action, and FWP's reliance on the surveys was arbitrary, capricious, and unlawful.

28. Despite MEPA's requirement for a detailed analysis of the issue, FWP conducted an inadequate analysis of the "irreversible and irretrievable commitments of resources" that will

result from the Final EIS and ROD. The Final EIS makes conflicting statements regarding whether there will be an irretrievable resource commitment. At one point the document states “there is the potential for irretrievable commitments,” but in the preceding paragraph, the Final EIS states “[n]o irreversible resource commitments are predicted . . .” The conflicting statements are the result of FWP’s failure to take a hard look at this issue as required by MEPA. If FWP were to proceed with implementing the Final EIS, there is a real and irreversible risk to Plaintiff’s members.

29. FWP failed to adequately consider the secondary and cumulative impacts of the four alternatives it considered, in violation of MEPA. Nowhere does the EIS address the secondary and cumulative impacts of disease transmission between bison, livestock, and other area wildlife. The document talks about “*the perception* of disease risk transmission from restoration bison to cattle.” The risk of disease transmission is real and should have been studied.

30. FWP’s analysis of secondary and cumulative impacts of the “no-action” alternative was flawed because it was based on an outdated and incorrect assessment of bison being listed under the Endangered Species Act. The Final EIS cites the possibility of “listing of the American Bison as an imperiled species under the Endangered Species Act (ESA) of 1973” as a possible secondary effect of the no-action alternative. The Endangered Species Act only allows the federal government to list a species as threatened or endangered. An “imperiled species” classification does not exist under the federal act. Additionally, the Final EIS mentions several petitions to list bison under the ESA, but fails to discuss the federal government’s rejection of those petitions, as well as the rejection of several subsequent petitions. FWP’s

reliance on the possibility of ESA listing as a possible secondary or cumulative impact of the “no action” alternative is legally and factually flawed and a violation of MEPA.

31. When considering the secondary and cumulative impacts of the action alternatives the agency considered, it merely stated short, speculative statements such as “there may be secondary and cumulative ecological impacts, possibly beneficial and/or adverse . . .” Elsewhere, the Final EIS states, “Potential secondary and cumulative impacts to vegetation are difficult to anticipate. . .”; “[c]umulative impacts are much more difficult to anticipate. . .”; and “[t]here are too many unknown variables to predict secondary or cumulative impacts at this time.” Even though providing a “description” of the secondary and cumulative impacts may be “difficult,” FWP may not choose to avoid the difficult portions of MEPA. In failing to assess secondary and cumulative impacts, FWP was unable to identify whether said impacts might be beneficial or adverse. FWP’s failure to assess secondary and cumulative impacts was a violation of MEPA.

Count Two—Judicial Review, Declaratory, and Injunctive Relief—Actions in Excess of Statutory Authority

32. Plaintiff incorporates the foregoing facts and allegations as if set forth fully here.

33. FWP may not relocate any bison that have been exposed to or infected with a contagious disease, including bison that have originated from YNP. FWP is responsible for managing wild buffalo or bison that “have not been exposed to or infected with a dangerous or contagious disease” but which may threaten persons or property.” Mont. Code Ann. § 87-1-216(2)(a) (emphasis added); Mont. Code Ann. § 87-1-216(3). FWP is required to consult and coordinate with the Montana Department of Livestock (“DOL”) to ensure that wild buffalo or bison under FWP’s purview remain disease-free. Mont. Code Ann. § 87-1-216(2)(b).

34. With regard to wild buffalo and bison from a herd infected with disease, FWP are limited to public hunting or “taking” of said bison, after consultation with the DOL. Mont. Code Ann. § 87-1-216(2)(c).

35. YNP bison are “chronically infected with brucellosis....” Final EIS at 35. Those YNP bison that do not “test positive” for brucellosis, or who have gone through quarantine processes, have still been exposed to the disease. As such, YNP bison are beyond FWP’s regulatory purview and the agency may not consider them for relocation.

36. FWP’s efforts to “recover” a game species that is not “listed,” “sensitive,” or a “potential candidate” for the Endangered Species List, exceeds the agency’s statutory authority.

37. As rationale for evaluating “potential opportunities for bison restoration,” FWP states:

State law (§87-1-201 MCA) provides that Montana Fish, Wildlife and Parks (FWP) has the responsibility to manage wildlife in a manner that assists in the maintenance or recovery of species. Montana statute also requires FWP to manage wildlife, fish, game, and nongame animals in a manner that prevents the need for listing under the state list of endangered species (§ 87-5-10 MCA) [sic] or under the federal Endangered Species Act (16 U.S.C 1531, *et seq.*).

ROD at 1; Final EIS at 4, 9. This is a misstatement of the law. Mont. Code Ann. § 87-1-201(9) (a)(ii) states that

The department shall implement programs that manage listed species, sensitive species, or a species that is a potential candidate for listing under 87-5-107 or under the federal Endangered Species Act, 16 U.S.C. 1531, *et seq.*, in a manner that assists in the maintenance or recovery of those species.

Mont. Code Ann. § 87-1-201(9)(b) also states that

In maintaining or recovering a listed species, a sensitive species, or a species that is a potential candidate for listing, the department shall seek, to the fullest extent possible, to balance maintenance or recovery of those species with the social and economic impacts of species maintenance or recovery.

38. Bison are not listed as threatened or endangered on either the state or federal

endangered species lists. To the contrary, wild buffalo are considered “game animals.” Mont. Code Ann. § 87-2-101(4). Since FWP’s release of the Draft EIS in 2015, the USFWS has denied three separate petitions to list bison on the Endangered Species List. FWP’s rationale for bison “restoration” lacks foundation and exceeds the agency’s statutory authority.

Count Three—Judicial Review, Declaratory, and Injunctive Relief—Failure to Fulfill Statutory Duties

39. Plaintiff incorporates the foregoing facts and allegations as if set forth fully here.

40. The Final EIS misstates FWP’s liability as the same is set forth in Mont. Code Ann. § 87-1-21697). FWP is liable for all costs resulting from its failure to develop and adopt a bison management plan in accordance with Mont. Code Ann. § 87-1-216. “The department is liable for all costs incurred, including costs arising from protecting public safety, and any damage to private property that occurs as a result of the department’s failure to meet the requirements of subsection (5).” Mont. Code Ann. § 87-1-216(7) (emphasis added).

41. Mont. Code Ann. § 87-1-216(5) states that FWP “shall develop and adopt a management plan before any wild buffalo or bison under the department’s jurisdiction may be released or transplanted onto private or public land in Montana. A plan must include but is not limited to:”

- (a) measures to comply with any applicable animal health protocol required under Title 81, under subsection (2)(b), or by the state veterinarian;
- (b) any animal identification and tracking protocol required by the department of livestock to identify the origin and track the movement of wild buffalo or bison for the purposes of subsections (2)(b) and (5)(c);
- (c) animal containment measures that ensure that any animal transplanted or released on private or public land will be contained in designated areas. Containment measures must include but are not limited to:
 - (i) any fencing required;
 - (ii) contingency plans to expeditiously relocated wild buffalo or bison that enter private or public property where the presence of the animals is not authorized by the private or public owner;

- (iii) contingency plans to expeditiously fund and construct more effective containment measures in the event of an escape; and
- (iv) contingency plans to eliminate or decrease the size of designated areas, including the expeditious relocation of wild buffalo or bison if the department is unable to effectively manage or contain the wild buffalo or bison.

- (d) a reasonable means of protecting public safety and emergency measures to be implemented if public safety may be threatened;
- (e) a reasonable maximum carrying capacity for any proposed designated area using sound management principles, including but not limited to forage-based carrying capacity, and methods for not exceeding that carrying capacity, including in years of drought or severe winters. The carrying capacity must be based on a forage analysis conducted in accordance with standards contained in the most recent natural resources conservation service field office technical guide by a range scientist who is on the staff of:
 - (i) The Montana state university-Bozeman college of agriculture;
 - (ii) The United States natural resource conservation service; or
 - (iii) A technical service provider certified by either the natural resources conservation service or the society for range management.
- (f) identification of long-term, stable funding sources that would be dedicated to implementing the provisions of the management plan for each designated area.

Mont. Code Ann. § 87-1-216(5).

42. FWP misstates its liability in the Final EIS. Throughout the Final EIS, FWP states that it “is only liable for damage when all efforts to follow a management plan endorsed by the local citizen working group have not been made.” Final EIS at 70, 77, 133, 199 (emphasis added). Similarly, FWP discusses application of its game damage policy in instances where bison damage private property, recognizing that said policy does not apply to all instances of damage and that a landowner is required to provide hunting access before the game damage policy applies. Final EIS at 75-76.

43. FWP is unequivocally liable for all costs incurred as a result of its failure to develop and adopt a management plan that meets the objectives of Mont. Code Ann. § 87-1-216(5). Statements by FWP qualifying or limiting the clear liability imposed under Mont. Code Ann. § 87-1-216(7) are improper and in violation of said law.

Count Four—Attorney's Fees

44. Plaintiff incorporates the foregoing facts and allegations as if set forth fully here.
45. Pursuant to Mont. Code Ann. §27-8-313, Plaintiff, on behalf of its members, is entitled to an award of its reasonable attorney's fees and costs as successful applicants for a declaration of their rights and status and the obligations of Defendant.
46. Attorney's fees may further be awarded under the private attorney general doctrine under the following test: 1) the strength or societal importance of the public policy is vindicated by the litigation; 2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff; 3) the number of people standing to benefit from the decision; and 4) the equity of imposing attorney fees on the party against whom fees are sought. *See, Montanans for the Responsible Use of School Trust v. State, ex rel., Bd. of Land Com'rs, 1999 MT 263, ¶ 66, 296 Mont. 402, 989 P.2d 800 (citing Serrano v. Priest, 569 P.2d 1303, 1314 (Cal. 1977)); Finke v. State, ex rel., McGrath, 2003 MT 48, ¶ 33, 314 Mont. 314, 65 P.3d 576.*
47. Plaintiff, on behalf of its members, is entitled to an award of its attorney's fees under Mont. Code Ann. § 27-8-313 or, alternatively, under the private attorney general doctrine because: this case will vindicate important societal policies; this case requires private enforcement and the magnitude of the resultant burden upon Plaintiff is great; a large number of people stand to benefit from the decision in this case; and it is equitable and right to impose attorney's fees upon Defendant.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment as follows:

1. Declaratory relief adjudging that:

- a. FWP's rejection of the "No-Action" alternative was arbitrary and capricious and in violation of MEPA;
- b. FWP's failure to take a "hard look" at evidence and risks associated with disease transmission was arbitrary and capricious and in violation of MEPA;
- c. FWP's incorporation of new information into the Final EIS, absent a supplemental environmental impact statement and additional public comment, was arbitrary and capricious and in violation of MEPA;
- d. FWP's Final EIS relies on stale information and data, and was thus arbitrarily and capriciously adopted in violation of MEPA;
- e. FWP's failure to give due consideration to opposing views was arbitrary and capricious and in violation of MEPA;
- f. FWP's reliance on public opinion surveys was arbitrary and capricious and in violation of MEPA;
- g. FWP failed to conduct an adequate analysis regarding irretrievable resource commitments in violation of MEPA;
- h. FWP failed to adequately consider the secondary and cumulative impacts of the four alternatives it considered, in violation of MEPA;
- i. FWP lacks statutory authority to relocate bison from YNP;
- j. FWP lacks statutory authority to relocate bison, generally; and
- k. FWP is liable for all costs incurred as a result of its failure to develop and adopt a management plan meeting the objectives of Mont. Code Ann. § 87-1-216(5).

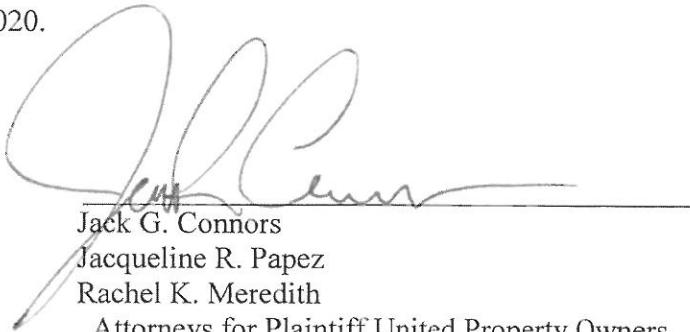
2. Permanent injunctive relief:

- a. Restraining all implementation and enforcement of the Final EIS and ROD in their current form; and
- b. Affirmatively requiring any plans adopted by FWP to rely on adequate environmental impact study and conform with FWP's statutory obligations and authorizations.

3. For an award to Plaintiff of its attorney's fees and costs as provided by law and equity; and

4. For such other relief as this Court may deem proper.

DATED this 9th day of March, 2020.



Jack G. Connors
Jacqueline R. Papez
Rachel K. Meredith
Attorneys for Plaintiff United Property Owners
of Montana, Inc.

AGREEMENT

THIS SETTLEMENT AGREEMENT is made and entered into this 22 day of March, 2021, by and between United Property Owners of Montana, Inc. ("UPOM"), and Montana Department Fish, Wildlife & Parks ("FWP").

WHEREAS, on or about January 7, 2020 FWP issued a Final Programmatic Environmental Impact Statement for Bison Conservation and Management in Montana ("Final EIS") and an associated Record of Decision ("ROD"); and

WHEREAS, on or about March 9, 2020, UPOM filed a Complaint for Declaratory and Injunctive Relief against FWP, in Montana Tenth Judicial District Court, Fergus County, (Cause No. DV-2020-30) challenging the Final EIS and ROD; and

WHEREAS, the parties desire to settle the litigation on the terms stated below.

NOW, THEREFORE, in consideration of the mutual promises contained in this Agreement, and other good and valuable consideration, the parties agree as follows:

1. The parties agree that 1) the Final EIS and the ROD improperly rejected the "no-action" alternative; 2) the Final EIS failed to take a "hard look" at disease transmission between bison, livestock, and other wildlife; 3) the public did not have an opportunity to comment on additional information considered and incorporated in the Final EIS; 4) the length of time between the draft and the Final EIS has rendered the Final EIS stale; and 5) the Final EIS fails to address, and is contrary to, the mandates set forth in MCA 87-1-216. For these reasons, the parties agree the Final EIS and the ROD should be vacated and declared null and void. To achieve that result the parties will file the Stipulated Judgment attached hereto with the District Court.

2. FWP shall not undertake a Final EIS process similar to that at issue in this case for a period of 10 years from the date of this Agreement, unless the species Plains bison (*Bison bison bison*) is listed as an endangered or threatened species under the Federal Endangered Species Act of 1973, as amended. The parties acknowledge and agree that UPOM may bring an action for injunctive relief to enforce this provision.

3. To offset a portion of UPOM's attorney fees and costs incurred in the litigation, FWP shall pay to UPOM the sum of \$5,000, which shall be paid within 30 days from the date of this Agreement.

4. This Agreement may be signed in counterparts, which when combined, shall contain the entire Agreement between the parties.

5. If either party has to file an action to enforce this agreement, the prevailing party shall be entitled to their reasonable attorney fees and costs incurred.

6. This Agreement shall be binding upon the successors, and assigns of the parties hereto.

7. The Parties hereby warrant that they are duly authorized to enter into and execute this Agreement on behalf of the entity for which they are signing.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date hereinabove written.

UNITED PROPERTY OWNERS OF MONTANA, INC.

By: Mark L Robbins
Its: President

MONTANA FISH, WILDLIFE & PARKS

By: K. St. John
Its: Director

MONTANA TENTH JUDICIAL DISTRICT COURT, FERGUS COUNTY

UNITED PROPERTY OWNERS OF
MONTANA, INC., a Montana non-profit
corporation,

Plaintiff,

vs.

MONTANA DEPARTMENT OF FISH,
WILDLIFE & PARKS, an Agency of the State
of Montana,

Defendant.

Cause No.: DV-2020-30

Judge: Jon A. Oldenburg

STIPULATED JUDGMENT

The parties to this action having filed a Notice that this action has been fully settled and a
Request for entry of a Stipulated Judgment; and good cause appearing therefor;

IT IS HEREBY ORDERED that the Final Programmatic Environmental Impact
Statement for Bison Conservation and Management in Montana, and the associated Record of
Decision, issued by the Montana Department of Fish, Wildlife & Parks on or about January 7,
2020, are hereby VACATED, declared null and void, and of no further force or effect.

DATED this ____ day of _____ 2021.

Honorable Jon A. Oldenburg
DISTRICT COURT JUDGE

cc: Jacqueline R. Papez / Jack G. Connors
Rebecca Dockter / Kevin Rechkoff