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MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

WESTERN WATERSHEDS PROJECT, GALLATIN WILDLIFE ASSOCIATION, BUFFALO FIELD CAMPAIGN, & YELLOWSTONE BUFFALO FOUNDATION, Petitioners, v. STATE OF MONTANA and MONTANA DEPARTMENT OF FISH, WILDLIFE & PARKS, an agency of the State of Montana, Respondents.	Cause No. DV-10-317A RESPONDENTS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on cross-motions for summary judgment. Respondents Montana Department of Fish, Wildlife and Parks (FWP or Department) replies in support of its motion for summary judgment as follows.

ARGUMENT

Plaintiffs' claim fails for multiple reasons. First, they have not articulated a standard of the public trust in wildlife that is based in Montana law. Further, while the Montana Supreme Court has only tangentially touched on the issue where it has, the Court's analysis mirrors that of FWP. Similarly, Plaintiffs fail to apply the test set forth by the U.S. Supreme Court in *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892) (*Illinois Central*), later adopted by the Montana

Supreme Court in *Mont. Coalition for Stream Access, Inc. v. Curran*, 210 Mont. 38, 682 P.2d 163 (1984) (*Curran*), concerning state alienation of public resources. Proper analysis of the *Illinois Central* rule shows FWP's agreement allowing Turner Enterprises, Inc. (TEI) to keep 75 percent of the bison offspring in exchange for TEI's five years of care and management does not violate the public trust, but, rather, is in furtherance of the Quarantine Feasibility Study (QFS), the purpose of which is long-term bison conservation in Montana. Likewise, even employing the test Plaintiffs suggest, FWP's agreement with TEI passes muster.

Second, by and large, FWP's public trust duties have been codified in the Department's governing statutes, as have those of many resource management agencies. To the extent they have not, FWP is meeting its trust duties by undertaking the QFS, one of the purposes of which is long-term conservation of bison in Montana. The Department elected to undertake this study, without a specific statutory mandate to do so, in order to avoid simply slaughtering bison as they migrated out of Yellowstone National Park. Admin. Rec. at 2681.

Finally, federal courts have recognized that agencies have inherent flexibility in their management statutes for dealing with Yellowstone bison. FWP's statutory authority is likewise broad and allows for a variety of management options for the Department, ranging from conservation to outright slaughter. The agreement with TEI – which keeps the bison alive – falls within that range of options. Additionally, courts have rejected Plaintiffs' contention that the genetics of Yellowstone bison dictate agencies' management actions of them.

A. Plaintiffs have not articulated tangible legal standards for their public trust theory.

Plaintiffs' briefing in this case reveals the fundamental problem with their theory of the public trust doctrine: Plaintiffs allege FWP has failed to meet a standard that even Plaintiffs themselves cannot articulate.

Plaintiffs complain that FWP "abandoned" its public trust duties, "violated" the public trust, and "misconstrued" the public trust. *See e.g.* Plaintiffs' Answer Brief, pp. 9, 13, 2. They contend that the public trust doctrine confers "obligations" and "duties" on FWP and lament that the Department does not consider the correct "standard" in reviewing its duties to the public. *See e.g.* Plaintiffs' Answer Brief, pp. 3, 9, 13. But at no point do Plaintiffs attempt to articulate what those "obligations," "duties," and "standards" are. Plaintiffs simply treat FWP's agreement with TEI as a *per se* violation of the public trust. But the law does not support this position. *See Illinois Central*, 146 U.S. at 455-56; Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 486 (1969-70) (noting "there is no general prohibition against the disposition of trust properties, even on a large scale.").

Plaintiffs' case exemplifies exactly why FWP's actions should be evaluated according to its *statutory* duties, not a common law theory. For instance, Plaintiffs do not explain how an agency is to consider the public trust in its management decisions. Nor do Plaintiffs indicate what factors a court should look to in reviewing an agency decision. While Plaintiffs claim FWP's agreement with TEI violates the public trust, as discussed below, the case they rely on for support – *Illinois Central* – does not stand for that proposition. Moreover, while presuming to rely on *Illinois Central* for support, Plaintiffs fail to analyze the one tangible test set forth in that case. In essence, Plaintiffs allege little more than FWP's agreement with TEI is a violation of the public trust simply because Plaintiffs disagree with it. This is precisely what FWP warned about in its prior briefs. *See* Respondents' Brief in Support, p. 17; Respondents' Answer Brief, pp. 5-6.

B. Montana law does not support Plaintiffs' public trust theory.

Plaintiffs' inability to articulate tangible legal standards for their public trust theory is a direct result of the fact that there is no clear legal authority in Montana for their claim.

The truth of this is nowhere better demonstrated than the simple fact that Plaintiffs' briefing – on both sides of this issue – is void of Montana caselaw standing for the proposition that there is a common law public trust duty to wildlife in Montana. In support, Plaintiffs rely instead on cases interpreting the doctrine with respect to water resources and state trust land, both of which are explicitly set forth in the Montana Constitution. *See e.g.* Plaintiffs' Answer Brief, p. 4. Indeed, the sole authority for the very crux of Plaintiffs' claims in this case is nothing more than a law review article. *See* Plaintiffs' Answer Brief, p. 7 ("FWP must evaluate the impacts of its actions on the bison resource and public trust values, and undertake only those actions that provide clear public benefit....") (*citing* Deborah g. Musiker, Tom France & Lisa Hallenbeck, *The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 Pub. Land & Resources L. Rev. 87, 90, 100 (1995)).

Contrary to Plaintiffs' suggestions FWP does not contend it has no common law public trust duties, nor is it attempting to "write the common law doctrine out of existence." *See* Plaintiffs' Answer Brief, p. 17. Rather, FWP contends that that while the public trust concept is enshrined in the Montana Constitution and the common law, agencies such as FWP look for specific guidance on how to meet that duty by following the Department's *statutory* mandate as set forth by the legislature. Indeed, the legislature enacted such legislation to "codify and provide specifics" as to how agencies are to meet these constitutional provisions. *See Bitterroot River Protective Assn. v. Bitterroot Conservation Dist.*, 2008 MT 377, ¶ 51, 346 Mont. 507, 198 P.3d 219 (*Bitterroot River*). This is consistent with the approach taken by other state and federal courts. *See e.g. Cal. Envtl. Protec. Info. Ctr. v. Cal. Dept. of Forestry & Fire Protec.*, 187 P.3d 888, 926 (Cal. 2008) (California Supreme Court noting "the duty of government agencies to protect wildlife is primarily statutory."); *Ctr. for Biological Diversity v. FPL Group, Inc.*, 166

Cal. App. 4th 1349, 1364 (Cal. App. 1st Dist., 2008); *Sierra Club v. Andrus*, 487 F. Supp. 443 (D.D.C. 1980); *Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981) (both rejecting notion that National Park Service has broader public trust duties beyond what is contained in agency's governing statutes). While Plaintiffs seem to believe that FWP's common law public trust duty is strictly for conservation, the simple reality is that FWP – *statutorily* – is obligated to manage Yellowstone bison as a "species requiring disease control." Mont. Code Ann. § 87-1-216(1)(a). In this regard, the Department's duties are more nuanced that Plaintiffs seem to appreciate. However, as discussed in more detail below, whatever *common law* public trust duties FWP has are being met through the QFS, one of the purposes of which is long-term bison conservation in Montana.

While the Montana Supreme Court has not explicitly ruled on the application of the public trust doctrine to wildlife management, where it has touched on the issue the Court's analysis mirrors that of FWP. *See Hagener v. Wallace*, 2002 MT 109, 309 Mont. 473, 47 P.3d 847; *State v. Boyer*, 2002 MT 33, 308 Mont. 276, 42 P.3d 771. In *Hagener*, the Court did not directly address the issue, but did note that "*statutes*... are essential to ensure the health and safety of Montana's natural wildlife population. They reflect the theory underlying environmental protection that being proactive rather than reactive is necessary to ensure that *future generations enjoy both a healthy environment and the wildlife it supports*." *Hagener*, ¶ 33 (emphasis added). Despite Plaintiffs' contention otherwise, this language regarding "protection" of wildlife for "future generations" is classic public trust doctrine language. *Hagener*, in effect, recognizes that the public trust is now rooted in statute – not the common law.

Similarly, the Montana Supreme Court's analysis in *Boyer* reflects FWP's contention that while general trust principles are found in the Montana Constitution, where the legislature enacts

statutes, those statutes largely subsume the common law public trust. Indeed, the decision in *Boyer* is useful for at least two reasons. First, the Court properly analyzed the Department's duties with respect to the public trust. Specifically, the Court indicated:

> Article IX, Section 1(1) of the Montana Constitution provides that 'the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.' To safeguard Montana's wildlife for present and future generations, the Legislature provided for the appointment of game wardens to 'enforce the laws of this state and the rules of the Department with reference to the protection, preservation, and propagation of game and fur-bearing animals, fish, and game birds.' Section 87-1-502(2), MCA.... In summary, our Constitution, laws, and regulations mandate special considerations to assure that our wild places and the creatures that inhabit them are preserved for future generations.

Boyer, ¶ 22. The Court begins by acknowledging the Constitution's "clean and healthful environment" provision because, unlike state trust lands and water resources, there is no direct reference to wildlife management in the Montana Constitution. *See Id.* The Court then notes that acting within this broad "clean and healthful environment" authority, the legislature has enacted *statutes* "to safeguard Montana's wildlife for present and future generations" – i.e., the public trust. *See Id.* In support, the Court cites Mont. Code Ann. § 87-1-502(2) which provides FWP's game wardens the authority to enforce FWP's "laws... and... rules." *Id.* Then, in summary, the Court indicates that it is "our Constitution, laws, and regulations" which guarantee "our wild places and the creature that inhabit them are preserved for future generations." *Id.* While Plaintiffs argue that *Boyer*'s reference to "laws" does not necessarily exclude the "common law," read in context, it is obvious the Court meant "statutes" when it said "laws," because the Court was, in fact, relying on a statute for that portion of its analysis. *See Id.* (relying on Mont. Code Ann. § 87-1-502(2)). The Court also noted that in acting in this statutory capacity, FWP wardens "are acting not only as law enforcement officers, but *as public trustees protecting and conserving Montana's wildlife and habitat for all of its citizens*." *Boyer*, ¶ 24 (emphasis added).

Second, to the extent the Court in *Boyer* found that nine fish constituted a threat to the river's resources for future generations as Plaintiffs contend (*see* Plaintiffs' Answer Brief, p.15), that conclusion was based on a FWP *regulation* setting a 10-fish-per-person limit to protect the species – *not* a common law notion of what would constitute a threat to the population. *Boyer*, ¶ 26. But unlike the fish at issue in *Boyer*, bison are not a game animal, nor is the Department obligated to manage them as such. On the contrary, Yellowstone bison are a "species requiring disease control." Mont. Code Ann. § 87-1-216(1)(a). Indeed, unlike the fish at issue in *Boyer*, the catch limit of which was 10 per person, there is no minimum number of bison that Montana is required by law to maintain or that otherwise have to be allowed in the state.

The Montana Supreme Court's holding in *Curran* is instructive, though not for the reasons Plaintiffs believe. 210 Mont. 38, 682 P.2d 163. Plaintiffs claim that *Curran* holds that "*both* the public trust doctrine *and* the constitution are relevant" in considering the public's interests. *See* Plaintiffs' Answer Brief, p. 4 (emphasis original). This is true, but ultimately misses the point. In *Curran*, the Court was attempting to determine the parameters of Art. IX, §3(3) of the Montana Constitution, which provides that "all… waters within… the state are the property of the state for the use of its people…." The legislature had not enacted a statute addressing the issue. Given the lack of statutory direction, the Court was forced to look to the common law public trust doctrine for guidance instead. *See Curran*, 210 Mont at 52, 682 P.2d at 170. Indeed, as the Montana Supreme Court later explained, in response to *Curran*, the legislature enacted the Stream Access Law to "codify and provide specifics" with respect to recreational river use. *Bitterroot River*, ¶ 51. Thus, both *Curran* and *Bitterroot River* reflect the Montana Supreme Court looking to the common law public trust doctrine primarily when the legislature has not addressed the issue through statute. Here, FWP has numerous statutes that

"codify and provide specifics" with respect to its management both of wildlife generally, as well as bison specifically. *See e.g.* Mont. Code Ann. § 87-1-216.

However, assuming the Department has public trust duties to wildlife that exist beyond its explicit statutory obligations, *Curran* is also significant because it provides what little guidance there is as to the application of those duties in Montana. In *Curran*, the Supreme Court adopted the *Illinois Central* test concerning state alienation of public resources to private entities. *See Curran*, 210 Mont at 47, 682 P.2d at 168 (*quoting Illinois Central*, 146 U.S. at 452-53). While Plaintiffs presume to rely on both *Curran* and *Illinois Central* for support, their briefing in this case has misrepresented the rule for which those cases stand. *See* Plaintiffs' Answer Brief, p. 9 (stating unequivocally "The state cannot abandon or relinquish its trust responsibilities to a private party by transferring property" and citing *Curran* and *Illinois Central* in support). In any event, Plaintiffs thus far have failed to apply that test to the facts of this case. FWP has. *See* Respondents' Answer Brief, pp. 6-7. That test is:

> The trust with which they are held, therefore, is governmental and cannot be alienated, *except in those instances mentioned of parcels used in the improvement of the interest thus held*, or *when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.*

As discussed in Respondents' Answer Brief (pp. 6-7), FWP's agreement with TEI meets both of these circumstances and thus does not violate any common law public trust duty. First, by allowing TEI to keep a portion of the offspring, in exchange for TEI's management of QFS bison for five years, the alienation was "in the improvement of the interest thus held." *Illinois Central*, 146 U.S. at 455-56. TEI's management of the QFS bison allows the QFS to continue toward its ultimate goal of bison conservation efforts in Montana. In this respect, the agreement with TEI improves the public's interest in conservation of Yellowstone bison in Montana. *See Id.*

Second, under the terms of the agreement, TEI's portion of the offspring does not pose a

"detriment to the public interest" of the remaining Yellowstone bison herd. *Id.* The 88 bison at issue in this case were only a small fraction of the overall herd, which, as Plaintiffs acknowledge in their brief, fluctuates between 2,000 and 5,000 bison. *See* Plaintiffs' Brief in Support, pg. 3 (citing Admin. Rec. at 2556). It is difficult to imagine how a *portion* of the offspring of four percent of the overall herd constitutes a "detriment to the public interest" in the remaining 96 percent of bison. *See e.g. Western Watersheds Project v. Salazar*, 766 F. Supp. 2d 1095, 1119 (D. Mont. 2011) (*WWP I*) (attached as Exhibit A to Respondents' Answer Brief). (finding no injury to Yellowstone herd by NPS slaughter because herd "has shown remarkable resilience," and "emphatically" acknowledging the Yellowstone bison "is plentiful and reproductively prolific"). This is even more so given that the bison offspring were born on TEI's Green Ranch, under the care of ranch managers, as part of a scientific study and, thus, have never truly been a part of the Yellowstone herd.

In a bigger sense, the TEI agreement does not pose a "detriment to the public interest" precisely because, contrary to Plaintiffs' contention, bison are not "rare" in Montana. *See* Plaintiffs' Answer Brief, p. 14. Yellowstone National Park provides a constant source of bison which move into the state every winter and spring. The migratory path they take is largely the same from one year to the next. Only the actual numbers vary, based largely on the severity of the winter. During particularly harsh winters, such as 2010-11, approximately 1400 bison moved into Montana.[1] Even though many years these bison are rounded up and shipped to slaughter, the Yellowstone herd continues to grow. The National Park Service's (NPS) 2012 summer count revealed the herd had grown nearly 14 percent over the past year and now numbers over 4,200 animals. *See* Respondent's Answer Brief, Exhibit C. This is because the herd has "shown

[1] This number comes from the IBMP's 2010-2011 Annual Report, p. 10. The report, along with virtually all other IBMP documents, is available at www.ibmp.info, a document clearinghouse maintained by the IBMP partner agencies.

remarkable resilience," and the Yellowstone bison is "plentiful and reproductively prolific...." *WWP I*, 766 F. Supp. 2d at 1119. Bison numbers in Montana are relatively small, but there is a "plentiful and reproductively prolific" source of them that move into the state each year and keeps them from being rare. *See WWP I*, 766 F. Supp. 2d at 1119.

FWP's agreement with TEI also meets the test created by Plaintiffs, although Plaintiffs do not attempt to apply that test either. *See* Plaintiffs' Answer Brief, p. 3 (before entering TEI agreement must first "analyz[e] or pursu[e] other alternatives, and secur[e] clear and at least equal public benefit for its decision....").

First, as discussed above, FWP "analyzed and pursued other alternatives" throughout the QFS. Prior to accepting TEI's proposal, FWP "analyzed" collectively no fewer than 14 alternatives for placement of the bison.[2] *See* Admin. Rec. at 2687-2690 (Phase I), 2826-2828 (Phase II/III), 3150-3153 (Wind River Translocation), and 7823-7825 (TEI Translocation). In these documents FWP also explained why it was not considering five other options. *See* Admin. Rec. at 3153-54 and 7825.[3] FWP also "pursued" another alternative when it issued the environmental assessment and decision notice to send the bison to the Wind River Reservation. Admin. Rec. at 3140-3180. At the last minute the Tribes withdrew their proposal. Admin. Rec. at 7823. Notably, despite these efforts, Plaintiffs somehow claim that FWP "failed to plan ahead" for placement of the first cohort of QFS bison. *See e.g.* Plaintiffs' Answer Brief, pp. 2 and 17. Regardless, FWP has clearly "analyzed and pursued other alternatives" as Plaintiffs argue is required.

Second, in selecting TEI's proposal for the bison, FWP "secured clear and at least equal

[2] FWP acknowledges some of these alternatives were repeatedly considered. Nevertheless, this repeated inclusion reflects that the Department considered them at each stage of the process.

[3] Likewise, FWP acknowledges some of these options were repeatedly considered. Nevertheless, this repeated inclusion reflects that the Department considered them at each stage of the process.

public benefit." As a result of the agreement with TEI, FWP and the citizens of Montana got five years of care and management by an experienced organization that was estimated at a cost of $480,000. Admin. Rec. at 3251. They also got the continuation under ideal circumstances of the QFS, one of the goals of which is long-term bison conservation in Montana. *See* Admin. Rec. at 3244-3259. Under the terms of TEI's proposal, FWP will receive more of the bison back – approximately 150 animals, including all of the original QFS bison – than any of the other proposals, all of which anticipated keeping all the bison. Admin. Rec. at 7834. Thus, FWP's agreement with TEI "secured clear and at least equal public benefit" and did not violate the public trust doctrine – even under Plaintiffs' own standard.

Plaintiffs' approach to this case exhibits the exact problems warned about by Professor Joseph Sax in his seminal law review article on the public trust doctrine. Sax, *The Public Trust Doctrine in Natural Resource Law*, 68 Mich. L. Rev. at 486.[4] For example, as discussed above, not only do Plaintiffs fail to apply the test set forth in *Illinois Central*, they also rely heavily on "general statements which seem to imply that a government may never alienate trust property by conveying it to a private owner[.]" *See Id.* at 485. "But a careful examination of the cases will show [those statements] are dicta and do not determine the limits of the state's legitimate authority in dealing with trust [resources]." *Id.* at 486. The first thing to recognize is that "there is no general prohibition against the disposition of trust properties, even on a large scale." *Id.* Accordingly, "as these cases make clear, the courts have permitted the transfer of some element of the public trust into private ownership and control, even though that transfer may exclude or impair certain public uses." *Id.* at 488. Indeed, "what one finds in the cases is not a niggling preservation of every inch of public trust property against any change, nor a precise maintenance

[4] It should be noted that Plaintiffs recognize the utility of this article as they rely on it in their Brief in Support of Summary Judgment (pp. 2-3).

of every historical pattern of use." *Id.*

Ultimately, however, a "niggling preservation of every inch of public trust property" is precisely what Plaintiffs seek in this case. But in relying on broad statements about the public trust to resources not applicable to the facts of this case, failing to otherwise cite Montana caselaw on point, and failing to apply either the *Illinois Central/Curran* test or their own test, Plaintiffs have failed to articulate a workable standard of the public trust to wildlife in Montana. Further, what Montana law does apply supports the FWP's agreement with TEI. FWP is meeting whatever common law public trust duties remain by undertaking the QFS, one of the purposes of which is long-term bison conservation in Montana. Plaintiffs' claim should be rejected by this Court. FWP is entitled to summary judgment.

C. FWP's agreement with TEI is allowed under the Department's broad statutory authority to manage Yellowstone bison as a "species requiring disease control."

FWP's broad authority to manage Yellowstone bison as a "species requiring disease control," provides for a variety of management options, "including but not limited to" public hunting. *See* Mont. Code Ann. §§ 87-1-216(1)(a) and (2)(a). This broad authority includes not only public hunting, but also the authority for the Department to slaughter bison as they leave Yellowstone National Park. Accordingly, FWP's agreement with TEI – which resulted in the bison being kept *alive* – was allowed under this authority as well, particularly because it furthered the Department's broader conservation goals provided for in the QFS.

Plaintiffs recognize FWP has broad statutory authority to manage bison, a point with which FWP fully agrees. As Plaintiffs correctly note, there are numerous management options available to the Department under the "including but not limited to" language in Mont. Code Ann. § 87-1-216 (2)(a). *See* Plaintiffs' Answer Brief, pp. 8-9 (listing various management

options). While it should be noted that Plaintiffs gloss over the difficulty of many of those options and fail to acknowledge that many of them were not necessarily available when FWP needed to move this cohort of bison, FWP nonetheless agrees these are valid possibilities that would fall within the Department's broad authority under the statute. However, FWP interprets the statute also to authorize the agreement with TEI. This interpretation is entitled to deference. *See Sleath v. W. Mont. Home Health Servs., Inc.*, 2000 MT 381, ¶ 37, 304 Mont. 1, 16 P.3d 1042, *quoting Chevron, U.S.A., Inc. v. Nat. Resources Def. Council*, 467 U.S. 837, 844 (1984).

Federal courts have recognized that agencies have broad management discretion for Yellowstone bison. For example, in *Intertribal Bison Coop. v. Babbitt*, 25 F. Supp. 2d 1135 (D. Mont. 1998) (*ITBC*), the court considered a challenge to the NPS decision to slaughter Yellowstone bison as they moved out of the park into Montana. Plaintiffs maintained that NPS was prohibited from killing any bison. NPS, however, argued that its broad authority under the NPS Organic Act, 16 U.S.C. § 1, allowed the agency to kill bison if it determined it was necessary to meet broader conservation goals. The court agreed with the NPS. Of particular note, the court concluded the NPS had the authority to kill bison under its *general conservation authority* in 16 U.S.C. § 1, *rather* than a Yellowstone-specific statute which allowed the NPS the authority to "dispose of" bison. Explaining that it was "not prepared to define conservation to exclude destruction or removal of wildlife," the court concluded killing bison was allowable "when serving the broader conservation goals" of 16 U.S.C. § 1. *ITBC*, 25 F. Supp. 2d at 1138.

ITBC is noteworthy for at least two reasons. First, the court recognized that the NPS – an agency with an almost exclusively conservation-oriented mandate – is entitled to kill individual members of a species in order to perpetuate broader conservation goals. If the NPS, with its conservation mandate, is allowed to kill bison in furtherance of broader goals, then surely FWP,

an agency obligated to manage Yellowstone bison as a "species requiring disease control," Mont. Code Ann. § 87-1-216(1)(a), is allowed to enter the agreement with TEI, particularly when it insures the bison stay alive.

Second, the *ITBC* court based its reasoning not on a statute that specifically allowed the NPS to "dispose of" Yellowstone bison, but rather on the broader conservation principles enshrined in the NPS Organic Act. 16 U.S.C. § 1. Applying this reasoning here, FWP is arguably entitled to enter the agreement with TEI, even without falling back on the Department's specific bison management duties found in Mont. Code Ann. § 87-1-216, provided the agreement furthers broader agency goals.

In a more recent matter, the court in *WWP I* considered another challenge to the NPS's authority to kill bison, this time in the context of the agency's statutory authority to "dispose of" Yellowstone bison. 766 F. Supp. 2d 1095. Having determined in *ITBC* that the NPS Organic Act allowed the agency to kill bison pursuant to the broad conservation principles set forth therein, the court in *WWP I* went on to further uphold the NPS's authority to "dispose of" the "surplus" bison by killing them under 16 U.S.C. § 36 (providing Secretary of Interior may donate Yellowstone bison to "Federal, State, county, and municipal authorities for preserves, zoos, zoological gardens, and parks," or "sell or otherwise dispose of the surplus buffalo of the Yellowstone National Park herd...."). *WWP I*, 766 F. Supp. 2d at 1115-1116.

The holding in *WWP I* is significant, for if "dispose of" can be interpreted to include killing bison, then "including but not limited to" must fairly be interpreted to authorize FWP's agreement with TEI for at least two reasons. First, the language "including but not limited to" found in Mont. Code Ann. § 87-1-216 is much broader than the "dispose of" language at issue in *WWP I*. Second, for the court in *WWP I* to have interpreted that wording to include killing bison

by NPS – again, an agency with an almost exclusively conservation-oriented mandate – then "including but not limited to" necessarily takes on an even broader meaning in the context of FWP's broader mandate to manage Yellowstone bison not for conservation purposes like the NPS, but rather for "disease control." Mont. Code Ann. § 87-1-216(1)(a).

Separating Plaintiffs' innuendo in this case from their actual legal claim reveals an inherent flaw in their approach to this case. By claiming that FWP did not have specific statutory authority to enter the agreement with TEI and therefore violated the public trust doctrine, Plaintiffs attempt to conjure a *common law* legal claim out of what they allege is a *statutory violation*. *See* Complaint, p. 16. But if FWP did not actually have the authority to enter the agreement with TEI, then FWP violated a *statute*, not the common law. *See e.g. Cal. Envtl. Protec. Info. Ctr. v. Cal. Dept. of Forestry & Fire Protec.*, 187 P.3d 888, 926 (Cal. 2008) (*EPIC*) (holding that because the agency failed to meet statutory requirements, "Its violation, therefore, is not of some general public trust duty, but of a specific statutory obligation."). The appropriate remedy for such a violation could be through the Montana Administrative Procedure Act, Mont. Code Ann. § 2-4-101 *et seq.*, or otherwise – but not through creating a new area of common law. Plaintiffs have tried to bootstrap a common law claim where they otherwise allege a statutory violation, but without seeking the remedies provided for a statutory violation. This approach should be rejected by this Court.

Federal courts have acknowledged that agencies have broad management authority for Yellowstone bison, even where the statutory language at issue is narrower than that here and the proposed agency action is broader than FWP's action in this case. *See WWP I*, 766 F. Supp. 2d 1095. FWP's interpretation of its authority to manage Yellowstone bison as a "species requiring disease control," Mont. Code Ann. § 87-1-216(1)(a), is entitled to deference. *Sleath*, ¶ 37,

quoting Chevron, 467 U.S. at 844. FWP's motion for summary judgment should be granted.

D. Federal courts, including the Ninth Circuit, have rejected Plaintiffs' argument that the Yellowstone bison's genetics dictate agencies' management of the bison.

Lastly, Plaintiffs argue FWP has not ensured its decision will protect the QFS bison or the broader conservation goals of the QFS.

As an initial matter, it should be clarified what bison are at issue here. As stated above, TEI is keeping a portion of bison offspring born at TEI's Green Ranch in exchange for TEI's care and management of the larger bison herd for five years. Admin. Rec. at 3244-3259. At the end of that time the remaining original 88 bison and 25 percent of their offspring will be returned to FWP. Admin. Rec. at 3251. These are QFS bison. As part of the QFS, they have been removed from Yellowstone, held in pens, and tested repeatedly. *See generally* Admin. Rec. at 2659-2677. They were then shipped to the Green Ranch. The offspring were born at Green Ranch, under the care of ranch managers. The offspring are not from, nor have they ever been to, Yellowstone National Park. Indeed, the original bison that were actually removed from Yellowstone will be returned to FWP. Furthermore, the QFS itself was a "study" to determine whether "quarantine" of bison was a "feasible" method to certify that individuals or groups of Yellowstone bison are free from brucellosis. Hence the name *Quarantine Feasibility Study*. As a "study," the QFS was intended to identify additional future management options for conservation of Yellowstone bison by FWP. In this way, the QFS was a means to an end, not an end in itself.

As Plaintiffs rightly acknowledge, these bison are *not* wild Yellowstone bison. *See* Plaintiffs' Answer Brief, pp. 13-14 (acknowledging FWP identified three lines of bison – a commercial line, a wild line, and this quarantine study line and citing Admin. Rec. at 3315). Thus, Plaintiffs' argument regarding these bison, in essence, is that although not wild

Yellowstone bison and although born on a ranch, under the care of ranch managers, their *genetics* should dictate FWP's management actions.

This argument regarding Yellowstone bison genetics, however, has already been rejected by federal courts. *See WWP I*, 766 F. Supp. 2d 1095, *aff'd, Western Watersheds Project v. Salazar*, No. 9:09-cv-00159-CCL (9th Cir. Aug. 2012) (noting decision in *WWP I* was "thorough and well-reasoned") (*WWP II*) (attached to Respondents' Answer Brief as Exhibit B). While noting that Plaintiffs were "clearly" "not supporters of the IBMP," the court rejected these same Plaintiffs' arguments that supposedly new genetic information required NPS to conduct additional environmental analysis of their management of the herd. *WWP I*, 766 F. Supp. 2d at 1106, 1108-1109. In particular, the court noted the study's conclusion that culling the Yellowstone herd "will seldom accelerate loss of genetic variation when population size remains larger than 2,000 to 3,000 individuals." *Id.* at 1109 (quoting genetics study). The court then concluded that because "the current herd size is 3,700, there is no imminent or future threat of irreparable harm to the genetic diversity of the Yellowstone bison herd." *Id.*

Plaintiffs will undoubtedly point out that the 88 QFS bison at issue here are far fewer than the 2,000 to 3,000 individuals necessary to maintain genetic diversity the court relied on in *WWP I*. This is unavailing for at least two reasons. First, while FWP does not "claim[] the entire Yellowstone population [is] under its jurisdiction" as Plaintiffs contend (*see* Plaintiffs' Answer Brief, p. 17), it does share bison management responsibilities for the Yellowstone herd with the other IBMP partner agencies. Therefore, genetically speaking, while the 88 QFS bison at issue here come from the same gene pool as the Yellowstone herd, they are largely insignificant, because they are only a subgroup of the larger and more genetically diverse Yellowstone herd, which itself is "plentiful and reproductively prolific...." *WWP I*, 766 F. Supp. 2d at 1119.

Moreover, as discussed above, Montana could prohibit *all* Yellowstone bison in the state.[5] FWP is required to manage them as a "species requiring disease control," which could include slaughter. *See* Mont. Code Ann. § 87-1-216(1)(a). Thus, Montana could manage for *zero* genetic diversity of Yellowstone bison in the state.

Plaintiffs' argument that the Yellowstone bison's genetics dictate agencies' management actions of the bison has been rejected by federal courts. It should also be rejected by this Court.

CONCLUSION

FWP is entitled to summary judgment for several reasons. First, Plaintiffs' claim finds little support in Montana law. The cases Plaintiffs rely on do not apply the public trust doctrine to wildlife management. Further, where the Montana Supreme Court has addressed the issue, the Court's analysis mirrors that of FWP: the Department's public trust duties have largely been subsumed by statutes enacted by the legislature according to its constitutional authority. Whatever public trust duties FWP has beyond the statutes, however, are being met by the QFS, one of the purposes of which is long-term bison conservation in Montana. FWP's agreement with TEI furthered those goals by allowing the QFS to proceed.

Second, FWP's broad statutory authority to manage bison as a "species requiring disease control," "including but not limited to public hunting" also authorizes the agreement with TEI. Indeed, in construing agencies' authority for management of Yellowstone bison, federal courts have found narrower statutory language than this to authorize broader agency action than FWP undertook. *See WWP I*, 766 F. Supp. 2d 1095. Courts have also rejected Plaintiffs' fundamental contention that the genetics of Yellowstone bison dictate agencies' management actions of them.

[5] While FWP could prohibit all Yellowstone bison in the state, it instead manages for increased numbers of Yellowstone bison in Montana through the IBMP and subsequent adaptive management efforts.

FWP's interpretation of its statutory authority is entitled to deference.

FWP respectfully requests this Court grant summary judgment in the Department's favor.

Respectfully submitted this 27th day of September 2012.

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CERTIFICATE OF SERVICE

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