

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

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WESTERN WATERSHEDS PROJECT,	)	
GALLATIN WILDLIFE ASSOCIATION,	)	Cause No. DV-10-317A
BUFFALO FIELD CAMPAIGN, and	)	
YELLOWSTONE BUFFALO	)	FINAL ORDER
FOUNDATION	)	AND JUDGMENT ON
	)	CROSS MOTIONS FOR
Petitioners,	)	SUMMARY JUDGMENT
	)	
v.	)	
	)	
STATE OF MONTANA and MONTANA	)	
DEPARTMENT OF FISH, WILDLIFE	)	
& PARKS, an agency of the State of	)	
Montana,	)	
	)	
Respondents.	)	
	)	

This matter comes before the Court on a Complaint for Declaratory and Injunctive Relief, filed by Plaintiffs Western Watersheds Project, Gallatin Wildlife Association, Buffalo Field Campaign, and Yellowstone Buffalo Foundation (collectively, “Plaintiffs” or “Western Watersheds”). Plaintiffs seek declaratory and injunctive relief against the Montana Department of Fish, Wildlife and Parks and the State of Montana (collectively, “the Department”), pursuant to the Department’s Public Trust Doctrine responsibilities contained in the common law, the Montana Constitution, and relevant statutes and regulations.

This cause of action is based upon the Department’s decision to transfer “title” of some bison from the Department’s Quarantine Feasibility Study project (“QFS” or “Quarantine project”) – which involves bison removed from the population of wild,

migratory bison in the Yellowstone ecosystem – to the corporation Turner Enterprises, Inc. (“TEI”), to own and use for its own purposes. Plaintiffs contend that under the circumstances surrounding the challenged decision, the decision amounts to a violation of the Department’s Public Trust Doctrine responsibilities to manage and protect wild bison on behalf of its public beneficiaries, for present and future generations.

The parties filed cross motions for summary judgment, which have been fully briefed and are pending before the Court. Oral argument on the motions was held on March 29, 2013. Having read the briefing, heard the parties’ arguments, and reviewed the administrative record and other relevant documents containing the facts of the case, the Court now issues its ruling. The Court rules that the Department violated its Public Trust Doctrine (“Public Trust”) when it decided to alienate bison from the Quarantine to TEI, and grants Plaintiffs’ Motion for Summary Judgment, for the reasons explained below.

## **BACKGROUND**

Enormous herds of plains bison once roamed North America, but their numbers were decreased to near extinction in the late 1800s and early 1900s, due to widespread hunting and other human pressures. Admin. Rec. at 2288. In 1901 only about 25 wild bison remained in Yellowstone National Park (Admin. Rec. at 8). (“YNP” or “Yellowstone”). Admin. Rec. at 2288. The population has recovered to the point of fluctuating between about 2,000 and 5,000 bison in the Yellowstone ecosystem. Admin. Rec. at 2556. While this partial recovery is remarkable, wild bison populations remain limited “in small fragmented populations” in North America. AR 2659-2660 (citing Boyd 2003). Additionally, most conservation populations show evidence of hybridization with

domestic cattle, which gives them “limited potential as a reliable source for restoration efforts.” (Boyd 2003)

This leaves plains bison restoration and conservation an important mission today. Indeed, as the Department notes, “although bison conservation was conceived and initiated by notable characters in history, who presented a new model of wildlife conservation to the world, the mission was never fully completed . . .” Admin. Rec. at 2673. As “one of a limited genetically “pure” population within the U.S.,” the Yellowstone bison are “important to bison conservation efforts throughout the U.S.,” and are considered the ideal source population for restoration efforts. Admin. Rec. at 3016, 3283; *see also* 2659-2660.

However, restoration has been complicated and hindered by the presence of *Brucella abortus* (brucellosis) in the Yellowstone bison population. Brucellosis is a bacterial disease that can cause domestic cattle to abort their fetuses. Admin. Rec. at 2291-2292. Although bison were most likely originally exposed to the disease by domestic cattle, the livestock industry has since endeavored to eliminate the disease in cattle. Admin. Rec. at 112. Now fear over the potential for transmission from bison to cattle has led the Department and other management agencies to avoid using Yellowstone bison as a source population for restoration efforts, although their genetic status makes them sought-after and valued for such efforts. Admin. Rec. at 3283.

The presence of brucellosis and the bison’s natural migrations in and out of Montana in the Yellowstone ecosystem has also led to intensive management of bison by the Department and partner agencies, which manage bison pursuant to an Interagency Bison Management Plan (IBMP). Admin. Rec. at 2445-2519. In years when bison

migrate into Montana, the state and its federal partners manage them to prevent contact with cattle, by taking actions such as hazing bison into YNP, capturing the bison for slaughter or confinement and possible later release, and occasionally shooting and killing bison on site. Admin. Rec. at 2291-2292, 2454-2457.

The IBMP contemplated the potential use of quarantine as an additional management alternative, however a quarantine program was not fully analyzed in the IBMP and no specific quarantine measures were included in the IBMP. *See, e.g.* AR16, 21, 50, 2717, 2457, 2461-62. Thus, in 2004, the Department and the U.S. Department of Agriculture, Animal and Plant Health Inspection Service (APHIS) proposed, and soon after initiated, a Feasibility Study of Bison Quarantine Procedures (Quarantine Study or QFS) Admin. Rec. at 2659-2677. The QFS was designed to “develop and test appropriate quarantine protocols and quantitatively evaluate the risks . . .” Admin. Rec. at 2660. It was undertaken specifically with the intent of acquiring brucellosis-free bison with the Yellowstone genetics to support conservation and restoration by establishing new public and tribal herds or augmenting existing public and tribal herds. Admin. Rec. at 2659-2660, 2710.

The project stated three primary goals:

1. Develop quarantine procedures, using the best available science and adaptive research strategies, that will allow bison from Yellowstone National Park to be accepted as free of brucellosis and suitable for the establishment of new public and Native American bison herds or to augment existing populations in North America.
2. To research the feasibility of a program to conserve genetics from free-ranging Yellowstone bison by the creation of additional conservation bison herds in other habitats in North America without transmitting brucellosis onto these landscapes.
3. To examine the feasibility of quarantine protocols and the

reintroduction of bison to large grassland systems as a conservation strategy that may benefit the management of bison in the GYA (Greater Yellowstone Area) where populations are expanding beyond social tolerance limits.

Admin. Rec. at 2660-2661.

The Department acknowledged that acquiring brucellosis-free bison through the Quarantine would come at a high cost, but asserted the cost would be justified due in part to the “reward of conserving unique genetics.” Admin. Rec. at 2671. The Department noted that there was only a narrow window of opportunity to restore bison on the North American continent, and promoted the Quarantine study for its potential to restore the species with the “important set of genetics” of the Yellowstone population. Admin. Rec. at 2876. More broadly, the Department sought to restore the bison “operating on the landscape as part of a functional free-ranging bison herd(s),” Admin. Rec. at 2876, and to promote the “long-term greater conservation needs of plains bison (*including maintaining genetic diversity*),” Admin. Rec. at 2878 (emphasis in original).

The study was conducted, and evaluated, in phases, with separate environmental assessments (EA) and decision notices (DN) issued pursuant to the Montana Environmental Policy Act (MEPA). Admin. Rec. at 2679-2708, 2689, 2694-95, 2720. The phases included: Phase I, during which Yellowstone bison calves were captured and tested for brucellosis, and “graduated” to Phase II/III if they tested negative; Phase II, during which bison were held until they reached sexual maturity and then were bred; Phase III, during which bison were held in small cohorts through calving to confirm that cows did not develop brucellosis infection during pregnancy, and that calves subsequently born also tested negative for brucellosis. Affidavit of Ken McDonald at ¶¶ 13-14 (“McDonald Aff.”), Admin. Rec. at 2679-2708, 2689, 2694-95, 2720.

Translocation of graduating bison was the final phase, Phase IV. Admin. Rec. at 3015-3017. During Phase IV, the remaining bison and their offspring were to be kept as a closed herd for a final five-year period while monitoring and testing continued. Admin. Rec. at 7822. The goal of this final phase was to "increase confidence and confirm that none (of the bison) carry a latent infection." Admin. Rec. at 7822. The bison could be translocated to an interim site for this five-year period, Admin. Rec. at 7823, or preferably to a long-term location where the five years of testing could take place and the bison could remain thereafter, Admin. Rec. at 7815.

FWP planned to complete the QFS by processing two groups of bison – called “cohorts” – through the multiple phases of the study. This matter concerns the first cohort of bison.<sup>1</sup> The first cohort began with 100 calves captured from the Yellowstone population. Admin. Rec. at 7792. The agencies leased private land for use as the quarantine facility, in the Gardiner Basin north of YNP and adjacent to a public highway. Admin. Rec. at 2687, 2692, 2695; *see also* FWP’s Response to Interrogatories 1 & 4. Over half of the calves were slaughtered during Phase I. Thirty-seven females and eight males moved into Phase II, during which the females were bred with the males and some became pregnant and later calved. Admin. Rec. at 3182.

FWP decided not to analyze impacts of translocation, or identify criteria or sites

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<sup>1</sup> The second cohort of 64 bison was moved to the Fort Peck Reservation on or about March 19, 2012, though only 61 survived the transfer. That translocation was challenged in Blaine County District Court by livestock interests who indicate they support Tribal ownership of bison but oppose translocation anywhere in Montana unless FWP implements better management plans and protects public safety and property. *See Appellees’ Brief on appeal*, No. DA 12-0306, *Citizens for Balanced Use, et al. v. Maurier, et al.* Shortly after the translocation, 10 of the bison (including calves, 21 of which had been born since the transfer) were killed in a wildfire. *See* <http://www.defendersblog.org/2012/09/devastating-fire-at-fort-peck-leaves-10-bison-dead/>.

for translocation when it initiated the project, and limited its initial evaluation to Phase I. Admin. Rec. at 2694 (Phase I EA). The Department anticipated the bison would be “well received as a potential source to restock native bison ranges throughout suitable habitats in North America.” Admin. Rec. at 2672. However, it also noted that finding other agencies, tribal governments, and conservation partners to take the bison was “likely but not certain.” *Id.*

Although FWP delayed analysis and decisions for translocation until Phase IV, it did begin discussion during Phase I, of translocation criteria and the process that would be used. FWP opted to identify and select translocation sites for the bison cohorts by issuing Requests for Proposals (“RFP”). Admin. Rec. at 2669. The proposals were to adhere to criteria that would be established by an interagency/tribal panel (“RFP panel” or “panel”) before Phase III of the QFS, and were to be for restoration projects. *Id.* Proposals were to be evaluated for their conservation value, and entities receiving any bison would have to provide assurances that the bison would not be used for commercial purposes. Admin. Rec. at 2669-2670.

Throughout the process the Department repeatedly represented that all graduating bison and future offspring would be used exclusively for conservation, managed as wildlife, and would not be commercialized. *See* Admin. Rec. at 7395 (email with attachment “2<sup>nd</sup> Q Bison Commitments”). And from the outset, FWP noted the intense public interest in retaining the bison for restoration efforts and maintaining public ownership:

“During the public comment period for the environmental assessments of the Feasibility Studies of Phase I and Phase II/III, numerous comments were received by FWP regarding what would happen to the bison coming out of the quarantine facility. Comments submitted were focused on

appropriate locations be chosen (sic) for reestablishment of herd (sic) on tribal and public lands, the desire to maintain the bison in the public ownership, and need for a unified bison conservation plan.”

Admin. Rec. at 3016.

When the Department circulated a Request for Pre-Proposals and Letter of Interest, asking parties to express their interest in taking the first cohort of bison in summer of 2008, Admin. Rec. at 2999-3003, the criteria for translocation were explicitly spelled out. Admin. Rec. at 3003. The Request and Letter were followed by an RFP sent to four parties who expressed initial interest, and asking that they submit formal proposals based on the same criteria. Admin. Rec. at 2932-2941. The criteria set forth in these requests included, *inter alia*:

- “quarantine bison, including any offspring, cannot be used for commercial purposes – i.e., sold as livestock (vs. ecotourism, outfitting, etc.)” and
- “quarantine bison (and any offspring) must be managed as native wildlife (pre- and post 5-year closed herd). Bison will be public/Tribal wildlife (nor private) forever.”

Admin. Rec. at 2938.

The RFP panel also identified “bedrock stipulations” for translocation. These included the need for the bison to “be part of a conservation program,” and be located where they would not be intermixed with other bison “so their unique genetics [would be] conserved.” Admin. Rec. at 3006. FWP in particular emphasized the “importance of public ownership” and availability to the public. *Id.* As well, FWP noted the QFS had “yielded bison that are seronegative for brucellosis, and that can *finally be used to supplement genetic variation of existing wild bison herds* or establish new herds on the American Plains where appropriate.” Admin. Rec. at 3017 (emphasis added).



The RFP process and moving the first cohort of bison did not go as smoothly as the Department intended or hoped, and it ended up issuing multiple RFPs. In response to the first RFP, the Department received three proposals including one from the Northern Arapaho Tribe on the Wind River Reservation in Wyoming. Admin. Rec. at 2979-2996, 2942-2958, 2959-2978. The Department prepared an environmental assessment evaluating whether to accept that proposal. Admin. Rec. at 3022. The proposal met all the criteria and the Tribe committed to manage the bison as wildlife and not for commercial purposes. Admin. Rec. at 3040, 3169. The Tribe was also to be responsible for all costs associated with moving the bison, fencing and management of the herd. Admin. Rec. at 3025, 3153. Before the bison were moved to the Tribe's land, however, the Tribe rescinded its proposal. Admin. Rec. at 7823.

This led to the Department issuing a second RFP in the summer of 2009. Admin. Rec. at 3181-3188. This RFP included the same criteria prohibiting commercialization and privatization of the bison and offspring. *Id.* After the Northern Arapaho arrangement fell through, then-Governor Brian Schweitzer solicited TEI to submit a proposal. See "Ted Turner gets OK for Yellowstone bison on ranch", Salt Lake Tribune, December 3, 2009, available at [http://www.sltrib.com/outdoors/ci\\_13916668](http://www.sltrib.com/outdoors/ci_13916668) ("Ted Turner stepped in after Montana Gov. Brian Schweitzer asked if he would consider submitting a proposal for the animals"); "Turner Bison Bid Draws Ire of Opponents", redOrbit, January 8, 2010, available at [http://www.redorbit.com/news/science/1806879/turner\\_bison\\_bid\\_draws\\_ire\\_of\\_opponents/](http://www.redorbit.com/news/science/1806879/turner_bison_bid_draws_ire_of_opponents/). TEI submitted a proposal in August 2009. Admin. Rec. at 3200-3211.

TEI proposed to house the first cohort of bison for the five year closed-herd

monitoring and testing period, and estimated its costs of doing so would be \$480,000. Admin. Rec. at 3207, *see also* 3251. To provide “incentive for TEI’s expenditure of capital and assumption of risk” associated with housing the QFS bison, TEI requested receipt of 80 percent of the offspring expected to be born to the “original” QFS herd. Admin. Rec. at 3206. The proposal accordingly indicated that TEI would not provide assurances against commercialization of those bison, as the RFP criteria required. Admin. Rec. at 3205-3206. Instead, TEI posited that “commercialization” should not be a consideration for the Department’s project. *Id.*

The Department was eager to move the bison, citing concerns that the quarantine facility had reached capacity, and the need to move a final group of bison through the program. Admin. Rec. at 3284. The RFP panel reviewing the proposals noted the strength of TEI’s proposal was that TEI could “take bison right away” and had the necessary facilities. Admin. Rec. at 3222. On the other hand, there was an agreement with YNP that the bison would not be commercialized. *Id.* The panel ultimately decided to recommend changing the criteria in response to TEI’s proposal. In order to ensure it did not appear the “deck was stacked” in TEI’s favor against other commercial producers, the panel recommended that the RFP be circulated again with the new criteria. *Id.*

The Department subsequently changed the RFP criteria by eliminating the requirement that bison be managed as native wildlife both pre- and post- closed herd, and instead prohibited commercialization only during the 5-year closed herd monitoring and testing period. Admin. Rec. at 3226-3228. A third RFP with the amended criteria was re-circulated only to those entities that had submitted proposals in response to the second RFP. This RFP solicited additional or amended proposals. Admin. Rec. at 3224-3231.

TEI submitted a slightly modified proposal requesting 75 percent of the offspring at the end of the five-year period instead of 80 percent. Admin. Rec. at 3275. The Department also received one new proposal from the Wyoming State Parks and Cultural Resources requesting 14 of the bison, Admin. Rec. at 3265-3274, as well as modified proposals from two other entities that had previously submitted proposals, Admin. Rec. at 3232-3243, 3260-3264.

TEI and the Department anticipated that at the end of the five-year period there would be a total of about 338 bison. Admin. Rec. at 3306, 3247, 7814. Under the allocation proposed by TEI, the Department would receive 150 bison back, while TEI would receive title to 188 bison to retain as its private property. Admin. Rec. at 3247. The Department did not make any specific plans or commitments regarding how the 150 returned bison would be managed or used, or where they would be located. *See, e.g.* Admin. Rec. at 3247, 7837-7838, 7787-7821, 7822-7834.

In evaluating this round of proposals, the panel generally agreed that the TEI proposal was the “most complete” but some members were concerned about having any of the bison privatized. Admin. Rec. at 3276-3278. At least one panel member did not support transferring any bison to TEI. *Id.* However, the panel ultimately recommended that 14 bison be moved to Guernsey State Park in Wyoming, which would help address “public access” concerns, and the other 74 bison be moved to TEI’s Green Ranch. Admin. Rec. at 3276.

The Department then prepared an EA to evaluate the proposals, considering four options: 1) a no-action alternative, under which some bison would remain at the quarantine facility and some would be slaughtered; 2) the proposed alternative, under

which 74 bison would be transferred to TEI and 14 to Guernsey, as recommended by the panel; 3) transferring 14 to Guernsey and managing the remainder as under the no-action alternative; and 4) transferring all 88 bison to TEI. Admin. Rec. at 3289-3295. The Department decided to transfer all 88 bison to TEI and committed to transfer title of 75 percent of the offspring to TEI at the end of the five-year period. Admin. Rec. at 7822-7834 (Decision Notice).

Notably, when altering the established translocation criteria and selecting TEI's proposal, the Department declined to fully evaluate several other alternatives that Plaintiffs and others suggested to avoid privatizing any of the Quarantine bison, or that otherwise could have been identified and pursued. *See, e.g.* Declaration of Glenn Hockett ("Hockett Dec.") at ¶¶ 12-13; Declaration of Darrell Geist ("Geist Dec.") at ¶ 19; AR7305, 7400-7401, 7444, 4870-73. For example, the Department did not negotiate with TEI regarding potential monetary compensation in lieu of bison, nor did it seek to identify any potential funding sources. Admin. Rec. at 7830. The Department did not evaluate whether it was feasible to allow breeding between TEI's bison and some QFS bison in order to enhance the genetics without alienating actual bison from the population. It did not negotiate for TEI to house the bison for a shorter immediate time (and thus minimize TEI's costs) to allow the bison to be moved from the quarantine facility and to allow the Department more time to secure another appropriate location. In response to a public comment suggesting FWP pay TEI instead of providing bison, FWP responded that "[t]he TEI proposal did not include an option to pay for housing the bison for five years. It is unknown if such a proposal would be a consideration of TEI." Admin. Rec. at 7830.

Additionally, the Department did not attempt to work with any of the tribes submitting proposals to identify or secure funding or complete fencing in order to receive bison. It did not evaluate whether to place the bison on one of the many Wildlife Management Areas (“WMA”) under state jurisdiction. Admin. Rec. at 7804. And it did not evaluate the possibility of locating the bison on federal lands such as on National Forests or National Wildlife Refuges, explaining in response to public comment that “a proposal was not submitted . . .”. Admin. Rec. at 7831. Nor did it evaluate whether the quarantine facility could be expanded in order to keep the bison there until a suitable location was found. *See* Admin. Rec. at 7832.

In fact, the Department never independently identified, evaluated, or pursued any potential restoration sites other than those proposed, and even after receiving TEI’s non-compliant proposal. Instead, the Department continued to rely solely on other entities to submit proposals and select a site for translocation. *See, e.g.*, Admin. Rec. at 3275-3278, 7787-7821; *see also* Department’s Answer to Interrogatories 3.

FWP also rejected the other proposals it received, stating these were eliminated from full consideration because they “did not meet the translocation criteria were requesting the bison for solely commercial interests.” (sic). Admin. Rec. at 7803. Yet FWP did not establish in its EA or Decision Notice that TEI’s commercial proposal differed from those FWP rejected. Admin. Rec. at 7823-7825. The only potential conservation aspect identified in TEI’s proposal was the possibility of using the QFS progeny to increase the genetic diversity of TEI’s privately owned Castle Rock bison herd in northern New Mexico. Admin. Rec. at 7799. TEI and the Department stated the herd originated in YNP in the 1930s and was believed to be genetically “pure.” *Id.*; *see*

*also* 3291. However, there is no evidence in the record confirming that claim or indicating what test was used to make this determination. Moreover, the MOU later signed between the Department and TEI included no requirement or commitment to use the bison for conservation purposes, including genetic augmentation. *See* Admin. Rec. at 7835-7842.

During the time that the TEI proposals were being considered and the RFP criteria amended, Plaintiffs and others contacted the Department expressing concerns about the impact that privatizing and commercializing the bison would have on the public trust, and noting it was counter to commitments made at each phase of the study. *See* Admin. Rec. at 3277, 7395-7404, Hockett Dec. at ¶¶ 8-13, Geist Dec. at ¶¶ 11, 16-19. They registered their opposition to the TEI proposal and any reversal in criteria that would allow privatizing or commercializing any of the Quarantine bison. *Id.* In response to public comments asking what justification there was for TEI retaining offspring, the Department simply referred to TEI's proposal and estimate of costs. Admin. Rec. at 7832.

In addition to declining to fully evaluate other options after receiving only what the Department determined were inadequate or non-compliant proposals, the Department did not ever analyze what effect alienating 188 bison from the Quarantine population would have on public trust values, particularly restoration efforts using those bison. In its Decision Notice (DN), the Department posited that “[a]fter the 5 year monitoring period, the placement of the returned QF bison to locations on public and tribal lands will likely serve to meet the goal of genetically augmenting those herds.” Admin. Rec. at 7828. However, the statement was not supported by any analysis or data. In fact, the Department admits it did not analyze in its EA or DN for this decision what impact

removing TEI's share of the bison would have on the genetic composition or viability of the remaining bison, or how the removal may impact restoration and conservation efforts that would rely on the remaining bison. *See* Stipulated Pretrial Order, Agreed Facts ¶ 37, Admin. Rec. at 7787-7821, 7822-7834. There is nothing in the record indicating the Department has considered the impact of removing the bison on its ability to preserve important genetics for restoration.

Plaintiffs, on the other hand, submitted the Declaration of James Bailey ("Bailey Dec."), a retired wildlife biologist, who outlines a number of concerns regarding the impact of reducing the Quarantine population by TEI's share of offspring. Mr. Bailey opines that the Quarantine bison "value exists in their number, in their unique genetics, and in their important but limited genetic diversity." Bailey Dec. at ¶ 6. He explains that the Department has not addressed the issue of maintaining genetic diversity through the Quarantine study, and thus the Quarantine bison population currently at the Green Ranch is "already genetically compromised." *Id.* at ¶ 7. Further, "[r]emoving 75% of the bison born during 2010-2014 at the Green Ranch will further diminish the value of this public herd for conservation and restoration by reducing both the number of bison and their potential for passing on their already limited genetic diversity." *Id.* at ¶ 8. Mr. Bailey further explains the importance of genetic diversity and the deleterious effects to populations that can occur when genetic diversity is lost. He details specific concerns, including the already diminished genetic diversity of the population due to founder effects, the remaining importance of the Quarantine bison herd despite the limitations in genetic diversity, the difficulty of duplicating the genetics and reproductive potential of the existing Quarantine bison, and concerns that removing offspring from the population

could result in loss of uncommon alleles important to maintaining genetic diversity and viability, and additional unknown effects. *See generally* Bailey Dec.

The Department did not consider or address genetic concerns such as those explained by Mr. Bailey, in their EA, DN, or anywhere else in the record. Nor did they respond to the concerns raised by Mr. Bailey to explain how genetic diversity would be maintained despite removing 75 percent of the offspring of the already limited population.

Additionally, FWP did not consider or indicate how it determined a value – in terms of genetic or conservation value, or monetary value – for the Quarantine bison in order to assess TEI’s proposed allocation. The Department indicated early in the process that the study would cost an estimated \$2,360,000 to implement through Phase III. Admin. Rec. at 2671. The Department broke the estimate down by individual and pairs of bison, and estimated each bison would cost \$13,111.00 to obtain. *Id.* If this number is applied to the offspring that TEI will receive (and the Court is not aware of any other cost estimate to be applied to the offspring), and the number of offspring is multiplied by this cost (188 times \$13,111.00), the resulting cost or value of the bison to be transferred is \$2,464,868.<sup>2</sup> This is well in excess of the value of TEI’s services over five years, which it estimated at \$480,000. Admin. Rec. at 3207, 3251.

On February 16, 2010, the Department signed a Memorandum of Understanding (“MOU”) with TEI and the Montana Department of Livestock. Admin. Rec. at 7835-7842. In the MOU, the Department agreed to “transfer to TEI, with sufficient legal

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<sup>2</sup> The Court does not suggest by making this calculation that the bison *should* be viewed in monetary terms, however it is telling that no consideration was made of the expense involved in graduating bison from the QFS compared with the expense TEI anticipated for five years of bison care (\$480,000).



documentation, at the expiration of the 5-year term of this MOU, title to seventy-five percent (75%) of the offspring of the original, surviving QFS bison in exchange for the proper care and maintenance of the QFS bison and offspring during the term of this MOU.” Admin. Rec. at 7837. The parties recognized the bison and their offspring would remain “property” of the State of Montana for the duration of the MOU. Admin. Rec. at 7836. The MOU also contained provisions for the event of early relocation, including provision of the offspring of offspring to TEI. *Id.* The parties also agreed that if the Department decided to relocate the bison before the end of five years, or if a court ordered their removal, the Department “will allow TEI to collect an amount of genetic material (semen, ova, and/or zygotes) that has the potential to result in an equal number of offspring to TEI as would have resulted at the expiration of the 5-year term.” Admin. Rec. at 7838.

The agreement did not place any restrictions on TEI’s use of the offspring it would receive title to, or obligate or commit TEI to use their genetics in any way to support conservation. *See* Admin. Rec. at 7835-7842. Nor did it require TEI or the Department to provide for public access to the bison during the time they were to remain on TEI’s Green Ranch. *Id.*, *see also* Department’s Answer to Interrogatories 2. Indeed, the Department left it entirely up to TEI to decide how it would manage the genetically pure offspring after the five-year period. Admin. Rec. at 7833.

In February 2010 the bison were moved to TEI’s Green Ranch. Admin. Rec. at 8421. The Department remains the “primary steward with oversight of the bison housed at TEI. Total bison as of February 2011 was 102 including 2010 births and all mortalities during 2010.” Admin. Rec. at 8421.

## SUMMARY JUDGMENT STANDARD

The parties filed cross motions for summary judgment pursuant to Mont. R. Civ. P. 56(c). "Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Estate of Wilson v. Addison*, 2011 MT 179, ¶ 13 (citations omitted). The facts in this case are based on the administrative record filed with the Court, the declarations and affidavits submitted in support of briefs, and other documents referenced in the record and/or publicly available.

## ANALYSIS AND DECISION

The State's duty to manage wildlife in trust for the people derives from three sources: the common law, the Montana Constitution and the Department's statutes. The Public Trust Doctrine acts as an umbrella principle, which both operates independently as a management mandate and is incorporated into Montana's law through our Constitution and statutes.

### **I. General trust law principles and public trust purpose**

In the role of trustee, the State owes its public beneficiaries a duty of undivided loyalty. *See Montanans for Responsible Use of School Trust v. State ex rel. Board of Land Commissioners*, 1999 MT 263, ¶ 41, 296 Mont. 402, 989 P.2d 800 ("*Montrust I*"). The Montana Supreme Court holds this duty is "jealously insisted on by the courts which require a standard with a punctilio of honor the most sensitive." *Id.* The State as trustee cannot "act in [its] own interest, or in the interest of a third person." *Id.* Instead, its duty of undivided loyalty requires that the State act solely on behalf of its beneficiaries, to the

exclusion of all other interests. *Montanans for Responsible Use of School Trust v. Darkenwald*, 2005 MT 190, ¶ 55, 328 Mont. 105, 119 P.3d 27 (“*Montrust II*”).

Moreover, when acting as trustee the State should secure the highest public benefit, including transferring trust assets – if allowed to be transferred at all – only when it obtains full market value. See *Montrust I*, ¶¶ 23, 32, 42, 51, 58; *Montrust II*, ¶¶ 54-55. This goal cannot be sacrificed no matter how laudable other objectives may be. *Id.*

Similar principles form the basis of the Public Trust Doctrine, which obligates states to hold natural resources in trust and to protect and manage them for the benefit of the public. The doctrine is of ancient origins, dating “from Roman Law through Magna Carta to present day decisions.” *Montana Coalition for Stream Access, Inc. v. Curran*, 210 Mont. 38, 47, 682 P.2d 163, 167 (1984). As explained by Professor Sax, one of the premier Public Trust scholars:

“[The] idea of public trusteeship rests upon three related principles. First, that certain interests--like the air and the sea--have such importance to the citizenry as a whole that it would be unwise to make them the subject of private ownership. Second, that they partake so much of the bounty of nature, rather than of individual enterprise, that they should be made freely available to the entire citizenry without regard to economic status. And, finally, that it is a principle purpose of government to promote the interests of the general public rather than to redistribute public goods from broad public uses to restricted private benefit.”

Joseph L. Sax, *Defending the Environment: A Strategy for Citizen Action*, 165 (Knopf 1970).

## **II. Trust duties regarding wildlife**

The Public Trust Doctrine has special application when it comes to wildlife. The U.S. Supreme Court has declared: “[i]t is pure fantasy to talk of ‘owning’ wild fish, birds, or animals. Neither the States nor the Federal Government . . . has title to these creatures

until they are reduced to possession by skillful capture.” *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977)(citing *Missouri v. Holland*, 252 U.S. 416, 434 (1920); *Geer*, 161 U.S. at 539-40 (Field, J., dissenting). The distinction between ownership of wildlife and of other resources has been further confirmed: “[a] state does not “own” wild birds and animals in the same way that it may own other natural resources such as land, oil, or timber. *Baldwin v. Fish & Game Commission of Montana*, 436 U.S. 371, 392 (1978) (Chief Justice Burger, concurring).

While early cases referred to the states’ ownership over wildlife as a source of their authority and responsibility to manage and protect on behalf of the public, *see e.g. Geer*, 161 U.S. at 529, it has since been declared a “legal fiction.” *Hughes*, 441 U.S. at 334-35. The *Hughes* court explained that the label of state “ownership” is used to express “the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.” *Id.*

This recognition of the unique character of wildlife extends back to the roots of the public trust doctrine. As Blackstone long ago proclaimed:

‘A man may lastly have a qualified property in animals *ferae naturae* propter privilegium; that is, he may have the privilege of hunting, taking, and killing them in exclusion of other persons. Here he has a transient property in these animals usually called ‘game’ so long as they continue within his liberty, and he may restrain any stranger from taking them therein; but, the instant they depart into another liberty, this qualified property ceases . . . ***A man can have no absolute permanent property in these, as he may in the earth and land***; since these are of a vague and fugitive nature, and therefore can only admit of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer.’

2 Bl. Comm. 394 (cited by *Geer*, 161 U.S. at 526-27) (emphasis added).

The State thus acts as trustee – but not as owner – of wildlife it manages for the

people. States generally must manage wildlife populations “as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.” *Geer v. State of Connecticut*, 161 U.S. 519, 529, 16 S. Ct. 600, 604, 40 L. Ed. 793 (1896) (overruled for other reasons by *Hughes v. Oklahoma*, 441 U.S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979)). As trustee the State has a “right and a duty to protect and preserve the public’s interest in natural wildlife resources. Such right does not derive from the ownership of the resources but from a duty owing to the people.” *See, e.g. Matter of Steuart Transportation Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980).

### **III. Public Trust law in Montana**

In Montana, the State’s duty as trustee derives not only from the common law, but also is reflected in Montana’s Constitution and statutes.

The Public Trust Doctrine has long existed in Montana case precedent. *See In re Adjudication of the Existing Rights to the Use of All the Water*, 2002 MT 216, ¶ 70, 311 Mont. 327, 356, 55 P.3d 396, 414 (Rice, J., concurring in part and dissenting in part). The Montana Supreme Court has addressed the doctrine most specifically in its application to water resources, and has repeatedly concluded that the Public Trust Doctrine in conjunction with the Montana constitution afford strong protections for public over private ownership and use of, access to, and benefit from, the State’s natural resources. *Curran*, 210 Mont. at 53 (holding that “under the public trust doctrine and the 1972 Montana constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes.”); *Montana Trout Unlimited v. Beaverhead Water Co.*, 2011

MT 151, ¶ 29, 361 Mont. 77, 255 P.3d 179 (citing *Curran* for holding that “the Constitution and public trust “do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters.””); *Montana Coalition for Stream Access, Inc. v. Hildreth*, 211 Mont. 29, 39, 684 P.2d 1088, 1093, *overruled for other reasons by* *Gray v. City of Billings*, 213 Mont. 6, 689 P.2d 268 (1984) (reiterating *Curran* holding regarding public rights under public trust doctrine and constitution); *Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation District*, 2008 MT 377, ¶ 51 ¶ 85, 346 Mont. 507, 198 P.3d 219 (citing same *Curran* holding, and holding altered channel of Bitterroot River is protected for public access and cannot be controlled by private landowners); *In re Adjudication*, 2002 MT 216, ¶ 30 (noting public trust doctrine dates back to Montana's statehood, and specifying *both* public trust doctrine and Montana constitution protect public “instream, non-diversionary right to the recreational use of the State's navigable surface water”); *Galt v. State by and through Dept. of Fish, Wildlife & Parks*, 225 Mont. 142, 148, 731 P.2d 912, 916 (1987) (affirming landowners' fee in land is burdened by dominant public estate in waters capable of recreational use and crossing over private land, for recreational use of the waters and land between high water mark).

The court in *Curran* relied on the U.S. Supreme Court's analysis in what is perhaps the seminal trust case regarding tidelands and waterways, *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387 (1892). *Illinois Central* involved an attempt to transfer a large portion of the lakeshore in Chicago to a railroad company as private property. The court held the state was incompetent to make alienate the tidelands in that situation, and set forth a test under which it could be possible for a state to alienate

tidelands consistently with its Public Trust duties. *See, id.* at 455-56. While the case did not announce a general prohibition on alienating trust resources, it indicated that a state's authority to alienate such resources is limited. *Id.*

#### **IV. Public Trust protections for wildlife in Montana**

Although apparently no Montana court has yet had occasion to directly apply the Public Trust Doctrine to wildlife, our wildlife heritage and the strong protections afforded wildlife in our various laws indicates these general and public trust duties apply.<sup>3</sup> As the Montana Supreme Court has proclaimed: “. . . 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.” *Hagener v. Wallace*, 2002 MT 109, ¶ 54, 309 Mont. 473 (Nelson, J., *concurring opinion*), (*overruled for other reasons by Shammel v. Canyon Res. Corp.*, 2003 MT 372, 319 Mont. 132; *see also State v. Boyer*, 2002 MT 33, ¶ 22, 308 Mont. 276, 42 P.3d 771. The Montana constitution protects Montanans' right to a clean and healthful environment and requires the state and each person to “maintain and improve a clean and healthful environment in Montana for present and future generations.” Montana Constitution, Article II, section 3, and Article IX, section 1. These protections apply to wildlife as part of the natural environment, and the State must be “proactive rather than reactive . . . to ensure that future generations enjoy both a healthy environment and the wildlife it supports.” *Hagener*, 2002 MT at ¶¶ 33, 54 (citing *Montana Environmental Information Center v. Department of*

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<sup>3</sup> This is further supported by the Montana Supreme Court's repeated application of the doctrine to waterways, as discussed *supra*. Through these cases, the court has upheld public rights of access, use and ownership in waterways against private interference even where competing rights and interests of landowners were at stake.

*Environmental Quality*, 1999 MT 248, ¶ 77, 296 Mont. 207, 988 P.2d 1236).<sup>4</sup>

Further, the Department’s governing statutes set forth its general powers and duties, which are to protect, preserve, manage, and propagate wildlife. *See* Mont. Code Ann. 87-1-201(3), (giving FWP “exclusive power to spend for the protection, preservation, management, and propagation of fish, game, fur-bearing animals, and game and nongame birds all state funds collected or acquired for that purpose . . .”); 87-1-301 (Fish and Game Commission has power for “protection, preservation, management, and propagation of the wildlife, fish, game, furbearers, waterfowl, nongame species . . .”). The Department specifies further in its regulations that “the responsibility of the Wildlife Bureau is to protect, enhance, and regulate the wise use of the state’s wildlife resources for public benefit now and in the future.” Admin. R. Mont. 12.1.101(8)(b).

**V. Transferring public bison out of public ownership is generally inconsistent with the Department’s trust duties**

Although the Court is not called upon in this instance to announce a general rule regarding wildlife ownership and privatization, it is called upon to determine whether the Department appropriately agreed to alienate the Quarantine bison under the circumstances surrounding its decision. It is clear from general and public trust law principles that *in general* the State must protect resources such as the bison at issue here, as publicly owned and valued. These principles, as reflected in Montana law and policy, influence the Court’s decision, and the Court concludes that alienation of the bison can only be done consistently with Public Trust duties under narrow circumstances.

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<sup>4</sup> The Montana constitution further identifies and protects public interests in wildlife in “forever preserv[ing]” to individual citizens of Montana the “opportunity to harvest wild fish and wild game animals.” Article IX, section 7.



The constitutional, statutory and regulatory provisions discussed above provide protection of wildlife and reflect the nature of the Department's duty, which is to serve as trustee, protecting the wildlife resource and the public's interest therein.<sup>5</sup> Thus, general trust and public trust principles must apply to the Department's decision, and obligate it to act in the undivided interest of the public, with a punctilio of honor the most sensitive.

To protect the public interest in shared resources such as wildlife, the state generally must retain them in the public trust, i.e. in public "ownership." As the Montana Supreme Court stated with regard to public waters, they "*shall not be disposed of piecemeal to individuals as private property*, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State . . . ." *Curran*, 210 Mont. at 46 (quoting *Shively v. Bowlby*, 152 U.S. 1, 48-50, 14 S.Ct. 548, 566, 38 L.Ed. 331). Thus, while it is true there is no absolute bar against alienating portions of certain resources into private ownership, the common thread throughout trust authorities such as those discussed above is one of public ownership, access and use in the resources held in trust by the State. Accordingly, while there may be circumstances under which the State can alienate public resources consistently with its trust duties, these are necessarily limited and are the exception to the general obligation to hold such resources in common ownership.

Indeed, as Professor Sax has noted, courts will "look with considerable skepticism

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<sup>5</sup> The Montana Environmental Policy Act (MEPA) Mont. Code Ann. § 75-1-101 *et seq.*, which applies to various state agency actions including FWP's decision in this case, also reflects the nature of the state's duty as trustee over important natural resources, by providing, *inter alia*, that the State is to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations," "attain the widest range of beneficial uses of the environment . . .," and "preserve important . . . natural aspects of our unique heritage .... " Mont. Code Ann. § 75-1-101(2)(a), (c), and (e).

upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.”

Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L.Rev. 471, 490 (1970)(emphasis in original). Rightfully so. For where the State transfers public resources to a private party, and thereby directly benefits that private party, its duty of *undivided* loyalty to the public is called into question. *See, Montrust I*, 1999 MT 263. Certainly management of public resources may often result in benefit to private interests, but when it does the action must primarily benefit the public and incidentally the private interest. If the public interest has been compromised in bestowing public resources upon a private party, the State will not have acted with the punctilio of honor demanded of it as trustee.

Further, wildlife privatization is viewed by many – including the Department – as a threat to wildlife conservation and public trust values. For example, in the Department’s Strategic Plan, FWP identifies commercialization of trophy wildlife as a long-term challenge in wildlife management, and set a policy to “discourage commercialization of wildlife.” Admin. Rec. at 8388, 8393. Well-established non-governmental organizations have also identified privatization as a “threat” to wildlife conservation. *See, e.g., The Wildlife Society Technical Review, The Public Trust Doctrine: Implications for Wildlife Management and Conservation in the United States and Canada*, p. 15 (September, 2010) available at <http://www.wildlife.org/publications/technicalreviews#wildlife-health>. Montana’s wildlife traditions embrace the principles of fair chase hunting and the North American Model of Wildlife Conservation, which include a disdain for privatizing and commercializing shared wildlife resources. *See id.* at

pp. 9, 15-17; Hockett Dec. at ¶ 29.

Where Montana law allows private acquisition of wildlife or fish, it is under limited and highly regulated circumstances, and the laws reflect the notion that wildlife belong to the whole people and alienation of even a small portion may harm the public trust. For example, in *Boyer*, the Montana Supreme Court upheld the conviction of Boyer for unlawfully killing game fish when he had 19 instead of the allowed 10 fish in his possession. 2002 MT at ¶¶ 2-6. Examining whether Boyer was subject to an unlawful search, the court addressed the question whether Boyer had a reasonable expectation of privacy in the fish he caught, and held that he did not, because “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.” *Id.* at ¶ 22. The court further explained that Boyer’s position that he had a reasonable expectation of privacy in the fish he caught was untenable and “reeked of irony” because it would result in the “unnecessary depletion of Montana’s wildlife and fish,” and “threatened the river’s resources for future generations.” *Id.* at ¶¶ 23, 26.

Recognizing this, Montana’s hunting statutes limit individuals’ acquisition of wildlife and fish resources in order to protect the resource for future generations and avoid unnecessary depletion. These allow acquisition through “skillful capture” as contemplated in early public trust doctrine, but they are necessarily limited and individuals’ uses of captured wildlife are proscribed. *See* Mont. Code Ann. 87-2-101 *et seq.* Montana law specifically prohibits and criminalizes a host of activities related to game acquisition, including prohibiting and criminalizing sale, purchase or exchange of all or part of any game fish, bird, game animal, or fur-bearing animal, 87-6-206,

criminalizing waste of game animal, bird or fish suitable for food, 87-6-205, and criminalizing hunting or fishing out of season, 87-6-204.

Wild bison, as opposed to commercial bison, hold unique public trust value. There appears to be general consensus regarding the value of wild bison as opposed to commercial bison, and the Department specifically distinguished between the two categories several times. Discussing its statutory obligations, the Department identified three lines of bison: two lines developed through past conservation efforts including “the domestic bison, subjected to the selection and breeding schemes common in livestock management; and a wild bison, subject to natural breeding and selection to the degree that space and management constraints allow.” Admin. Rec. at 3315, 3283. The third line the Department produced through the Quarantine study, which it specifies was “intended to serve as a conservation strategy to protect and propagate the genetically pure Yellowstone bison.” Admin. Rec. at 3315. The Department specifically notes that its duty to protect, preserve, manage and propagate is to *wild* bison. *Id.* The Department, along with the RFP panel, also distinguished between conservation bison and commercial bison in discussing the purpose of the Quarantine, and defined conservation bison as those “on public lands.” Admin. Rec. at 2876.

Throughout the study, it was apparent that the Department and other agencies sought to restore bison with wild, genetically pure animals and not the commercial line. *See, e.g.* Admin. Rec. at 2876 (noting the Quarantine bison “present the opportunity to tap into an important set of genetics, as well as the ability to have bison operating on the landscape as part of a functional free-ranging bison herd(s).”).

Thus the Court can reasonably conclude that without providing a clear

justification for the alienation that leads to a reduction in wild, genetically pure and brucellosis-free bison on the landscape, the Department cannot have acted in accordance with its duties as public trustee. The question remains what test must be applied to the Department's decision to determine whether it has provided the necessary justification in this instance. The Court will first analyze whether any statutes authorize the Department's decision and set forth the appropriate test for compliance with its trust duties, or whether a common law Public Trust Doctrine test is applicable.

#### **VI. No law authorizes the Department to privatize the public trust Quarantine bison**

The Department contends that the Public Trust Doctrine has been subsumed by its governing statutes and regulations, and perhaps the Montana Constitution, and argues that its decision should be evaluated simply in terms of statutory compliance. The Department refers to its general authorities and duties, many of which were discussed above, and primarily relies upon 87-1-216 as the source of authority for the decision to alienate the QFS bison. Plaintiffs contend that no statutes authorize the Department specifically to privatize bison and no statutes apply to this particular situation. They argue that in the absence of statutory guidance for the decision, and in light of the public trust duties implicit in the governing laws, the Department's decision must be evaluated in terms of the common law Public Trust Doctrine.

The Department asserts that under 87-1-216(5) and (6), it is authorized to transplant bison to "private or public land in Montana." Further, the Department asserts that because there may be a cost to private landowners who agree to house bison, the Department must necessarily be afforded flexibility to enter agreements such as that with TEI that involve providing bison as "payment" to offset those costs. The Department's

reliance upon this statute is problematic for a few reasons.

First, these sections of the statute were added by amendment through a bill in the 2011 legislative session, more than a year after the Department made the decision and transferred bison to TEI's Green Ranch. The bill was not made retroactive. Thus, the Department cannot rely on these sections to justify the decision made when these provisions did not exist.

Second, even if these provisions existed at the time of the Department's decision, they do not provide the specific authority the Department claims. Rather than authorizing FWP to transplant bison to private or public land, the statute seeks to limit the Department's ability to transfer bison anywhere in the state. Subsection (4) provides the context for the provisions in subsections (5) and (6) that the Department relied upon, and it provides: "The department may not release, transplant, or allow wild buffalo or bison on any private or public land in Montana that has not been authorized for that use by the private or public owner." Subsection (5) further requires that when the Department is authorized to make such a transfer, it "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." Subsection (6) adds a requirement for public comment and hearing before any such transfers are made. The statute therefore does not specifically authorize the Department to transfer bison onto private land and the Department's reliance on it is misplaced.

Moreover, the plain language refers only to private *land* and says nothing of private *ownership*. There is thus nothing in the statute that specifically allows the Department to alienate bison into private ownership. The statute's repeated references to

the *public* status of the bison further undermines the Department's position that it authorizes bison to become private property even if appropriately placed on private land at some time. *See, e.g.* Mont. Code Ann. 87-1-216(1)(a), 2(a), (2)(c), referring to bison as "*publicly* owned"; the Department may manage a "*public*" hunt. As well, the Department's contention that it must be able to compensate private landowners for housing bison is negated by the fact the statute specifies "*the department* is liable for all costs incurred." Mont. Code Ann. 87-1-216(7). Thus, the existence of costs associated with bison management cannot be used to justify transferring bison as chattel.

The Department separately argues that its duties to bison are more nuanced than the duty to preserve them for restoration, because it is statutorily obligated to manage the Yellowstone bison as a "species requiring disease control." Department Reply Brief at 5, citing Mont. Code Ann. § 87-1-216(1)(a). However, this section is in regards to bison exposed to brucellosis, and posing the potential for disease transmission. The bison at issue in this case and which the Department agreed to transfer to TEI, have been subjected to several years of quarantine and are designated brucellosis-free. Thus, whatever statutory obligations the Department may have regarding bison exposed to brucellosis, it does not apply to this case and the Department's trust duties are not diminished by this statute.

To the extent the Department also contends that MEPA replaces its trust duties, the Court concludes this is incorrect because MEPA is exclusively procedural. Mont. Code Ann. § 75-1-102(1). Thus, even if the Department fully complied with MEPA, its substantive decision would not be affected in any manner. This is distinct from the trust duties that require actions to benefit the public and ensure the most successful

conservation of bison.<sup>6</sup>

Given the lack of statutory direction regarding alienation of bison, the common law Public Trust Doctrine must fill in the gaps and provide guidance for reviewing the Department's decision. *See, Curran*, 210 Mont at 52, 682 P.2d at 170; Department Reply Brief at 7. This is especially true considering the Court's discussion above of general trust obligations, ownership of wildlife, and the duty of undivided loyalty to the public regardless of where the duties are articulated.<sup>7</sup> To determine whether FWP complied with its own interpretation of its duty and authority – to ensure the most successful preservation – trust principles and the common law Public Trust Doctrine must be applied.

#### **VII. The Department did not appropriately alienate public trust Quarantine bison under the *Illinois Central* test**

In the absence of applicable statutory authority or statutory test to be applied, the common law provides some guidance for evaluating the Department's decision. The Department has argued that if the common law doctrine is applied, it is the test from *Illinois Central* that governs. The Department contends its decision satisfies the *Illinois*

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<sup>6</sup> Moreover, given that the Department did not evaluate in its MEPA documents the impacts to Public Trust values, or the impacts on the potential for restoration using the Quarantine bison, here the MEPA process cannot suffice for the Department's related Public Trust duties, as discussed *infra*.

<sup>7</sup> Additionally, even where the constitution and statutes speak to the state's duties regarding public resources, the Montana Supreme Court has relied on the public trust doctrine as well as those other sources to determine the extent of the public's rights and protected interests. *See, e.g. Curran*, 210 Mont. 38 at ¶ 53; *Bitterroot River*, 2008 MT 377; *In re Adjudication*, 2002 MT at ¶ 30; *see also Montrust II*, 2005 MT at ¶ 6 (trust duties addressed in *Montrust I* arose from constitution and enabling act, and general trustee obligations applied); *Montrust I*, 1999 MT at ¶¶ 23, 32, 42, 51, 58 (same).



*Central* test, while Plaintiffs contend it does not and that a variation of the test is necessary to evaluate the Department's decision regarding the Quarantine bison.

In *Illinois Central*, the U.S. Supreme Court explained the state's title in tidelands is "held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." *Illinois Central*, 146 U.S. at 452. Because the title is held in trust, the court further explained, the state does not have power or authority to alienate tidelands to private parties, except in certain limited circumstances. *Id.* at 455-56. Under the test articulated, a state may alienate parcels of trust property in "those instances . . . 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 . . ." *Id.*

**a. The Quarantine Bison to be alienated are not parcels used in the improvement of the interest thus held**

The Department argues its decision to transfer 75 percent of the offspring to TEI is "in the improvement of the interest thus held" because it allowed the Quarantine study to "continue toward its ultimate goal of bison conservation in Montana," and thus "improves the public's interest in conservation of Yellowstone bison in Montana." Department's Answer Brief at 7. Plaintiffs argue that the alienation does not improve the interest thus held because nothing about the specific act of alienation facilitates or furthers the public interest in these bison, and may actually hinder conservation/restoration efforts.

As previously noted, the interests for which the state held tidelands and navigable waters in trust for the people in *Illinois Central* were navigation, commerce, and fishing.

It was thus these interests that the court considered when identifying the circumstances under which a state might legitimately transfer parcels of trust tidelands. Although the *Illinois Central* court ultimately held the alienation in that case did not satisfy its test, the court explained how parcels alienated to private parties could feasibly be used to improve the public interests held:

“The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining . . .”

*Id.* at 452.

The court thus contemplated that alienation of parcels used to “improve” the public interests therein, would be in the event of such parcels being developed in a manner as to directly facilitate and further the public’s use of the tidelands and waters for the protected interests. Thus, private ownership of some parcels – for the specific purpose of constructing infrastructure like wharves, docks and piers – could directly enhance the protected interests by allowing the public to more easily access tidelands for navigation, commerce and fishing, as opposed to reducing the public resource available for those protected interests.

Applying this same reasoning to the instant case, the question is thus whether removing 75 percent of the Quarantine Bison offspring, representing an estimated 188 of 338 bison, and transferring them into private ownership provides any comparable direct benefit to the public interests held. In evaluating this question, the Court is cognizant of

the value of TEI's services in housing and tending to the Quarantine Bison during the five-year period remaining of the study. The Court does not discount the value of these services, and has no reason to question TEI's estimate of monetary value. The Court is also cognizant of the fact that under the arrangement, FWP has been able to continue the Quarantine Study towards completion by monitoring and testing the bison while they are housed at TEI's Green Ranch. The Department argues that because the decision was one that allowed the QFS to continue, and the QFS has a general conservation purpose, this satisfies the need to improve the interest thus held.

Yet these facts are not enough; the relevant inquiry is not whether there is some value to the services provided by TEI, or even whether the arrangement is one (of perhaps many) that allows the Department to continue the Quarantine study towards its completion, but whether and how the alienation itself will directly improve the public trust values and interest in the Quarantine bison population.

This evaluation necessitates some discussion of what "interests thus held" are to be protected – and improved – in this case. The Court agrees with the Department that the general "interest held" and to be protected under the public trust in bison, is conservation. This is consistent with trust law and with the record of this case. Indeed, the Department acknowledges it must generally protect, preserve, manage and propagate the species. Admin. Rec. at 3315, Mont. Code Ann. 87-1-201(3), 87-1-301. The Department interprets this duty and authority as requiring it to "ensure the most successful preservation of our important resources." Admin. Rec. at 3315.

Although the general duties of "management" and conservation entail some management discretion on the part of the Department, it is always limited by its duties to

the public over private interests, and to ensure the “most successful preservation” of the bison. Admin. Rec. at 3315. Even as the Department contends the broad statutory authority – which does not directly address situations in which it can or cannot transfer bison into private ownership – allows it to transfer bison to TEI “as payment,” it recognizes that any such arrangement must “protect, preserve, manage and propagate wild bison as the basic mandate requires.” Admin. Rec. at 3315. Thus, there can be no real dispute as to the general duty or the public interest held in the bison – FWP must act to protect, preserve, manage and propagate *wild* bison.

The interest in the QFS bison is even more specific and enhanced. As previously discussed, these bison were particularly sought after by FWP and others for purposes of restoration. They are derived from the Yellowstone population, which itself is prized for its intact genetics and relative wildness; and they are one of only two small cohorts from that population that have been subjected to rigorous enough testing to be designated brucellosis-free. The elimination of the brucellosis concern has led the Department to conclude the bison can “finally be used to supplement genetic variation of existing wild bison herds or establish new herds on the American Plains where appropriate.” Admin. Rec. at 3017. The Department is otherwise limited in its ability to use the genetically pure and desirable Yellowstone bison to complete its mission of restoration. *See* Admin. Rec. at 3283. Thus, when evaluating whether and how the alienation of 188 of these particular bison will directly improve the public interest, this particular value must be considered in addition to the Department’s general duty to preserve *wild* bison in the “most successful” manner possible.

The Court does not readily see how the alienation of these bison can directly

facilitate or enhance the public's use of them or the particular interests in them the way that parcels of tidelands can "afford[] foundation" for infrastructure that enhances the public's interests in and use of tidelands. *See Illinois Central*, 146 U.S. at 452. The bison to be transferred to TEI will not "afford foundation" for any public access to a wild bison population, or for more successful restoration efforts. Whereas tidelands alienated to private parties would continue to serve the public interests and facilitate their use, here the bison (and any unique genetic traits in those disposed of) will simply be lost to the public trust and the population available for restoration of brucellosis-free, wild bison will be reduced. There is simply no equivalent here to constructing wharves, docks and piers to enhance public interests and uses of the protected resource.

Moreover, there is evidence that the chances of successful restoration using the Quarantine Bison are actually diminished by alienating the 188 offspring to TEI, and thus no "improvement" can be claimed.<sup>8</sup> At the least, the Department has not evaluated how the alienation may impact the potential success of restoration efforts due to a smaller source population, fewer breeders, and any genetic losses or other impacts. Admin. Rec. at 7787-7821; 7822-7834, *see also* Bailey Dec. Without undertaking some sort of objective analysis of these potential impacts, the Department cannot demonstrate that its decision will improve the public interest thus held.

Given the lack of evaluation of potential impacts from the alienation, the evidence that alienation will likely diminish the potential for successful restoration, and the absence of any evidence that the alienation of bison will somehow directly improve the

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<sup>8</sup> This in turn would further diminish rather than improve the public interests in access to bison populations for viewing, photographing, studying, and in appropriate circumstances, hunting.

public interests in the QFS bison, the Court concludes that the Department's decision does not satisfy this first prong of the *Illinois Central* test.

**b. The Quarantine Bison are not parcels that can be disposed of without detriment to the public interest in the bison remaining**

The second prong of the *Illinois Central* test instructs that a state can alienate tidelands consistently with its Public Trust duties in instances wherein “parcels can be disposed of without detriment to the public interest in the lands and waters remaining . . .” *Illinois Central*, 146 U.S. at 455-56. The Department contends its decision satisfies this prong and does not pose detriment to the public interest because the number of bison TEI will receive is a “small fraction of the overall [Yellowstone] herd,” and because the bison were born on TEI's Green Ranch under the care of ranch managers rather than among the “Yellowstone herd.” Department Reply Brief 7-8, Department Answer Brief 6-7. Plaintiffs contend the decision does not satisfy this prong of the test, because the Department has not evaluated potential detriment, there is evidence of potential detriment, and the Department must consider detriment in terms of the Quarantine bison population rather than the overall Yellowstone population.

The *Illinois Central* court's discussion of this point is illuminating. Quoting another case, the court discussed uses of tidelands and waters that necessarily involved some disposition of the resource to individuals. See *Illinois Central*, 146 U.S. at 457. In the instance of fisheries, these were parceled out to particular operators, but the land continued to serve “paramount” public uses of navigation and commerce, and the rent or consideration from the operators was used to benefit the whole people. *Id.* In another instance, “portions of the submerged shoals and flats, which really interfered with navigation, and could better subserve the purposes of commerce by being filled up and

reclaimed, were disposed of to individuals for that purpose.” *Id.* The court concluded these dispositions were consistent with trust purposes because “neither did these dispositions of *useless parts* affect the character of the title to the remainder.” *Id.* (emphasis added).

Thus, parcels that can be disposed of without detriment to the interest in the remaining tidelands were those that were “useless” in serving the public interests, and which did not interfere with or limit the public uses by being disposed of. It is easier to see in the case of tidelands and waters how disposition in the above examples does not interfere with the use of the remaining tidelands for navigation and commerce, and even additional fishing. Yet there does not appear to be an equivalent in the disposition of the bison at issue in this case, particularly where there is concern that alienating 188 of the offspring may in fact hamper successful restoration efforts and potentially reduce opportunities for public access to wild bison.

The Department argued in its Reply Brief, that “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.” Department Reply Brief at 17. However, the record belies any assertion that the Quarantine Bison are a “useless part” of the overall Yellowstone herd, or even of the species.

For the same reasons discussed above regarding the unique value of the Quarantine bison and the loss (rather than improvement) to the public trust from removing 188 of them, the alienation cannot be said to leave the remainder unimpaired for the public interests held in them. Indeed, as the only population of wild, non-

commercial bison in the state that has been deemed brucellosis-free and acceptable for restoration herds, the Quarantine population is a particularly *useful* part of the overall population. Because and because the Department did not conduct any evaluation of the impacts of removing the bison, and because their removal from the population appears to threaten successful restoration efforts, the Court cannot conclude that their alienation will not cause detriment to the remaining bison and the interest in restoring brucellosis-free wild bison herds.

#### **VIII. The Department violated its duty to evaluate the impacts of the Quarantine bison alienation on trust values**

The Plaintiffs have also argued that under the Public Trust Doctrine the Department must evaluate the impacts of its decision on public trust values. The Department argues that it has no separate duty in this regard, but has fulfilled any procedural obligations it has by undertaking a MEPA process for its decision. The Court need not spend much time addressing this issue. It is evident from the analysis above that without objective evaluation of the impacts of its decision on the public trust, there is no way for the Department to support its position.

For instance, if the Department has not considered what public interests are at stake or how alienating 188 bison from the limited QFS population will impact restoration efforts and other public interests, there is simply no support for the conclusion that the alienation improves the public interest or that it will not cause detriment to the interest in the bison remaining. For this reason alone, an evaluation is necessary, and FWP did not undertake this evaluation.

Moreover, courts and scholars discussing the PTD have also indicated the doctrine requires some evaluation of impacts to the public trust. See, e.g. Musiker, 16



Pub. Land & Resources L. Rev. at 100 (explaining that, like the Montana Environmental Policy Act, the public trust doctrine requires the state to evaluate impacts of proposed actions, and imposes substantive obligations to act to prevent impairment of trust resources). Without evaluating the impacts to the public trust, FWP runs the risk of causing unnecessary depletion of public resources, *Boyer*, and “needless destruction of those values,” *National Audubon Society v. Superior Court*, 658 P.2d 709, 712 (Cal. 1983), cert. denied, 464 U.S. 977 (1983).

Thus, it is not enough merely to conduct the decision under a process labeled “MEPA.” The public trust doctrine and FWP’s general duty to act with a punctilio of honor the most sensitive in protecting the public’s wildlife resource, demands that an actual evaluation of impacts to the public trust and interests thus held be made. FWP has failed in this regard.

**IX. The Department violated its duty to avoid privatization unless necessary to maximize clear public benefit**

Plaintiffs have also argued that a variation on the *Illinois Central* test is necessary to apply to the instant situation, given the unique nature of wildlife generally, and the Quarantine bison in particular. Whether construed as a different test or merely a lens through which to consider the *Illinois Central* test and the Department’s overall trust duties, it is true the specific circumstances surrounding the Department’s decision must influence the Court’s decision here.

There is an awkwardness to applying the *Illinois Central* test here due to the distinct nature of the different resources at issue and the public interests associated with them. Thus, while the Court was able to deduce through that test that the Department’s decision was not in accordance with its Public Trust duties regarding privatization of the

public resource, there are additional considerations . . . That is, even if the Department could demonstrate that some benefit would be secured through the arrangement with TEI, because it is able to continue the Quarantine study and will have another chance to relocate 150 bison at the end of five years, too many aspects of the Department's decision appear to have been made more in the interest of political expediency than in the interest of maximizing the public benefit.

In this situation, there is a clear and distinct benefit being provided by the Department to the private corporation, TEI. TEI estimates the cost of its services will amount to \$480,000 over five years of housing the Quarantine bison. Yet the apparent monetary value of the bison TEI is to receive surpasses two million dollars. The Department agreed to this payment without disclosing if or how it calculated a monetary value, and without negotiating with TEI about the compensation in terms of amount or form (e.g. money or bison). Under basic trust principles, the Department appears to have ultimately failed to act in the best interest of the public in this regard.

Beyond the monetary cost associated with acquiring the Quarantine bison, which far surpasses the services TEI will provide, is the value of the Quarantine bison due to their genetics and their status as brucellosis-free. TEI clearly values these bison, as is apparent from its desire and request to be compensated with bison and from the inclusion of the provision in the MOU allowing it to extract genetic material from the bison in the event the Department's decision was found unlawful. But while there is clear value and benefit to TEI based on receipt of these genetically pure and brucellosis-free bison, the Department has not explained (or apparently even evaluated) whether the public is benefitting at least equally to the private corporation.

Given the inequity of the monetary value of the exchange, and the fact that TEI will receive 188 bison to the public's 150, even after years of public expenditure and governmental effort to acquire the limited Quarantine population, it appears that the arrangement primarily serves TEI's own private interests. It seems this is precisely why Plaintiffs urge that alienating a substantial portion of this trust asset should only be undertaken when the Department has exhausted all other reasonable options and demonstrated that privatizing the resource is necessary to maximize the public benefit. This seems an appropriate test under the circumstances, and considering the Department's duty of *undivided loyalty* to the public.

Without pursuing other options, negotiating with TEI for the best possible arrangement that would maximize restoration and the number of bison publicly available for that purpose, and without accounting for the impacts on the public trust and the losses to the public in terms of monetary value and the value of the Quarantine bison as genetically pure and brucellosis-free, the Department has not acted with a punctilio of honor the most sensitive and has violated its Public Trust duties.

**X. The Department was not authorized to agree to transfer title of Quarantine bison to TEI**

A final issue deserves some attention. The Court is particularly troubled by the Department's apparent attempt to escape the fall-out of its decision. Once it announced its decision to accept TEI's proposal, and knowing the public scrutiny it faced for that decision, in its MOU with TEI, the Department included provisions to allow TEI to still gain some direct benefit from the public bison even if a court ordered the removal of the bison. It appears this was included in anticipation of possible invalidation by a court, and demonstrates the shaky ground upon which the Department made its decision.

The provision of genetic material to TEI was never evaluated either pursuant to MEPA or in consideration of the impacts that action may have on the public trust. While the Plaintiffs have not directly challenged the MOU, it was entered as an extension of and pursuant to the Department's Decision Notice for the Quarantine bison translocation. With the underlying decision which led to the agreement with TEI deemed in violation of the Department's legal duties, the MOU is void. If the Department still wishes to provide TEI with compensation in the form of genetic material, that must be part of a new analysis and disclosure, with consideration of the impacts of that proposed action on the public trust.

### **CONCLUSION**

While the Department's intentions may have been laudable, and its position a difficult one politically, it is clear that under the circumstances of this case the Department did not fulfill its Public Trust duties. Without demonstrating that it was somehow necessary to transfer bison into private ownership in order to maximize protection of that population and to maximize its conservation value and use, and without demonstrating that the transfer would provide a clear public benefit over private benefit, the Department cannot support its decision to alienate those bison to a private party. The Public Trust Doctrine – whether found in the common law, the Montana Constitution, and/or the statutes and regulations governing the Department – demands that the Department act with undivided loyalty on behalf of the public, and with a punctilio of honor the most sensitive.

The Department's duties are ultimately to the broader public, to preserve the bison for public access, restoration, and other uses consistent with the Public Trust and

which retain the bison in public “ownership” such that it is. Giving a portion of this limited and admittedly valuable population over to private ownership and use without fully considering and pursuing options that avoid any privatization, is not consistent with the Department’s duties under these circumstances, and the decision must be set aside.

### **ORDER**

IT IS HEREBY ORDERED:

- 1) Plaintiffs’ Motion for Summary Judgment is GRANTED.
- 2) The Department’s Motion for Summary Judgment is DENIED.
- 3) The decision is remanded to the Department with instructions that the Department prepare new analysis of its options for translocation (pursuant to MEPA or another process as appropriate and determined by the Department), and including evaluation of the impacts of each option on public trust values and interests, and the Department is further instructed to select the option that maximizes the public interests in the Quarantine bison and upholds its Public Trust duties as articulated in the Court’s order.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2013.

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Honorable Holly Brown  
District Judge