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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  PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
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**INTRODUCTION**

This case involves the Montana Department of Fish, Wildlife and Parks' (FWP) public trust responsibilities as they pertain to a unique and priceless resource – plains bison in Montana. In particular, it involves FWP's responsibilities over a portion of the population that has survived a quarantine procedure and been deemed free of the bacteria *brucella*. Such bison were sought by FWP for the purpose of not only determining what quarantine protocol would be effective, but also for the purpose of obtaining *brucella*-free bison to be available to aid in the critical task of restoring populations of plains bison in Montana.

FWP unfortunately made a political compromise when it came time to relocate the first cohort of bison out of the quarantine, and cheated the public out of bison they had been promised. Having failed to plan ahead for an appropriate relocation site where

the bison would be managed as wildlife and protected against the threat of privatization and commercialization, FWP made a quick bargain with a private corporation, and agreed to transfer title of a portion of the bison population to the corporation to use for its own private purposes. FWP made this decision without even analyzing and pursuing other reasonable alternatives that may have avoided transferring any of the public's bison into privately owned chattel, and without fully assessing the impacts the decision would have on the public trust. FWP also failed to ensure the public would have even minimal access to the bison while they would be housed – some of them temporarily – on private land away from public view.

FWP's decision and its flawed decision-making process, violate its responsibilities under the public trust doctrine to protect the wildlife resource for public over private benefit.

### **LEGAL STANDARDS**

Plaintiffs move for summary judgment pursuant to Montana Rule of Civil Procedure 56(c). 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).<sup>1</sup>

When acting as trustee, the State owes its beneficiaries the duty of undivided loyalty, which is "jealously insisted on by the courts which require a standard with a punctilio of honor the most sensitive." *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*). When reviewing actions for consistency with public trust doctrine responsibilities, courts will "look with considerable skepticism 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.

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<sup>1</sup> In this case, Plaintiffs and Defendants file cross motions for summary judgment. The facts of the case are set forth in the administrative record, and accompanying declarations and attachments.

Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L.Rev. 471, 490 (1970) (emphasis in original).

## STATEMENT OF FACTS

Wildlife are a vital and irreplaceable part of Montana's heritage. Plains bison are a unique and relatively rare species that are native to Montana and once widely populated the state and much of North America. *See* AR8; 8067. When they were nearly exterminated in the late 1800s, only about 25 remained in a remote area of Yellowstone National Park. AR8. Over time, with protective management and supplementation with wild bison captured elsewhere, the population recovered to some extent. AR8-9. The population of wild bison in the Greater Yellowstone Area today fluctuates between approximately 2,000 and 5,000. AR2556.

Montana, bordering the Park on the west and north boundaries, is one of few states that could boast of being home to such a treasured species. AR2; *see also* Declaration of Darrell Geist, ¶ 9 (Geist Dec.). Yet bison remain very limited in Montana, due to intensive management that hazes bison out of the state, or captures them for relocation back into the Park or for slaughter. AR2454-2457; Geist Dec. at ¶ 9. The State, through FWP of Fish, Wildlife and Parks, and FWP of Livestock, is party to and implements the Interagency Bison Management Plan (IBMP). AR2445-2519. The Plan is a joint agreement between the state agencies and three federal agencies – the National Park Service, the Forest Service, and US Animal and Plant Health Inspection Service (APHIS) – entered on or about December 22, 2000, and implemented ever since. *Id.* The Plan is designed to maintain spatial and temporal separation between bison migrating in Montana and domestic cattle that are grazed part of the year in some areas outside the Park boundaries in Montana, purportedly to manage the minimal risk that bison transmit the bacteria *brucella* to cattle. AR2449. This separation is accomplished primarily by restricting bison movements and habitat use in Montana. AR2454-2457. The Plan calls for bison to be hazed back into the Park each spring, restricts bison to limited areas adjacent to the Park boundaries, and uses capture facilities to capture bison for slaughter, confinement for later release, or use for other purposes such as research projects. *Id.*

The IBMP contemplated potential use of quarantine procedures to eliminate

brucellosis in those animals taken into quarantine, but the IBMP did not fully analyze its use nor set forth specific quarantine measures that might be used. *See, e.g.* AR21, 50, 2717, 2457, 2461-62. FWP, in partnership with APHIS, proposed a quarantine feasibility study - prior to developing a full quarantine program to incorporate into the IBMP – to “develop and test appropriate quarantine protocols and quantitatively evaluate the risks . . .” AR2660. The project goals included developing quarantine protocol for the purpose of gaining brucellosis free bison to be used to augment or establish new tribal and public herds, and to conserve the genetics of the Yellowstone bison in order to create additional conservation herds. AR2660-2661. FWP prepared separate environmental assessments for various phases of the quarantine study project, rather than analyzing the project in one document from the outset. *See* AR 2679-2708; 2689; 2694-95; 2720.

Phase I was the selection process, which involved removing approximately 100 bison calves captured from Yellowstone National Park, and removing them to the quarantine facility where they would be tested for brucellosis exposure, and approximately half of them would be killed for further testing. AR2662. Phase II was the maintenance and breeding phase, and Phase III was the calving phase during which time the bison originally removed from Yellowstone would produce offspring. *Id.* At the end of Phase III, all surviving bison were to be relocated as a brucellosis free herd. *Id.*

At each phase, and throughout the project, FWP indicated a purpose and goal of the project was to provide bison for public and tribal herds for conservation purposes, and repeatedly committed to the public that bison surviving the quarantine - including future offspring - would be used for conservation purposes and would never be privatized or commercialized. *See* AR7395, Attachment “2<sup>nd</sup> Q Bison Commitments.” FWP also specified that the bison coming through quarantine presented an opportunity to preserve “an important set of genetics” and “the ability to have bison operating on the landscape as part of a functional free-ranging bison herd(s).” AR2876.

Criteria for the bison’s release were to be developed by an interagency/tribal panel and selection of release sites was to occur before Phase III of the project, and were to be made according to *established* criteria. AR2669. Any release of bison to tribal locations, where bison would be under tribal rather than FWP jurisdiction, would be made with guarantees that bison not be used for commercial purposes. *Id.* FWP

distinguished between “conservation” bison and “commercial bison,” defining conservation bison as those “on public lands.” AR2876. From the outset, discussion of criteria for release sites incorporated requirements that recipients be able to ensure that bison and offspring would remain public wildlife forever rather than private or commercial, and they must be able to house the original bison *and* offspring, and have the capacity to expand to accommodate further breeding. AR2878-2880.

FWP decided to select relocation sites based upon proposals from external parties, and in December, 2008, FWP sent Request for Proposals (RFP) Letters to solicit relocation proposals from interested parties. AR2932-2941. It included its RFP criteria, which proposals were to adhere to in order to be considered. AR2936, 2938. The criteria included a requirement that the bison be kept as a “closed” herd, separate from other bison or livestock, to allow for monitoring and testing for five years to complete the study. AR2938. It also included requirements that “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 (not private) forever.” AR2938.

In response to this RFP, FWP received proposals and selected one from the Northern Arapaho Tribe on the Wind River Reservation in Wyoming. AR3140-3173; 3174-3180. However, the Tribe rescinded its proposal before the transfer was completed. AR7823.

When this relocation option fell through, FWP sent another RFP letter in August, 2009, which included the same criteria as that set forth in the initial RFP. AR3181-3188. In response to the second RFP letter, the committee considering proposals received three proposals, including one from Turner Enterprises, Inc. (TEI or Turner Enterprises). AR3221-3223; 3200-3211. TEI’s proposal stated it could not make the required assurance that bison would not be commercialized, and instead posited that “commercialization” should not be a consideration for FWP’s project. AR3205-3206. The proposal requested receipt of a portion of the quarantine bison offspring to compensate for housing the bison for the five year closed-herd monitoring and testing period. AR3207. The RFP committee decided that although TEI’s proposal did not

satisfy all the criteria, they would not reject it but instead would reconsider the conservation commitment, and re-issue the RFP to allow for commercial uses of the bison such as those TEI suggested. AR3221-3223; *see also* AR8248-8258.

Thereafter, FWP sent a third RFP letter in November 2009 to solicit additional proposals, or allow changes to the initially submitted proposals. AR3224-3231. This third RFP letter included revised criteria, which eliminated the requirement to manage the bison as native wildlife both pre and post closed herd, and only prohibited commercialization during the 5-year closed herd period. AR3226. FWP received four proposals in response to this RFP letter, including another proposal from TEI that requested receipt of 75% of the offspring of the quarantine bison. AR3275. Some committee members expressed concern about the privatization aspect of the TEI proposal, AR3276, 3278, but the committee recommended transferring the majority of the cohort to TEI and transferring to the corporation a portion of the bison offspring, AR3276.

While FWP was revising its criteria to allow the TEI proposal to go forward, many members of the public were expressing grave concerns and opposition to the proposal. AR3277; Declaration of Glenn Hockett, at ¶¶ 8-13 (hereinafter Hockett Dec.); Geist Dec. at ¶¶ 11, 16-19. Plaintiffs and others expressed concerns about the change in criteria at the eleventh hour, and the allowance for privatization and commercialization that FWP had all along stated would not be allowed. Hockett Dec. at ¶¶ 10-13; Geist Dec. at ¶¶ 16-19; AR7395-7404. When Plaintiffs and others expressed concerns about FWP's decision and its impact on the public trust bison, FWP responded by defining the trust corpus to include only the "original" bison removed from Yellowstone, and to exclude their offspring. AR7828-7829.

Before FWP made its final decision, Plaintiffs suggested several options to FWP to consider as alternatives that would comply with the original RFP criteria and commitments made throughout the process. *See, e.g.* Hockett Dec. at ¶¶ 12-13; Geist Dec. ¶ 19; AR7305; 7400-7401; 7444; 4870-73. FWP did not, however, consider any of these alternatives. AR7797-7804; AR7825; Answer to Interrogatory 3(A),(B). Nor did FWP develop or pursue any of its own options for relocating the bison, even when it was not satisfied that the proposals it received were ready or compliant with the original RFP

criteria. *See id.* It did not consider placing bison on any one of the many Wildlife Management Areas under state jurisdiction. AR7804. It did not negotiate with TEI to compensate the corporation with money, nor identify potential funding sources. AR7830. It did not initiate discussions or assess options with federal agencies regarding the possibility of locating the bison on federal lands such as the Red Rock Lakes National Wildlife Refuge. AR7831. Instead, FWP only considered proposals submitted to it by other entities. Answer to Interrogatory 3(A), (B).

In making its decision, FWP did not consider various aspects of the quarantine herd's genetic diversity, nor how loss of 75% of the offspring would impact the genetic value for conservation and restoration purposes. AR7787-7821; 7822-7834; *see also* Declaration of James A. Bailey (hereinafter Bailey Dec.) FWP merely concluded without analysis about the loss of offspring and failure to meet project goals with TEI's proposal, that "After 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." AR7828 (emphasis added).

FWP left decisions about the disposition and use of the public quarantine bison to Turner Enterprises. For example, the only justification provided for the decision to transfer public bison to TEI was TEI's requests in their proposal. AR7832. Also, FWP did not negotiate with TEI regarding any changes to their proposal that would have avoided privatizing any of the trust resource, such as compensating TEI with money rather than wildlife, AR7830, or providing semen from bulls for breeding purposes instead of live bison, AR7833. FWP stated that any such options would be TEI's decision rather than FWP's. AR7830, 7833. Moreover, FWP did not require any commitment or place restrictions on the use or management of the bison once they are transferred to TEI; instead, the corporation may use the bison any way they see fit and need not use them for conservation or restoration purposes. AR7833.

When FWP settled on the TEI option to complete the study, and decided to move the bison to TEI's private Green Ranch, FWP did not make provisions or commit to make any provisions in the future for the public to access or view the bison being housed at the Green Ranch during the duration of the study (including those that would remain public and be returned to FWP). Answer to Interrogatory 2(A). Nor did FWP commit to

provide the public with any updates as to the status and condition of the “public” bison at the Green Ranch. Answer to Interrogatory 2(B).

Members of the Plaintiff organizations attempted to locate and view the public quarantine bison on the Green Ranch numerous times. Hockett Dec. at ¶¶ 25-27; Geist Dec. at ¶¶ 20-27. At times, they believed they had spotted the public bison on the Green Ranch, but they later learned they had been viewing TEI’s private, commercial herd. *Id.* Plaintiffs also requested information from FWP multiple times to determine the status and condition of the bison being held at the Green Ranch, because they could not access or view them on their own. *Id.* Information was generally hard to come by, and often was only obtained after a delay or repeated requests. *Id.* Eventually, FWP arranged for two tours of the Green Ranch in conjunction with TEI, with 6-8 members of the public allowed to attend. *Id.* No further tours at scheduled at this point (although FWP has indicated it will likely arrange for some future tours), and Plaintiffs are unaware of any public viewing locations.

## **ARGUMENT**

### **I. FWP Violates its Public Trust Doctrine Responsibilities by Failing to Protect the Quarantine Bison for Public Rather than Private Benefit**

The public trust doctrine instructs that natural resources are the shared and common property of all citizens that cannot be subject to private ownership and must be preserved and protected by the government on behalf of its citizens. *See Sax*, 68 Mich. L. Rev. 471. 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). Under the doctrine, the state holds natural resources on behalf of the public, and must manage and protect those resources for public rather than private benefit. *See, e.g. Matter of Steuart Transportation Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980) (explaining government has the “right and the 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.”).

The State is prohibited from relinquishing its trust responsibilities to a private party. *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387, 452-53 (1892); *Curran*, 210 Mont. at 47. Nor can the State, as trustee, “act in [its] own interest, or in the



interest of a third person.” *Montrust I*, ¶ 41; *see also Montanans for Responsible Use of School Trust v. Darkenwald*, 2005 MT 190, ¶ 55, 328 Mont. 105, 119 P.3d 27 (hereinafter *Montrust II*) (noting a trustee must act with undivided loyalty to the trust beneficiaries, to the exclusion of all other interests). Moreover, whenever the State acts as trustee it must act to obtain the highest public benefit, and can only transfer trust assets (where specifically allowed) when it obtains full market value, which goal it may not sacrifice no matter how laudable other objectives may be. *See Montrust II*, ¶¶ 54-55; *Montrust I*, ¶¶ 23, 32, 42, 51, and 58.

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 concluded the doctrine and 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 public trust doctrine, along with the Montana constitution, afford similar strong protections of public rights regarding wildlife as for water resources.<sup>2</sup> Indeed, FWP admits it has public trust duties to protect wildlife, including the bison at issue in this case. Answer, ¶1.

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." Article II, section 3, and Article IX, section 1; *Hagener v. Wallace*, 2002 MT 109, ¶¶ 33, and 54 (Nelson, J. *concurring opinion*), 309 Mont. 473, (*overruled for other reasons by Shammel v. Canyon Res. Corp.*, 2003 MT 372, 319 Mont. 132, 82 P.3d 912) (noting these rights and obligations apply to wildlife as part of the natural environment). The Montana constitution also "forever preserve[s]" to individual citizens of Montana the "opportunity to harvest wild fish and wild game animals." Article IX, section 7. The State must be "proactive rather than reactive . . . to ensure that future generations enjoy both a healthy environment and the wildlife it supports." *Hagener*, ¶33 (citing *Montana Environmental Information Center v. Department of Environmental Quality*, 1999 MT 248, ¶ 77, 296 Mont. 207, 988 P.2d 1236).

Consistent with these duties, the State must manage wildlife populations "as a trust for the benefit of the people, and not as a prerogative for the advantage of the

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<sup>2</sup> Although the doctrine originated as protection of tidelands and navigable waters, the doctrine is not limited to those resources, and has increasingly been applied to wildlife and other resources. *See, e.g. Center for Biological Diversity, Inc. v. FPL Group, Inc.*, 166 Cal. App. 4th 1349, 1359-64, 1372, 83 Cal. Rptr. 3d 588, 595-600, 606 (2008)(explaining history of doctrine and its application to wildlife, but upholding dismissal of suit for failure to sue state agency instead of private party); *State, Department of Fisheries v. Gillette*, 27 Wash. App. 815, 820, 621 P.2d 764, 767 (1980)(requiring landowners to pay damages to state for harm caused to spawning salmon after violating statute designed to protect citizens' common interest in the fishery and fish habitat).

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 the Montana Supreme Court has stated: “. . . 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*, ¶ 54; *see also State v. Boyer*, 2002 MT 33, ¶ 22, 308 Mont. 276, 42 P.3d 771.

To provide the strong protection of public over private rights *vis a vis* public resources, as discussed above, the State must deal with the public’s wildlife only in such manner as secures the highest public benefit, and avoids privatization of the resource whenever possible. *See Illinois Central*, 146 U.S. at 452-53 (requiring clear public benefit when alienating portion of trust tidelands); Deborah G. Muskiker, Tom France & Lisa A. Hallenbeck, *The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 Pub. Land & Resources L. Rev. 87, 90 (1995). Thus, if any alienation of the wildlife resource is to be acceptable under the public trust doctrine, it may only be under circumstances in which (1) there are no reasonable options for greater public benefit and avoidance of any privatization of the resource; and (2) the state demonstrates it will secure public benefit that is at least equal to the private benefit of acquiring a valuable public resource. This requires procedural and substantive duties of the state to ensure it protects the highest public benefit: it must first consider and pursue all reasonable alternatives to any action that would privatize any of the trust resource, and it must select the options that maximize the public benefit as opposed to private gain. *See 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). The State has not satisfied any of these obligations here.

### **A. FWP Failed to Consider Alternatives that Would Protect all Quarantine Bison as Part of the Public Trust**

The State's first failure was deciding not to analyze or consider various alternatives to its decision that results in privatizing and commercializing a portion of the bison trust resource. Had FWP included in its environmental assessment all reasonable alternatives and analyzed them for impact on the public trust, it likely would have satisfied the procedural aspects of its public trust responsibilities. Yet FWP did not analyze or pursue any options other than the proposals it received, even when it determined the proposals did not meet all the RFP criteria. Answer to Interrogatory 3 (A),(B); AR7797-7804; 7825; 7830-33.

Without determining all reasonable alternatives, evaluating them to determine what impacts each would have on the public trust and what would provide the greatest public benefit, FWP has violated its public trust doctrine responsibilities. Using either MEPA procedures or a similar analysis of impacts and comparison of alternatives would provide FWP, as well as the public and a reviewing court, some means of reviewing the decision-making process and the impacts the decision has on the public trust. Absent an adequate process, FWP simply cannot ensure its decision is of public necessity or will provide the most protection for public rather than private benefit and interests.

FWP abdicated its responsibilities by leaving all decisions and potential alternatives to the exchange of public wildlife in the hands of TEI, a private corporation. *See Illinois Central*, 146 U.S. at 452-53; *Montrust I*, ¶ 41, *Montrust II*, ¶ 55; AR7830, 7833. It did not have to look far to come up with reasonable alternatives to consider, as Plaintiffs suggested numerous options for FWP to consider in order to avoid privatizing the bison resource. Hockett Dec. at ¶¶ 12-13; Geist Dec. ¶ 19; AR7305; 7400-7401; 7444; 4870-73. FWP's decision not to analyze any of the proposed alternatives, or to develop its own alternatives for completing its quarantine project and ensuring the project fulfilled the goal of bison conservation and restoration, violates its obligations to the public and the wild bison of the state.

Thus, FWP's decision must be vacated, and FWP ordered to prepare analysis under MEPA or another similar process in order to fully evaluate all options for retaining all the quarantine bison and future offspring in the public trust.

## **B. FWP Violates its Public Trust Responsibilities by Failing to Provide Adequate Public Access and Information Regarding the Public Bison**

As discussed above, the cases addressing the public trust doctrine in Montana all reflect the strong protection for public access as well as public ownership of shared resources. *See e.g. Curran*, 210 Mont. at 41-42, 52. Apart from and in addition to FWP's public trust violation from privatizing a portion of the bison population as discussed more thoroughly below, FWP also failed to satisfy its duties when it decided to house the bison – including those that would ultimately be returned to FWP – on private property without making any provisions for public access or information about the “public” bison herd. Answer to Interrogatory 2(A), (B).

The public has made it known to FWP that it values these bison as part of the population originating in Yellowstone National Park, and as those that may contribute to bison restoration in other parts of the State. And they have made it known how important it is to them to know what the status is of the population that will later be returned to the public. *See, e.g. Hockett Dec.* at ¶¶ 25-27; *Geist Dec.* at ¶¶ 20-27. Yet the Plaintiffs have faced substantial challenges in simply viewing the so-called “public” herd, and in obtaining basic information about their status and condition. *Id.* FWP's failure to make any commitment to provide basic information to the public about their bison herd, or to provide adequate public access while the herd is housed away from public lands or viewing locations, is equivalent to attempts by individuals to prevent the public from accessing waters flowing through their private property. The Montana Supreme Court has repeatedly upheld the public's reasonable access rights even where private interests are in conflict. *See Supra, at Section A.*

Here, because FWP decided to relocate the bison to a place they could not be generally observed and enjoyed by the public, they were obligated to make provisions for public access and information. Having made no commitments for either, FWP has violated its obligations to its public beneficiaries. FWP's decision thus must be vacated, and FWP ordered to make a new final decision and/or to ensure the public has reasonable and adequate access to and information about the public bison during any time they remain away from public observation at the Green Ranch or other private location.

**C. FWP Violates its Public Trust Responsibilities by Converting Public Bison into Private Property, to the Benefit of a Private Corporation and Without Equal or Greater Public Benefit**

Even more importantly, FWP has violated its public trust duties by providing for privatization and commercialization of a significant portion of the valuable bison that have survived the quarantine study. Privatization is a threat to wildlife conservation and public values associated with this shared resource. *See 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) (hereinafter “PTD Implications”), available at <http://www.wildlife.org/publications/technical-reviews#wildlife-health> (last accessed August 18, 2012); Hockett Dec., ¶ 29. 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. *PTD Implications*, pp. 9, 15-17; Hockett Dec., ¶ 29. Indeed, in its 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.” Montana Fish, Wildlife and Parks Strategic Plans, pp. 11, 16 (2008).<sup>3</sup>

To ensure the public’s interests and rights in wildlife are perpetually protected, as required by the public trust doctrine and the Montana constitution, that resource must be jealousy guarded against interference and acquisition by private parties. Any wildlife privatization that may be permissible under the public trust doctrine must be allowed in only narrowly prescribed circumstances, where no other reasonable options are available to the state and the state can ensure at least equal public benefit is obtained. *See Illinois Central*, 146 U.S. at 452-53; Musiker, 16 Pub. Land & Resources L. Rev. at 90.

As discussed previously, the Montana Supreme Court has upheld public rights to access and use natural resources numerous times where private parties attempted to gain

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<sup>3</sup> Although FWP agreed to add this document to its administrative record, Plaintiffs did not receive the updated record prior to preparing this brief, and thus pinpoint cites to the Strategic Plan are based on the document’s page numbering rather than bates stamp pages that will be provided by FWP.

control of them in some fashion. For example, in *Curran*, an individual claimed title to the banks and streambed of part of the Dearborn River flowing through property owned or controlled by him, and claimed to have the right as a private property owner to restrict public use of the river. *Curran*, 210 Mont. at 42. The State, including FWP, sued the private landowner to defend the public's common interest and ownership of the waters. *Id.* at 41. In examining the history of the public trust and questions of title, the Court quoted the U.S. Supreme Court's holding that public waters "*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 . . ." *Id.* at 46. The Court held: "Streambed ownership by a private party is irrelevant. If the waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people. The Constitution and the public trust doctrine do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters." *Id.* at 52.

Nor should the public's wildlife resource be "disposed of piecemeal to individuals as private property" but that is precisely what FWP has committed to here.<sup>4</sup> *Id.* at 46. It is of no moment that the privatization involves a portion of the population rather than the entire bison population. Even where a relatively small portion of the trust asset is threatened by private acquisition or control, the public trust doctrine protects the public's rights in that resource. See *Bitterroot River Protective Association*, ¶¶ 28-29, 45-46, 50-52, 63-85 (public retains recreational use rights to one relatively small channel of river, and private parties could not control or restrict the channel or public access to it).

Instead of preventing piecemeal disposition of the bison population, and meeting the high standards demanded of it, the State abandoned its trust responsibilities and agreed to turn bison that would have been part of the public domain into a corporation's private livestock. After assuring the public at each phase of the project – from 2004 until its criteria change in 2009 – that bison graduating from the quarantine project would be

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<sup>4</sup> Indeed, transferring "title" of the bison to TEI appears a legal impossibility, as the courts have made clear that wildlife are not subject to "ownership" as are other resources such as land or chattel. *Geer*, 161 U.S. at 529; *Hughes v. Oklahoma*, 441 U.S. 322, 334-35, 99 S. Ct. 1727, 1735-36, 60 L. Ed. 2d 250 (1979).

managed as public wildlife and used for restoration or supplementation of conservation herds, FWP abandoned those promises and its public trust responsibilities when it committed to transfer title of a significant portion of the quarantine bison population to a private corporation. *See* AR7395, Attachment “2<sup>nd</sup> Q Bison Commitments”; 2660-61; 2876. Finding itself in the unenviable position of having its first relocation site fall through, and a cohort of bison reportedly needing to be moved, the State settled on a politically expedient short-term solution to its political problem.

Instead of rejecting the next round of proposals if it found them unsatisfactory or unable to meet the translocation criteria, FWP’s committee went out of its way to change the criteria to specifically allow the bison to be privatized and commercialized. AR3221-23; 8248-58. FWP’s decision came without explanation of why a large, private corporation should receive any portion of the public’s unique, priceless and limited bison resource from the State. The only explanation FWP could provide for agreeing to the barter was that the barter is what TEI proposed. AR7832. This does not even begin to address what the *public* interest or *public* benefit is that could possibly justify FWP’s decision.

While touting the agreement because the State will get back the “original” bison, the State ignores the significant loss of the public resource – a full 75% of all offspring born to the already limited cohort transferred out of quarantine. It did so without evaluating what losses or impacts this would create in terms of potential for restoration. Given its purpose of gaining bison for restoration efforts and to preserve the unique genetics of the Yellowstone herd, FWP must evaluate the impacts of its decision on such efforts. As explained by wildlife biologist James A. Bailey, there are significant concerns regarding the genetic diversity of the quarantine bison, and what adverse impact removing 75% of the offspring may have on FWP’s conservation and restoration goals. *See generally* Bailey Dec.

Whether there will be genetic losses or not remains uncertain but likely, *see* Bailey Dec. ¶¶ 3, 19, and in any event the loss of a significant portion of the small population currently made available in the state for restoration outside the Greater Yellowstone Area represents a substantial loss to the public trust. Instead of retaining the potentially unique genetics and the most animals possible to ensure the highest chance of



success in terms of restoration and genetic preservation in the future, Bailey Dec. ¶¶ 3, 14c, 15c, 16-19, the State has agreed to give those valuable genes and future reproducers to a private corporation for its own purposes. This violates its public trust obligations and represents an impermissible action in favor of a private party over the State's public beneficiaries. *See Montrust I*, ¶ 41.

FWP's decision also raises many questions about where the decision leads and how FWP can demonstrate it has adequately protected the public's interest. Questions include: Is there a "fair market value" for a priceless public resource such as wild bison, and if so, how is it calculated and will FWP obtain that value when it transfers bison to TEI? How can FWP transfer "title" to wildlife that it does not and cannot own in the manner that land or chattel are owned by individuals or governmental entities? And, importantly, where does this type of decision end? What species are next? If FWP can dispose of the bison population piecemeal to private corporations, might it next give private parties portions of Montana's populations of elk, deer, moose, bighorn sheep, mountain goats, pronghorn, wolverines, wolves and bears? Surely the strong protections for public interest, access, benefit and use provided by the public trust doctrine and Montana constitution do not allow the State to barter away portions of our priceless wildlife resource, especially where the state fails to exhaustively pursue all alternatives and secure at least equal public benefit when it benefits a private party by bestowing upon it a valuable public asset.

FWP has thus violated its public trust responsibilities, and its decision to transfer title of 75% of the quarantine bison offspring must be vacated, and FWP ordered to select an alternative that avoids any privatization if at all possible.

### **CONCLUSION**

FWP turned its back on years of promises to the public that the bison it removed from Yellowstone National Park for the Quarantine Feasibility Study would be used only for conservation and restoration purposes and be managed as public wildlife *forever*. Without pursuing reasonable alternatives, and without securing *at least* equal public benefit for its contribution of valuable public wildlife to a private corporation (for the corporation's own private uses), FWP failed to act with the "punctilio of honor" and undivided loyalty to its perpetual public beneficiaries as is demanded of it. *Montrust I*, ¶

41. The State's short-term solution to its political problem is an impermissible action in its "own interest, [and] in the interest of a third person." *Id.*

Plaintiffs respectfully request that the Court grant Plaintiffs' motion for summary judgment and hold that FWP violated its public trust doctrine responsibilities in this instance. Plaintiffs also request the Court order FWP to prepare new analysis to consider all reasonable alternatives for locating *all* of the bison – including offspring – in a public or tribal location with assurances against privatization and commercialization as required by the initial relocation criteria, and to ensure that there is adequate public access and information to the public bison so long as they are housed on the Green Ranch or at any other private location that is away from public observation and access.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of August, 2012.

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