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UNITED STATES DEPARTMENT OF THE INTERIOR
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DEPARTMENTAL CASES HEARINGS DIVISION

STATE OF MONTANA, BY AND THROUGH THE MONTANA ATTORNEY GENERAL, *Appellant*, V. BUREAU OF LAND MANAGEMENT, *Respondent*.	Docket No. _____ **APPEAL OF JULY 28, 2022, FINAL DECISION FOR TELEGRAPH CREEK (05654), BOX ELDER (15634), FLAT CREEK (15439), WHITE ROCK COULEE (15417), EAST DRY FORK (05617), FRENCH COULEE (05616), AND GAREY COULEE ALLOTMENTS (05447) (DOI-BLM-MT-L010-2018-0007-EA)**

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NOTICE OF APPEAL

Pursuant to 43 C.F.R. Part 4, the State of Montana ("State") appeals the July 28, 2022, final decision, including the Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI"), by BLM Malta Field Manager Tom Darrington concerning seven BLM grazing allotments administered by the Malta Field Office in Phillips County, Montana.

STATEMENT OF REASONS

BLM's final decision ignores what makes Montana's rural communities unique. The final decision prioritizes elitist land management attitudes over economic realities for the generational ranchers who rely on the land. As the American Prairie Reserve ("APR")[1] occupies more and more land, it pushes these ranching communities out, threatening the livestock industry and defying the very purpose of the federal laws BLM purports to uphold.

On September 24, 2019, APR submitted a proposal to BLM seeking approval to fundamentally alter the way it manages federal grazing allotments: transitioning from livestock to bison—what it styles "domestic indigenous livestock." The proposal also requested changes to the authorized seasons of use as well as modifications to exterior and interior fencing. On July 21, 2021, BLM hosted a single, virtual meeting to hear feedback on APR's proposal. Over one year after this virtual meeting, BLM issued its final decision, a near-perfect duplication of APR's 2019 proposal. The

[1] American Prairie Reserve (APR), American Prairie Foundation (APF) and American Prairie (AP) are all the same entity. The term American Prairie Reserve (APR) is used to reference the entire applicant.

decision ignored the numerous concerns and legal deficiencies raised by commenters and protesters. The final decision violates the Administrative Procedure Act ("APA"), the Taylor Grazing Act ("TGA"), the Federal Land Policy and Management Act ("FLPMA"), the Public Rangelands Improvement Act ("PRIA"), and the National Environmental Policy Act ("NEPA").

Together, the TGA, FLPMA, and PRIA all aim to improve public rangelands and uplift ranching communities. *See Pub. Lands Council v. Babbitt*, 529 U.S. 728, 737–38 (2000); *W. Watersheds Project v. BLM*, 629 F. Supp. 2d 951, 966 (D. Ariz. 2009) ("These statutes … appear to constitute the 'specific statutory foundation' or independent statutory obligation for the BLM to manage federal land ...."). And to the extent those acts alone can't do the job, they delegate specific authority to BLM to engage in limited rulemaking. But rather than go through rulemaking to restructure the permitting process and redefine key statutory terms, BLM conducted linguistic gymnastics to create an entirely new classification of "livestock." The State appeals.

I. Factual Background

This appeal arises out of a grazing proposal submitted by APR on September 24, 2019. This proposal impacts seven allotments: Telegraph Creek, Box Elder, Flat Creek, Whiterock Coulee, East Dry Fork, French Coulee, and Garey Coulee. The proposal asks to allow for bison grazing, change the current authorized seasons of use, modify exterior fences, and build or remove interior fences. *See* APR Grazing Proposal Sept. 2019. While each of these requests signals a departure from prior grazing terms, the most significant departure is the request to allow conservation bison grazing.

On July 1, 2021, BLM issued a Draft EA and Draft FONSI. In response, many individuals, groups, and state officials—including the Attorney General—commented, citing numerous problems with BLM's analysis.[2] BLM received a total of 2,748 comment submissions from over 2,600 individuals. Considering only 4,000 individuals reside in Phillips County, Montana, the significant number of comments highlights the impact this decision will have on the surrounding communities.[3]

Despite the public outcry against BLM's anticipated decision, BLM rubber-stamped APR's proposal, making a few small tweaks and ultimately awarding APR coveted general grazing permits to graze bison on public lands. BLM permitted this bison grazing by reclassifying bison as "domestic indigenous livestock" and claiming that this new term of art—that appears nowhere in the TGA, FLPMA, PRIA, or BLM's regulations—allows BLM to treat cattle and bison interchangeably for the purpose of issuing general grazing permits.

This defies both law and logic. BLM acknowledges that APR manages a "conservation" herd that is "non-production-oriented." EA, 3-39, D-1. And APR classifies its bison restoration as part of its efforts to "rebuild wildlife populations."[4] Whether APR classifies its bison as conservation animals, non-production animals, or as

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[2] *See* Montana Attorney General, Comment Letter on American Prairie Reserve Bison Change of USE DOI-BLM-L010-2018-0007-EA (Sept. 28, 2021) (attached as "Exhibit A").

[3] Phillips County, Montana, United States Census Bureau (last accessed Aug. 24, 2022), https://www.census.gov/quickfacts/phillipscountymontana.

[4] Wildlife Restoration, American Prairie (last accessed Aug. 24, 2022), https://www.americanprairie.org/wildlife-restoration.

wildlife, the fact remains that they are *not* livestock for purposes of the laws that provide for grazing activities.

II. Standing

The Attorney General brings this action as the State's chief legal officer. Mont. Const. art. VI, § 4(4). In this role, he plays the preeminent role in articulating and safeguarding the State's legal interests. *Id.* The Attorney General has specific authority over all legal actions concerning state lands. Mont. Code Ann. § 77-1-111.

The State has standing to bring this appeal to protect its interests. In Montana, BLM's decision directly implicates 63,065 acres of BLM land; 32,710 acres of private land; and 5,830 acres of state trust land. *See* Final Decision, 1. From the outset, APR has made clear that this proposal is part of a larger effort to expand bison grazing on the plains. *See* APR Grazing Proposal Sept. 2019, 1 (The current proposal "will give APR additional time to further demonstrate the sustainability of our preferred bison grazing system.").

Under the APA, TGA, FLPMA, PRIA, and NEPA, Montana has an economic interest in maintaining proper grazing practices as well as an interest in "promoting environmental quality." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). The State has an interest in governing the land within its borders. *Akiachak Native Cmty. v. U.S. Dep't of Interior*, 584 F. Supp. 2d 1, 6–7 (D.D.C. 2008). And the State has an interest in protecting "the exercise of sovereign power over individuals and entities within the relevant jurisdiction[, which] involves the power to create and enforce a legal code." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982).

The TGA itself envisions a cooperative relationship between States and the federal government. 43 U.S.C. § 315 (noting that nothing in the TGA shall "limit[] or restrict[] the power or authority of any State as to matters within its jurisdiction"). And Montana law reflects this relationship. *See* Mont. Code Ann. § 76-16-102 ("The purpose of this chapter is … to provide a means of cooperation with the secretary of the interior as provided in the federal act known as the Taylor Grazing Act …"); § 76-14-102 ("The purpose of [the Montana Rangeland Resources Act] is to establish a program of rangeland management whereby … the importance of Montana's rangeland with respect to livestock … is recognized[.]"). Montana is the only western state that formally recognizes federal grazing districts in state law.

III. Standard of Review

Section 9 of the TGA provides that the Secretary will establish rules for appeals of grazing decisions. The Secretary established such an appeals process, which is a formal adjudication under 5 U.S.C. § 554. *Ralph and Beverly Eason v. BLM*, 127 IBLA 259, 261–62 (1993); *see also* Circular No. 4, 55 I.D. 368 (Oct. 7, 1935).

The APA mandates that a grazing decision must be set aside if it's "arbitrary, capricious, or inequitable" or otherwise "not supportable on any rational basis." *Tabor Creek Cattle Co. v. BLM*, 170 IBLA 1, 15–16 (2006); *see also* 5 U.S.C. § 706(2)(A). The grazing decision cannot remain in effect if it's unreasonable or fails to substantially comply with the applicable law. *Tabor Creek Cattle Co.*, 170 IBLA at 15–16; *see also* 43 C.F.R. § 4.480(b). Here, BLM's final decision violates the APA, TGA, FLPMA, PRIA, and NEPA. The State will address these arguments, in turn, below.

IV. BLM's final decision violates the Administrative Procedure Act ("APA).

The APA commands courts to set aside agency actions "found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). BLM's decision violates the APA because (1) it was inconsistent with the TGA, FLPMA, and PRIA; (2) it was arbitrary and capricious; and (3) it failed to comply with procedural requirements.

A. BLM's decision is contrary to law

BLM's decision violates several discrete statutes. It violates the TGA, FLPMA, and PRIA by redefining—contrary to its own regulations—the term "livestock" to include bison. These statutes work together to "govern[] the administration of livestock grazing on public lands …." *Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1289 (10th Cir. 1999).

1. BLM's decision violates the Taylor Grazing Act ("TGA").

The TGA, enacted in 1934, provides BLM with the authority to execute the grazing administration of public land. Its primary objective is to stabilize the livestock industry by protecting resources, providing for orderly use, and promoting improvement and development of public grazing lands. *See United States v. Fuller*, 442 F.2d 504 (9th Cir. 1971); *Chournos v. United States*, 193 F.2d 321 (10th Cir. 1951), *cert. denied*, 343 U.S. 977 (1952); *see also* 43 U.S.C. § 315. The TGA permits the Secretary of the Interior to issue *general* permits to graze livestock, giving preference to landowners engaged in the livestock business. 43 U.S.C. §§ 315(b), (d). The TGA

itself does not authorize general grazing permits for non-production, non-livestock species. *Id.*; *see also* 43 C.F.R. § 4130.6-4 (regulations allowing special grazing permits). This is especially true when such unauthorized permits cause harm to the livestock industry and local economy.

When Congress passed the TGA, it did not define "livestock." Instead, it delegated authority to the Secretary of the Interior to "make such rules and regulations" and "do any and all things necessary to accomplish the purposes" of the TGA. 43 U.S.C. § 315(a); *see also, e.g.*, *Yardley v. BLM*, 123 IBLA 80, 89 (1992) (noting that implementation of the TGA is committed to the Secretary through his duly authorized representatives in BLM). Pursuant to this statutory authority, BLM issued regulations about different types of permits and defined several terms contained in the TGA. 43 C.F.R. § 4100.0-5. Both the TGA and these limited regulations "constrain the Secretary's discretion in issuing permits." *Babbitt*, 529 U.S. at 745.

The TGA authorizes general public grazing permits "to graze livestock" and establishes that "[p]reference *shall* be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights." 43 U.S.C. § 315(b). This language "has been extremely important in practice." *Babbitt*, 529 U.S. at 745–46. Those holding expiring grazing permits get first priority for new

permits as long as, among other things, the lands remain available for domestic livestock grazing. 43 C.F.R. § 4130.2(e).[5]

By comparison, special grazing permits allow grazing for "indigenous animals," have no priority for renewal, and "cannot be transferred or assigned." 43 C.F.R. §§ 4130.6, 4130.6-4. Creatures of regulations—not the Taylor Grazing Act—BLM treats them differently and affords them a lower priority than general grazing permits. *Compare* 43 U.S.C. § 315(b) (authorizing permits "to graze livestock") *and* 43 C.F.R. § 4130.2 (regulating grazing permits "that are designated in land use plans as available for livestock grazing") *with* 43 C.F.R. § 4130.6-4 (describing "special grazing permits" for "controlled indigenous animals"). At least, that's what its regulations dictate. *Id.*

Yet BLM blurred that here. In its final decision, BLM first noted that "[b]ison under this proposal are privately owned and are indigenous to the region." E.A. 1.4. It then said that §§ 4130.2, 4130.3-2 set forth the requirements for this type of grazing permit. *Id.*; *see also* Final Decision, 7. Rather than treat these indigenous animals pursuant to the special grazing permit regulations it cites, BLM reclassified bison as "domestic indigenous livestock" and applied the general public grazing permit

[5] The general grazing permits get priority if: "(1) The lands for which the permit or lease is issued remain available for domestic livestock grazing; (2) The permittee or lessee is in compliance with the rules and regulations and the terms and conditions in the permit or lease; and (3) The permittee or lessee accepts the terms and conditions to be included by the authorized officer in the new permit or lease." 43 C.F.R. § 4130.2(e)

regulations instead. *See* Final Decision, 7. As explained below, that math doesn't add up. But one thing is certain: APR is the windfall beneficiary, and now holds priority grazing privileges on the grazing allotments. *See* 43 C.F.R. 4130.2(d).

The problem with BLM's formulation is that it squarely violates the TGA. The statute clearly dictates that general public grazing permits are for domestic livestock—not "domestic indigenous livestock." Grazing indigenous animals—like bison—can only be accomplished through special use grazing permits. By labeling bison "domestic indigenous livestock," BLM bypassed the special grazing permit process and instead authorized bison grazing under the general public grazing permit process, giving APR a grazing preference not otherwise available to special use permittees. *See* 43 C.F.R. 4130.2(d).

This challenge focuses on the TGA's use of the word "livestock," which BLM defines as "species of domestic livestock—cattle, sheep, horses, burros, and goats." 43 C.F.R. § 4100.0-5. Here, BLM found that "[APR] has acquired grazing preference on the associated BLM allotments," despite the fact that doesn't plan to graze livestock on the allotments. APR instead intends to allow what it identifies as "wildlife" to graze on the allotments.[6]

Classifying bison as "domestic indigenous livestock" in the final decision contradicts the plain text of the TGA and BLM's permitting regulations. It also defies the TGA's very purpose. And despite BLM's creative linguistic dexterity, bison are

[6] *See* Wildlife Restoration, American Prairie (last accessed Aug. 24, 2022), https://www.americanprairie.org/wildlife-restoration.

not domestic livestock for purposes of the TGA, and any bison grazing must fall under a special use permit.

Bottom line: the TGA does not permit bison to graze under a general public grazing permit. Bison aren't livestock under federal law. Not in 1934. Not today. And calling bison "domestic indigenous animals" or "indigenous livestock"—as BLM did here—does not alter this reality. The plain language of the statute excludes bison from the term "livestock." The use of the word "livestock" in other related statutes further solidifies this understanding. And BLM's own regulations exclude bison from the definition. No method of statutory or regulatory interpretation results in a finding that bison are, in fact, livestock for purpose of the TGA. Accordingly, because the TGA only authorizes permits for "livestock," APR fails to meet the eligibility requirements for the permit and BLM improperly permitted APR to utilize a general grazing permit for bison grazing.

i. The plain meaning of "livestock" cannot support BLM's grazing decision.

This agency need not engage in a rigorous statutory analysis to ascertain the meaning of livestock under federal law.[7] *See Babbitt*, 167 F.3d at 1307–08 (restricting grazing permits based "on the plain language of the relevant statutes"). When "determining the meaning of a statutory provision," courts "look first to its language, giving the words used their ordinary meaning." *Artis v. Dist. of Columbia*, 138 S. Ct.

[7] Montana state law defines livestock to include bison. *See, e.g.*, Mont. Code Ann. § 81-2-702. But BLM's grazing decision arises entirely out of federal law. If Congress, like Montana, wanted to clearly define livestock in statute, it could have done so. In the absence of a statutory definition, courts look to the plain meaning of the word.

594, 603 (2018) (quotation omitted); *see also Kouichi Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) (If "a term goes undefined in a statute, [courts] give the term its ordinary meaning").

One way to determine the ordinary meaning is to look to dictionaries. Because Congress enacted the TGA in 1934, contemporaneous dictionaries serve as a useful starting point. Livestock refers to domestic animals associated with a farm like "cattle, hogs, sheep, and horses." Ballentine's Law Dictionary 746 (William S. Anderson, 3d ed. 1930); *see also* Webster's New International Dictionary (William Allan Neilson et al. eds., 2d ed. 1942) (defining livestock as "domestic animals used or raised on a farm"). Cattle, in turn, refers to "*domestic* quadrupeds," typically of the bovine genus. Black's Law Dictionary 290 (3d ed. 1933); *see also* Ballentine's Law Dictionary 181 (William S. Anderson, 3d ed. 1930) (defining cattle as "domestic bovine animals" like "cows, bulls, steers or oxen"); *State v. Eaglin*, 86 So. 658, 658 (La. 1920); *Gragg v. State*, 201 N.W. 338, 340 (Neb. 1924). Domestic animals similarly mean animals that "live in or near the habitation of men." Ballentine's Law Dictionary 368 (William S. Anderson, 3d ed. 1930); *see also* Black's Law Dictionary 607 (3d ed. 1933) (defining domestic animal as animals "habituated to live in or about the habitations of men, or such as contribute to the support of a family or the wealth of community"). At the

time Congress passed the TGA, bison were excluded from the definition of livestock because they were not farm animals living in or near these farming communities.[8]

In comparison to livestock like cattle, bison primarily exist in conservation herds.[9] Groups like APR aim to restore them to "fulfill their former ecological role on the prairie."[10] Conservation herds are distinct as both a factual and legal matter from livestock herds. *See Babbitt*, 167 F.3d at 1307 (holding the TGA, FLPM, and PRIA do not authorize "permits intended exclusively for 'conservation use'"); *see also* 71 Fed. Reg 9,965, 9,899 (Feb. 22, 1995) (allowing permittees to use allotments for "conservation use"); 71 Fed. Reg. 39,402, 39,404 (July 12, 2006) (eliminating the "conservation use" permit regulatory provisions). And in APR's mission statement and

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[8] In 1934, bison were scarce, and there were few, if any, commercial bison operations in the United States. *See History of Bison Management in Yellowstone*, Nat'l Park Serv. (last accessed August 24, 2022), https://www.nps.gov/articles/bison-history-yellowstone.htm.; *see also* Dean Lueck, *The Comparative Institutions Approach to Wildlife Governance*, 6 Tex. A&M L. Rev. 147, 166 (2018) (discussing early efforts to profitably raise bison).

[9] *FAQs*, American Prairie (last visited August 10, 2022), https://www.americanprairie.org/bison-faqs; *Bison Restoration*, American Prairie (last visited August 10, 2022), https://www.americanprairie.org/project/bison-restoration; *see also* Sean Gerrity, *7 Generations and 130 Years Later, A Circle is Complete*, American Prairie (July 25, 2012), https://www.americanprairie.org/news-blog/7-generations-and-130-years-later-circle-complete ("The management of our bison herd should be exemplary for how to restore and conserve the genetic, ecological and behavioral features of *wild bison*.") (emphasis added).

[10] *FAQs*, American Prairie (last visited August 10, 2022), https://www.americanprairie.org/bison-faqs; *see also* Bison Management Plan, American Prairie (last accessed August 22, 2022), https://www.americanprairie.org/sites/default/files/APR_Bison-MangPlan_5_29_18_sm.pdf.

marketing materials, it makes clear that APR views bison as wildlife, not livestock, which falls outside the TGA.[11]

In support of its definition, BLM points to *Hampton Sheep Co.*, WYO 1-74-1 (1975). *See* APR Bison Change of Use EA Public Comment Report, BLM (Mar. 2022) ("Pub. Comment Rep."), App. A-3. But in that administrative proceeding, *the permit at issue was a special grazing permit* rather than a general grazing permit. This reinforces the State's argument—bison fall under the special grazing permit. And to the extent that opinion has any relevance to the present grazing decision, BLM cannot rely on an ad hoc decision made by an administrative law judge that runs counter to the agency's longstanding official position. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019).

ii. The context of the TGA also informs the meaning of "livestock."

Dictionaries, while helpful, don't paint the full picture. They don't say what a word or words mean in a particular context. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" (internal quotations omitted)); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 110–11,

[11]*See* Mission, American Prairie (last visited August 22, 2022), https://www.americanprairie.org/mission-and-values#:~:text=Our%20mission%20is%20to%20create,as%20part%20of%20America's%20heritage ("Our mission is to create the largest nature reserve in the contiguous United States, a refuge for people and wildlife preserved forever as part of America's heritage.").

418 (2012) ("Scalia & Garner") ("Because common words typically have more than one meaning, you must use the context in which a given word appears to determine its aptest, most likely sense."). The Board must look at the "structure of the law itself." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019); *see also Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021). The meaning "depends upon reading the whole statutory text." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006); *see also Yates v. United States*, 574 U.S. 528, 555 (2015) (Kagan, J., dissenting). Courts don't "construe the meaning of statutory terms in a vacuum." *Tyler v. Cain*, 533 U.S. 656, 662 (2001).

The TGA authorizes the issuance of permits to graze livestock where "bona fide settlers, residents, and other stock owners" participate in the use of the range. 43 U.S.C. § 315(b). The use of these words around the word "livestock" reinforces its limited meaning. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 132–33; *see also Yates*, 574 U.S. at 555 (Kagan, J., dissenting). Stock owners refer to those who own domestic animals. Black's Law Dictionary 1662 (3d ed. 1933); *see also* Ballentine's Law Dictionary 1218 (William S. Anderson, 3d ed. 1930) (defining stock grazer as "persons who make use of their land in pasturing livestock"). And the fact that the text says "*other* stock growers" suggest that the "settlers" and "residents" refer to settlers and residents who own and manage livestock. *See Yates*, 574 U.S. at 552 (Alito, J., concurring) (noting that the surrounding words "reinforce[] what the text's nouns and verbs independently suggest"); *see also Comm'r v. Nat'l Carbide Corp.*, 167 F.2d 304, 306 (2d Cir. 1948) ("[W]ords are chameleons, which reflect the color of their

environment."). The TGA later states that preference will be given to "landowners engaged in the livestock business." 43 U.S.C. § 315(b). At a minimum, this confirms that the TGA doesn't intend to grant grazing preferences to landowners engaged in conservation efforts.

Common usage at the time Congress passed the TGA further shows that in the context of grazing permits, it only covered permits for traditional farm animals like cattle and sheep.[12] One court at the time noted, "[i]n the arid regions of the West commercial success in the livestock industry requires that sheep and cattle be run upon the open range …. the Act is intended … to define their grazing rights and to protect those rights by regulation against interference." *See Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308, 314 (D.C. Cir. 1938). A look at other sources reveals the same. At and around the time Congress passed the TGA, people understood livestock to mean farm animals, not animals like bison, elk, antelope, or deer.[13]

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[12] Leasing of Public Lands, Exclusive of Alaska, for Grazing of Livestock, Under Taylor Grazing Act as Amended by the Act of June 26, 1936, 55 I.D. 593, 601 (July 28, 1936) (approving Form 4-721 which asks how many head of livestock an individual owns and breaks it into four categories: cattle, horses, sheep, and goats).

[13] *See, e.g.*, Franklin Delano Roosevelt, Address at Timberline Lodge (Sept. 28, 1937) (cattle is a type of livestock); Iowa Attorney General Opinion, 1937 WL 67772 (Apr. 30, 1937) (referring to Iowa statutes, which limit livestock to "cattle, horses, mules, sheep, goats, and hogs"); Franklin Delano Roosevelt, Campaign Address at Denver, Colo. (Oct. 12, 1936) (using livestock to refer to cattle and sheep); Franklin Delano Roosevelt, Fireside Chat of 1936 (Sept. 6, 1936) (same); *In re St. Joseph Stock Yards Company*, 2 N.L.R.B. 39 (July 7, 1936) (defining livestock as cattle, calves, hogs, sheep, horses and mules); Franklin Delano Roosevelt, Extemporaneous Address on A.A.A. to Farm Groups (May 14, 1935) (using livestock to refer to cattle and hogs); Ohio Attorney General Opinion No. 2123 (July 22, 1930) (relying on Webster's New International Dictionary's definition of "livestock" and noting that livestock means animals kept for farm purposes).

FLPMA understands livestock the same way. It defines grazing permits as authorizations for using public lands in the eleven contiguous western States for the purpose of "grazing domestic livestock." 43 U.S.C. § 1702(p). While FLMPA—like the TGA—doesn't itself define "livestock," it relies upon the same BLM regulations that define the term for TGA purposes: it only includes, cattle, sheep, horses, burros, and goats. 43 C.F.R. § 4100.0-5. The same is true of PRIA. *See Babbitt*, 167 F.3d at 1307–08.

Finally, interpreting "livestock" to include bison conflicts with the entire reason Congress passed the TGA, which "was to develop and stabilize the western cattle business." *Fuller*, 442 F.2d at 507. It marked a "turning point in the history of the western rangelands." *Babbitt*, 529 U.S. at 731. It came about after cattle and sheep ranchers—facing increased herds and decreased natural forage—began fighting over the land. *Id.* The "whole purpose … was to conserve the public range in aid of the livestock industry." H.R. Rep. NO. 73-309, at 2 (1934); *see also* Statement of Secretary Ickes, To Provide for the Orderly Use, Improvement, and Dev. of the Pub. Range, Hearings on H.R. 2835 and H.R. 6462 before the House Comm. on the Pub. Lands, 73d Cong., 1st & 2d Sess. 133 (1933 & 1934) ("We wanted to protect the range in the interest of the stock industry.").

Congress intended grazing permits to be for the purpose of grazing domestic livestock. *Babbitt*, 167 F.3d at 1308. Managing a bison herd for conservation and ecological purposes—even if well intentioned—does not stabilize the western cattle business. In fact, it does quite the opposite. *Id.* ("None of these statutes authorizes

permits intended exclusively for 'conservation use.'"). It upends the statutory scheme, prioritizing outside groups like APR over the livestock industry. BLM's decision to recast bison as livestock elbows communities the TGA was designed to protect—livestock ranchers—off the public range to effectuate goals the law does not recognize.

iii. BLM's own regulations also affirm the meaning of "livestock."

BLM's regulations confirm the plain meaning of livestock under federal law. BLM defines livestock in the TGA as "species of domestic livestock—cattle, sheep, horses, burros, and goats." 43 C.F.R. § 4100.0-5. This definition of livestock contains no ambiguities—if an animal is not a cow, sheep, horse, burro, or goat, then it is not a species of domestic livestock under the TGA.

The first part of the definition states that "livestock" in the TGA specifically means *domestic* livestock. 43 C.F.R. § 4100.0-5. The second part of the sentence instructs the reader what species of domestic livestock the TGA covers. *Id.* Relevant canons of interpretation mandate the conclusion that livestock means only the listed livestock: cattle, sheep, horses, burros, and goats—not bison. *Compare* Scalia & Garner, 110–11 *with* Scalia & Garner, 132 (when the word "include" precedes a list, the list is not exhaustive). Any permit issued by BLM under § 315(b) of the TGA must be issued to those grazing cattle, sheep, horses, burros, or goats. *Id.* Because the regulation specifies the five species the TGA covers, and omits all others, the definition is not ambiguous and BLM cannot expand the definition without altering its

regulations. *See Kisor*, 139 S. Ct. at 2415 (stating that courts cannot afford deference "unless the regulation is genuinely ambiguous").

This instant permit doesn't fall into any of these enumerated categories. *See Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) ("[W]ords grouped in a list should be given related meaning." (quotation omitted)). Bison are not cattle. They're not sheep. They aren't horses, burros, or goats. And BLM does not claim that bison are any of these things.

Instead, BLM creates an entirely new term: "indigenous domestic livestock." Of course, "indigenous domestic livestock" appears nowhere in the text of the TGA or in BLM's own regulations. For that reason alone, BLM lacked the authority to grant APR's permit. The TGA doesn't authorize permits for indigenous domestic livestock. *Kisor*, 139 S. Ct. at 2416 ("[T]he regulatory interpretation must be one actually made by the agency."); *see also Corrigan v. Haaland*, 12 F.4th 901, 913 (9th Cir. 2021) ("Congress intended preferences for renewal to be exercised only by individuals who hold valid grazing permits and are in compliance with the terms of those permits"). The regulation—not the grazing decision—reflects the agency's view. *Kisor*, 139 S. Ct. at 2416 (noting the regulatory interpretation "must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views") (quoting *United States v. Mead Corp.*, 533 U.S. 218, 257–59 (Scalia, J., dissenting)).

The court must "assign[] a permissible meaning that makes them similar." Scalia & Garner, 195; *see also Third Nat'l Bank v. Impac Ltd.*, 432 U.S. 312, 322

(1977) (noting that "words grouped in a list should be given related meanings"). Here, the animals listed share the common characteristic that they're grazing animals traditionally associated with a farm. Certainly other grazing animals exist: deer, elk, and bison, for example. But the TGA general permitting process does not afford these animals any grazing preferences because they are not farm animals.[14]

The TGA is not unique in identifying specific animals as "livestock." Other federal statutes do the same. *See, e.g.,* 7 U.S.C. § 1523(b)(1) (the Federal Crop Insurance Act defines livestock to include "cattle, sheep, swine, goats, and poultry"); 7 U.S.C. § 182(4) (defining "livestock" as "cattle, sheep, swine, horses, mules, or goats whether live or dead"); 29 C.F.R. § 780.328 (federal regulations under the Fair Labor Standards Act defining "livestock" as "cattle, sheep, horses, goats, and other domestic animals ordinarily raised or used on the farm"). Each of these statutory definitions illustrates that if Congress intended the TGA's use of the word "livestock" to include animals besides cattle, sheep, horses, burros, and goats, it could have done so explicitly. And if BLM intended for livestock to include bison, it also could have done so explicitly.

[14] Bison are, in some instances, commercially raised, but APR has made abundantly clear that it maintains its bison herd for conservation and ecological purposes only. *See FAQs*, American Prairie (last visited August 10, 2022), https://www.americanprairie.org/bison-faqs; *Bison Restoration*, American Prairie (last visited August 10, 2022), https://www.americanprairie.org/project/bison-restoration; *see also* Sean Gerrity, *7 Generations and 130 Years Later, A Circle is Complete*, American Prairie (July 25, 2012), https://www.americanprairie.org/news-blog/7-generations-and-130-years-later-circle-complete.

Again, BLM lists "cattle, sheep, horses, burros, and goats" as animals allowed to graze under its permits. Even if this list was not exhaustive, these animals provide further evidence that "livestock" excludes bison. BLM only has authority to issue general grazing permits for animals like cattle, sheep, horses, burros, and goats—animals that have historically been associated with farms and that contribute to the wealth of the community. *See supra* Section IV(A)(1)(a). Few (no) cattle ranchers raise cows for the sheer glory of the bovine form, for their symbolic connection to American history, or for their contributions to the natural environment.[15] But that's precisely what APR intends to do here—manage bison herd for purely conservation, ecological, and nostalgic ends. Bison aren't livestock under federal law.

Whether or not bison are "indigenous" to Montana is immaterial. The question is whether bison are livestock under the TGA, such that BLM could grant a general grazing permit for a conservation bison herd. The answer must be "no." Based on the plain text of the statute, historical understanding of the word "livestock," and related statutes, BLM's reinterpretation of the word "livestock" fails.

2. BLM's decision violates the Federal Land Policy and Management Act ("FLPMA").

FLPMA declared that public lands must be systematically inventoried and managed by the Secretary of the Interior

> in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values; that, where appropriate, will preserve and protect

[15] Montanans persist in the proud ranching heritage because it puts (delicious) food on the table for their families and families around the world. *But see* Corb Lund, Cows Around (New West Records 2012).

> certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy use.

43 U.S.C. § 1701(a)(8). It amplified the rangeland protections in the Taylor Grazing Act by adding a new management structure for "multiple use and sustained yield." 43 U.S.C. § 1732(a). "Congress … expressly protected the grazing permit system as contemplated by the TGA" when it enacted FLPMA. Solicitor Clarification M-37008 2003.

Under FLPMA, all management decisions must "conform with the approved [land use] plan." 43 U.S.C. § 1712; 43 C.F.R. § 1610.5-3(A). If BLM's action is inconsistent with the land use plan, BLM must rescind the action. 43 C.F.R. §§ 1610.5-3, 1610.5-5. FLPMA only authorizes grazing permits that are designated under their land use plans for livestock grazing. 43 C.F.R. § 4130.2(a). FLPMA also sets terms and conditions for "domestic livestock" grazing permits under the TGA.

Because FLPMA and the TGA work together, the statutes must be read consistently. *Erlenbaugh v. United States*, 409 U.S. 239, 244, (1972) (noting that the rule that statutes *in pari materia* should be construed together "is … a logical extension of the principle that individual sections of a single statute should be construed together"). As discussed above, BLM's regulations define "livestock," a term FLPMA uses throughout. *See* 43 C.F.R. § 4100.0-5; *see also supra* Section IV(A). FLPMA identifies domestic livestock grazing as one of the "principal or major uses" of the public lands. *See* 43 U.S.C. §§ 1702 (l). For the same reasons the incorporation of the term "domestic indigenous livestock" violates the TGA, it also violates FLPMA.

3. BLM's decision violates the Public Rangelands Improvement Act ("PRIA").

Congress passed PRIA to direct the Secretary that "the public lands be managed with more attention paid to range *improvement*." *Nat. Res. Def. Council, Inc. v. Hodel*, 618 F. Supp. 848, 861 (E.D. Cal. 1985) (emphasis in original). PRIA defines range improvements as "any activity or program on or relating to rangelands which is designed to improve production of forage; change vegetative composition; control patterns of use; provide water; stabilize soil and water conditions; and provide habitat for livestock and wildlife." 43 U.S.C. § 1902(f). But it is limited in operation, working "in accordance with" the TGA and FLPMA. 43 U.S.C. § 1903(b); *see also W. Watersheds Project*, 629 F. Supp. 2d at 966. And both statutes "unambiguously reflect Congress's intent that the Secretary's authority to issue 'grazing permits' be limited to permits issued 'for the purpose of grazing domestic livestock.'" *Babbitt*, 167 F.3d at 1308 (citing 43 U.S.C. §§ 1702(p), 1902(c)). PRIA doesn't "authorize[] permits intended exclusively for 'conservation use'" even where conservation use may lead to range improvement. *Id.* For the same reasons that BLM's creation of a new statutory term—"domestic indigenous livestock"—violates the TGA and FLPMA, it also violates PRIA. *Babbitt*, 167 F.3d at 1307–08.

B. BLM's decision was arbitrary and capricious.

The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary [and] capricious." 5 U.S.C. § 706(2)(A). To clear this threshold, the agency's action must be based in "reasoned decisionmaking" and "the process by which it reaches [its] result must be logical and rational."

Allentown Mack Sales & Serv. v. NLRB, 522 U.S. 359, 374 (1998). The court reviews whether the agency considered "the relevant factors and whether there was a clear error in judgment." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 52, (1983). A court will reverse an agency decision if the agency "relied on factors Congress did not intend it to consider" or "entirely failed to consider an important aspect of the problem." *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (internal quotations omitted).

1. BLM relied on flawed methodology.

BLM relied on fundamentally flawed methodology. To evaluate the impact of the proposed action, BLM considered a standard bison farm budget, which is a production-oriented enterprise. *See* EA, App. D. Production bison operations differ dramatically from non-production bison operations like APR's conservation herd. And a model based on "non-production-oriented, wildlife management focused bison grazing" will yield different economic impact results than one based on production-oriented operations. The production livestock industry centers on agriculture and eliminating production on those allotments will have an effect beyond the ranchers themselves. In a typical production cattle operation, ranchers pay for feed supplements from local suppliers, medical care from local veterinarians, hardware costs from nearby suppliers, machinery from dealers in their community, and hire ranch hands to ensure the health of their livestock. Pub. Comment Rep., App. A-6. Ranchers invest all this money into their region before spending their profits to buy homes, food, clothing, and other essentials in their local communities. Compare this economic impact to that of conservation bison herds, which are intended to graze with

minimal human interaction. Such a shift in the use of the land harms not only ranchers—who can no longer use this federal land to graze their livestock—but entire rural communities who depend on livestock operations to earn their own living.

The model used by BLM purports to consider the impact on feed suppliers, veterinarians, hardware stores, and ranch hands, but the inputs, again, are based on a production-oriented model. EA, App. D. While the difference between a production farm and non-production farm might be minimal for each of these categories, in the aggregate, the difference will lead to a significantly different impact on the local economy. Because the methodology was arbitrary and capricious, the agency's decision was neither logical nor rational. *See United States Air Tour Ass'n v. FAA*, 298 F.3d 997, 1019 (D.C. Cir. 2002) ("[I]n the absence of any reasonable justification for excluding non-tour aircraft from its noise model, we must conclude that this aspect of the FAA's methodology is arbitrary and capricious and requires reconsideration by the agency."); *Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 206 (D.C. Cir. 2007) (concluding an agency's decision was arbitrary and capricious because "it failed to provide an explanation for the elements of [its] methodology that [petitioner] disputes"); *see also Louisiana v. Biden*, 2:21-cv-01074, 2022 U.S. Dist. LEXIS 25496, at *45–47 (W.D. La. 2022).

2. BLM failed to consider important aspects of the problem.

BLM also failed to consider the harms associated with a larger conservation herd. *See Lands Council*, 537 F.3d at 987. A large bison herd will harm the surrounding community by introducing brucellosis and interfering with surrounding

cattle herds. Brucellosis is a devasting disease for production cattle operations. The United States Department of Agriculture describes the disease as "a formidable threat to livestock" that "can spread rapidly and be transmitted to humans …."[16] BLM's response to serious concerns about brucellosis merely references APR's promise to vaccinate its bison, test 325 of them annually, and create a treatment plan for escaped animals. *Id.*

But this response is wholly inadequate and fails to consider the entirety of the problem. There is no known cure for brucellosis, so if a cow contracts the disease, the USDA asks ranchers to quarantine and slaughter cattle until they eradicate the disease from their herds. *Id.* The USDA notes that free-ranging bison are a major vector for brucellosis in Montana and that "[r]eintroduction of the disease into a brucellosis-free State could have a serious economic impact on domestic livestock markets …." *Id.* Although production cattle ranchers work hard to limit brucellosis exposure in their herds, this work would be in vain if APR introduces a single infected animal to the area. Because bison are known carriers of brucellosis, the public correctly worries about their introduction here. *See* Pub. Comment Rep., App. A-6, A-41 (noting the potential for brucellosis introduction and the possibility of escape). BLM's flippant dismissal of these concerns by pointing to vague promises of future vaccinations, testing, and plans to treat escaped animals betrays a total failure to engage with the

[16]APHIS, *Facts About Brucellosis*, USDA, https://www.aphis.usda.gov/animal_health/animal_diseases/brucellosis/downloads/bruc-facts.pdf.

concerns of the affected public. *See* Pub. Comment Rep., App. A-41 (noting that APR will vaccinate its bison in the future and develop a plan to treat escaped animals).

BLM also failed to meaningfully analyze the impact that APR's fencing modifications would have on surrounding cattle herds because it fails to even identify the type of fencing that would be used. In its EA and final decision, BLM notes that APR will modify 79.6 miles of fencing to meet the Montana Fish, Wildlife, & Parks' standards for wildlife-friendly fencing, which is the type of fencing used on many livestock grazing allotments. EA, 3-10; Final Decision, 10. But BLM does not consider the effectiveness of this fencing in the EA. Instead, the EA only notes that "[p]roperly constructed and maintained electrified 3-, 4-, and 5-wire high-tensile fencing is highly effective in containing captive bison herds." EA, 3-14. High-tensile fencing, which APR does not propose using, is different than "wildlife-friendly" fencing. EA, 3-10. Unlike high-tensile fencing, wildlife-friendly fencing is designed to keep cattle in while allowing wildlife to move freely. This is accomplished through using a fence no taller than 42 inches that has a gap at the bottom no shorter than 16 inches. EA, App. B-10. A 42-inch-tall fence might keep cattle contained, but bison can jump fences five to six feet tall.[17] In other words, the wildlife-friendly fencing won't contain

[17] That's why the National Bison Association recommends using fencing that is at least six feet high to contain bison. *See* Pub. Comment Rep., App. A-6 (citing the National Bison Association in a comment); *see also* Judith Kohler, *6 Amazing Facts You Never Knew About Bison*, NWF Blog (Mar. 28, 2017), https://blog.nwf.org/2012/02/6-amazing-facts-you-never-knew-about-bison/#:~:text=The%20bison%2C%20shaggy%20behmoth%20of,quickly%20pivot%20to%20combat%20predators.

the bison, and the high-tensile fencing doesn't comply with wildlife-friendly fencing standards.

When the public shared concerns about this fencing dilemma, BLM repeated the EA's finding about high-tensile fencing verbatim. *See* Pub. Comment Rep., App. A-6 ("high-tensile fencing is highly effective in containing captive bison herds"). But APR didn't propose using high-tensile fencing, and BLM's response doesn't address concerns about existing wildlife-friendly fences, which bison can easily pass through. BLM's assertion that other allotments effectively use high-tensile fencing to contain bison is irrelevant. *Id.* What matters here is the type of fencing that APR proposed and BLM ignored in its analysis. BLM's failure to address the use of wildlife-friendly fences to keep bison contained fails to consider an important part of the problem with APR's proposal, and the action must be set aside. *See Protect Our Communities Found. v. LaCounte*, 939 F.3d 1029, 1034 (9th. Cir. 2019).

The agency's flawed methodology and refusal to consider serious harm renders its decision arbitrary and capricious. The decision must be set aside.

C. BLM failed to follow procedural requirements.

"It is a fundamental tenet of the APA that the public must be given some indication of what the agency proposes to do so that it might offer meaningful comment thereon." *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1486 (9th Cir. 1992). Although BLM claims to have considered public comments, its actions and final decision tell another story. As the final decision notes, APR sought to graze bison on public lands by reclassifying the bison as "domestic indigenous livestock." The proposal also requested changes to the authorized seasons of use as well as exterior and

interior fencing. The final decision then notes that BLM "provided notice of a series of four BLM-hosted in-person open house-style public meetings, which were held on April 9th and 12th, 2018, in four communities in north-central Montana[.]" Final Decision, 2. Strange that BLM could hold public meetings to consider APR's proposal more than a year before its submission.[18] After APR submitted its proposal, BLM on July 21, 2021 hosted a single, virtual meeting. This meeting took place in the middle of the day, in the middle of the work week, in the middle of haying season—a time and format that precluded the participation of those individuals most impacted by the proposal and most likely to offer salient feedback. According to BLM, though, that "meeting" was good enough.

It was not. BLM could have done more to engage with the affected community. On September 15, 2021, Montana Attorney General Austin Knudsen hosted an actual public hearing on APR's proposal. *See* App. A. He heard from over 250 Montanans, in person. BLM declined Attorney General Knudsen's invitation to attend.[19] The failure to engage in meaningful public participation stemmed from a blatant *unwillingness* to engage in meaningful public participation. The APA requires more of federal agencies.

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[18] According to the record, APR submitted an initial proposal in 2017. The final decision makes no mention of this proposal, which differed dramatically from the 2019 proposal.

[19] *See* Pierre Bibbs, "Knudsen gives a voice to locals in BLM, APR, grazing proposal," Phillips County News (September 22, 2021). Available online at https://www.phillipscountynews.com/story/2021/09/22/news/knudsen-gives-a-voice-to-locals-in-blm-apr-grazing-proposal/12022.html. It's almost as if BLM didn't want to hear the meaningful feedback of those members of the public directly affected by APR's proposal.

V. BLM's decision violates the National Environmental Policy Act ("NEPA").

Congress developed NEPA to promote "the understanding of the ecological systems and natural resources important to" the United States. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004). NEPA "does not mandate particular results," but it does impose procedural requirements on federal agencies seeking to take certain government actions. *Robertson*, 490 U.S. at 350.

When BLM undertakes certain agency actions, including decisions regarding resource use permits, it must prepare an Environmental Assessment (EA). 42 U.S.C. § 4332(C); BLM Decision Manual, Dep't of Interior, *Managing the NEPA Process—Bureau of Land Management*, 516 DM 11, 11.7 (June 2, 2020). After BLM issues an EA, the agency determines whether to prepare an environmental impact statement (EIS) or a FONSI. 516 DM at 11.7. Regardless of the form of the agency's "detailed statement," 42 U.S.C. § 4332(C), the agency must consider all "direct," "indirect," and cumulative impacts from the action. 40 C.F.R. § 1502.16. Here, BLM determined that the new permit "is not a major federal action," so it issued a FONSI.

Under NEPA, agencies can establish "categorical exclusions" for federal actions that don't require an EA or EIS. 40 C.F.R. § 1508.4. The exclusions exist for the "category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency." *Id.* Categorical exclusions are a specific type of NEPA review.

BLM has long considered general grazing permits to fall within such a categorical exclusion. The agency has already determined that these types of actions won't have a significant effect on the quality of the environment. 516 DM at 11.9. Only if "extraordinary circumstances," as defined by BLM apply, must the agency prepare an EA for an action involving a categorical exclusion. *Id.* This allows for rapid agency action in instances where extensive regulatory burdens yield little reward.

Categorical exceptions, though, are just that: exceptions. Absent a categorical exception, the agency requires an EA to fully evaluate the impact of its actions. For rangeland management, BLM outlines eleven categorical exclusions. 516 DM at 11.9. The issuance of livestock grazing permits where "[t]he new grazing permit/lease is consistent with the use specified on the pervious permit/lease" falls within BLM's explicit categorical exclusions, meaning the agency requires no EA. *Id.*

Here, by altering the use specified on the previous lease—allowing conservation bison grazing rather than livestock grazing—the agency prepared an EA. Had the new permits issued to APR authorizing "domestic indigenous livestock" grazing been consistent with the prior permits authorizing domestic livestock grazing, BLM would not have needed to prepare the EA. But by doing so, BLM conceded that the APR proposal is inconsistent with the previous permit, which authorized domestic livestock grazing for cattle.

The State challenges BLM's decision because it improperly redefined statutory terms into its EA and relied on flawed methodology, rendering its decision

unreasonable. *Bennett v. Spear*, 520 U.S. 154, 175–76 (1997) (looking to the specific provisions under which a party raises its NEPA claims). The State not only possesses an economic interest in maintaining proper grazing practices, it also has an interest in "protecting and promoting environmental quality." *Robertson*, 490 U.S. at 348. The final decision will result in significant harm to the grazing districts and the surrounding communities.

Here, BLM failed to comply with 42 U.S.C. § 4332, which requires that the agency develop methodology for appropriately considering the unquantified environmental impact and consider appropriate alternatives to the proposed action. Commenters correctly noted that such actions would make best grazing practices, like rest rotation, impossible. Pub. Comment Rep., App. A-9. Instead, the removal of internal fences could allow bison to overgraze certain allotments, unsustainably depleting resource protection. In response to this concern, BLM recited its belief that rangeland health would not be harmed by the plan and, in any case, it would step in to stop any damage if it occurred. *Id.* BLM's failure to meaningfully address the potential environmental damage that APR could cause by removing internal fences falls short of its duty under 42 U.S.C. § 4332. Because of these violations, the EA is insufficient.

A. BLM drafted the EA using language that appears nowhere in the applicable regulations.

Throughout the EA, BLM uses sleight of hand to achieve its objective of allowing bison to graze under a general use permit. It acknowledges that the special use permit regulations allow BLM to issue grazing permits for "controlled indigenous animals" like bison. EA, 1.4. It then acknowledges that the TGA regulates "livestock

grazing." EA, 1.4. The EA then concludes that the proposal "to graze domestic indigenous livestock is consistent with the authorities in the Taylor Grazing Act" and 43 C.F.R. § 4110.1, which cover grazing of domestic livestock. Rather than issue a special use permit under the regulations the agency itself identifies is the proper permit for indigenous animals (43 C.F.R. 4130.6-4), the agency simply concludes that "domestic indigenous livestock" falls under the general use permit (43 C.F.R. § 4110.1). In other words, the agency selected key words from each regulation and combined them into a new regulation. *See supra* Section IV(A). BLM "provides no reasons or analysis in support of" its conclusion that "domestic indigenous livestock" is a permissible term under the TGA or 43 C.F.R. § 4110.1. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1180 (9th Cir. 2008).

B. The proposed alternatives are, by definition, inappropriate because they violate federal law.

Under NEPA, an agency must consider appropriate and reasonable alternatives to the proposed action. 42 U.S.C. § 4332(E); 40 C.F.R. § 1508.9. The reasonableness of an alternative is determined by the "purpose and need" of the project. *League of Wilderness Defs.-Blue Mtns. Biodiv. Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1069 (9th Cir. 2012). If the agency fails to consider reasonable alternatives, or considers alternatives that are contrary to law, the action must be set aside entirely. Reasonable alternatives, by definition, comply with federal law. *See City of Alexandria v. Slater*, 198 F.3d 862, 869 (D.C. Cir. 1999) ("A reasonable alternative is defined by reference to a project's objectives.") (internal quotations omitted); *Nat. Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972) ("A rule of reason is implicit

in this aspect of the law as it is in the requirement that the agency provide a statement concerning those opposing views that are responsible."); *see also W. Lands Project v. BLM*, 13-cv-339, 2014 U.S. Dist. LEXIS 87189 (S.D. Cal. 2014) (an agency's reasonable alternatives satisfied NEPA, in part, because they were not "contrary to law").

In the EA, BLM considered four alternatives. The final decision combines two: Alternative B, which was entirely proposed by APR, and Alternative C, which combines APR's proposal to permit bison grazing with current management practices. Final Decision, 2; *see also* EA, 2.3, 2.4. Because these alternatives allow bison—"domestic indigenous livestock"—to graze under a general use permit, these alternatives violate the law and contradict the purpose of the statutes. *Compare* 43 U.S.C. § 315(b) ("Preference shall be given in the issuance of grazing permits to those … who are … engaged in the livestock business.") *with* 43 C.F.R. § 4130.6 ("special grazing permits … have no priority for renewal"). The EA therefore perpetuates the TGA violation by relying on the term "domestic indigenous livestock" to circumvent statutory requirements.

The two selected proposals violated the TGA by creating a new term not mentioned in the TGA or its associated regulations. Only Alternative A, which would have allowed the continuation of current management practices with no changes, appropriately followed federal law. The EA, therefore, failed to comply with NEPA because it considered and selected proposals that violate other federal laws. The action

must be set aside for failure to comply with proper procedures and for resulting in a decision that, as discussed above, runs afoul of federal law. *See* 5 U.S.C. § 706(2).

C. BLM used inappropriate methodology.

The Draft EA also used improper methodology to analyze the impact of the proposed decision. *Nw. Envt'l Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1150 (9th Cir. 2006). It analyzes APR's bison operation under a production agriculture model using inputs from a standard bison farm. EA, App. D. But APR does not intend to manage a commercial bison herd. It intends to manage a conservation herd. The two herd types are similar only in the animals they feature, not the impact they will have.

Although NEPA doesn't require BLM to decide whether an EA is "based on the best scientific methodology," the analysis must still be reasonable. *Wyoming Audobon v. BLM*, 151 IBLA 42, 51 (1999); *see also Greenpeace Action v. Franklin*, 14 F.3d 1324, 1333 (9th Cir. 1992). Omission of "crucial factors," which are "essential to a truly informed decision" mandate agency reconsideration. *Found. for N. Am. Wild Sheep v. Dep't of Agriculture*, 681 F.2d 1172, 1178 (9th Cir. 1982). As discussed above, BLM relied on flawed methodology by using a production-oriented bison farm. *See supra* Section IV(B). Based on this flawed methodology, BLM underestimated the impact APR's project will have on the local economy and surrounding communities. The agency, therefore, improperly concluded that the grazing decision would not have a significant economic impact.

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BLM fell short of its statutory obligations under NEPA. The agency created new terminology inconsistent with BLM's authority. It considered unreasonable—and unlawful—alternatives. It relied on improper methodology. And it failed to meaningfully engage with the public. For these reasons, the final decision must be set aside.

PETITION TO STAY

Pursuant to 43 C.F.R. § 4.471(b), the State respectfully requests that the Board stay BLM's final decision until this appeal is resolved. BLM's decision violates the APA, TGA, FLPMA, PRIA, and NEPA. Absent a stay, the final decision will cause irreparable harm to the grazing allotments and Montana's surrounding communities.

A court must stay the matter if the State demonstrates its likelihood of success on the merits; the likelihood of immediate and irreparable harm absent a stay; the relative harm to the parties if the stay is granted or denied weighs in the State's favor; and the public interest favors a stay. 43 C.F.R. § 4.471(c). In balancing the likelihood of success on the merits against the relative harm of the stay, "it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Sierra Club v. BLM*, 108 IBLA 381, 385 (1989). Maintaining the status quo during pendency of appeal "can be of considerable importance since the effectiveness of any relief may be compromised if actions objected to are allowed to go forward during the period of adjudication." *W. Wesley Wallace v. BLM*, 156 IBLA 277, 278 (2002).

I. The State is likely to succeed on the merits.

To meet this standard, the State need only "raise[] questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Sierra Club*, 108 IBLA at 384–85 (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)). The State meets this burden. As asserted above, BLM's final decision violates the APA, TGA, FLPMA, PRIA, and NEPA. And the questions raised under each of these statutory provisions are "serious," "substantial," and require "careful consideration." *Id.* Because the State will likely succeed on the merits of these claims, the Board must stay BLM's decision and maintain the status quo.

II. The State will suffer irreparable harm.

BLM's final decision will lead to imminent and irreparable harm to Montana's public land. The decision affects 63,065 acres of BLM-administered land in Montana. Final Decision, 1.

Noncompliance with NEPA itself generally causes irreparable injury, both by threatening environmental harm and by injuring the rights of affected members of the public to participate in the agency's decision-making process. *See, e.g.,* S*ave Our Ecosystems v. Clark,* 747 F.2d 1240, 1250 (9th Cir. 1984); *California v. Block*, 690 F.2d 753 (9th Cir. 1982). This is because "[t]he NEPA duty is more than a technicality; it is an extremely important statutory requirement to serve the public and the agency *before* major federal actions occur." *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985).

In the absence of a stay, APR will graze bison under a permit that only permits the grazing of cattle, sheep, horses, burros, and goats." 43 C.F.R. § 4100.0-5.

III. BLM [and APR] will not suffer any harm from a stay of the grazing decision.

The balance of harms weighs in favor of the State. If the stay does not issue to preserve the status quo, irreparable harm will follow. Maintaining the status quo means maintaining "the last, uncontested status which preceded the pending controversy." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009). Prior to this new grazing decision, the last, uncontested status was that only domestic livestock could utilize a general grazing permit to graze on the seven allotments. *See* 43 U.S.C. § 315(b); *see also* EA, 1.2 ("The proposal includes changes in class of livestock for Cattle and/or [bison].").

If the decision is not set aside, it will fundamentally alter grazing management by permitting bison to use general grazing permits. Instead of working to stabilize the cattle industry—the TGA's overriding intention—prioritizing bison grazing permits will reduce the land available for commercial cattle grazing; it will destabilize an industry that depends upon the public rangeland. Pub. Comment Rep., App. A-1–2. Setting a precedent that BLM may prioritize bison grazing over commercial cattle grazing would further allow APR to push commercial cattle ranchers off public land in Montana. This danger is especially apparent, given that APR only shows signs of increasing its bison herd numbers.

By comparison, a stay will have minimal impact on APR, which has never been allowed to graze its bison on these lands. Its conservation herd will simply remain where it already exists.

Compared to how rapidly and severely it can harm the surrounding livestock industry, the EA barely addresses disease transmission. Because APR intends to treat its bison—"domestic indigenous livestock"—herd as wildlife,[20] APR does not have a comprehensive vaccination plan in place like other production livestock operations. *See, e.g.*, Pub. Comment Rep., A-19; *see also supra* Section IV(B). APR also fails to sell animals like production operations do, which results in older herd individuals contracting and harboring diseases for longer periods of time. Finally, APR fails to identify a disease mitigation plan to prevent the transfer of diseases from wildlife to bison, which then might impact the transfer of diseases to livestock. APR's conservation bison herd threatens nearby livestock herds by exposing them to increased risk.

Fencing also remains a major concern. *See, e.g.*, Pub. Comment Rep., App. A-5, A-8, A-12–13, A-14, A-23. APR seeks to construct, reconstruct, or modify a significant amount of interior and exterior fencing on the allotments. APR relies on Montana Department of Fish, Wildlife, and Parks' wildlife friendly fencing guidance for this design. EA, 2.9, App. B. But FWP designed this fencing to contain cattle and sheep, not bison. As seen with the wild bison in the Greater Yellowstone Area, these

[20] Under BLM's logic, bison are livestock for permitting purposes but wildlife for all other purposes.

fences do not contain bison. BLM's response to concerns about the proposed fencing focus on its ability to alter APR's grazing permit if incidents occur. *See* Pub. Comment Rep., App. A-6 ("BLM has the authority to modify permit terms").[21] But allowing the bison to trample fencing and move freely between APR and private land would wreak havoc on landowners' property and disrupt their livestock herds in an irreparable manner. Even if BLM stood by its promise to modify the grazing terms after such an incident, damage to fences, destruction of rangeland, and the introduction of disease could not be reversed.

IV. A stay serves the public interest.

The public interest favors maintaining the status quo until the Board can fully consider the merits of this serious controversy. *See supra* "Statement of Reasons." This matter implicates issues of great public interest. After BLM failed to provide an adequate opportunity for public comment, the community organized its own event for individuals to comment. This event garnered significant attention, and individuals explained how this decision would adversely affect them. *See generally* Pub. Comment Rep., App. A.

Allowing BLM to proceed with implementing this grazing decision before the State can obtain review through this administrative appeal would harm the public's interest and undermine the public's faith in this administrative process.

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[21] BLM's response is that "[i]f APR cannot successfully contain the bison to its appropriate pastures and/or allotments, BLM has the authority to modify permit terms and conditions …." Pub. Comment Rep., App. A-5. This wait-and-see approach undermines the very purpose of the public comment process.

CONCLUSION

BLM's approval of APR's change of use permit request runs afoul of clear statutory and regulatory guidelines. It transforms Northeast Montana into a wildlife viewing shed for out-of-staters at the expense of local communities, local families, and local agricultural producers. Whereas the TGA aimed "to develop and stabilize the western cattle business," APR's proposal aims to develop and stabilize a large nature reserve for people to come view wildlife.[22] But unauthorized means don't justify desirable ends. The BLM's rubber stamp of APR's application violates the APA, TGA, FLPMA, PRIA, and NEPA, and the agency's decision must be set aside.

DATED this 26th day of August, 2022.

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[22] *See* Mission, American Prairie (last visited August 22, 2022), https://www.americanprairie.org/mission-andvalues#:~:text=Our%20mission%20is%20to%20create,as%20part%20of%20America's%20heritage.

CERTIFICATE OF SERVICE

I certify that I served the foregoing document to counsel upon the following:

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CERTIFICATE OF COMPLIANCE

Pursuant to 43 C.F.R. § 4.401(c)(5), I certify that service will be made on each of the persons named in the decision (listed in Attachment 1 – Mailing List) via certified mail on August 29, 2022.

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Attachment 1

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Exhibit A

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Re: American Prairie Reserve Bison Change of Use DOI-BLM-L010- 2018-0007-EA June 2021 and FINDING OF NO SIGNIFICANT IMPACT AMERICAN PRAIRIE RESERVE BISON CHANGE OF USE DOI-BLM-L010-2018-0007-EA

Via: Electronic Submission

Dear Mehlhoff, Darrington, and Albers:

As Montana's Attorney General, I write to express my concerns regarding American Prairie Reserve's ("APR") change of use application, and the utter insufficiency of the Bureau of Land Management's ("BLM") Draft Finding of No Significant Impact ("FONSI") and Draft Environmental Assessment ("EA").

Whatever motives APR may harbor, and whatever donors APR may serve, its interests in this change of use permit request run afoul of clear statutory and regulatory guidelines and BLM should scrap the Draft FONSI and EA and conduct a more thorough review for the benefit of Montanans and the affected communities. My concerns regarding APR's 'vision' to transform Northeast Montana into a wildlife viewing shed for out-of-staters at the expense of local communities, local families, and local agricultural producers only grew more pronounced after hearing from over 250 Montanans directly on September 15, 2021.

While not comprehensive, I have summarized my concerns regarding the (in)adequacy of BLM's environmental review.

Bison Are Not Livestock

Under current law and regulation bison do not qualify as livestock. Livestock is a clearly defined term that includes only specifically listed domesticated animals. 'Bison' is absent from that list. The Draft FONSI and Draft EA substitute 'indigenous livestock' and 'indigenous animal' in place of livestock to describe bison. These terms, which are undefined, cannot be used to replace the longstanding definition of livestock. Even if these terms had some defined meaning that covers bison, APR's mission statement and marketing materials make clear that APR views the bison herd on its property as *wildlife*—not livestock—and thus outside the scope of the relevant laws and regulations.

The FONSI characterizes APR's request as a "10-year grazing permit for cattle and indigenous livestock (bison)" including changes in "class of livestock for Cattle and/or Indigenous animals (bison)" in the covered parcels. FONSI at 1. Grazing permit regulations found at 43 C.F.R. Part 4100 define livestock. *See* 43 C.F.R. § 4100.0-5 ("Livestock or kind of livestock means species of domestic livestock — cattle, sheep, horses, burros, and goats."). 'Indigenous livestock' is not a term used in statute or regulation and has no discernable meaning. 'Indigenous animal' is not defined in law or regulation, but is a term used in the rules allowing for special grazing permits *for non-livestock*. *See* 43 C.F.R. § 4130.6-4 ("Special grazing permits or leases authorizing grazing use by privately owned or controlled indigenous animals may be issued..."). Whether or not bison are "indigenous animals," they are clearly not cattle or any other livestock species. The regulatory structure clearly defines livestock to preclude bison and BLM cannot use ill-defined terms to insert bison into the definition of livestock.

This discussion over the definition of livestock matters because the purpose of the grazing lease structure is "to provide for the sustainability of the western livestock industry and communities that are dependent upon productive, healthy public rangelands." 43 C.F.R. § 4100.0-2. Livestock takes priority over non-livestock because that is the purpose upon which the leasing structure is built. APR's prior proposals sought to subvert this clear purpose by changing the type of animal from livestock (cattle) to non-livestock (bison) on its leases. *See* Overview of American Prairie Reserve's Proposed Action, Bureau of Land Management (April 2018). But now, APR's tactic has changed. No longer will they admit (in BLM proceedings) that bison are non-livestock, which is obviously correct. Now, they've conjured a new classification—indigenous livestock—and insist that bison fit inside. The law requires more than clever linguistic re-jiggering. APR doubtlessly paid a lot for the legal brain that suggested: "we only need to stop calling bison non-livestock and call them indigenous livestock instead," but unless the biological makeup of bison has change dramatically in the last three years, bison are still not livestock. So even if authorized under a

special grazing permit, special permits must still comply with the purpose of the Taylor Grazing Act ("TGA") and related statutes. That purpose is to provide for the *livestock* industry, not reintroduction of wildlife.

APR's statements outside of its proposal makes clear that they view bison as wildlife. APR previously told BLM its bison herds qualify under the TGA as indigenous animals. *See e.g.* APR 2018 Comments at 31.[1] But APR's marketing materials tell a different tale.[2] APR's mission "is to create the largest nature reserve in the contiguous United States, a refuge for people and wildlife preserved forever as part of America's heritage."[3] Glaringly absent from this mission statement is any mention of livestock or ongoing livestock operations. That is because APR's goal is to 're-wild' Northeast Montana, including the reintroduction of bison herds as wildlife, not livestock.[4] APR's Bison Management Plan ("BMP")[5] submitted to BLM admits as much stating, "[r]eintroduction of wildlife species is generally a long-term process." BMP at 17. Any doubt that wildlife refers to bison is removed because a goal of the BMP is to "[e]stablish a population that contributes to removal of wild bison from the Montana list of species of concern." *Id.* at 20.

In sum, APR's mission, statements, and goals are at odds with the TGA's objective to promote the livestock industry. APR seeks bison as wildlife, not livestock. Re-categorizing them as indigenous livestock undermines the TGA, hurts local livestock interests, and defies logic.

BLM Failed to Consider Important Interests

BLM, in analyzing the current proposal, puts on blinders that obscure the reality of what APR proposes. APR's current proposal derives entirely from an earlier, larger, proposal that APR has not disavowed. Because the current proposal is part and parcel of a larger scheme, BLM must analyze the consequences of APR's full plan to reasonably calculate impacts to local communities and to the state. BLM hasn't done so.

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[1] APR's 2018 Comments are available at https://www.americanprairie.org/sites/default/files/2018-06-11%20APR%20NEPA%20Comments.pdf. (accessed September 27, 2021).

[2] *See e.g.* www.americanprairie.org/wildlife-restoration ("American Prairie reintroduced bison in 2005 after a 120-year absence. Read about our bison goals, management, and progress over time.").

[3] www.americanprairie.org/mission-and-values.

[4] www.americanprairie.org/bison-faqs (APR would "be fine with" designating bison as wildlife for its operations).

[5] The BMP is available online at https://www.americanprairie.org/sites/default/files/APR_BisonMangPlan_5_29_18_sm.pdf. (accessed September 27, 2021).

NEPA requires federal agencies to consider the full scope of a proposed action to determine whether it will have a significant impact. Importantly, agencies cannot avoid this required cumulative impact analysis by looking only at the narrow proposal in front of it. *See* 40 C.F.R. 1508.27(b)(7) (For NEPA purposes, "significance cannot be avoided by terming an action temporary or by breaking it down into small component parts"); *see also* 40 CFR 1508.25(a)(1)(iii) "Actions are connected if they: Are interdependent parts of a larger action and depend on the larger action for their justification.").

APR's current proposal directly implicates 69,130 acres of BLM land; 32,710 acres of private land; and 5,830 acres of state trust land. Draft EA at 1-1. APR's 2017 proposal affected 260,893 acres of BLM land; 86,426 acres of private land; and 29,309 acres of state trust land. Revised APR Proposed Action at 1 (November 20, 2017).[6] APR makes clear that its scaled-down proposal is still part of the larger plan. *See* APR Proposal at 1 (September 24, 2019) (The current proposal "will give APR additional time to further demonstrate the sustainability of our preferred bison grazing system."). NEPA, in this context, does not contemplate such "we're-sure-this-will-work-out" projects because reviewing the proposal only in a temporary, geographically limited, or contingent context ignores the consequences of APR's comprehensive scheme.

BLM failed to conduct the necessary cumulative impact analysis of the current proposal and how it relates to the larger APR plan. Instead, the Draft EA includes only a cursory finding that no cumulative socioeconomic impacts exist. *See* Draft EA at 3-43. Respectfully, that is absurd. APR's mission is to displace Northeast Montana's livestock industry and replace it with a large outdoor zoo. That will obviously have negative impacts on Montana's agricultural economy—and acute impacts on local farmers and ranchers. *See* Draft EA at 3-37. BLM must do better. It should examine all the impacts of APR's current proposal in light of its broader scheme to eliminate the existing agricultural economy in Northeast Montana.

BLM Failed to Adequately Allow Public Input

BLM must allow the public, and state and local governments, meaningful opportunity to comment on the proposal. BLM inexplicably relies on public meetings held for a different proposal to justify its state and local outreach on this proposal. Further, the format and timing of the public meetings for APR's current proposal were seemingly designed to favor non-local interests at the expense of directly

[6] Available online at https://eplanning.blm.gov/public_projects/nepa/103543/139909/172013/APR_Proposal.pdf. (accessed September 27, 2021).

affected local communities and cannot possibly satisfy the requirement to allow Montanans to meaningfully comment on this matter.

BLM failed to account for state and local interests. *See* Draft FONSI at 6. The Draft FONSI says, "[f]ederal, state, and local interests were given the opportunity to participate in the environmental analysis process. A complete description of public involvement is contained in Chapter 4 of the EA." *Id.* But Chapter 4, in turn, states that public meetings were held on April 9 and 12, 2018. *See* EA 4-1. APR's current proposal was not submitted until September 24, 2019. *See* Proposal at 1. There is simply no possibility that public meetings concerning a different proposal, pre-dating the current proposal, can sufficiently address the concerns surrounding this proposal. That should be common sense.

As Montana Attorney General, I initiated a public meeting concerning the current proposal because BLM's public outreach has been woefully lacking. If BLM had done its job, my forum would not have been necessary to hear the voices of over 250 local Montanans on this issue.[7] But BLM did not do its job. A single virtual meeting held between 1 p.m. and 4 p.m. on a Wednesday afternoon doesn't work for Northeastern Montana agriculturists. Those people work for a living. The scheduling and format of that meeting benefits out-of-state and lobbying interests, not the people in the affected communities who are working during those times. The comments and public participation at that "meeting" make this clear. BLM needs to genuinely engage state and local stakeholders in a serious, non-perfunctory, fashion to address concerns regarding APR's proposal and what it means for the local economy.

Finally, APR's conduct throughout this proceeding leaves much to be desired. While it requests special dispensation in the instant permit application, APR previously threatened other permit holders. *See* APR 2018 Comments at 3 ("Other permittees should be aware that any standard or precedent set for APR, whether in NEPA or grazing stipulations, could just as easily become the standard for all livestock permittees.").[8] APR's my-way-or-the-highway (nonmotorized access only!) approach is nothing more than a reflexive threat to subject other permits to burdensome administrative protests and is, to be polite, unneighborly. No wonder APR has generated intense local opposition to its efforts. As I said at our public forum, "there may be people here that won't agree but this is Eastern Montana. We don't get angry with each other and we are going to be respectful."

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[7] Pierre Bibbs, "Knudsen gives a voice to locals in BLM, APR, grazing proposal," Phillips County News (September 22, 2021). Available online at https://www.phillipscountynews.com/story/2021/09/22/news/knudsen-gives-a-voice-to-locals-in-blm-apr-grazing-proposal/12022.html.

[8] Because bison are not livestock, it is entirely unclear how APR's proposal would reflect on actual livestock producers.

That said, my office will vigorously protect the lawful interests of Montana families and agricultural producers.

Montana communities can only thrive when we are working together. It does not work for Montana to have BLM rubber-stamp a radical proposal aimed at fundamentally transforming Northeastern Montana. We deserve better than that.

Sincerely,

Austin Knudsen
Montana Attorney General