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FILED

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY
DEPUTY

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

**ORDER ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT**

This cause comes before the court on cross-motions for summary judgment submitted on August 20, 2012, by Petitioners Western Watersheds Project, Gallatin Wildlife Association, Buffalo Field Campaign, and the Yellowstone Buffalo Foundation ("Petitioners"), and Respondents State of Montana and the Montana Department of Fish, Wildlife and Parks ("FWP" or "Department"). Pursuant to Petitioners' request for a hearing on their motion, the Court heard argument on March 29, 2013

BACKGROUND

Through the Pretrial Order, the parties stipulated to a set of uncontested facts establishing the background and history in this matter. In addition, the parties filed an administrative record consisting of more than 8,000 pages, portions of which were cited

in the parties' briefs and submitted for consideration at the hearing. The administrative record was admitted as Court's Exhibit 1 at the hearing, and the specific pages referenced by the parties were admitted as Petitioners' Exhibit 1 and Respondents' Exhibit A respectively. Neither party has asserted there are any questions of material fact that would preclude consideration of the cross-motions for summary judgment as a matter of law. The stipulated facts included in the Pretrial Order filed in November of 2012 are as follows:

1. Plains bison restoration and conservation remains an important mission today, and the Yellowstone bison are an ideal source population for restoration of the species in North America. The Yellowstone bison population contains unique genetics, and is one of the few—and possibly the only—population that does not have evidence of cattle gene introgression. The unique genetics and traits of the population make them particularly valuable for conservation and restoration of the species.

2. Some Yellowstone bison have been exposed to and may be infected with *brucella abortus*, a bacterial infection which, if passed to cattle, may cause cows to abort their fetuses.

3. Concern over the spread of brucellosis from Yellowstone bison has limited Interagency Bison Management Plan ("IBMP") agencies from using Yellowstone bison for restoration efforts outside the Greater Yellowstone area ("GYA").

4. The Yellowstone bison naturally migrate to winter and spring calving and feeding ranges beyond park boundaries into Montana. The numbers of bison that migrate vary, depending on a range of factors including access to and availability of forage and winter severity and duration.

5. To address concerns about the possibility of brucellosis transmission from bison to domestic cattle, and to manage the bison population, several state and federal agencies developed a joint management plan, the IBMP, to oversee management of bison in the Yellowstone area. The IBMP partner agencies include FWP, the Montana Department of Livestock ("DOL"), the U.S. Department of Agriculture's Animal and Plant Health Inspection Service ("APHIS"), the National Park Service ("NPS"), and the U S Forest Service ("USFS"). Representatives from the Nez Perce Tribe, Confederated Salish & Kootenai Tribes, and the InterTribal Buffalo Council ("ITBC") joined the IBMP in 2010.

6. The IBMP anticipates a variety of adaptive management practices for managing bison, including maintaining temporal and spatial separation from cattle, possible expanded tolerance in areas outside of Yellowstone, as well as hazing, capturing for confinement and later release, slaughter, and occasionally shooting bison on site in the field.

7. Quarantine of bison was another management action contemplated by the IBMP, but required further research and analysis before the agencies would consider making it part of the IBMP. Therefore, in 2004, FWP and IBMP partner APHIS proposed and began analyzing the Quarantine Feasibility Study ("QFS" or "Study") to determine whether quarantining Yellowstone bison and testing them for brucellosis over multiple generations could provide a high probability that the bison could be deemed brucellosis-free.

8. The project had three goals:

a. Develop quarantine procedures, using the best available science and adaptive research strategies, that will allow bison from Yellowstone National Park to be accepted as free of brucellosis and suitable for the establishment of new public and Native American bison herds or to augment existing populations in North America.

b. To research the feasibility of a program to conserve genetics from free-ranging Yellowstone bison by the creation of additional conservation bison herds in other habitats in North America without transmitting brucellosis onto these landscapes.

c. To examine the feasibility of quarantine protocols and the reintroduction of bison to large grassland systems as a conservation strategy that may benefit the management of bison in the GYA where populations are expanding beyond social tolerance limits.

9. FWP planned to complete the QFS by processing two groups of bison—called “cohorts”—through the Study in multiple phases. This matter concerns the first cohort of bison.

10. The QFS had three phases. The various phases were intended to determine whether bison that initially tested negative for brucellosis would subsequently test positive following pregnancy and calving.

11. The final phase of the Study called for the bison to be removed from their holding facilities and kept in a “closed herd” for an additional final five-year period for continued monitoring and testing.

12. The first cohort began with 100 calves captured from the Yellowstone population. Over half of the calves were slaughtered during Phase I. Thirty-seven females and eight males moved into Phase II, during which the females were bred with the males and some became pregnant and later calved.

13. By the time the first cohort was moved out of the quarantine facility in March 2010, there were 88 bison in the cohort.

14. The Department chose to use a request for proposals (“RFP”) process to identify and select sites for translocation of the bison graduating from the QFS. Its various environmental assessments (“EA”) prepared under the Montana Environmental Policy Act (“MEPA”) indicated the Department anticipated it would use the RFP process.

15. The RFP process involved seeking proposals from parties interested in housing the bison during the five-year closed herd monitoring and testing period, and/or for that period and permanently thereafter.

16. In the summer of 2008, the Department circulated a Request for Pre-Proposals and Letter of Interest, asking parties to express their interest in taking the bison. Four parties expressed initial interest in response to the letter. The request included criteria for relocation, including that the “quarantine bison, including any offspring, cannot be used for commercial purposes – i.e., sold as livestock (vs. ecotourism, outfitting, etc.)” and that “quarantine bison (and any offspring) must be managed as native wildlife (pre- and post 5-year closed herd). Bison will be public/Tribal wildlife (nor private) forever.”

17. In September 2008, the Department sent four of the parties that expressed initial interest a Request for Proposal seeking full proposals. Three parties submitted formal proposals for taking the bison.

18. The QFS Interagency/Tribal Bison Restoration Panel (“Panel”)—which consists of representatives from FWP, USFWS, DOL, ITBC, BLM, APHIS—reviewed the submissions and made recommendations to FWP. FWP remained responsible for

analyzing and selecting any translocation alternative.

19. FWP prepared an EA analyzing whether to accept the proposal submitted by the Northern Arapaho Tribe on the Wind River Reservation in Wyoming, and ultimately selected the Tribe's proposal and issued a Final EA and Decision Notice in March 2009. The Tribe agreed to manage the bison as wildlife and not for commercial purposes, and agreed to be responsible for all costs associated with moving the bison, fencing and management of the herd.

20. However, before the bison were moved to the Wind River Reservation, the Northern Arapaho Tribe rescinded its proposal because it was unable to acquire the necessary facilities for managing the bison.

21. As a result, during the summer of 2009, the Department issued another round of RFPs.

22. That second RFP letter included the same criteria that bison and offspring be managed as public/tribal wildlife forever and not used for commercial purposes, and specified: "All quarantine bison and their offspring are and will continue to be classified as public wildlife under the management jurisdiction of Montana Fish, Wildlife and Parks or the appropriate state or Tribal jurisdiction where they reside." FWP also included a sample Memorandum of Understanding that would have to be signed before bison could be transferred. The MOU contained the requirement that bison not be used for commercial purposes.

23. This second RFP was published in newspapers statewide. The Department received seven proposals.

24. Additionally, Montana Governor Brian Schweitzer asked Turner

Enterprises, Inc. ("TEI") to consider submitting a proposal.

25. FWP received five responses to the second RFP, three of which the Panel considered as proposals.

26. The proposal from TEI requested receipt of 80 percent of the offspring expected to be born to the "original" QFS herd, to provide "incentive for TEI's expenditure of capital and assumption of risk" associated with housing the QFS bison. TEI stated it could not provide assurances against commercialization of those bison, as the RFP criteria required.

27. The Panel considered the proposals and how to respond to TEI's request to receive offspring for commercial purposes. The Panel noted the strength of TEI's proposal was that TEI "could do it" and it was the "only proposal" that could "take bison right away." Some other proposals were not ready to accept the bison at that time. As well, the Panel noted that part of the cohort needed to be moved by the end of the year, and the remainder needed to be moved before calving. The panel further noted that from a "facility and functional standpoint, Turner meets the criteria." On the other hand, the Panel noted there was "an agreement with YNP that the bison not be commercialized" and that the RFP included "offspring" in the non-commercialization criteria. The Panel discussed whether to renegotiate the conservation commitment with TEI or to change the RFP criteria to allow commercialization. The Panel apparently recommended the RFP be changed, with panel members to investigate the commercialization issue for their various entities. The Panel also recommended the revised RFP be reissued so it would not appear to other commercial producers that the "deck was stacked" for TEI if the criteria were changed to allow commercialization but

the changed RFP was not circulated.

28. FWP then re-issued the RFP and eliminated the criteria to manage the bison as native wildlife both pre- and post- closed herd, and only prohibited commercialization during the 5-year closed herd period. This third RFP was sent only to those entities that had previously submitted proposals during the second RFP.

29. TEI resubmitted its proposal, this time requesting 75 percent of the offspring instead of 80 percent. FWP also received one new proposal from the Wyoming State Parks and Cultural Resources requesting 14 of the bison, as well as modified proposals from two other entities that had previously submitted proposals.

30. The Panel considered the proposals again, and further deliberated about the commercialization and conservation issues. The Panel generally agreed that the TEI proposal was the “most complete” but some members were concerned about having any of the bison privatized. At least one Panel member did not support transferring any bison to TEI. The Panel ultimately recommended that 14 bison be moved to Guernsey State Park in Wyoming (“Guernsey”), which would help address “public access” concerns, and the other 74 bison be moved to TEI’s Green Ranch.

31. FWP then prepared an EA considering a no-action alternative (with some bison to remain at the quarantine facility and some to be slaughtered), a proposed alternative transferring 74 bison to TEI and 14 to Guernsey, or to transfer all the bison to TEI, or transfer 14 to Guernsey and manage the rest as under the no action alternative.

32. Two proposals were not considered because they sought the bison for exclusively commercial purposes, and two other proposals were rejected because they were not ready to take the bison in February 2010.

33. FWP also eliminated from consideration the return of bison to Yellowstone National Park, because the population in the Park was well-established and it would risk exposing the QFS bison to brucellosis and thus undermine the purpose of the QFS. FWP did not fully evaluate translocating the bison to a state Wildlife Management Area ("WMA"), explaining it believed it should first complete a statewide planning process, and noting that no existing WMA had the necessary facilities to manage bison as specified in the RFP, including bison-proof fencing and testing facilities.

34. FWP issued a final EA and Decision Notice ("DN") in February 2010, selecting the alternative to translocate all the bison to TEI for five years. During the five-year period TEI agreed to house the bison at its Green Ranch and to continue to test the bison for brucellosis, and FWP agreed to transfer title of 75 percent of the bison offspring to TEI at the end of that five-year period.

35. TEI estimated the cost of its proposal would be \$480,000.

36. TEI's proposal projected that approximately 150 bison would be returned to FWP at the end of the five-year period, while TEI would keep approximately 188 for which FWP would transfer title to TEI.

37. In its EA and DN, FWP did not analyze what impact removing TEI's share of offspring would have on the genetic makeup or viability of the remaining bison, or how that removal may impact future restoration and conservation efforts.

38. At the time FWP agreed to TEI's proposal, FWP did not have a specific plan for disposition of the bison to be returned, and did not commit to manage them as wildlife or for non-commercial purposes.

39. On February 16, 2010, FWP signed a Memorandum of Understanding (“MOU”) with TEI and the Montana DOL.

40. The MOU provided that if a court ordered removal of the QFS bison and offspring from the Green Ranch, FWP would be obligated to allow TEI to extract genetic material in the form of semen, ova and/or zygotes from the QFS bison instead of the offspring TEI otherwise would have received. The MOU also provided that if FWP decided to relocate bison before the five-year period ended, TEI would retain offspring born at that time, and FWP would transfer title to TEI of those offspring’s offspring to make up the equivalent of TEI’s 75 percent portion.

41. In March 2010 the bison were moved to TEI’s Green Ranch.

LEGAL STANDARD

Both parties have moved for summary judgment pursuant to Rule 56(c), M.R.Civ.P. Under Rule 56(c) a moving party is entitled to summary judgment when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Wagner v. Woodward*, 2012 MT 19, ¶ 16, 363 Mont. 403, 270 P.3d 21. As noted above, there is no dispute as to the material facts of this case and, as a result, the issue before the Court is purely a question of law.

DISCUSSION

Petitioners assert that the common law Public Trust Doctrine “should be applied to protect public wildlife in Montana,” specifically the quarantined bison at issue in this case. Reply Br., p. 3. Petitioners describe the Public Trust Doctrine in a number of ways, but essentially summarize that “the state is entrusted with the duty to protect

public resources such as wildlife for the benefit and use of its public beneficiaries,” and “[t]he perpetual nature of the trust necessitates preservation of the wildlife, in this instance the iconic plains bison.” Reply Br., p. 1. According to Petitioners, under the public trust doctrine the State is precluded from alienating a public trust resource, such as bison, to a private party for private gain.

Petitioners argue the Department violated these principals of trusteeship and the public trust by allowing TEI to keep 75 percent of the bison offspring in exchange for TEI's five years of testing, management and care. Petitioners characterize the Department's decision as “redistribut[ing] public bison from public ownership to private ownership for restricted private benefit.” Reply Br., p. 2. Petitioners also include a number of allegations that the Department did not fulfill its public trust obligations because it did not undertake any analysis or consideration of various alternatives to its agreement with TEI, or appropriately weigh the impacts of their decision on public trust values. Pl.'s Br. in Support, p. 12. Petitioners contend that in order to “legitimately transfer bison to a private party in this instance,” the Department must be able to demonstrate that “the privatization was necessary to promote overall conservation and restoration values,” and “there will clearly be at least equal public benefit gained to compensate for the public loss and private gain.” Reply Br., p. 11. Finally, Petitioners include that, in addition to the privatization concerns, the Department also failed to satisfy its public trust duties by housing the bison “on private property without making any provisions for public access or information about the ‘public’ bison herd.” Pl's Br. in Support, p. 13.

Petitioners acknowledge they did not challenge the Department's actions, or the sufficiency of the Environmental Impact Statements ("EIS") or EAs that were completed, under either MEPA or the Montana Administrative Procedure Act ("MAPA"). Reply Br., p. 14. In that regard, § 75-1-201(6), MCA, authorizes a party to bring an action or proceeding in a Montana district court or a federal court to challenge a final agency decision made pursuant to MEPA, and further provides that "[a]ny action or proceeding challenging a final agency action alleging failure to comply with or inadequate compliance with a requirement under this part must be brought within 60 days of the action that is the subject of the challenge." Section 75-1-201(3), MCA, also discusses judicial review of the adequacy of an agency's environmental review document. Here, Petitioners concede that they are not basing their claims in this case on any alleged failure of the Department to follow the dictates of MEPA or the Title 87 statutes governing the Department in general in reaching its decision to enter into the MOU with TEI. Nor does it appear that Petitioners challenged, via judicial proceeding, any prior aspects or phases of the QFS or the adequacy of the Department's environmental review documents.

The Department responds that any common-law public trust doctrine applicable to its actions as a state agency has largely been subsumed by statutes establishing its duties and procedures relating to wildlife management and conservation as adopted by the Montana Legislature. The Department further asserts that a common law public trust duty with respect to wildlife has not previously been recognized in Montana and is not explicitly required under the Montana Constitution. Resp. Br , p. 5. According to the Department, the decision to enter into the MOU with TEI was within its statutory

authority for bison management. The Department states that it acted within its discretion to change the RFP regarding the transfer of the bison offspring in compensation to TEI as long as it complied with the required procedures through MEPA and the final decision was authorized by law. Resp. Br., p. 3. The Department notes that it is statutorily required to consult and coordinate with the Montana DOL regarding the bison, and the DOL also signed the MOU with TEI. The Department thus concludes that it considered the relevant data, provided explanation for its actions and complied with all applicable MEPA analysis.

The Department also notes that Petitioners did not invoke MEPA's provisions for judicial review of the adequacy of the Department's EAs or the analysis and explanation of its decision in the DN. The Department argues that any remaining common law public trust duties it owes have been met through the QFS, a discretionary Department action with the stated goal of long-term bison conservation in Montana. The Department further contends there is no legal authority for Petitioners' claim that they are entitled to view all wildlife or to have public access to the bison in the Study.

The Montana Supreme Court has not directly addressed the issue of the State's public trust duties in relation to wildlife. Where it has touched on the subject through *dicta*, however, its analysis reflects recognition that legislation enacted to provide regulations and procedures to manage and protect Montana's wildlife incorporates public trust doctrine concepts. See *Hagener v. Wallace*, 2002 MT 109, 309 Mont. 473, 47 P.3d 847; *State v. Boyer*, 2002 MT 33, 308 Mont. 276, 42 P.3d 771. In *Hagener*, the Court did not directly address the subject, but did note that "statutes... are essential to ensure the health and safety of Montana's natural wildlife population. They reflect the

theory underlying environmental protection that being proactive rather than reactive is necessary to ensure that future generations enjoy both a healthy environment and the wildlife it supports.” *Hagener*, ¶ 33.

Likewise, the Supreme Court's analysis in *Boyer* reflects recognition of statutes and regulations adopted by the Legislature to implement Constitutional, and common law, duties to manage, protect and preserve Montana wildlife. Specifically in *Boyer* the Supreme Court stated:

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

Boyer, ¶ 22 (emphasis added). Although *dicta*, the discussion in *Boyer* is insightful. The Court acknowledges the Montana Constitution’s guarantee of the right to a clean and healthful environment in Article IX, § 1(1), and then notes the Legislature enacted statutes to protect wildlife in order to give effect to this right. In summarizing, the *Boyer* Court indicated the State’s “Constitution, laws, and regulations” assure Montana’s wildlife will be protected for future generations. Moreover, the *Boyer* Court stated that, in acting in their statutory capacity, FWP wardens “are acting not only as law enforcement officers, but as public trustees protecting and conserving Montana’s wildlife and habitat for all of its citizens.” *Boyer*, ¶ 24. While Petitioners argue that *Boyer*’s reference to “laws” includes the common law, when read in full, it is clear the *Boyer*

Court was discussing a specific statute; § 87-1-502, MCA.

The interplay between the common law and statutory duties also is demonstrated by the Montana Supreme Court's holdings in *Montana Coalition for Stream Access v. Curran*, 210 Mont. 38, 682 P.2d 163 (1984) (*Curran*), and *Bitterroot River Protec. Assoc. v. Bitterroot Conservation Dist.*, 2008 MT 377, 346 Mont. 507, 198 P.3d 219 (*Bitterroot River*). In *Curran*, the Supreme Court concluded that, under Article IX, § 3(3) of the Montana Constitution, as well as the public trust doctrine, the public had a right to recreational use of the state's waters without regard to streambed ownership or navigability for non-recreational purposes. See *Curran*, 210 Mont. at 53, 682 P.2d at 171. While Petitioners are correct that the *Curran* Court looked to both the Montana Constitution and the common-law public trust in reaching its decision, the *Curran* Court looked to the common law because there was no statutory guidance on the specific issue. In response to the *Curran* decision, the Legislature enacted the Stream Access Law to remedy the lack of statutory guidance regarding the public's constitutional right to access the State's waters.

In *Bitterroot River*, the Montana Supreme Court explained that, in response to *Curran*, the "Legislature enacted the (Stream Access Law), an act 'generally defining laws relating to recreational use of state waters,' to codify and provide specifics with regard to recreational use of state waters." *Bitterroot River*, ¶ 51 (quoting Ch. 556, L. 1985). This explanation supports the Department's contention that the Legislature, acting pursuant to its constitutional authority, gives precision and guidance to the public trust doctrine by enacting statutes directing the Department in how to fulfill its duties to the public.

This is not to say that no common law public trust exists. But where the Montana Legislature enacts legislation pursuant to its constitutional authority, that legislation necessarily subsumes the common law. Section 1-1-108, MCA; See *also*, *Boyer*, ¶ 22; *Bitterroot River*, ¶ 51. It is these statutory obligations for which state agencies, including the Department of Fish, Wildlife and Parks, are accountable.

Other jurisdictions also have acknowledged a statutory basis for wildlife protection and preservation as opposed to applying general common law principles. For instance, the California Supreme Court has acknowledged that “the duty of government agencies to protect wildlife is primarily statutory.” *Cal. Env’tl. Protec. Info. Ctr. v. Cal. Dept. of Forestry & Fire Protec.*, 187 P.3d 888, 926 (Cal. 2008) (*EPIC*); see *also Ctr. for Biological Diversity v. FPL Group, Inc.*, 166 Cal. App. 4th 1349, 1364 (Cal. App. 1st Dist., 2008) (*FPL*).

The Court notes that Petitioners rely heavily on *FPL* in an attempt to counter the California Supreme Court’s statement in *EPIC*. See Petitioners’ Answer Brief, pp. 6-7. In particular Petitioners quote *FPL* as follows:

it matters not whether the obligations imposed by the public trust are considered to be derived from the common law or from statutory law, or from both. Either way public agencies must consider the protection and preservation of wildlife

Thus, Petitioners argue that, regardless of whether the Department’s “public trust duties stemmed from statutes and regulations that embody the common law doctrine or from the common law doctrine alone—FWP would still be obligated to protect the wildlife in the state and act with loyalty and honor as the trustee over public wildlife.” Petitioners further assert that “[e]ither way here, FWP must evaluate the impacts of its actions on the bison resource and public trust values, and undertake only those actions that

provide clear public benefit as opposed to private benefit." As discussed below, however, Petitioners' arguments essentially are an assertion that the Department failed to adequately analyze and evaluate all available options when it developed the third RFP and entered into the MOU with TEI. This assertion falls squarely into the parameters and requirements of MEPA and Petitioners failed to challenge the Department's actions under the MEPA provisions authorizing such challenges.

Furthermore, Petitioners' reliance on *FPL* is problematic for two reasons. First, Petitioners omit the beginning of the quoted sentence, which states "For purposes of deciding the issues presented in this case . . .," and thus qualifies application of the statement in other cases. See *FPL*, 166 Cal. App. 4th at 1364. Second, because it is a decision of the California Court of Appeals, *FPL* necessarily was controlled by the California Supreme Court's decision in *EPIC* and, indeed, *FPL* acknowledged such in stating that "[e]ither way, public agencies must consider the protection and preservation of wildlife although, as the Supreme Court indicates, the contours of that obligation are 'generally speaking' (ibid.), defined by statute." *FPL*, 166 Cal. App. 4th at 1364 (quoting *EPIC*, 187 P.3d at 926).

Federal courts also have rejected arguments that resource management agencies such as the NPS and Bureau of Land Management have public trust duties beyond their statutory duties. See *Sierra Club v. Andrus*, 487 F. Supp. 443 (D.D.C. 1980) ("To the extent that plaintiff's argument advances the proposition that defendants are charged with 'trust' duties distinguishable from their statutory duties, the Court disagrees. Rather, the Court views the statutory duties previously discussed as comprising all the responsibilities which defendants must faithfully discharge."); *Sierra*

Club v. Watt, 659 F.2d 203 (D.C. Cir. 1981).

Section 1-1-108, MCA, provides that

[i]n this state there is no common law in any case where the law is declared by statute. But where not so declared, if the same is applicable and of a general nature and not in conflict with the statutes, the common law shall be the law and rule of decision.

The Montana Legislature has enacted a statutory scheme, including provisions for wildlife management and enforcement of fish and game laws, to address the protection and preservation of Montana wildlife. Within that statutory scheme, there are a number of statutes specifically directed toward the management of wild bison, which also acknowledge and provide direction to address concerns related to the control of Brucellosis. These statutes, along with the procedural requirements under MEPA, provide the framework for the preservation, protection and management of bison through the Montana Department of Fish, Wildlife and Parks. These statutes also provide the public, and Petitioners in this case, with available remedies and procedural challenges should the Department fail to fulfill its obligations or follow required procedures.

The Department has broad statutory authority and management responsibilities for bison as set forth at § 87-1-216, MCA. The purpose of the statute is to “set out specific duties for the department for management of [bison].” Section 87-1-216(1)(c), MCA. The Montana Legislature recognized that “significant potential exists for the spread of contagious disease to persons or livestock in Montana and for damage to persons and property by wild buffalo or bison.” Section 87-1-216(1), MCA. To this end, the Legislature designated “publicly owned wild buffalo or bison originating from Yellowstone national park as a species requiring disease control” Section 87-1-

216(1)(a), MCA. It designated “other wild buffalo or bison as a species in need of management” Section 87-1-216(1)(b), MCA. The Department is “responsible for the management, including but not limited to public hunting, of wild buffalo or bison in this state that have not been exposed to or infected with a dangerous or contagious disease....” Section 87-1-216(2)(a), MCA.

In fulfilling these duties, the Department is required to consult, coordinate, and cooperate with the DOL. Section 87-1-216(b)-(c), MCA. For its part, the DOL may physically remove bison by a number of methods, “including but not limited to hazing and aversion tactics or capture, transportation, quarantine, or delivery to a department-approved slaughterhouse.” Section 81-2-120(1)(a), MCA. The DOL also may destroy bison using firearms. Section 81-2-120(1)(b), MCA. Finally, wild bison that have been certified brucellosis-free by the state veterinarian may be “sold to help defray the costs that the [DOL] incurs in building, maintaining, and operating necessary facilities related to the capture, testing, quarantine, or vaccination of the wild buffalo or wild bison” Section 81-2-120(1)(d)(i), MCA.

Based on these statutory provisions, FWP has broad authority to manage bison in Montana. The bison management statutes for both FWP and the DOL—with whom FWP must consult, coordinate, and cooperate with in bison management pursuant to § 87-1-216(b)-(c), MCA)—provide the basis for bison management in Montana. This authority is broad, ranging from management practices “including but not limited to public hunting,” outright slaughter or shooting bison. See §§ 87-1-216(2)(a) and 81-2-120(1)(a)-(b), MCA. While the authority to alienate bison to a private entity may not be expressly provided to FWP in the statutes, § 81-2-120(1)(d)(i), MCA, does allow the

DOL to sell bison “to help defray costs that the department incurs in building, maintaining, and operating necessary facilities related to the capture, testing, quarantine, or vaccination of the wild buffalo or wild bison” In this regard, the Court notes that the DOL was a signatory to the MOU with TEI which granted TEI the right to retain 75 percent of the bison offspring.

The statutory framework authorizing FWP’s management of bison in Montana necessarily grants the Department a wide variety of options. While Petitioners may not agree with the ultimate decision, the Department’s decisions are entitled to “great deference, especially where it implicates substantial agency expertise.” *Winchell v. Dept. of Nat. Resources and Conservation*, 1999 MT 11, ¶ 11, 293 Mont. 89, 972 P.2d 1132. Clearly, the Department has considerable expertise in managing bison, having been an IBMP partner-agency since 2000. Accordingly, given the Department’s broad statutory duties and authorization to manage Montana bison, the Department’s interpretation of these statutes is entitled to deference. *See Sleath v. W. Mont. Home Health Servs., Inc.*, 2000 MT 381, ¶ 37, 304 Mont. 1, 16 P.3d 1042, *quoting Chevron, U.S.A., Inc. v. Nat. Resources Def. Council*, 467 U.S. 837, 844 (1984). Furthermore, when the Legislature grants an agency such broad decision-making authority as that granted to the Department under § 87-1-216, MCA, the Court cannot substitute its judgment for that of the agency by determining whether the Department’s decision was correct. *Hobble Diamond Ranch, LLC v. State*, 2012 MT 10, ¶ 21, 362 Mont. 310, 268 P.3d 31.

The Department also must comply with the requirements of MEPA, codified at Title 75, Section 1, part 1 of the Montana Code Annotated. While MEPA is

characterized as procedural in nature, it also requires state agencies to consider the impacts of their proposed actions on the environment. See Amended Complaint, ¶ 46 (noting “MEPA reflects the public trust doctrine....”); Respondents' Brief in Support, p. 8.

As a starting point, § 75-1-102(1), MCA, states that

[t]he legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Montana Environmental Policy Act.

Section 75-1-102(2), MCA, then sets forth that it is the purpose of MEPA

to declare a state policy that will encourage productive and enjoyable harmony between humans and their environment, to protect the right to use and enjoy private property free of undue government regulation, to promote efforts that will prevent, mitigate, or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans, to enrich the understanding of the ecological systems and natural resources important to the state

Furthermore, in its express statement as to the policy of the State in enacting MEPA, the Legislature specifically provided as follows:

(1) The legislature, recognizing the profound impact of human activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances, recognizing the critical importance of restoring and maintaining environmental quality to the overall welfare and human development, and further recognizing that governmental regulation may unnecessarily restrict the use and enjoyment of private property, declares that it is the continuing policy of the state of Montana, in cooperation with the federal government, local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which humans and nature can coexist in productive harmony, to recognize the right to use and enjoy private property free of undue government regulation, and to fulfill the social, economic, and other requirements of present and future generations of Montanans.

(2) In order to carry out the policy set forth in parts 1 through 3, it is the continuing responsibility of the state of Montana to use all practicable

means consistent with other essential considerations of state policy to improve and coordinate state plans, functions, programs, and resources so that the state may:

- (a) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (b) ensure for all Montanans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
- (c) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- (d) protect the right to use and enjoy private property free of undue government regulation;
- (e) preserve important historic, cultural, and natural aspects of our unique heritage and maintain, wherever possible, an environment that supports diversity and variety of individual choice;
- (f) achieve a balance between population and resource use that will permit high standards of living and a wide sharing of life's amenities; and
- (g) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(3) The legislature recognizes that each person is entitled to a healthful environment, that each person is entitled to use and enjoy that person's private property free of undue government regulation, that each person has the right to pursue life's basic necessities, and that each person has a responsibility to contribute to the preservation and enhancement of the environment. The implementation of these rights requires the balancing of the competing interests associated with the rights by the legislature in order to protect the public health, safety, and welfare.

Section 75-1-103, MCA.

As acknowledged by Petitioners, these stated policies and purposes reflect the nature of the State's duty as trustee over important natural resources by providing that the State is to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations," "ensure for all Montanans safe, healthful,

productive, and aesthetically and culturally pleasing surroundings,” and “attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences....” Section 75-1-103(2)(a)-(c), MCA; *see also* Pl’s. Proposed Final Order and Judgment, nt. 5, p. 25.

Based on the above, the Court concludes that the specific statutory directives to the Department for bison management under Title 87, in conjunction with express policies enunciated and enacted by the Legislature in MEPA, codify the Department’s public trust duties with regard to bison management and provide specific procedures to ensure implementation of those duties. The Court further concludes that these statutes sufficiently address the principles and concerns identified by Petitioners under the common-law public trust doctrine. The Court therefore declines to impose any requirement of a common-law public trust doctrine in addition to, or in place of, the statutes already adopted by the Montana Legislature in directing the Department’s duties regarding preservation, protection and management of Montana’s wildlife.

As noted above, Petitioners have not challenged that the Department followed MEPA procedures throughout not only the IBMP, but also the QFS, as well as the decision-making process leading up to the agreement with TEI. Nor have Petitioners challenged the sufficiency of the EAs that were completed for each phase of the Study. While Petitioners argue that the Court should require the Department to undertake new analysis “either pursuant to [MEPA] or some other similar process,” (Stipulated Pretrial Order, p. 13), Petitioners do not otherwise allege the Department has violated MEPA. *See* Petitioners’ Reply Brief, p. 14.

The Court has concluded above that any public trust duty of the Department is contained within the statutory and procedural requirements of Title 87 and MEPA. Therefore because Petitioners do not allege the Department failed to meet its statutory obligations, the Petitioners have not established that the Department has not fulfilled its public trust duties.

Petitioners also argue that the common-law public trust doctrine places heightened duties on the Department in this instance because of the “unique” genetics of Yellowstone bison. Petitioners assert that

[a]s FWP explicitly states, it views the presence of brucellosis as limiting its ability to use the “otherwise genetically pure bison population” of the Yellowstone ecosystem “for conservation purposes elsewhere.” FWP Brief at 2, citing AR 3283. The small population acquired through the quarantine project therefore represents a unique and valuable portion of the overall population, and it is to this population and the trust values associated with them – as well as to the species as a whole – that FWP owes its duties.

Petitioners' Answer Brief, p. 14. As noted above, however, it appears that Petitioners did not challenge the portion of Phase 1 of the QFS in which over half of the initial 100 “genetically pure bison” were slaughtered for testing purposes. Thus, 55 genetically pure bison were prevented from ever being used “for conservation purposes elsewhere” long before the Department entered into its agreement with TEI.

Additionally, according to the Department’s predictions, at the end of the 5-year cycle of Phase III of the QFS, at least 150 genetically pure—and brucellosis-free—bison will be returned to the State; half again as many bison as were initially brought into the QFS and almost twice as many as were first placed into Phase III of the QFS. Again, if Petitioners really believed that the Department did not sufficiently address the unique characteristics of the bison in the QFS, the remedy was to challenge the sufficiency of

the Department's analysis under MEPA. The Court also notes that a federal district court and the 9th Circuit Court of Appeals have rejected the argument that agencies' management of Yellowstone bison failed to adequately consider genetic concerns. See, *W. Watersheds Project v. Salazar*, 766 F. Supp. 2d 1095, 1109 (D. Mont. 2011) ("The NPS has diligently continued to monitor the size and population characteristics of the Yellowstone herd throughout the IBMP period and has continued to conduct and fund studies to promote its understanding of the best practices to preserve the herd's genetic diversity. Plaintiffs fail to show that new scientific information is significant to an extent or degree not analyzed in the existing NEPA documents by the Defendants or that additional NEPA analysis is necessary." *Id.* at 1109.), *aff'd*, *Western Watersheds Project v. Salazar*, 2012 U.S. App. LEXIS 18433 (9th Cir. 2012).


Similarly, Petitioners' complaint that the Department "failed to plan ahead" for placement of the bison in the third Phase of the QFS is not a claim that the Department violated the common-law public trust. Rather, if the proposals or EAs that were completed by the Department failed to sufficiently address plans for placement during Phase III, the remedy available to Petitioners was a proceeding brought pursuant to the provisions of MEPA. Nor do Petitioners provide the Court with any legal support for the proposition that government agencies cannot change their decisions. Provided they do so using the correct public process and their final decisions are authorized by statute, a governmental agency can determine that a different action should be pursued. Here, as discussed extensively above, Petitioners do not otherwise allege the Department's MEPA process was flawed. Therefore, the Court cannot provide Petitioners with any other relief on this claim.

Petitioners also have argued that the Department's agreement with TEI has harmed them because they can no longer view and observe the bison that are located on TEI's private Green Ranch, and that the Department reneged on "promises" to keep the bison on public lands for public viewing. Petitioners do not provide any legal authority that requires that the bison subject to the Study must be available for public view on a regular or routine basis. It is the responsibility of the Department to ensure that TEI complies with the terms of the MOU and the Court has no legal basis to require access to the bison involved in the Study by the public.

The simple truth is that management of Yellowstone bison is no easy task, from either a logistical standpoint or a public relations one. Yellowstone bison arouse great passions from individuals and groups across the spectrum. They are difficult to fence, in or out. They may carry disease. Under some circumstances they can be dangerous. Some members of the public may welcome bison in their part of the state; others do not. Indeed, as noted by the Department during the hearing on the Motions, at least two other lawsuits concerning the Department's management of Yellowstone bison currently are on appeal before the Montana Supreme Court. There are no simple, easily-applied answers to the issues involved in the management, protection and conservation of the bison located in the GYA. In this case, however, the Court must conclude that Petitioners have failed to establish that the Department's actions were legally incorrect or insufficient.

Accordingly, **IT IS HEREBY ORDERED** that the Department's Motion for Summary Judgment is **GRANTED**. Petitioners' Motion for Summary Judgment is **DENIED**. As a result, **IT IS FURTHER ORDERED** that the First Amended Complaint for Declaratory and Injunctive Relief is **DISMISSED**.

Dated this 22 day of April, 2013.



Honorable Holly Brown
District Judge

c: Summer Nelson - *e-mailed*
Zach Zipfel - *mailed hard copy*
Robert Lane } *e-mailed*
John Lynch }
Rebecca Dwyer }
4/22/13