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October 13, 2022

ORDER

STATE OF MONTANA, by and through)	MT-010-22-01
the Montana Attorney General,)	
	)	Appeal of a July 28, 2022, Notice of
Appellant	)	Final Decision authorizing grazing
	)	in the Telegraph Creek, Box Elder,
v.	)	Flat Creek, Whiterock Coulee, East
	)	Dry Fork, French Coulee and the
BUREAU OF LAND MANAGEMENT,	)	Garey Coulee Allotments, Malta
)	Field Office, Montana
Respondent)	
AMERICAN PRAIRIE RESERVE,)	
Intervenor)	
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NORTH PHILLIPS COUNTY)	MT-010-22-03
COOPERATIVE STATE GRAZING)	
DISTRICT, SOUTH PHILLIPS)	Appeal of a July 28, 2022, Notice of
COUNTY COOPERATIVE STATE	)	Final Decision authorizing grazing
GRAZING DISTRICT, and MONTANA	)	in the Telegraph Creek, Box Elder,
STOCKGROWERS ASSOCIATION,	)	Flat Creek, Whiterock Coulee, East
	)	Dry Fork, French Coulee, and the
Appellants	)	Garey Coulee Allotments, Malta
	)	Field Office, Montana
v.)	
)	
BUREAU OF LAND MANAGEMENT,)	
)	
Respondent)	
AMERICAN PRAIRIE RESERVE,)	
Intervenor)	

STATE OF MONTANA, BY AND	)	MT-010-22-02
THROUGH ITS GOVERNOR,)	
MONTANA DEPARTMENT OF	)	Appeal of a July 28, 2022, Notice of
AGRICULTURE, MONTANA	)	Final Decision authorizing grazing
DEPARTMENT OF LIVESTOCK,	)	in the Telegraph Creek, Box Elder,
MONTANA DEPTMENT OF	)	Flat Creek, Whiterock Coulee, East
NATURAL RESOURCES AND	)	Dry Fork, French Coulee and the
CONSERVATION, and MONTANA	)	Garey Coulee Allotments, Malta
DEPARTMENT OF FISH, WILDLIFE	)	Field Office, Montana
AND PARKS,)	
)	
Appellants)	
)	
v.)	
)	
BUREAU OF LAND MANAGEMENT,)	
)	
Respondent)	
AMERICAN PRAIRIE RESERVE,)	
Intervenor)	

ORDER DENYING PETITIONS FOR STAY

I. SUMMARY

The above-captioned appellants¹ (referred to collectively as Appellants) have each appealed from, and petitioned for a stay of, a July 28, 2022, Final Decision issued by the Bureau of Land Management (BLM) responding to and approving the American Prairie Reserve's (APR) change of use application for seven BLM allotments in Phillips County, Montana: Telegraph Creek, Box Elder, Flat Creek,

¹ For clarity, this decision refers to the appeal of the State of Montana through its Attorney General as "MT AG Appeal" and to the appeal of the State of Montana acting through its governor and its above-captioned agencies as "MT Gov Appeal." The appeal filed jointly by the South and North Phillips County Cooperative State Grazing Districts and the Montana Stockgrowers Association is referred to as the "Districts Appeal."

Whiterock Coulee, East Dry Fork, French Coulee and Garey Coulee Allotments (Allotments). As discussed further below, BLM's Final Decision authorizes a change in use from cattle to cattle and/or domestic indigenous animals (bison) for four of these allotments, of which only one, Whiterock Coulee, will have bison introduced in the immediate future. The change of use decision authorizes several other changes related to fencing. As explained further below, I am denying the stay petitions because Appellants have not adequately demonstrated the likelihood of immediate and irreparable harm if a stay is not granted.

II. BLM'S FINAL DECISION

A. Changes from the Existing Grazing Authorizations

BLM issued the final decision on July 28, 2022 (the "Final Decision"). This decision provides for BLM to re-issue 10-year grazing permits to APR for the seven grazing Allotments identified above. BLM's Final Decision makes various changes to the grazing permits. BLM approved a combination of Alternatives B and C as described in an Environmental Assessment (EA) for the APR Bison Change of Use, DOI-BLM-MT-L010-2018-0007-EA.² Alternative B was selected for the Telegraph Creek, Box Elder, Flat Creek and Whiterock Coulee Allotments.³ Alternative C was selected for the French Coulee, East Dry Fork, and Garey Coulee Allotments.⁴ BLM also elected to modify certain permit terms and conditions in accordance with Alternative B.⁵

BLM approved a change in use for four of the grazing allotments: the Flat Creek, Whiterock Coulee, French Coulee, and Garey Coulee Allotments. On these allotments, livestock authorized to graze changed from cattle only to cattle and/or indigenous animals that are identified as bison owned and managed by APR.⁶

² The EA is included in the Administrative Record (AR) at 2.5-01. Citations to the EA will only refer to the EA.

³ Final Decision at 2. The Final Decision is included in the Administrative Record at 2.8. Citations to the Final Decision will only refer to the Final Decision.

⁴ *Id.*

⁵ *Id.*

⁶ Final Decision at 2-4. The Final Decision and other documents leading up to the Final Decision use the terms bison and domestic indigenous livestock interchangeably. This decision does so as well except where distinguished.

BLM's final decision changes the use of 3,866 AUM⁷ allocated to these four allotments from cattle only to cattle and/or indigenous animals.⁸ The number of authorized livestock on these four allotments will increase by 18, from 970 livestock to 988.⁹ Permits that authorize grazing by both cattle and/or indigenous livestock will allow for any combination of cattle or indigenous livestock.¹⁰ The other three grazing allotments, Box Elder, Telegraph Creek, and East Dry Fork, will keep the same uses, amounts of AUM, and numbers of livestock. The Box Elder and Telegraph Creek Allotments will remain authorized for domestic indigenous livestock.¹¹ The East Dry Fork Allotment will remain authorized for cattle only.¹²

In addition, the Final Decision authorizes other modifications that alter the way that bison and/or cattle use the grazing allotments. For example, the Final Decision modifies the authorized seasons of use.¹³ It also authorizes the addition of several fences, the removal of several fences, and the reconstruction and electrification of fences.¹⁴ The total amount of fencing removed, reconstructed, electrified, and added is unclear because the totals in the Final Decision are for changes under Alternative B,¹⁵ but Alternative B is only selected for four of the seven Allotments.¹⁶

BLM's final decision effectively authorizes combining the Telegraph Creek and Box Elder Allotments with state leases 8124 and 4873 to be managed as a larger unit

⁷ An AUM is an animal unit month, or the amount of forage necessary for sustenance of one cow or its equivalent for one month. 43 C.F.R. § 4100.0-5.

⁸ The change in use affects 1,243 AUMs in the Flat Creek Allotment, 2,055 AUMs in the Whiterock Coulee Allotment, 7 AUMs in the French Coulee Allotment, and 561 AUMs in the Garey Coulee Allotment.

⁹ The change in the number of livestock reflects an increase of 16 livestock in the French Coulee Allotment and 2 livestock in the Garey Coulee Allotment. The current authorized total reflects 114 livestock in the Flat Creek Allotment, 235 livestock in the Whiterock Allotment, 189 in the French Coulee Allotment and 432 in the Garey Coulee Allotment.

¹⁰ Final Decision at 6.

¹¹ *Id.* at 3.

¹² *Id.* at 4.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 10.

¹⁶ *Id.* at 4. See Section III.C.2.i. of this Order for a discussion of the lack of clarity in the amount of fencing authorized.

under unified management, which APR calls the Sun Prairie Unit.¹⁷ The grazing scheme for this combination of BLM allotments and state leases is neither described in detail in the EA nor analyzed in the discussion of the environmental consequences.

Finally, BLM adopted changes to the discretionary terms and conditions of the grazing permits.¹⁸ BLM is requiring APR to tag or identify individual bison in a manner that meets the requirements of the Montana Department of Livestock and imposing disease testing that meets the requirements of the Montana Department of Livestock.¹⁹ BLM is requiring certain standards relating to fences, such as posting electric fence notification signs at gates and for electrified wire and prohibiting electrified gates.²⁰ There is a new term and condition in the grazing permit, requiring livestock numbers be reduced by 10 percent if on-the-ground monitoring determines that livestock grazing has prevented suitable habitat conditions for Greater Sage-Grouse on more than half of three or more than three key monitoring sites within an allotment and may be reduced by another 10 percent if conditions remain unimproved.²¹

The following is a more specific delineation of the changes authorized in the Final Decision for each allotment:

Telegraph Creek Allotment

BLM selected Alternative B, the Applicant proposed alternative.²² Bison were authorized to graze prior to the Final Decision and there are no changes to the number or kind of livestock or to the season of use.²³ The total number of AUMs remains the same at 1,361.²⁴ One internal pasture fence will be removed so there

¹⁷ EA at 2-1.

¹⁸ Compare EA 2-2 to 2-6 (no action alternative) with EA 2-6 to 2-9; see also Final Decision at 5.

¹⁹ Final Decision at 6; EA at 2-8.

²⁰ Final Decision at 6; EA at 2-8 to 2-9.

²¹ Final Decision at 5; EA at 2-8. Both sources include the confusing phrase “more than half of three or more than three key monitoring sites within an allotment.” There is no monitoring plan considered or imposed other than the requirements identified in the Hi-Line RMP as a result of the change of use authorizations.

²² Final Decision at 2.

²³ *Id.* at 3.

²⁴ *Id.*

would be three pastures instead of four on BLM-administered land within this Allotment.²⁵ The Box Elder allotment would be combined with the Telegraph Creek Allotment, deeded land, and state leases to form APR's Sun Prairie Unit.²⁶

Box Elder Allotment

BLM selected Alternative B, the Applicant proposed alternative.²⁷ Bison were authorized to graze prior to the Final Decision and there are no changes to the number or kind of livestock or to the season of use.²⁸ The total number of AUMs remains the same at 1,158.²⁹ The construction of two new fences will be authorized; one between BLM-managed land and the Charles M. Russell National Wildlife Refuge (Refuge) and one between BLM-managed land and deeded lands.³⁰ The Box Elder allotment would be combined with the Telegraph Creek Allotment, deeded land, and state leases to form APR's Sun Prairie Unit.³¹

Flat Creek Allotment

BLM selected Alternative B, the Applicant proposed alternative.³² There will be a change of use from cattle to cattle and/or bison.³³ The total number of AUMs remains the same at 1,243.³⁴ The grazing season will remain the same for the small custodial parcels that provide 21 AUMs.³⁵ The grazing season will change for the rest of the allotment area. It will start earlier on April 1 instead of May 1 and end sooner on September 30 instead of November 15.³⁶ There will be changes to fencing to allow this allotment to be grazed as a four-pasture rest-rotation system with one pasture rested each year and one pasture deferred each year.³⁷ These fencing

²⁵ *Id.*

²⁶ AR 2.1-02 (APR 2019 Proposal) at 1.

²⁷ Final Decision at 2.

²⁸ *Id.* at 3.

²⁹ *Id.*

³⁰ *Id.*

³¹ AR 2.1-02 (APR 2019 Proposal) at 1.

³² Final Decision at 2.

³³ *Id.* at 3.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

changes consist of the removal of two fences. In addition, other interior and exterior fences may be modified by adding one electric wire.³⁸

Whiterock Coulee Allotment

BLM selected Alternative B, the Applicant proposed alternative.³⁹ There will be a change of use from cattle to cattle and/or bison.⁴⁰ The total number of AUMs remains the same at 2,055. The grazing season will remain the same for the small custodial parcels that provide 193 AUMs. The grazing season will change on the remainder of the allotment area. It will start earlier on April 1 instead of May 1, but it will end sooner on September 30 instead of October 31. There will be fences added, removed, and electrified to allow the allotment to be grazed in a three-pasture deferred rotation system, with one pasture deferred during the growing season each year. This is the only allotment where APR has plans to introduce bison to the BLM-managed lands in the immediate future.⁴¹

French Coulee Allotment

BLM selected Alternative C.⁴² There will be a change of use from cattle to cattle and/or bison.⁴³ Reconstruction and electrification of the existing allotment boundary fence will be authorized.⁴⁴ The total number of AUMs remains the same at 7.

East Dry Fork Allotment

BLM selected Alternative C.⁴⁵ There will be no change in use from cattle.⁴⁶ The total number of AUMs remains the same at 1,584.⁴⁷

³⁸ *Id.*

³⁹ *Id.* at 4.

⁴⁰ *Id.*

⁴¹ APR Response, Ex. 1 (Heidebrink Declaration) at ¶¶ 23, 25.

⁴² Final Decision at 4.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

Gary Coulee Allotment

BLM selected Alternative C.⁴⁸ There will be a change in use from cattle only to cattle and/or bison.⁴⁹ Reconstruction and electrification of the existing allotment boundary fence will be authorized. The total number of AUMs remains the same at 561.⁵⁰

B. BLM's Rationale and Determinations

BLM's rationale for choosing a combination of Alternatives B and C (Selected Alternative) is that the EA's effects analysis indicates that the Selected Alternative, to a greater degree than other alternatives, meets BLM's need to respond to APR's proposal while incorporating terms and conditions that best facilitate management that will continue to meet Standards of Rangeland Health and conform to the Guidelines for Livestock Grazing Management (Standards and Guidelines).⁵¹ The Final Decision also concludes that allotments will continue to meet or make progress towards meeting the Standards and Guidelines under all alternatives, but to a greater degree for the Selected Alternative.⁵²

In addition, the Selected Alternative best facilitates coordination of public land grazing with intermingled and adjacent deeded base property owned by APR because it reduces potential indirect effects to wildlife and special status species that may occur due to potential increases in the density of range improvements on the adjacent public lands.⁵³ Within the project area boundaries, in addition to the 63,065 acres of BLM- administered lands, there are 32,710 acres of APR's private land and 5,830 acres of state lands administered by the Montana Department of Natural Resources and Conservation (DNRC).⁵⁴

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 6.

⁵² *Id.* at 6-7.

⁵³ *Id.* at 8.

⁵⁴ EA at 1-2.

III. BACKGROUND

A. The Requested Action

The final decision was the culmination of a five year review process that began in January 2017 when APR submitted an application for modifications to certain terms and conditions of BLM-administered grazing permits held by the APR.⁵⁵ On November 20, 2017, APR submitted a Revised Proposed Action that modified the January 2017 Proposed Action.⁵⁶ On September 24, 2019, APR stated that it was withdrawing its previous bison grazing proposal and submitted a further revised proposal to the BLM.⁵⁷ The 2019 proposal reduced the number of grazing allotments that APR requested to modify from eighteen allotments to seven allotments, all seven allotments located in Phillips County, Montana.⁵⁸

B. The Public Review Process Preceding BLM's Final Decision

APR's initial application was submitted in January of 2017 and revised in November of 2017.⁵⁹ BLM notified the public about the proposed action and provided a public scoping period that occurred from April 9 to June 11, 2018.⁶⁰ On September 24, 2019, APR withdrew its previous proposal and submitted a revised proposal to the BLM.⁶¹

BLM issued a preliminary EA on July 1, 2021.⁶² There was a 90-day public comment period on the EA that ended on September 28, 2021.⁶³ On July 21, 2021, BLM held a virtual public meeting to discuss the proposal and accept verbal public comments.⁶⁴ APR submitted a revised proposal to the BLM a few days prior to the

⁵⁵ AR 2.1-03.

⁵⁶ AR 2.1-01 (2017 Revised APR Proposal).

⁵⁷ AR 2.1-02 (2019 APR Proposal) at 1.

⁵⁸ EA at 1-1.

⁵⁹ AR 2.1-01 (2017 APR Proposal) and AR 2.1-03 (2017 Revised APR Proposal).

⁶⁰ EA at 4-1 (stating that the initial public scoping period ended May 9, 2018, but was extended through June 11, 2018); *but see* Final Decision at 2, stating that the public scoping period ended on May 9, 2019.

⁶¹ AR 2.1-02 (2019 APR Proposal) at 1.

⁶² *See* Final Decision at 2; American Prairie Reserve Draft EA at <https://eplanning.blm.gov/eplanning-ui/project/103543/570>

⁶³ *Id.*

⁶⁴ Final Decision at 2.

end of the public comment period, on September 24, 2019. BLM made several revisions to the EA based on the public comments it received and published a report with responses to the public comments.⁶⁵

On March 29, 2022, BLM issued a final EA, a proposed grazing decision and a draft Finding of No Significant Impact (FONSI).⁶⁶ This triggered a 15-day protest period. BLM received 18 letters of protest, including one from the Montana Governor's office.⁶⁷ On July 28, 2022, BLM issued a FONSI and the Final Decision without modification. The Final Decision includes an appendix that has responses to the protests.⁶⁸

C. The Environmental Assessment

BLM analyzed four alternatives in the EA: the proposed action and three action alternatives. Alternative A was the no action alternative.⁶⁹ Under this alternative, the permits would remain unchanged and the current fencing configuration would remain in its current state although changes could occur on a case-by-case basis in accordance with current range improvement cooperative agreements.⁷⁰ Alternative B was the revised proposal that APR submitted in September of 2019.⁷¹ Alternative C combines APR's proposal with current management practices.⁷² Alternative D is a no-grazing alternative.⁷³

1. Alternatives Analyzed

Alternative B is identified as reflecting APR's expected bison stocking plans for at least the next 10 years, based on its desire to keep bison management operations centralized and to have herds of at least 400 animals to maintain genetic diversity.⁷⁴ BLM characterizes APR's bison herd as a "conservation-based" or "non-

⁶⁵ Final Decision at 2 (describing process); AR 2.4-01 (Public Comments to Preliminary EA); AR 2.4-02 (Public Comment Report).

⁶⁶ AR 2.5-1 (EA); AR 2.5-02 (FONSI); and 2.6 (Notice of Proposed Decision).

⁶⁷ AR at 2.7-09.

⁶⁸ Final Decision, Attach. 2

⁶⁹ EA at 2-1.

⁷⁰ *Id.*

⁷¹ *Id.* at 2-6.

⁷² *Id.* at 2-11.

⁷³ *Id.* at 2-12 to 2-13.

⁷⁴ EA at 2-6.

production-oriented, wildlife management focused” herd.⁷⁵ In other words, APR does not operate for the purpose of raising bison to sell at market.⁷⁶ However, it does allow for some recreational hunting of bison via permits and has transferred over 400 bison to conservation and tribal herds in Montana, Colorado, Nebraska, Arizona, South Dakota and Oklahoma since 2009.⁷⁷

Alternative B contemplates issuing a 10-year grazing permit for cattle and domestic indigenous livestock (bison) on all seven allotments.⁷⁸ The Box Elder and Telegraph Creek allotments would be combined with two state leases and deeded lands to form the APR Sun Prairie Grazing Unit.⁷⁹ Also, the East Dry Fork, French Coulee, and Garey Coulee allotments would be combined to form the APR Dry Fork Unit.⁸⁰ In addition, the season of use would be reduced compared to the current grazing permit for certain allotments.⁸¹

Alternative B included proposals for the following fencing changes:⁸²

- Existing fencing to be retained: 87.4 miles
- Fencing to be reconstructed: 43.9 miles
- Fencing to be reconstructed as electric only: 35.7 miles
- New fencing to be constructed: 5.2 miles
- Existing fencing to be removed: 30.4 miles.

Alternative B provides for several changes to the required terms and conditions for all the grazing permits and for one new term and condition to be added to the additional terms applicable to the grazing allotments that contain Greater Sage-Grouse habitat.⁸³ As detailed in the description of the Final Decision above, the terms and conditions require tagging or identification of individual bison and disease testing, both of which meets the requirements of the Montana Department of Livestock.⁸⁴ There are also certain requirements relating to fences,

⁷⁵ EA at 3-39, 3-44 n. 11, and App. D at D-1.

⁷⁶ See EA at 3-39.

⁷⁷ EA at 3-39; APR Response, Ex. 1 at ¶ 16.

⁷⁸ *Id.*

⁷⁹ AR 2.1-02 (2019 APR Proposal) at 1.

⁸⁰ EA at 2-10.

⁸¹ *Id.* at 2-10 to 2-11.

⁸² *Id.* at 2-8.

⁸³ Compare EA 2-2 to 2-6 (no action alternative) with EA 2-6 to 2-9.

⁸⁴ *Id.* at 2-8.

such as posting electric fence notification signs at gates and for electrified wire and prohibiting electrified gates.⁸⁵ The new additional term relating to the Greater Sage-Grouse requires livestock numbers be reduced by 10 percent if on-the-ground monitoring determines that livestock grazing has prevented suitable habitat conditions for Greater Sage-Grouse on more than half of three or more than three key monitoring sites within an allotment and may be reduced by another 10 percent if conditions remain unimproved.⁸⁶

Alternative C combines APR's proposal with the current management practices.⁸⁷ Under Alternative C, BLM would issue permits changing the use from cattle to cattle and bison for the four of the five allotments that were limited to cattle (Flat Creek, French Coulee, Garey Coulee, and Whiterock Allotments).

Current fencing structures and pasture configurations would remain, and the BLM would allow APR to upgrade to electrical fencing to ensure bison containment.⁸⁸ All other aspects of the alternative, season of use, stocking rate, and AUMs would remain the same as under Alternative A, the no action alternative.⁸⁹ In particular, the season of use would stay the same, and APR would utilize what BLM calls a "typical" rest-rotation system.⁹⁰ The Telegraph Creek allotment would be monitored to allow BLM the ability to study bison movements in a year-round grazing system with internal fences in place.⁹¹ Alternative C was a response to issues raised regarding bison year-long continuous grazing.⁹²

Under Alternative D, the no-grazing alternative, BLM would cancel the grazing permits on all seven allotments included in the application, including the Box Elder allotment, and the use of the allotments by domestic livestock would be discontinued.⁹³ The permittee would be given two years prior notification and then its grazing permits and grazing preference would be cancelled.⁹⁴

⁸⁵ *Id.* at 2-8 to 2-9.

⁸⁶ Final Decision at 5, 9.

⁸⁷ EA at 2-12.

⁸⁸ *Id.* at 2-11 to 2-13.

⁸⁹ *Id.* at 2-12.

⁹⁰ *Id.*

⁹¹ *Id.* at 2-13 (although no monitoring plan is identified).

⁹² *Id.* at 2-12.

⁹³ *Id.*

⁹⁴ *Id.*

2. Issues Analyzed and Relevant Impacts

The EA analyzed seven distinct issues for each alternative: fish and wildlife/special status species; common allotment management; public health and safety; rangeland health; riparian-wetland habitat; socioeconomics; and vegetation. The assumptions and analysis are set forth in section 3 of the EA. Although all of the analysis is pertinent and relevant to BLM's decision and potentially this stay request, this decision addresses only the impacts of disease transmission and fencing because those are key to the arguments raised by Appellants in their requests for a stay.

i. Fencing

Range improvement modification is a major component of the EA, particularly in planned alterations to over a hundred miles of fencing. Under Alternative B, BLM identified the following fencing projects for the seven Allotments: reconstruct 43.9 miles of fence, electrify 35.7 miles, build 5.2 miles of new fence, and remove 30.4 miles of existing fence.⁹⁵ However, the Final Decision authorized the fencing projects under Alternative B for only four allotments: Box Elder, Telegraph Creek, Flat Creek, and Whiterock Coulee. The fencing projects under Alternative C were authorized for the other three allotments: East Dry Fork, French Coulee, and Gary Coulee.

The differences between the fencing projects for these three allotments under Alternative C versus Alternative B are not clear from a review of the Final Decision and the EA's fencing maps. It appears that construction of one internal fence and reconstruction of one internal fence contemplated within the East Dry Fork Allotment under Alternative B are not authorized under Alternative C.⁹⁶ The Final Decision does authorize the reconstruction and electrification of the existing allotment boundary fence for Garey Coulee and French Coulee Allotments,⁹⁷ but this is not shown on the EA map for Alternative C⁹⁸ and the mileage of this authorized improvement is not specified. Thus, the amount of fence reconstruction under Alternative C versus that under Alternative B is unclear. In sum, the amounts of the various fencing projects authorized under the Final Decision are not clear and are

⁹⁵ Final Decision at 10.

⁹⁶ *Compare* EA, Appendix A, Map 2-1 with Map 2-2.

⁹⁷ Final Decision at 4.

⁹⁸ EA, Appendix A, Map 2-1.

not equal to the amounts that would have been authorized if Alternative B had been approved for all seven allotments.

The EA states that fencing projects will comply with the Montana Department of Fish, Wildlife, and Parks' (DFWP) wildlife-friendly standards⁹⁹ contained in Appendix B "Fence Design and Maintenance." Appendix B is a 55-page guide from DFWP on building wildlife-friendly fences, with dozens of examples of potentially appropriate fences. DFWP provides recommendations on the maximum height of top wires and the minimum height of bottom wires.¹⁰⁰ It discusses types of wire (smooth, twisted, barbed, different colors, etc.),¹⁰¹ various methods to increase visibility,¹⁰² and ways to safely electrify fences.¹⁰³ Different types of wildlife-friendly fencing may be appropriate for different circumstances; for example, consideration is given to sites with high or continuous livestock use,¹⁰⁴ heavily traveled roadways,¹⁰⁵ migration corridors,¹⁰⁶ and residences.¹⁰⁷ Fences can be made to be adjustable,¹⁰⁸ or even seasonably dismantlable.¹⁰⁹

This is all to say that a "wildlife-friendly fence" covers a range of literally dozens of alternatives. As discussed in more detail below, BLM does not make clear which wildlife-friendly features will be incorporated into the various fence projects.

ii. Disease Transmission

In the EA, BLM identified the following diseases that may infect bison and are transmissible to livestock: anthrax, bluetongue, bovine anaplasmosis, bovine brucellosis, bovine spongiform encephalopathy, bovine tuberculosis, bovine viral diarrhea, Johne's disease, and malignant catarrhal fever.¹¹⁰ APR is required to test its bison for bluetongue, Bovine Viral Diarrhea (BVD), parainfluenza III, brucellosis,

⁹⁹ *Id.* at 2-9.

¹⁰⁰ *Id.*, Appendix B, at 10.

¹⁰¹ *Id.* at 10-11.

¹⁰² *Id.* at 11-13.

¹⁰³ *Id.* at 18, 24-25.

¹⁰⁴ *Id.* at 20.

¹⁰⁵ *Id.* at 38-40.

¹⁰⁶ *Id.* at 27.

¹⁰⁷ *Id.* at 45.

¹⁰⁸ *Id.* at 28.

¹⁰⁹ *Id.* at 34.

¹¹⁰ *Id.* at 3-15.

anaplasmosis, Johne's disease, rhinotrachetis, leptospirosis, and EHD through 2030 pursuant to an agreement between APR, the South Phillips County Co-operative District, and others (APR-District Agreement).¹¹¹

Regarding the risks of disease transmission to wildlife, BLM found in the EA that "the potential for transmission of these diseases to wildlife would not be measurably greater under the proposed change of use in livestock compared to that which exists under current conditions."¹¹² As for the disease transmission risks to cattle, BLM concluded: "The grazing of cattle and bison in close proximity would fit within the character of existing grazing of cattle that occurs in allotments surrounding APR properties and occurs without incident. There is no indication that bison pasturing in close proximity to cattle poses a health risk to cattle."¹¹³

IV. STANDARDS OF REVIEW

To prevail on a stay petition, the petitioner must show, in accordance with 43 C.F.R. § 4.471(c), sufficient justification based on four criteria:

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) The likelihood of the petitioner's success on the merits;
- (3) The likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) Whether the public interest favors the granting of the stay.

The petitioner bears the burden of demonstrating that a stay is warranted under each of the regulatory factors.¹¹⁴ Although the petitioner is not required to prove each criterion with certainty, the petitioner must show that it likely meets each criterion.¹¹⁵ As more fully discussed below, Appellants have not prevailed on their burden to so show that there is a likelihood of immediate and irreparable harm, therefore their stay petitions must be denied.

¹¹¹ *Id.* at 3-15.

¹¹² *Id.* at 3-11.

¹¹³ *Id.* at 3-16

¹¹⁴ See 43 C.F.R. § 4.471(d); *W. Wesley Wallace*, 156 IBLA 277, 278 (2002); *Oregon Natural Resources Council*, 148 IBLA 186, 188 (1999).

¹¹⁵ *Pueblo of San Felipe*, 187 IBLA 342, 345 (2016).

V. DISCUSSION

A. The Likelihood that Appellants Will Succeed on the Merits

For an appellant to demonstrate a likelihood of success on the merits, it need not show that the probability of success is free from doubt.¹¹⁶ Instead, an appellant “need only present a reasonable basis for challenging the legal or factual soundness of the agency’s decision.”¹¹⁷ This standard will ordinarily be satisfied if the appellant raises “questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and more deliberative investigation.”¹¹⁸

In considering the likelihood of Appellant’s success on the merits, I also note that “[o]ne of NEPA’s goals is to facilitate ‘widespread discussion and consideration of the environmental risks and remedies associated with the pending project,’ thereby augmenting an informed decision making process.”¹¹⁹ And BLM, “when preparing an EA, must provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process.”¹²⁰

Based on a preliminary review of the record, Appellants have raised significant doubts about the adequacy of BLM’s analysis and the sufficiency of the public’s opportunity to meaningfully participate in the process and inform BLM’s ultimate decision with regards to fencing. As noted above, range improvement modification is a major component of the EA, particularly in that APR proposed alterations to over a hundred miles of fencing. The Final Decision authorizes APR to construct, remove, reconstruct, and electrify fences.¹²¹ Yet for all this extensive work, BLM provides very few details on the specifics of any of these fencing projects.

¹¹⁶ *Id.* at 345-46.

¹¹⁷ *Id.*

¹¹⁸ *Wy. Outdoor Council*, 153 IBLA 379, 388 (2000) (quoting *Sierra Club*, 108 IBLA 381, 384-85 (1989)).

¹¹⁹ *LaFlamme v. FERC*, 852 F.2d 389, 398 (9th Cir. 1988) (quoting *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1021 (9th Cir. 1980) (per curiam)).

¹²⁰ *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng’rs*, 524 F.3d 938, 953 (9th Cir. 2008).

¹²¹ Final Decision at 10.

Given the wide range of potential options, the many miles of altered fencing, and the consequential importance of fencing to other resources, including wildlife, one might have expected the EA to analyze what fencing would be best for different areas. At the very least, the EA might have clearly identified what fencing it is proposing to authorize and why a particular type of fencing is appropriate in the identified location. But the only specificity the EA contains is that fencing will have “a four-wire fence, a second from the top high tensile electric wire, and the installation of solar charging panels.”¹²²

Even this requirement raises as many questions as it answers. The description of a four-wire fence with a second from the top electric wire presumably applies to the 35.7 miles of electrified fence authorized by the Final Decision, but what of the almost 50 miles of reconstructed or new fence? It is unclear whether these projects will be electrified, meaning that the EA’s fence description may not apply, and readers are left to guess what types of fences will be built.¹²³ BLM’s Final Decision adds no clarity. For example, for the Flat Creek Allotment, BLM states that “[o]ther interior and exterior fences *may* be modified by adding one electric wire.”¹²⁴ This condition throws into question how many miles of fence will be electrified and injects additional ambiguity into the process. BLM also provides no detail on the required heights of fence, whether electrified or not. Appellants rightfully express confusion about the specifics of BLM’s fencing plan and their inability to decipher what range improvement projects will occur where and what the final outcome will be.¹²⁵

The fencing specifications are not immaterial or of little concern to the interested public or of negligible potential impact to the environment. The design and impact of fencing was raised repeatedly during public scoping¹²⁶ and again in comments to the EA.¹²⁷ Fencing is of greater concern here than the average grazing

¹²² EA at 2-9.

¹²³ Alternatively, BLM could intend to suggest all fencing projects will result in a four-wire fence, with the second from the top electric wire. If so, it is unclear what distinction BLM makes when it references “reconstructed” fence, as opposed to “reconstructed as electric only” fence. EA at 2-8. Either way, this just further illustrates BLM’s lack of clarity on this issue.

¹²⁴ Final Decision at 3 (emphasis added).

¹²⁵ MT Gov Appeal at 15-17.

¹²⁶ AR 2.2.01. *See also* Districts Appeal, Ex. 9 (BLM letter responding to public concerns with APR’s fencing modifications).

¹²⁷ Final Decision at 44.

authorization because bison react differently to fencing than cattle. Appellants raise concerns about whether fencing can simultaneously be both wildlife-friendly and effective at containing bison.¹²⁸ Bison are large, powerful animals, capable of jumping over fences that cattle are not. Thus, Appellants argue, any fence low enough to allow big game to jump over can be just as easily traversed by bison.¹²⁹ Conversely, fencing tall enough to contain bison also proves to be an insurmountable barrier to wildlife.¹³⁰ DFWP's standards suggest that fencing can be both wildlife-friendly and bison-proof,¹³¹ but because BLM has not specified which of many options will be utilized in the Allotments (beyond the number of wires and which wire is electrified), the public is stymied in its attempt to meaningfully comment on the impact of electrified fencing. Similar, if not greater, obstacles prevent comment on reconstructed, non-electrified fencing since BLM has provided no detail at all as to what these projects will look like.

Appellants have raised concerns about fencing in general, but they are impeded in their ability to provide more specific comments by not knowing what type of wildlife-friendly fencing will ultimately be built and where. While maps provided in the EA show the locations of fencing, BLM has not adequately explained the configuration of the fencing and/or why the configuration is appropriate for the location, including meeting applicable goals such as constraining bison or permitting wildlife passage or both. Appellants and the public generally are frustrated in their ability to provide informed comments on the proposed fencing modifications because there is such a lack of specificity as to any aspect of it—such as where exactly cattle guards will be placed, where fence breaches such as gates or livestock openings are to be placed, and where recreation access will or will not be allowed. If BLM has failed to provide the public with adequate information to enable meaningful comment and engagement, it raises concerns whether BLM's ultimate decision was “fully informed and well-considered.”¹³² As such, this is “fair ground for litigation and more deliberative investigation.”¹³³

¹²⁸ MT Gov Appeal at 15-20; MT AG Appeal at 26-27.

¹²⁹ MT Gov Appeal at 18; MT AG Appeal at 26; *see also* Districts Appeal, Ex. 20 (affidavit describing incident with escaped bison).

¹³⁰ MT Gov Appeal at 18; MT AG Appeal at 26.

¹³¹ EA at 24.

¹³² *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978).

¹³³ *Wy. Outdoor Council*, 153 IBLA at 388.

BLM's analysis of the impacts of its fencing improvements also raises multiple use concerns. FLPMA requires BLM to manage public lands "on the basis of multiple use and sustained yield."¹³⁴ This mandate requires BLM to engage in "the enormously complicated task of striking a balance among the many competing uses to which land can be put."¹³⁵ Although BLM is given latitude in exercising its discretion in balancing competing uses, its decision must be "based on a consideration of all relevant factors and [be] supported by the record. . . ."¹³⁶

To show BLM erred in exercising its discretion in balancing competing resource uses, the Appellants must demonstrate that BLM's weighing of the resource values was unreasonable.¹³⁷ General disagreements with the balance BLM chose is not sufficient to establish a violation of FLMPA's multiple use mandate.¹³⁸

Appellants have raised concerns that BLM failed to consider how its Final Decision could exclude other legitimate uses. Specifically, the Districts allege that electrifying perimeter fence excludes other uses in the Allotments.¹³⁹ Electrified fencing can pose a safety risk to recreational users such as campers, hikers, or hunters who are trying to enter the allotments.¹⁴⁰ Electrified gates also impede neighboring graziers from entering the allotments to retrieve stray cattle or return a wayward bison.¹⁴¹

While Appellants have not provided sufficient evidence to show the likelihood or extent of such exclusion over the 63,000 acres of public lands, the evidence is sufficient, in combination with two other factors, to raise doubt about whether BLM's balancing of the competing resource uses is based on all relevant factors, supported by the record, and reasonable. The first factor relates to BLM's conflicting statements regarding the issue of impacts on recreational uses.

Concerns over the exclusionary impacts of electrified fences were raised at the public scoping stage, prompting BLM to include as a scoping issue, "How will electrified external fencing impact access for recreational opportunities, including

¹³⁴ 43 U.S.C. § 1701(a)(7).

¹³⁵ *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 58 (2004).

¹³⁶ *A.C.O.T.S.*, 60 IBLA 1, 5 (1981).

¹³⁷ *Jack L. & Diane L. Caufield*, 195 IBLA 84, 96 (2020).

¹³⁸ *Bristlecone Alliance et al.*, 179 IBLA 51, 58 (2010).

¹³⁹ Districts Appeal at 30-33.

¹⁴⁰ *Id.* at 31.

¹⁴¹ *Id.*

river access?”¹⁴² Yet in the EA, impacts on recreation was an issue eliminated from further analysis by BLM because “[r]ecreational opportunities were not raised as issues during the public or internal scoping processes.”¹⁴³ BLM fails to explain the discrepancy between the scoping report and the EA.

The second factor relates to the fact that Appellants have raised serious doubts about the adequacy of the EA’s analysis regarding the fencing projects because the description and analysis of those projects in the EA and Final Decision are confusing and lack detail. Appellants’ arguments highlight how BLM’s poor description of the fencing aspects of the Final Decision, and the consequentially weak analysis, impedes Appellants from establishing that BLM’s weighing of the competing resource uses was unreasonable.

Appellants also raise spirited arguments that the change of use from cattle only to cattle and bison violates the Taylor Grazing Act (TGA),¹⁴⁴ the Federal Land Policy and Management Act (FLPMA)¹⁴⁵, and the Public Rangelands Improvement Act (PRIA),¹⁴⁶ and that this change of use and the changes to fencing will lead to increased disease transmission to cattle and to socioeconomic impacts that were not properly considered in the NEPA process. However, they fail to marshal facts or legal authority to show that these inadequacies would be successful in a merits review.

B. The Likelihood of Immediate and Irreparable Harm If a Stay Is Not Granted

As discussed above Appellants have raised serious questions on the merits regarding BLM’s analysis pertaining to fencing. Nonetheless, a stay cannot stand unless Appellants successfully sustain all four elements of the stay criteria identified in Section IV, *supra*.

As discussed below, Appellants have failed to meet their burden of demonstrating the likelihood of immediate and irreparable harm if a stay is not granted. They must show that an irreparable harm is likely, not merely possible,¹⁴⁷

¹⁴² AR 2.2.01 at 3-3.

¹⁴³ EA at 1-8.

¹⁴⁴ 43 U.S.C. §§ 315-315r.

¹⁴⁵ 43 U.S.C. §§ 1701-1787.

¹⁴⁶ 43 U.S.C. §§ 1901-1908.

¹⁴⁷ *Western Watersheds Project, et al. v. BLM*, 195 IBLA 115, 130-31 (2020).

with reliable evidence of the timing and extent of the harm to show immediacy and significance.¹⁴⁸ Appellants' assertions of immediate and irreparable harm are not adequately developed or supported by marshalled evidence to show that any harm is likely, irreparable, and immediate. Furthermore, APR and BLM have identified facts and evidence that Appellants failed to consider or ignore entirely and that contradict Appellants' claims.

The analysis of the likelihood of an irreparable harm that will occur immediately as a result of converting to bison grazing is guided by the fact that only one allotment—the Whiterock Coulee Allotment—will be immediately converted. While the Flat Creek, French Coulee, and Garey Coulee Allotments are also authorized for conversion, APR represents that they will not be converted in the near future.¹⁴⁹ And, bison grazing was already authorized in the Telegraph Creek and Box Elder Allotments prior to the Final Decision.

Should APR convert the Flat Creek, French Coulee, and Garey Coulee Allotments to bison grazing while these appeals are pending, Appellants may re-petition for a stay. However, the harm analysis in this section applies even if those three allotments were to be converted immediately, given the lack of evidence supporting the Appellants' arguments.

1. Economic Harm

The Appellants assert that there will be a decrease in economic benefits from the conversion of production-oriented cattle grazing to non-production-oriented bison grazing and that this will cause harm to local businesses that support grazing and, in turn, local communities. Contrary to this assertion, BLM's detailed economic comparison of the economics of continuing current grazing with the economics of grazing if non-production bison grazing occurs in the five allotments not currently being grazed by bison showed that bison grazing would be modestly more beneficial to the local economy over the course of one year.¹⁵⁰

BLM estimated that continuation of current grazing on the five allotments would result in 24 jobs within Phillips County, \$291,500 in direct labor income, and \$1,818,106 in direct economic output.¹⁵¹ For non-production bison grazing on the

¹⁴⁸ *Id.* at 134.

¹⁴⁹ APR Response, Ex. 1 at ¶ 25.

¹⁵⁰ EA at 3-43 to 3-44.

¹⁵¹ *Id.* at 3-43.

five Allotments, BLM estimated a gain of 4 jobs bringing the total to 28 jobs, an increase in direct labor income to \$365,299, and direct economic output to \$2,070,762.¹⁵²

However, Appellants correctly point out that BLM based its analysis of bison grazing upon a production-oriented bison operation model, which—as BLM acknowledges—likely overestimated the potential effects from the non-production-oriented, wildlife-management-focused bison grazing on APR lands.¹⁵³ While Appellants’ criticism is well founded, as comparing one type of business model (production of an agricultural product) to an entirely different business model (tourism, game ranching), does pose questions regarding the quality of the analysis, even so, Appellants fail to produce evidence that identifies any immediate or irreparable harm that is likely to occur as a result of the immediate conversion of a single allotment (Whiterock Coulee) to bison grazing, let alone evidence showing how conversion of four allotments to bison grazing would cause harm.

What little information they provide is not illuminating, as they offer only crude measures of the potential economic impacts. For instance, the Districts note that over-90,000 acres and 12,000-plus AUMs in BLM, state, and private land may be grazed by bison under the Final decision and then compare these figures to the totals for Phillips County as a whole to highlight the significance of the potential impacts.^B But the relevant numbers are the amount of acreage and AUMs in the Whiterock Coulee Allotment or White Rock Unit,¹⁵⁴ the only place where bison will be added immediately¹⁵⁵. There are 16,721 acres and 2,055 AUMs in BLM lands in that allotment,¹⁵⁶ plus 7,000 acres of deeded lands and two state leases totaling 3,651 acres.¹⁵⁷ But the District’s zeal to highlight the larger harm they anticipate is no substitute for evidence of the harm that would support a stay.

¹⁵² *Id.* at 3-44.

¹⁵³ *Id.* at 3-44 n.11. BLM also opined that this model would not capture the full breadth of economic contributions associated with APR’s agricultural tourism-oriented operations. *Id.*

¹⁵⁴ *Id.* at 2-6 (describing White Rock Unit as consisting of deeded lands, the BLM’s Whiterock Coulee Allotment, and 3,651 acres of DNRC leases. *See also id.*, Appendix A, Map 1-1, and APR Response, Ex. 1 at ¶¶ 22, 23.

¹⁵⁵ APR Response, Ex. 1 at ¶¶ 23, 25.

¹⁵⁶ EA at 2-2.

¹⁵⁷ *Id.* at 2-6; APR Response, Ex. 1 at ¶ 23.

More importantly, even if the appropriate acreages and AUMs were applied, this type of crude measure is insufficient to determine the extent of the economic harm, if any, from adding bison to the Whiterock Coulee Allotment or White Rock Unit, or any of the three other allotments being converted to bison grazing. Appellants do not attempt to provide any detailed comparison of the monetary contributions of an operation like APR's current cattle operation in the four allotments with those of a non-production bison operation, let alone a comparison focused on the proper narrow target: operations within the Whiterock Coulee Allotment.

Relatedly, BLM's detailed comparison greatly overestimates the immediate economic impacts of converting to bison grazing under the Final Decision. This is so because it is based on a full conversion of the 5,450 AUMs for the five Allotments where bison grazing is not currently allowed,¹⁵⁸ whereas only the 2,055 AUMs of the Whiterock Coulee Allotment will be immediately converted.¹⁵⁹ Thus, only about 38 percent of the 5,450 AUMs will be converted immediately and the economic impacts should presumably be reduced by a similar ratio.

The net result is that the record does not adequately show the extent of the economic harm, if any, resulting from the immediate conversion of only 2,055 AUMs. Appellants bear the burden of making this showing and they have failed to do so.

Under these circumstances, the most immediate and substantial economic effect of not granting a stay would appear to be the benefit realized by the local businesses and community from the fence removal, construction, and modifications projects necessary to facilitate the new grazing schemes under the Final Decision. For example, a contract has already been awarded to a local fencing contractor for \$103,000 to complete all the fencing changes in the Final Decision.¹⁶⁰ APR has also

¹⁵⁸ EA at 3-43.

¹⁵⁹ BLM analyzed the economic impacts of Alternative B of the EA, which contemplates converting 5,450 AUMs to bison use within five allotments, including the East Dry Fork Allotment. However, because BLM adopted Alternative C for the East Dry Fork Allotment, that allotment and its 1,584 AUMs will not be converted to bison use. Another 1,811 AUMs for the Flat Creek, French Coulee, and Garey Coulee Allotments, while authorized for conversion, will not be converted in the near future. This leaves only the 2,055 AUMs in the Whiterock Coulee Allotment for immediate conversion.

¹⁶⁰ APR's Response, Ex. 1 at ¶ 31.

hired a veterinarian to conduct disease screening and complete a health assessment of the bison that will be moved to the Whiterock Coulee Allotment.¹⁶¹ In sum, Appellants' economic arguments fail to show that they will likely be harmed in the short-term, i.e., immediately.

2. Disease Transmission

All of the Appellants also contend that the change of use from cattle to bison grazing and fencing changes will irreparably harm them because the conversion and fencing changes will increase the risk of disease transmission from bison to wildlife and cattle. For instance, the Governor argues that BLM did not adequately analyze the impacts of increased fence permeability on disease transmission to cattle and wildlife.¹⁶²

Increased fence permeability encompasses both the removal of fencing and the modification of fencing to wildlife-friendly standards.¹⁶³ The Governor opines that increased fence permeability will either allow bison escape or increased wildlife presence so that bison more frequently interact with wildlife and cattle, increasing the risk of bison transmitting disease.¹⁶⁴

In that vein, the Attorney General points out that BLM contemplates using fencing that is wildlife friendly, electrified, and has high-tensile wire, but that wildlife-friendly fencing won't contain bison, and high-tensile fencing doesn't comply with wildlife-friendly fencing standards.¹⁶⁵ He asserts that wildlife-friendly fencing is no taller than 42 inches, while bison can jump fences five to six feet high.¹⁶⁶

The Districts also contend that two diseases carried by bison, anaplasmosis and leptospirosis, pose a risk to humans because they are zoonotic, meaning transmittable to humans.¹⁶⁷ The Attorney General expresses concern over the risk to humans of another zoonotic disease: brucellosis.¹⁶⁸

¹⁶¹ *Id.*

¹⁶² MT Gov Appeal at 21.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ MT AG Appeal at 26-27.

¹⁶⁶ *Id.* at 26.

¹⁶⁷ Districts Appeal at 44.

¹⁶⁸ MT AG Appeal at 25.

The Governor argues that BLM did not adequately take into account the increased risk of disease attendant to APR's non-production-oriented management practices, meaning infrequent or no vaccinations, culling, and inspections.¹⁶⁹ Because, unlike a cattle operation, APR's operation does not cull or sell individuals, the Governor alleges that APR's bison are older than cattle with the potential to contract and harbor diseases for a longer period of time.¹⁷⁰ And, they aren't as frequently inspected as cattle that are marketed and shipped.¹⁷¹ The Districts raise a similar argument,¹⁷² while the Attorney General's argument is more narrowly focused on the risk of transmitting a single disease: brucellosis.¹⁷³

In the EA, BLM identified the following diseases that may infect bison and are transmissible to livestock: anthrax, bluetongue, bovine anaplasmosis, bovine brucellosis, bovine spongiform encephalopathy, bovine tuberculosis, bovine viral diarrhea, Johne's disease, and malignant catarrhal fever.¹⁷⁴ BLM concluded without explanation that the potential for transmission of these diseases to wildlife would not be measurably greater under the proposed change of use in livestock compared to that which exists under current conditions.¹⁷⁵

In discussing the potential for disease transmission to cattle, BLM did make several observations. First, bison are authorized and managed as livestock and must comport with all Montana Department of Livestock (MDOL) regulations pertaining to disease control and sanitation.¹⁷⁶ Second, APR has entered into the APR-District Agreement, which includes a commitment to provide disease testing for 325 bison annually for the first 5 years, scaling back to 150 bison a year for the following 5 years, as part of a disease identification and management plan.¹⁷⁷ Third, "the grazing of cattle and bison in close proximity would fit within the character of existing grazing of cattle that occurs in allotments surrounding APR properties and occurs without incident. There is no indication that bison pasturing in close proximity to cattle poses a health risk to cattle."¹⁷⁸

¹⁶⁹ MT Gov Appeal at 22.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Districts Appeal at 40-46.

¹⁷³ MT AG Appeal at 24-26

¹⁷⁴ EA at 3-15.

¹⁷⁵ *Id.* at 3-11.

¹⁷⁶ *Id.* at 3-15.

¹⁷⁷ *Id.* at 3-15.

¹⁷⁸ *Id.* at 3-16.

While APR is required to comply with the MDOL regulations, as noted by BLM, the Districts point out that the MDOL does not actually require vaccination of most animals unless they are being imported into the state, citing Mont. Admin. R. 32.3. Neither BLM nor APR contradict this and a brief review of Montana law revealed no germane vaccination requirements, with a statutory vaccination section having been repealed.¹⁷⁹

The Districts assert that cattle operations in the area surrounding the Allotments employ “multiple vaccine protocols,” whereas APR’s bison are not vaccinated and thus pose a substantial risk of transmitting diseases to wildlife and to cattle either directly or through wildlife infected via the bison.¹⁸⁰ However, the Districts and other Appellants fail to present any evidence of which diseases the local cattle are being vaccinated for, and why the lack of vaccinations in APR bison puts Appellants’ cattle at higher risk for disease.¹⁸¹

Furthermore, the Districts acknowledge that “not all diseases of concern have a vaccine available.”¹⁸² Without evidence as to whether cattle are vaccinated for the diseases, it is difficult to determine whether the lack of vaccinations of the APR bison would make an appreciable difference in the risk to wildlife or cattle.

In compliance with the APR-District Agreement, APR is testing its bison for bluetongue, bovine viral diarrhea, parainfluenza III, brucellosis, anaplasmosis, Johne’s disease, infectious bovine rhinotracheitis, leptospirosis, and epizootic hemorrhagic disease (EHD).¹⁸³ And, this agreement was unanimously approved by an adjustment board appointed by the Montana’s DNRC.¹⁸⁴

The agreement also requires APR to observe its bison herd for signs of disease two days per year and test them if signs of disease are observed.¹⁸⁵ APR must also test any bison that escapes.¹⁸⁶ The MDOL or a veterinarian will determine the next

¹⁷⁹ Mont. Code Ann. § 81-2-801 (repealed).

¹⁸⁰ Districts Appeal at 40-46.

¹⁸¹ For example, the Districts assert that cattle herds are typically vaccinated for leptospirosis, *id.* at 45, but present no evidence to support this assertion.

¹⁸² *Id.* at 40-41.

¹⁸³ *Id.*, Ex. 1 at ¶ 14; Districts Appeal, Exs. 15-MM-4, 17 at 1, 18 at 1.

¹⁸⁴ *Id.*, Ex. 1 at ¶ 13.

¹⁸⁵ *Id.*, Ex. 1 to Ex. 1, at ¶ 2.c.

¹⁸⁶ *Id.* at ¶ 2.d.

action if the animal tests positive for brucellosis or if the animal tests positive for and shows clinical signs of one of the other diseases.¹⁸⁷

Furthermore, APR does cull its herds in the sense that it allows a couple dozen individuals to be harvested annually and has distributed more than 400 bison to conservation and tribal herds in Montana, Colorado, Nebraska, Arizona, South Dakota and Oklahoma since 2009.¹⁸⁸ APR asserts that it is important to maintain disease-free herds because it operates as a supplier to these other herds.¹⁸⁹

In a recent testing of 97 APR bison, they all tested negative for brucellosis, rhinotracheitis, bovine viral diarrhea, and Johne's disease.¹⁹⁰ This supports a finding that the risk of transmission of these diseases does not constitute a likelihood of immediate and irreparable harm.

Also supportive of this finding is the lack of relevant information which impedes analysis of the extent, if any, to which unvaccinated bison pose an additional risk of disease transmission. For these diseases, except brucellosis, Appellants have failed to identify: (1) their prevalence in wildlife and cattle,¹⁹¹ (2) the level of susceptibility of wildlife and cattle, whether by interspecies transmission or otherwise, and (3) whether cattle receive vaccinations

With regard to brucellosis, APR provided evidence from multiple experts supporting its position that the risk of APR bison transmitting brucellosis to cattle is negligible and is the same as the risk of cattle transmitting it to each other. Keith Aune, an expert with extensive bison research and management experience, opined that there is no greater risk for brucellosis from APR bison.¹⁹² Mr. Aune's opinion is shared by another APR expert, Jack Rhyan, who is experienced in the pathogenesis and epidemiology of brucellosis in bison and has developed several strategies to manage and eradicate the disease in bison and elk.¹⁹³

¹⁸⁷ *Id.* at ¶¶ 1, 2.b.

¹⁸⁸ *Id.*, Ex. 1 at ¶ 16.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at ¶ 14.

¹⁹¹ Districts' experts, the Levesques, did state that they had not diagnosed or seen signs of anaplasmosis in their clients' herds in Phillips County. Districts Appeal, Ex. 17 at 2, Ex. 18 at 2.

¹⁹² APR Response, Ex. 2 to Ex. 1 at ¶ 30.

¹⁹³ APR's Response, Ex. 2 to Ex. 3, at 1.

Mr. Rhyan opined:

I would consider the risk of APR bison being infected with [brucellosis] to be negligible. The risk is similar to or less than the surrounding livestock herds. . . . [T]here is negligible risk of transmission to other livestock in neighboring herds. It is the same risk the livestock herds in [Phillips] County pose to one another.¹⁹⁴

His opinion was cogently based upon several facts, including that APR's bison were originally sourced from brucellosis-free herds, Phillips County has been brucellosis-free since the early 1980's, and APR's rigorous testing of the animals it has subsequently imported.¹⁹⁵ These facts were also referenced by BLM in the EA.¹⁹⁶ In sum, Appellants provided no evidence to support their position that APR bison pose a risk of transmission of brucellosis that amounts to a likelihood of irreparable harm to Appellants.

Another recent testing of 121 APR bison showed percentage positive rates of 19 for bluetongue, 27 for anaplasmosis, 56 for EHD, 60 for parainfluenza III, and 70 for various strains of leptospirosis.¹⁹⁷ The Districts submitted affidavits from local veterinarians, Drs. Rick and McKenna Levesque, stating that these diseases can have numerous serious effects, including being potentially fatal to deer and antelope (bluetongue and EHD) and to cattle (anaplasmosis and leptospirosis).¹⁹⁸

However, the fact that APR bison tested positive for bluetongue, EHD, and parainfluenza III antibodies is not an additional risk that is likely to cause immediate and irreparable harm for at least two reasons. First, cattle (and sheep) rarely develop EHD.¹⁹⁹ Second, Scott Heidebrink, APR's Director of Bison Restoration, recounted a statement of Dr. Brock Aiton, the veterinarian who tested APR's bison, that these three diseases are prevalent or endemic in livestock and wildlife across Montana and that exposure was not a surprise or a concern.²⁰⁰

¹⁹⁴ *Id.* at 6.

¹⁹⁵ *Id.*

¹⁹⁶ EA at 3-19.

¹⁹⁷ Districts Appeal, Ex. 15-MM-4.

¹⁹⁸ *Id.* at 42-45.

¹⁹⁹ Montana Fish, Wildlife, And Parks, Bluetongue -Epizootic Hemorrhagic Disease, <https://fwp.mt.gov/conservation/diseases/ehd-blue-tongue> (cited in the Districts Appeal at 43).

²⁰⁰ APR Response, Ex. 1 at ¶ 14; Districts Appeal, Ex. 18 at 1.

The Levesques conclude that one of the greatest risks to cattle herds bordering the Allotments at this point in time is the spread of disease through bison controlled by APR.²⁰¹ However, neither the Levesques nor Appellants provide the necessary specificity in evidence and analysis to overcome evidence provided by APR and BLM and to demonstrate that there is an additional risk of disease transmission which will likely result in an immediate and irreparable harm.

In support of their conclusion, the Levesques reference incidents of APR bison straying out of the Allotments and the threat of transmission this poses to these herds.²⁰² However, they don't identify any of these incidents.

The only reliable evidence of such incidents is the affidavit of Peggy Bergsagel, whose family owns and operates a ranch surrounded by APR-controlled lands on three sides.²⁰³ She stated that in seven years there have been "several incidents where APR bison have forced their way onto my property."²⁰⁴

APR counters that it has been grazing bison since 2014 in the Telegraph and Box Elder Allotments and that Appellants fail to point to actual harm from this activity that evidences a likelihood of immediate and irreparable harm from implementing the Final Decision.²⁰⁵ The record basically supports this, as reliable evidence of such incidents over the eight years of bison grazing is limited to the "several" incidents mentioned by Ms. Bergsagel.

The Levesques' conclusion is also contradicted by one of APR's expert, Mr. Aune, who opined that there is no greater risk for these diseases from APR bison.²⁰⁶ Further, for all these diseases, testing showed no evidence of clinical disease in the APR bison.²⁰⁷

In an effort to reinforce Appellants' position, the Levesques opined that for anaplasmosis, even if there is no evidence of clinical disease, a positive test means

²⁰¹ Districts Appeal, Ex. 17 at 1, Ex. 18 at 1.

²⁰² *Id.*, Ex. 17 at 2, Ex. 18 at 2.

²⁰³ *Id.*, Ex. 20 at 1.

²⁰⁴ *Id.*

²⁰⁵ APR Response at 17 (citing EA at 2-2, 2-7).

²⁰⁶ APR Response, Ex. 2 to Ex. 1 at ¶ 30.

²⁰⁷ *Id.* at ¶ 15

that the disease can be transmitted by ticks and biting flies.²⁰⁸ The Levesques also opined that bison which test positive for one of the diseases should be removed from the herd, regardless of the presence or absence of clinical signs.²⁰⁹ In so stating, they seem to imply that for the diseases other than anaplasmosis, a positive test without clinical signs of disease poses little risk of transmission: “The other diseases these bison tested positive for were written off by Dr. Aiton as just “indicating prior exposure. . . . While this may be true, we cannot say with 100% certainty that they are pathogen free.”²¹⁰

Indeed, with regard to the diseases other than anaplasmosis, Appellants have not presented evidence showing that the diseases can be transmitted by insects which bite an animal which has tested positive but is not clinically diseased.²¹¹ For instance, the Districts point out that leptospirosis can be transmitted from grazing animal to grazing animal or by exposure to urine, an aborted fetus, or contaminated water, but they make no mention of it being transmittable via biting insects.²¹²

Regarding anaplasmosis, the Levesques referenced Dr. Aiton’s belief that the disease “is ‘more prevalent’ in Montana than once thought.”²¹³ However, the Levesques observed that they have not diagnosed any anaplasmosis in their clients’ herds in Phillips County nor seen signs of the disease and that these insects’ range extends to cattle herds bordering the Allotments.²¹⁴

Because bison are being added immediately only to the Whiterock Coulee Allotment, the relevant inquiry is whether the insects’ range extends to herds bordering that allotment. The Appellants have not identified whether any herds border that allotment or the distance of any herds from that allotment, and therefore the likelihood of transmission, if any, cannot be determined.²¹⁵

²⁰⁸ Districts Appeal, Ex. 17 at 2, Ex. 18 at 2.

²⁰⁹ *Id.*, Ex. 17 at 3, Ex. 18 at 3.

²¹⁰ *Id.*, Ex. 17 at 2, Ex. 18 at 2.

²¹¹ Bluetongue and EHD can be transmitted by biting flies, but there is no evidence that transmission can occur when the bison does not show clinical signs of disease.

²¹² *Id.* at 45.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ This conclusion also applies to bluetongue and EHD, which can be transmitted by biting flies as well. Montana Fish, Wildlife, And Parks, Bluetongue -Epizootic Hemorrhagic Disease, <https://fwp.mt.gov/conservation/diseases/ehd-blue-tongue> (cited in the Districts Appeal at 43).

As to whether the conversion to bison poses an increased risk to wildlife from insect disease transmission, Appellants, including the DFWP which presumably is knowledgeable about relevant data, fail to discuss or offer any supporting evidence of the prevalence of wildlife in the Whiterock Coulee Allotment area, the prevalence of anaplasmosis in wildlife frequenting the allotments or elsewhere, or their level of susceptibility to the disease.

More importantly, to show irreparable harm to wildlife, whether from the conversion to bison or changes in fencing, there must be a showing that a significant decline in population is likely, one that would impact a species as a whole.²¹⁶ Appellants have failed to make this showing with respect to any disease or any particular species of wildlife, as they don't even discuss the significance of the alleged impacts to any particular species as a whole.

Disease can also be transmitted by common usage of land by bison and cattle or wildlife, as indicated by the aforementioned fact that leptospirosis can be transmitted directly from grazing animal to grazing animal or by exposure to urine, an aborted fetus, or contaminated water. This raises the question of whether the fencing changes authorized under the Final Decision will result in increased common usage to the extent that immediate and irreparable harm to Appellants is likely.

The relevant changes would be those for the Telegraph Creek and Box Elder Allotments where bison are already grazing and those for the Whiterock Coulee Allotment, the only allotment where bison will be added immediately. For Telegraph Creek, one internal pasture fence will be removed and for Box Elder, two fences will be constructed, one between BLM land and the Refuge and one between BLM land and deeded land.²¹⁷ For the Whiterock Coulee, because bison have not been grazed there before, the effect of the fence changes are subsumed within the broader question of the effect of adding bison to that allotment, given the nature of all the fencing there once the fencing changes are completed.

²¹⁶ See, e.g., *Oregon Nat. Desert Ass'n v. Bushue*, 2022 U.S. Dist. LEXIS 57379, at *14-17 (D. Or.); see also *Idaho Rivers United v. U.S. Army Corps of Eng'rs*, 156 F. Supp. 3d 1252, 1262 (W.D. Wa. 2015) (even in the context of species listed as threatened or endangered under the Endangered Species Act, courts require a showing that the identified harm to the species is significant vis-à-vis the overall population, and not just that individual animals are likely to be injured).

²¹⁷ Final Decision at 3.

As discussed above in Section III.C.1, the EA contemplates that all fence construction and modifications will be made to wildlife-friendly standards in the EA's Appendix B.²¹⁸ The Appellants argue that Appendix B contains many different standards and that it is unclear which will be applied. They contend that wildlife-friendly fencing will not contain bison and fencing that will contain bison will not be wildlife-friendly, leading to either bison escaping and intermingling with cattle or more intermingling between bison and wildlife. In either situation, Appellants contend that the risk of disease transmission will increase.

Appellants' arguments suffer from the fact that they focus on fence changes generally rather than the changes for the three relevant allotments. For instance, the addition of two fences for the Box Elder Allotment would presumably result in less or the same amount of intermingling between bison and cattle or wildlife.

Left for analysis are Telegraph Creek and Whiterock Coulee. The Governor asserts that wildlife-friendly fencing will not contain bison because such fencing can be easily jumped, stretched, or moved by bison,²¹⁹ but the Governor fails to present reliable evidence of this, and presumably the Governor, representing the DNRC and the DFWP, would have the data or expertise to support its position that bison friendly fencing is inconsistent with wildlife friendly fencing. The Attorney General asserts that bison can jump fences five to six feet high but relies on commentary to the EA and a website article,²²⁰ both without sufficient indicia of reliability.

Furthermore, in making these assertions, the Appellants largely ignore relevant factors bearing on whether fencing will contain bison that are identified in a 2012 publication of DFWP, the agency under the Governor's direction with relevant expertise. DFWP states:

When evaluating a fence's ability to contain captive bison, it is important to consider . . . the ability of the herd to access the proper quality and quantity of food and water Properly constructed and maintained electrified high-tensile fencing appears to be highly effective in containing captive bison herds. . . . Some experience shows that properly maintained three-wire, four-wire, and five-wire high-

²¹⁸ EA at 2-8, 3-10.

²¹⁹ MT Gov Appeal at 18.

²²⁰ MT AG Appeal at 26 n.17.

tensile electric fences are all effective for containing domestic bison. . . . Familiarity with electric fencing deters domestic bison from contact.²²¹

The DFWP explained the criticality of habitat and forage:

The natural capacity of a bison herd is heavily dependent . . . on habitat and forage availability. . . . Migration is closely associated with locations of permanent water and forage quantity and quality due to seasonal changes and precipitation patterns. . . . In determining the ability of a specific habitat to support a bison herd the following factors must be examined: the existing conditions of the range, the seasonal range and its utilization by all species, and how a site's potential would differ based on whether it was supporting a confined herd versus a free-ranging herd.²²²

In the EA, BLM took into consideration the 2012 DFWP publication, observing:

Properly constructed and maintained electrified 3-, 4-, and 5-wire high-tensile fencing is highly effective in containing captive bison herds. When evaluating a fence's ability to contain domestic bison, consideration should be given to the ability of the herd to access the proper quality and quantity of food and water (DFWP 2012). APR has effectively contained bison within two allotments using 4-wire high tensile and electrified fence with few documented breeches.²²³

In response to the Appellants' commentary on the EA that the proposed fencing alterations are inadequate and should be six feet high to contain bison, BLM repeated these observations, and then noted that all the Allotments are meeting the rangeland health standards and "produce ample forage and have good water sources. This significantly reduces the need for more restrictive fencing"²²⁴

²²¹ Executive Summary of Montana Fish and Wildlife Park's Background Information on Issues of Concern for Montana: Plains Bison Ecology, Management, and Conservation (2012) (hereinafter "2012 DFWP publication") at 7.

²²² *Id.* at 3-4.

²²³ EA at 3-14.

²²⁴ AR 2.4-02 at A-5.

BLM elaborated that the fencing on the two allotments where bison have already been grazing (Telegraph Creek and Box Elder)

has a similar configuration to the fencing modifications proposed under alternatives B and C [of the EA]. The [other] allotments under this proposal have similar terrain and topography, therefore it is reasonable to forecast that the fencing changes will be sufficient to contain the bison on these allotments as well. Additionally, there are three other allotments within the North Central Montana District authorized for bison that utilize similar fence configurations with no known containment issues.²²⁵

In other words, the Allotments have the proper quality and quantity of food and water for the herd size and fences to be used there to minimize breeches.

The Governor contends that the DFWP publication states that such high-tensile fencing is only effective on “captive” bison, which it equates to “production” bison and not “wildlife-managed” bison. But the publication does not equate “captive” with “production” and does not state that such fencing is only effective on captive bison.

Captive appears to mean constrained by fences and “domestic.” Most of the information in the publication pertaining to the effectiveness of fencing “comes from those who are attempting to contain domestic bison.”²²⁶ And, the publication states that such fences are “effective” rather than “only effective” on captive bison.²²⁷

While APR’s bison are treated somewhere between wild and domestic bison, they are fenced and those fences have been effective in containing them for the last eight years in the Telegraph Creek and Box Elder Allotments. This, plus the similar results in three other allotments in the North Central Montana District, is the most compelling evidence, given that the Appellants, including DFWP with relevant expertise, have not presented evidence or argument addressing how the forage and habitat of Telegraph Creek and Whiterock Coulee may affect the efficacy of the fencing.

²²⁵ *Id.* at A-5 to A-6.

²²⁶ 2012 DFWP publication at 7.

²²⁷ *Id.* at 7.

Nor have Appellants presented sufficient evidence of the level of infectiousness, if any, of the APR bison that tested positive for diseases. This conclusion applies not only to transmission by biting insects but also by other methods. The DFWP's own publication notes: "Brucellosis may be identified through the detection of antibodies in the blood; however, the presence of antibodies does not imply current living infection and can lead to an overestimation of the true level of infection."²²⁸ The Appellants do not discuss whether the positive tests are based on detection of antibodies and the implications for level of infectiousness, if any. And, the Levesques' previously mentioned statement seems to imply that the risk of infectiousness is very low, i.e., acknowledging as possibly true that a positive test without clinical signs is merely an indication of past exposure but stating they could not be 100 percent sure.

As for the Appellants' concerns over the zoonotic diseases, they offer no evidence or analysis to show that the diseases would likely be transmitted to humans. In sum, Appellants have failed to show that immediate and irreparable harm is likely from disease being transmitted from bison to wildlife, cattle, or humans.

3. Other Alleged Irreparable Harm

The Districts argue that their members will be immediately and irreparably harmed in several other ways if a stay is not granted. First, the removal of fences will disturb the rangeland and, if the Final Decision is set aside on the merits, those fences will be needed but unavailable for renewed cattle operations, implying that the rangeland will suffer, and the land will have to be disturbed again to put the fences back.²²⁹ However, the Districts present no evidence that any of its members are permittees of the allotments or otherwise explain how the alleged damage to the Allotments will harm its members.

Also, the Districts make no attempt to show that any damage to the range from fence removal, fences being unavailable, or fence replacement will result in irreparable harm as opposed to short-term and temporary harm which is not irreparable.²³⁰ And, any damage from fences being unavailable or put back is speculative and not immediate because that damage would occur only if and when a decision is reached on the merits setting aside the Final Decision.

²²⁸ *Id.* at 5.

²²⁹ Districts Appeal at 46-47.

²³⁰ *Western Watersheds Project*, 195 IBLA at 132.

Second, the Districts assert that the presence of non-production bison on the allotments is a threat to the health of the allotments because APR has a history of poor management and the natural grazing habits of bison.²³¹ Again, the Districts have not shown that damage to the allotments will harm its members.

Further, the poor management allegation is not adequately supported, being based only on two random observations: (1) that a gate was missing in the Telegraph Creek Allotment that should have been present to restrict migration of bison into a pasture in rest cycle, and (2) that a portion of the Box Elder Allotment of unknown size was severely overgrazed.²³² From the single missing-gate observation, the Districts leap to the conclusion that “[i]nstead of rotating from one pasture to another every couple months, the APR has removed gates separating the pastures and allowed their animals to roam freely throughout the entire allotment.²³³ These isolated visual observations fall far short of establishing the accuracy of the District’s conclusion or overall poor APR management.

Moreover, this allegation is outweighed by the contrary findings of the DNRC and BLM. In 2019, DNRC performed a compliance check on state lease 8124 in the Box Elder Allotment and found that APR was in compliance with the lease terms, allowing APR to continue grazing bison on the state leased lands for another 10 years.²³⁴ Similarly, BLM found:

[APR] is in substantial compliance with the rules and regulations and the terms and conditions in the existing permits; has demonstrated conformance with Standards of Rangeland Health (Standards) and Guidelines for Livestock Grazing Management (Guidelines) on all allotments, including where bison grazing is already authorized; and has a satisfactory record of performance.²³⁵

As for bison grazing habits, the Districts allege that they crop vegetative growth close to the ground in large areas before moving off to a new area. The Districts point out that the allotments are smaller than the endless prairie historically

²³¹ Districts Appeal at 47.

²³² *Id.* at 49, Ex. 15 at ¶¶ 10, 11.

²³³ *Id.* at 49.

²³⁴ APR Response, Ex. 1 at ¶ 21.

²³⁵ Final Decision at 7.

available to bison and conclude that bison will excessively trample and defoliate an area, causing long-term damage.²³⁶

The Attorney General also argues that Montana's public lands will be irreparably damaged, but without explanation or evidence to support this dire prediction.²³⁷ This argument may relate to a conclusory argument earlier in the Attorney General's Appeal that "removal of internal fences would allow bison to overgraze certain allotments," with rest rotation being impossible.²³⁸

The relevant allotments for analyzing whether immediate harm is likely are the three allotments where bison will be grazing immediately: Box Elder, Telegraph Creek, and Whiterock Coulee. No internal fencing changes are being made in Box Elder and the removal of internal fencing will reduce the number of pastures from four to three in both Telegraph Creek and Whiterock Coulee.²³⁹ The latter will be grazed in a three-pasture deferred rotation system where one pasture is deferred during the growing season each year.²⁴⁰

It's unclear which allotments the Attorney General is referencing, all the allotments where internal fencing will be removed or a subset thereof. More importantly, the Attorney General presents no evidence to support his conclusion that the bison will overgraze and damage the range.

Nor do the Districts present sufficient evidence to show that bison grazing will be harmful overall, or to even raise serious questions as to BLM's analysis, supported by numerous studies, that bison grazing will benefit the range. BLM's analysis is supported by the fact that the Telegraph and Box Elder Allotments have been meeting rangeland health standards while being grazed by bison and that changes will be made if monitoring discloses any problems. Moreover, the Appellants have not presented evidence to show that any alleged damage would be immediate and irreparable.

A third argument of the Districts is that the presence of non-production bison pose several threats to the health of existing wildlife and domestic cattle and

²³⁶ Districts Appeal at 47-48.

²³⁷ MT AG Appeal at 36.

²³⁸ *Id.* at 31.

²³⁹ Final Decision at 3-4.

²⁴⁰ *Id.* at 4.

therefore the livelihood of its members and the local community as a whole.²⁴¹ They assert that electrifying fences without adequate openings for member of the public to cross is dangerous,²⁴² but they have not provided evidence showing what kind of openings support agribusiness, tourism and recreation and that APR's proposed fencing will compromise these uses.

The Districts presented evidence that APR has electrified gates and fences without posting notices of electrification.²⁴³ They assert that electrified gates prevent neighbors "from safely entering the allotment to return a bison or retrieve a cow. Furthermore, it presents a safety risk to other users such as campers, hikers, or hunters from entering an allotment that is required to be managed as multiple use."²⁴⁴

However, in the Final Decision, BLM requires that electric fence notification signs be posted at gates and elsewhere and that gates be non-electrified.²⁴⁵ The Final Decision also states:

Additional features to further ensure public safety will also be incorporated into project design, as needed. . . . To ensure adequate public vehicular access, gates and/or cattleguards will be installed in fences on every publicly accessible road or trail. Additional gates will be installed along fences where access is recommended by BLM. As a general rule, at least one gate will be installed every 0.50 mile and in sharp angle corners. The Permittee will be required to install additional gates, stiles, or fence ladders where additional public access may be needed in order to ensure public safety.²⁴⁶

The Districts fail to address how these safety features would be insufficient.

Another alleged threat to safety is the risk of users of the allotments, such as recreationalists, being gored in light of the removal of some internal fencing authorized in the Final Decision.²⁴⁷ BLM recognized the risk, noting reported

²⁴¹ Districts Appeal at 51.

²⁴² *Id.* at 51-52.

²⁴³ *Id.*, Ex. 15 at 2.

²⁴⁴ *Id.* at 31.

²⁴⁵ Final Decision at 6.

²⁴⁶ *Id.*

²⁴⁷ Districts Appeal at 32-34.

gorings in Yellowstone National Park (YNP).²⁴⁸ BLM contrasted YNP with Phillips County which receives comparably much lower levels of visitation on BLM-administered lands.²⁴⁹

The Districts argue that the likelihood of goring within the County might be more akin to YNP, but its argument is unconvincing for at least three reasons. First, they provide no data on the frequency of recreational use within the allotments, let alone the only two that matter for determining whether an immediate harm is like to result: Whiterock Coulee where bison will be added and Telegraph Creek where bison already graze, and one internal fence will be removed. Second, they don't analyze where recreational use is likely to occur seasonally within those two allotments in relation to whether bison are likely to be present there during that season. Third, as BLM noted in the EA: "Neither the BLM Malta Field Office nor APR have received any reports of personal injury related to bison on any allotments permitted by BLM for domestic indigenous livestock grazing." This experience is the most reliable evidence of whether immediate and irreparable harm is likely and suggests that it is not.

The Districts also assert that there will be a loss of income from recreational activity caused by harm to wildlife.²⁵⁰ However, they fail to present adequate evidence that the likelihood of harm to wildlife would lead to such a loss.

The Districts likewise fail to present sufficient proof to support their contention that its members are likely to suffer emotional distress from observing the harm to their cattle caused by disease transmitted by bison.²⁵¹

Reliance on emotional distress as a form of irreparable injury is misplaced where the risk of death or serious injury to the animals appears to be low,²⁵² as in the present case.

The Attorney General foresees the bison trampling the fencing and moving freely between APR and private lands, "wreak[ing] havoc on landowner's property and disrupt[ing] their herds in an irreparable manner."²⁵³ But this bare assertion is not supported by evidence or detailed analysis, let alone evidence and analysis

²⁴⁸ EA at 3-18.

²⁴⁹ *Id.*

²⁵⁰ Districts Appeal at 43-45.

²⁵¹ *Id.* at 45.

²⁵² *Friends of Animals & Craig C. Downer*, 188 IBLA 394, 398 (2016).

²⁵³ Districts Appeal at 39.

focused on the three allotments where bison will be grazing immediately. The Attorney General offers nothing to alter the previous analysis herein that the evidence shows that breeches of the fencing are unlikely to occur or cause irreparable harm.

The Governor contends that the State will suffer immediate and irreparable harm if a stay is not granted because the State is in danger of failing to meet its fiduciary obligation in the management of state trust lands on the allotments. This is alleged so because BLM is authorizing grazing by a “‘conservation-based,’ or ‘non-production-oriented, wildlife-management-focused’ bison herd without adequate analysis or management guidelines.”²⁵⁴ The Governor concludes that disease, trespass, goring, and land deterioration are not hypothetical damages, but real and immediate threats.²⁵⁵

The Governor’s position is undermined by the fact that APR holds state lease 8124 that authorizes bison grazing.²⁵⁶ Further, this Order has already addressed all these alleged threats and concluded that no immediate and irreparable harm is likely to result. Consequently, there is no likelihood of immediate and irreparable harm to the ability of the State to meet its fiduciary obligation.

Finally, citing Federal court case law from the 1980’s, the Attorney General argues: “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.”²⁵⁷ This is not the current state of the law, as the current Federal court case law, which the Board has adopted, provides that “‘a procedural violation of NEPA is not itself sufficient to establish irreparable injury.’”²⁵⁸

²⁵⁴ *Id.* at 34.

²⁵⁵ *Id.*

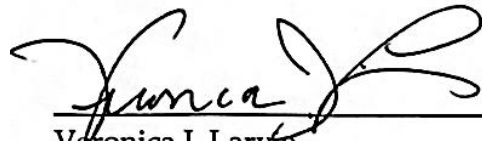
²⁵⁶ APR Response, Ex. 1 at ¶ 21.

²⁵⁷ MT AG Appeal at 36.

²⁵⁸ *Friends of Animals*, 188 IBLA at 401 (quoting *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 24 (D. D.C. 2009)); *see also Western Watersheds Project*, 195 IBLA at 131 (the Supreme Court has instructed that immediate and irreparable harm should not be presumed merely because an agency fails to properly evaluate the environmental impact of a proposed action).

VI. CONCLUSION

In conclusion, the Appellants have failed to provide sufficient proof and analysis to show that they will suffer a harm that is likely, immediate, and irreparable if a stay is not granted. Therefore, their stay petitions must be denied.


Veronica I. Larvie
Administrative Law Judge

See pages 42 and 43 for distribution.

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