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LEGAL NARRATIVE

Honoring and recognizing the implied right of habitat for Yellowstone Buffalo under Article 6 Treaty authorities will restore Yellowstone Buffalo to available habitat where they are now functionally extinct due to State interference and Federal inertia.

The Department of Interior, in an order issued by Secretary Deb Haaland last March, recognize wild bison as “functionally extinct to both grassland systems and the human cultures with which they coevolved.” Effectively counteracting the inadequacy of existing regulatory mechanisms, Tribes have the legal authority to assert the implicit right of habitat protection for Yellowstone Buffalo under Treaty laws that are acknowledged as the supreme law of the land. Tribes can and should insist upon the recovery of the migratory species in the Greater Yellowstone ecosystem where they’ve become functionally extinct due to State and federal government actions.

Asserting such a leadership role, in the form of a co-stewardship agreement with the Park Service, the Forest Service and, if listed pursuant to the Endangered Species Act, the Fish & Wildlife Service, will effectively lay the foundation for true cultural reparations for the numerous tribes who negotiated treaties with the U.S. government in good faith in the 19th Century.

For example, the treaty between the United States and the Nez Perce reserved to that tribe “the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.” *Id.* at 703. The treaty with the Nisqually and Puyallup reserved to those tribes “the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands.” *Id.* at 662. Treaties with the Crow, *id.* at 1009, and Eastern Shoshone and Bannock Tribes, *id.* at 1021, reserved to those tribes “the right to hunt on the unoccupied lands of the United States so long as game may be found thereon.”

Nye 1992 at 175–176 n.4 (citing C. Kappler ed. 1972).

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The U.S. Supreme Court recently ruled that President Cleveland's proclamation creating the Bighorn National Forest "reserved" the lands "from entry or settlement" making the Apsáalooke Nation's (the Crow Tribe's) exercise of the 1868 Treaty right to hunt on unoccupied lands "more hospitable, not less." *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019).

Treaty rights establish an implied right for protecting and expanding habitat for wild bison to freely roam within their historic range in the larger Yellowstone ecosystem. According to the U.S. Fish & Wildlife Service's acceptance of the petition to list Yellowstone Bison under the ESA, wild buffalo are currently confined to only 15% of their habitat. Given NPS science that this 15% can accommodate 11,000 Buffalo, it is reasonable to conclude that there is room on unoccupied federal lands surrounding the Park for a total population of over 70,000, which could be maintained by harvesting 7,000 every year.

In a context where wild bison sorely need more habitat in order to thrive, tribes [] have an opportunity to work toward this goal by asserting an affirmative right to habitat protection encompassed within their treaty hunting right. . . [A] negative right is essentially useless if a species' habitat has already been largely destroyed, as in the case of wild bison.

Leonard 2014 at 18-19.

Leonard's statement is true across bison's North American range where the migratory species has been reduced to less than 1% of their habitat, with very few populations functioning as wild. Sanderson et al. 2008 at 252-253; Aune, Jørgensen, & Gates 2018 at 1.

While no self-sustaining wild bison herds exist on more than 145 million acres of National Forest habitat in the Western United States (U.S. Forest Service Warren 2011), vast public trust lands on National Forests and other unoccupied lands in the Yellowstone ecosystem present an opportunity for remedying this condition of systemic ethnocide.

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States are precluded by constitutional law from interfering with such assertions of Treaty rights, and would have no standing in Court to challenge a sovereign-to-sovereign co-stewardship agreement between the Tribes and the federal agencies.

Whether grounded in law or treaty, the U.S. government has a duty to restore the abundance and diversity of Yellowstone's bison herds in the wild, and ongoing state action excluding the migratory species from substantial portions of their National Forest range and habitat is unlawful (note: the 2000 Interagency Bison Management Plan was not court-ordered, and has never been expressly approved by the courts).

To hold now that "the game may no longer be found" where the buffalo have been intentionally exterminated would absolve the government of fault while allowing roundabout abrogation by extra-congressional action.

Cole 2021 at 1089 (inferring a similar situation for buffalo and salmon exists where the courts found the government culpable for infringing on tribes' treaty-protected fishing rights for blocking salmon from their spawning grounds).

United States v. Washington (Culverts Case), 853 F.3d 946, 954 (9th Cir. 2017) (affirming the district court's holding "that in building and maintaining these culverts Washington had caused the size of salmon runs in the Case Area to diminish and that Washington thereby violated its obligation under the Treaties"), *aff'd mem.*, 138 S. Ct. 1832 (2018).

Cole 2021 at 1088 n.234.

Currently, State and federal law and policy stands in the way of recovering Yellowstone Buffalo and in restoring the wild species' abundance and distribution on National Forest habitat contiguous with Yellowstone National Park.

Together the agencies tightly manage the Yellowstone bison herd and its access to potential habitat outside the park. In practice, for the most part, this has meant that Yellowstone bison have extremely limited access to habitat outside the park... Not only does this management scheme deprive the Yellowstone bison herd of access to habitat; keeping the herd

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geographically and numerically confined also limits tribes' access to culturally important and treaty-guaranteed hunting opportunities.

Leonard 2014 at 20–21.

Contrary to Montana's interference with natural migrations of Buffalo within the larger ecosystem, courts have found that off-reservation hunting and fishing rights obligate the state to ensure the availability of a fair share of game and wildlife life to treaty tribes. See, e.g., 443 U.S. 678-79 (1979). If the States are unwilling or uncooperative in restoring wild Yellowstone bison on National Forest lands, "Indian treaty provisions supersede conflicting state laws or state constitutional provisions," under the U.S. Constitution's Supremacy Clause. Nye 1992 at 178 (footnote omitted).

Furthermore, the National Park System, National Forest System, along with other federal land management agencies with wildlife-specific powers "have an obligation, and not just the discretion, to manage and conserve fish and wildlife on federal lands," and can and must "stop the practice of reflexively acquiescing to state claims of wildlife authority," which are based on a legal fiction of state ownership. Nie et al. 2017 at 798, 905. States have a conservation interest in wildlife, not an ownership interest. See, e.g., Reynolds, "Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption" (UNC Law Rev. 1984).

Ideally, cooperation from the States would speed recovery of Yellowstone bison in the wild but it is not a prerequisite according to several courts including the U.S. Supreme Court.

"In our view, the 'complete power' that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there." *Kleppe v. New Mexico*, 426 U.S. 529, 541 (1976).

Within their jurisdictions, the States are entrusted to care for and protect wild animals but the States' police powers exist only "in so far as (their) exercise may be not incompatible with, or restrained by, the rights conveyed to the federal government by the constitution." *Kleppe* at 545 (quoting *Geer v. Connecticut*, 161 U.S. 519, 528 (1896)).s

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In addition to the U.S. Supreme Court, other federal courts have affirmed federal wildlife management authority for land management agencies.

[T]he Tenth Amendment does not reserve to the State of Wyoming the right to manage wildlife . . . regardless of the circumstances.

Wyoming v. United States, 279 F.3d 1214, 1227 (10th Cir. 2002).

Under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife

resources. Such right does not derive from ownership of the resources but from a duty owing to the people.

In re Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980) (citation omitted).

The Department of Interior acknowledges the critical importance of Yellowstone Buffalo to implementation of its Bison Conservation Strategy, and welcomes Tribal leadership initiatives.

As it stands, the U.S. government owes a duty to uphold its' trust responsibility and treaty relationship with Indigenous tribes and must fulfill its' public trust duty to the American people in protecting and recovering threatened and endangered species.

The Montana Wyoming Tribal Leaders Council (2012) have unequivocally asked managing authorities to recognize "the trust responsibility and Treaty obligations to American Indian Nations in providing for viable populations of migratory buffalo in their native habitat."

The Shoshone-Bannock Tribes have also articulated their concern "to protect, preserve, and enhance populations of wild bison" amidst the "geo-political boundaries preventing them from occupying much of their historic range throughout the Greater Yellowstone Ecosystem." Fort Hall Business Council 2012.

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The Interior Department's 2020 Bison Conservation Initiative (BCI):
"reaffirms the Department of the Interior (DOI) commitment to both leadership and partnership to ensure the conservation and restoration of wild American bison. Collaborative approaches to ecological and cultural restoration of American bison are central to the BCI."

"DOI is committed to an interagency, science-based approach to restore gene flow across DOI bison conservation herds through a metapopulation management strategy to maintain genetic diversity and integrity."

"DOI will provide opportunities to restore cultural connections to bison by working with tribes inextricably linked to bison; youth; and rural and urban communities to honor and promote the unique status of bison as an American icon for all people."

Re-affirming this strategy, last March the Department announced "several new steps to restore wild and healthy populations of American bison and the prairie grassland ecosystem. Through a new Secretary's Order and over \$25 million from the Inflation Reduction Act, the Department will empower its bureaus and partners to use the best available science and Indigenous Knowledge to help restore bison across the country.

"The American bison is inextricably intertwined with Indigenous culture, grassland ecology and American history. While the overall recovery of bison over the last 130 years is a conservation success story, significant work remains to not only ensure that bison will remain a viable species but also to restore grassland ecosystems, strengthen rural economies dependent on grassland health and provide for the return of bison to Tribally owned and ancestral lands," said Secretary Deb Haaland. "New historic funding from the Inflation Reduction Act will help support the Department's efforts to restore this iconic species and integrate Indigenous Knowledge into our shared stewardship goals."

Time is of the essence for the Tribes in asserting a leadership role over restoration of the last wild Buffalo. As stated in Joint Secretarial Order 3410 (adopted by the Departments of Agriculture and Interior):

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The imperative for ecocultural restoration is made even more urgent by climate change. Warming temperatures exacerbate the pressures on grasslands, with historic droughts, wildfires, and invasive species threatening the grassland ecosystems and the communities they support. The best science shows that returning bison to grasslands can enhance soil development, restore native plants and wildlife, and promote carbon sequestration, thereby providing benefits for agriculture, outdoor recreation, and Tribes. ***In addition, restoring bison and healthy grasslands can serve as a step toward national healing and reconciliation after centuries of federal policies designed to erase Native people and their cultures.***

Conclusions & Guiding Principles for Recovering Yellowstone Buffalo Ecology under Cooperative Tribal Leadership

Protections and provisions for restoring wild Yellowstone bison must incorporate the biological principles of resiliency, representation, and redundancy in the larger ecosystem for which they are the keystone species.

The inclusion of Indigenous leadership and inter-governmental cooperation with Indigenous tribes in developing and implementing recovery plans is an indispensable part of restoring wild Yellowstone bison in the ecosystem.

Procuring the services of tribal scientists, wildlife biologists, traditionalists with ecological knowledge and insight from tribes with treaty rights and ancestral ties to Yellowstone bison is fundamental to the success of protecting and restoring the migratory species in the wild.

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Tribes with treaty rights and ancestral ties to Yellowstone bison must now assert a federally funded role in:

- developing site-specific actions for recovering wild and robust herds of Yellowstone Buffalo;
- establishing measurable criteria for recovering wild Yellowstone Buffalo and allowing Tribal harvests on an equitable basis;
- carrying out conservation measures and taking those steps necessary in achieving full recovery of wild buffalo herds in the larger Yellowstone ecosystem; and,
- effectively monitoring the recovery of wild Buffalo herds in the larger Yellowstone ecosystem.

"The power and potential for a revolutionary model of tribal engagement in the management of the world's first national park becomes clear only upon a recognition of the stifling limitations imposed upon tribal interests by the historical and existing federal-tribal relations in Yellowstone... Now, in the modern era of [U.N. and] federal policies committed to supporting tribal self-determination, the exercise of tribal sovereignty, and the ability of tribes and their advocates to expand and express their priorities across the full breadth of policy areas, there exists a wholly new basis from which to reset the relationship between tribes and the federal government... rooted in honoring the legal landscape encompassing inherent tribal sovereignty, aboriginal title, reserved treaty rights, and the federal government's trust responsibility to tribes."

"Re-Indigenizing Yellowstone," Stark et al., Wyoming Law Review (2022)

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