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12 January 2010

Bison Translocation, Attn: Becky Cooper
Montana Fish, Wildlife & Parks
1420 E. 6th Avenue
Helena, MT 59601

SUBJECT: Comments on Environmental Assessment, QFS Phase IV, Bison Translocation

Dear Ms. Cooper:

We at GravelBar appreciate the opportunity to comment on the latest environmental assessment (EA) concerning the phase IV translocation of quarantine feasibility study (QFS) bison.

GravelBar is an association of naturalists and conservationists that focuses on natural history and citizen science as well as the conservation, management, and holistic study of land, water, and wildlife in the Greater Yellowstone Ecosystem, which we call the "Yellowstone Country." Our guiding principles are that the land, water, and wildlife of the Yellowstone Country constitute the common natural heritage and property (the commons) of the people who live in the Yellowstone Country as well as the United States and that the commons is a public trust. We view privatization and commercialization (enclosure of the commons) as the single greatest threat to the protection and conservation of the commons.

We are unalterably opposed to Montana Department of Fish, Wildlife, and Parks' (FWP) proposed action, the translocation of QFS bison to Turner Enterprises, Inc. (TEI) and to Guernsey State Park (GSP) in Wyoming. Neither recipient meets the goals and criteria for disposition of QFS bison that have been established in various documents relating to the QFS, such as the original proposal by Keith Aune (then Montana Department of Fish Wildlife & Parks, or FWP, now with the Wildlife Conservation Society) and Jack Rhyan (Animal and Plant Health Inspection Service, or APHIS), "A Proposed Feasibility Study of Bison Quarantine Procedures" (attached), or in decision notices issued under the Montana Environmental Policy Act (MEPA) for the QFS Phases II/III and Phase IV (Northern Arapaho) that established unequivocal criteria for proposed recipients prohibiting the privatization and commercialization of QFS bison *and their offspring*. We view the criteria established in these official decision notices issued under MEPA as legally binding on FWP (see below).

These documents--most of which are available on the FWP's website at <http://fwp.mt.gov/hunting/bison.htm> have made it clear that the purpose of the QFS is to produce disease-free bison that can be used to restore or augment *wild* herds on *public* or *tribal* lands and that these bison will not be privatized or commercialized.

In the Aune and Rhyon proposal, (2004, pages 1-2, my emphases) we read that: "This project outlines the current status of bison, offers guidance for the advancement of a conservation strategy and identifies the few *free-ranging and genetically pure bison herds in North America suitable for restoration projects*. According to this document, there are only about 8300 plains bison, classified as free-ranging and genetically pure, in 13 conservation herds and they present the best source stocks available for restoration efforts (reference omitted). Nearly 2/3 of these bison are from larger diseased herds, such as the Yellowstone and Grand Teton bison, while the remainder is found in small fragmented populations with limited potential as a reliable source for restoration efforts. The larger diseased conservation herds could become suitable source stock for conservation programs provided that disease free animals could be reliably filtered from the population. If animals can be declared disease free then bison from Yellowstone National Park could serve as a reliable source of genetically pure bison to be reintroduced into historical habitats contributing to the continued conservation of this species ... [Our goal is to] develop quarantine procedures, using the best available science and adaptive research strategies, that will allow bison from Yellowstone National Park to be accepted as free of brucellosis and suitable for the *establishment of new public and Native American bison herds or to augment existing populations in North America.*"

Further, as stated in a *Bison QFS Question & Answer* (2005?) sheet (attached, my emphases), in answer to the question "Will bison be 'domesticated' due to captivity during the study?" it is answered: "No. If released in wild environments, *offspring* from these bison will retain their wild character." And in answer to the question "What criteria will be used to determine appropriate recipients and locations for release of bison?" it is answered: "Applications will be reviewed on the basis of the willingness and ability of the applicant to receive and manage wild bison; management objectives that are consistent with a North American bison conservation strategy; locations that are suitable habitats within the historic range of bison; the recipient's commitment to monitor disease in the transplanted bison herd; *and the recipient's commitment to manage the bison for other than commercial purposes.*"

In short, over the last five years FWP has become legally and morally obligated to obey its previous decisions and promises to ensure that QFS bison and their offspring would be used to restore or augment wild bison on public or tribal lands and that QFS wild bison would not be commercialized and privatized. Yet this is precisely what FWP proposes to do now in violation of law, policy, and numerous public promises to the contrary. That is unacceptable to the people of Montana and the Greater Yellowstone Ecosystem.

We believe that FWP must completely drop this proposal to hand the QFS bison over to TEI and GSP and start the Phase IV process over from scratch, beginning with a new Request for Proposals (RFP) that includes the long-established criteria that no QFS bison *or their offspring* will be commercialized and privatized, but rather that these bison will be used to *restore wild, free-ranging bison* only to the public (federal and state) and tribal lands of the Great Plains and the American West.

We further believe that FWP should develop its own proposal to establish wild bison on FWP-owned Wildlife Management Areas in Montana such as the Robb-Ledford and/or Beartooth WMAs, and consider that proposal in an Environmental Impact Statement (EIS). A fair split

of disposition of QFS bison would be half to a Tribe and half to a Montana WMA.

Also, we believe that FWP should work far more closely with the InterTribal Bison Cooperative and its member tribes, especially the Gros Ventre and Assiniboine Tribes on the Fort Belknap Indian Reservation in northeastern Montana--which have a standing proposal to receive QFS bison, a proposal that has inexplicably been rejected as insufficient--to ensure that Native American tribes with close, untold generations-long relationships with wild bison have the opportunity to restore wild bison to their lands.

Finally, given the poor management of the QFS program (for example, the failure to identify and secure recipients for QFS bison by the beginning of Phases II/III of the QFS, as promised in the original Aune/Rhyan proposal [p. 11, para. 3]), and given the larger illegitimacy of bison brucellosis management under the Interagency Bison Management Plan (IBMP), we believe that the QFS, once the current inmates of the QFS facility are distributed to public and tribal recipients, should be ended. (We understand that the research permit from Yellowstone National Park that transferred wild Yellowstone bison to the QFS has been canceled anyway).

It is clear that the real reason the QFS has been so poorly managed, aside from its purely scientific aspects, is that the livestock industry opposes the restoration of wild, free-ranging bison to the landscape regardless of their ostensible disease-free status, no matter how many times QFS bison test negative for brucellosis, even after calves are born. We all know that the IBMP and the QFS were instituted under the demand of the livestock industry for bison control--not brucellosis control--to keep bison off the land where they'd compete with cattle. We believe the intent of the livestock industry for QFS bison has always been their commercialization and privatization as domestic livestock. For the livestock industry, it's OK to move bison around as long as they have vaccination tags in their ears, as long as females have radio implants in their vaginas to warn of births or abortions, as long as bison are imprisoned behind fences, and as long as bison are under the jurisdiction of the Montana Department of Livestock (DOL).

Therefore, we believe that the IBMP itself must be abandoned and that a more ecologically-informed, a more public interest-oriented bison management plan, to include ecological approaches to disease management, must be adopted.

SPECIFIC COMMENTS ON THE PROPOSAL

There are a number of problems with the proposal and the EA. I will address each of these in turn.

1. There are legal problems with the bid/RFP process.

- a. The FWP rewrote the original RFP of 17 June 2009, located at http://fwp.mt.gov/publicnotices/notice_2097.aspx, which included the criteria established in previous QFS decision notices (see attachment RFP II p. 3) prohibiting privatization and commercialization, to meet Turner's demands to privatize offspring of QFS bison for commercial purposes, primarily breeding. Turner's revised proposal, dated 29 October 2009, p. 6, specifically ignores the no privatization and no-commercialization criteria of the 17 June

2009 RFP, stating that "TEI does not believe 'commercialization' should be a factor in this project." The TEI proposal then goes on to demand a large percentage of offspring of QFS bison to be used in TEI's commercial bison breeding program. Now, in the draft EA, pps 7-8 (my emphases), we find this curious assertion: "During the evaluation of those proposals [including TEI's original proposal], *fundamental questions* arose regarding possible privatization of bison, importance of genetic conservation efforts, and *QF bison progeny*. *Since clarification was necessary for both the evaluation process and for the proposal criteria, the RFP process was opened again with clarifications.* The second RFP effort was distributed on October 9th directly to those organizations previously expressing interest QFB (sic) and had a submission deadline of November 2nd. A new proposal was submitted from Wyoming State Parks and Cultural Resources and modified proposals were submitted by Wildlife Conservation Society (zoo consortium), Fort Belknap Indian Community, and Turner Enterprises Inc."

b. One must read the revised RFP itself to learn that the no-privatization/no-commercialization criteria of the 17 June 2009 RFP were excised to "clarify" the situation. We are not told in the EA what the "fundamental questions" requiring clarification are nor why such clarifications were necessary, nor were the legal ramifications of rewriting an RFP to meet the demands of TEI to eliminate the no-privatization/no-commercialization criteria addressed. Additionally, as noted above from the EA, we learn that the revised RFP was given on 9 October 2009 only to the entities responding to the original 17 June 2009 RFP. The revised RFP was not officially placed on the FWP website as a public notice until 27 October 2009, at http://fwp.mt.gov/publicnotices/notice_2233.aspx, with a suspense date of 2 November. Finally, we learn in the 10 November 2009 minutes of the RFP review committee (attached, Bison RFP Recommendation Minutes) that the meeting at which TEI's proposal was approved improperly involved TEI personnel who were invited, I have learned, as guests of Montana State Veterinarian Marty Zalusky.

c. Rewriting the 17 June RFP to meet the demands of TEI to eliminate the no-privatization/no-commercialization criteria, which are legally established elsewhere (see para. 2 below); giving the revised RFP only to the entities who responded to the 17 June 2009 RFP on 9 October 2009 and not re-opening the bid to the public until 27 October 2009, with the highly unrealistic suspense date of 5 days hence; and including TEI personnel at the meeting at which TEI's proposal was accepted are all highly improper, unethical, and contrary to all principles of open, public bids. I can find no language in the Montana Code (Annotated) that authorizes FWP to undertake these improper and unethical bid actions. I would argue that these improper bid actions invalidate everything FWP has done regarding QFS bison in this round of proposals for Phase IV of the QFS. FWP must start the bid process over from scratch.

2. There are legal problems with dropping the no commercialization/no privatization criteria written into the 17 June 2009 RFP because these criteria were established in previous, legally binding post-Environmental Assessment decision notices (DN) issued under the Montana Environmental Policy Act regarding QFS bison. It is a well-established principle of administrative law that government agencies are bound by their own officially-adopted rules and decisions.

a. Specifically, the final EA for Phase II/III of the QFS, dated 15 December 2005, establishes no-privatization/no-commercialization criteria at paragraph 5.7, pps 31-32. The relevant language reads: "Bison cannot be utilized for a commercial purpose," "Bison must be managed as native wildlife and in a manner that achieves maximum conservation benefits."

b. The DN for the Phase II/III EA, dated 20 June 2006, states, p. 9: "Before a final decision on which projects are selected to receive [QFS] bison, however, the potential partners will have to meet all the criteria identified in the EA [i.e., the criteria established in para. 5.7 of the EA], including ... the bison will remain wild and non-commercial." We also find the following supporting comments in the DN: "The agencies agree that bison should remain in public ownership" (p. 36) and "The wildlife should be kept in public ownership" (p. 38).

c. These no-privatization/no-commercialization criteria were also applied in the Northern Arapaho Phase IV Bison Translocation EA, dated March 2009, in Appendix A, page 30: "Quarantine bison, *including any offspring*, cannot be used for commercial purposes--i.e., sold as livestock" and "Quarantine bison (*and any offspring*) must be managed as native wildlife ... Bison will be public/Tribal wildlife (not private) forever." The DN for the Northern Arapaho Phase IV EA, also dated March 2009, affirms these restrictive criteria on page 5.

d. It is clear that previous EAs and DNs for QFS bison *and their offspring* have established no-commercialization/no privatization criteria that FWP is now legally obligated to uphold in the disposition and translocation of QFS bison. Therefore, QFS bison may not be given to TEI for commercial purposes, nor may QFS bison or their offspring be privatized, used, or sold as livestock under any circumstances. (This would also apply to GSP; apparently, GSP intends to sell "excess bison" when numbers of QFS bison and their offspring exceed the limited capacity of the Park to manage them. This possibility of the sale of QFS bison given to GSP is the main reason we oppose GSP's proposal).

3. There are legal problems with FWP's general authority to hand these bison over to TEI. No specific statutory authority to privatize/commercialize public wildlife exists for FWP; general authority statutes of Title 87 (e.g., MCA 87-1-201) alone cannot be used to justify and authorize such a decision. Under the common law of the public trust, as a strict matter of law there must be a specific *positive* grant of authority from the legislature to FWP to pass wild bison into private hands.

4. There are legal problems with the delegation by the Governor of final authority over the decision to FWP director Joe Maurier rather than to the FWP commission, where legally final administrative authority for FWP decisions rest (see Matthew Brown, "Turner bid for Yellowstone bison draws protest," 8 January 2010, Billings Gazette, "Public comment on the proposal ends Jan. 12. Montana Fish, Wildlife, and Parks Director Joe Maurier will then have the final say on the fate of the quarantined bison.")

a) The FWP Commission is designated a "quasi-judicial" board and as such has significant independence from the Governor's exercise of his purely executive powers. MCA 2-15-3402(5); MCA 2-15-102(10).

b) A quasi-judicial board or commission has "rule-making authority" and decision-making

authority over the granting of "privileges, rights, or benefits" and "issuing, suspending, or revoking licenses, permits, and certificates." MCA 2-2-102(c); MCA 2-15-102(10)(b) and (c) .

c) The Governor's positive powers over the Commission are limited to appointment of Commission members, appointment of the presiding officer, and removal of Commission members for cause. MCA 2-15-124.

d) The FWP Commission has full authority to make decisions over the state's wildlife--not the FWP Director. MCA 87-1-301(a). The duties of the Director are purely executive in nature--to carry out the policies and decisions of the Commission. MCA 87-1-401.

e) Finally, the Annual Rule for the rewritten RFP at http://fwp.mt.gov/publicnotices/notice_2233.aspx, dated 27 October, states that "Once a final recommendation is made, MFWP will complete an Environmental Assessment of the proposal. If, based on the assessment, the decision is to proceed, *and if MFWP Commission approves*, then bison could be translocated by February, 2010." Clearly, FWP is committed to bring any decision over QFS bison to the attention of the Commission in a public forum, as stated in the Annual Rule.

f) In short, nothing in the MCA authorizes the Governor to bypass the authority of the FWP Commission in this matter and delegate Commission authority to make decisions about QFS bison to the FWP Director. The Director is not a policy- or decision-making employee of the State of Montana. The Commission is.

5. There are legal problems with FWP assertions of authority over QFS bison vis a vis the federal government. The research permit from Yellowstone National Park--a copy of this permit is attached to the Buffalo Field Campaign comments, which expand on this problem--to take wild bison from the Park to the QFS facility was granted to APHIS, not to FWP. The provisions of the research permit make it clear that both YNP and APHIS retain authority over the disposition of those bison, especially as the research permit envisions disposition of QFS bison only to public or tribal lands, not to private landowners. For example, on page 3 of the permit, we read that QFS bison "may be used for scientific or education purposes only, and shall be dedicated to public benefit and be accessible to the public" and also that QFS bison "may not be used for commercial or revenue-generating purposes unless the permittee [i.e., APHIS] has entered into a Cooperative Research and Development Agreement ... or other approved benefit-sharing agreement with the NPS. The sale of collected research specimens or other unauthorized transfers to third parties is prohibited." So, aside from prohibiting privatization or commercialization of the QFS bison without NPS approval, it is also clear that actual operational authority for QFS bison rests with APHIS, as the legal permittee, not FWP. It is not explained in the EA just how authority and "ownership" of QFS bison passed to FWP from APHIS. This assumption of authority and ownership of QFS bison must be discussed and justified in detail before FWP can take any action removing the QFS bison from the quarantine facility. In any case, the privatization and commercial use of QFS bison is not authorized by the research permit, and FWP may not violate those prohibitions.

6. There are problems with the Environmental Assessment.

a. The EA's presentation of alternatives is grossly deficient, asserting that essentially the only options are that either the majority of these bison go to TEI or will be slaughtered. Conservationists, such as the Gallatin Wildlife Association, have offered numerous practical and feasible alternatives to TEI or slaughter, to include: transferring the current cohort of QFS bison to Fort Belknap, placing the bison on FWP-owned WMAs to begin the process of restoring wild bison to the Montanan landscape, paying TEI to house these bison for the five year probation period or for a lesser period until legal recipients can be found, expanding the QFS facility itself until legal public or tribal recipients can be designated, or returning the QFS bison to Yellowstone National Park. The EA's rather abrupt dismissal of these alternatives without detailed analysis of their feasibility violates MEPA.

b. The EA fails to establish legal authority for the disposition of QFS bison to TEI. In other words, the EA fails to address the legal questions we have raised above. Instead, the EA attempts to sweep glaring legal problems under the rug, as it were.

7. Finally, there are legal problems with the proposal ultimately because it violates the public trust duty of the State of Montana, which came to Montana as an irrevocable aspect of sovereignty upon Statehood--a state's duty as well as a state's right--to protect public resources, including wild bison, against the rapacity of private interests as well as the negligent failure of individual public officials/agencies to defend the trust against private interests, as their fiduciary duty to the beneficiaries of the trust, the state's citizens, requires.

In short, this decision, if taken, would violate a whole host of laws and regulations. It also undermines the North American Model of Wildlife Management to which we as hunters are absolutely committed--I hope.

The above stated issues raise critically important legal and policy questions. In addition to the recommendations stated above, we urge the FWP Commission seek an official Attorney General's opinion on just where legal authority for the disposition of QFS bison lies. Furthermore, we urge the Commission to seek an AG's opinion on the legality of privatizing and commercializing these bison.

Sincerely,

Robert Hoskins