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March 2, 2021

Via Email Only rdockter@mt.gov / kevin.rechkoff@mt.gov

Rebecca Dockter / Kevin Rechkoff
Department of Fish, Wildlife and Parks
P.O. Box 200701
Helena, MT 59620-0701

RE: *United Property Owners of Montana, Inc. v. Montana Fish, Wildlife & Parks*
Cause No. DV-2020-30

RULE 408 CONFIDENTIAL SETTLEMENT OFFER

Dear Rebecca and Kevin,

As we discussed last month, my client United Property Owners of Montana (“UPOM”) is open to settling the litigation, but before making a settlement offer, I would like to point out why my client is confident of prevailing at trial and thus not willing to settle on unfavorable terms.

In reviewing the documents produced in the Administrative Record, it is clear that the prior administration improperly manipulated the Environmental Impact Statement (“EIS”) process. From the start, the Department of Fish, Wildlife and Parks (“FWP”) invited people who favored relocating/reintroducing additional bison into Montana, including American Prairie Reserve (“APR”), to help prepare the Draft EIS. It does not appear FWP invited or considered input from people who opposed this idea, including my client. FWP and APR even discussed including a proposal to use APR’s property as a reintroduction site in the Draft EIS, but the idea was removed at the last minute because FWP believed the idea would be “too confusing for the reader.” Administrative Record (“AR”) 11756. It appears the removal of the site-specific plan was not intended to avoid confusion; instead, it appears the decision was made to obfuscate APR and FWP’s ultimate plan to release “wild” bison on APR’s property and/or the adjoining Charles M. Russell National Wildlife Refuge. Even one of FWP’s employees working on the Draft EIS said the document “reads like an APR brochure.” AR 10168.

After receiving significant opposition to bison reintroduction and in favor of the “no action alternative” during the public comment period in 2015, FWP did not take any publicly visible steps towards finalizing the EIS for several years and most people believed FWP had realized that bison relocation was a dangerous and unsound idea and had decided not to proceed. Behind the scenes, however, the agency was working with bison reintroduction advocates to finalize the

EIS with the stated goal to have a significant heard of bison on the ground before the end of the Bullock Administration.

In January 2017, several groups of bison reintroduction advocates, including APR, held a private/secret meeting with Governor Bullock and FWP's leadership to discuss finalizing the EIS. AR 11831 ("please don't distribute further"). There is no indication that other parties, including my client and people who favored the no action alternative, were invited to the meeting. According to the email summary of the meeting, "we need to have things in place and hooves on the ground within a couple years so they are well established before the end of Bullock's 4-year term and therefore harder to undo." The goal was to "finaliz[e] the programmatic EIS and then moving forward on an analysis of a potential reintro. site involving the CMR in conjunction with APR – possibly using APR's bison, which would involve whatever legal hoops are necessary to make them wildlife." *Id.*

In the summer of 2017, Governor Bullock and Director Williams travelled to, and toured the APR property. As part of their junket, they meet with APR's management team and discussed the possibility of APR "helping to advance a decision on Montana's Draft Environmental Impact Statement for Bison Conservation and Management." AR 11931. In September 2017, APR's CEO sent a letter to Governor Bullock and Director Williams offering to donate APR's bison herd to the State. The key condition APR placed on the donation was the State "agreeing to maintain, in perpetuity, a minimum population of ten thousand wild bison in the immediate region of the American Prairie Reserve . . ." AR 11931. After receiving the letter from APR, FWP's leadership held a high-level meeting to coordinate a push to finalize the EIS and to include an alternative that would accommodate APR's proposal. AR 11853. Once again, groups in favor of the no action alternative were not made aware of APR's proposal, and thus did not have the same opportunity to lobby FWP and Governor Bullock.

Ultimately, Director Williams signed the Final EIS and Record of Decision on January 7, 2020. FWP was aware that the timing of the decision was suspicious and that some groups "will view the decision as the camel's nose under the tent and will want to portray it as the precursor to an 11th hour action on [Governor Bullock's] part." AR 11895. The Final EIS adopted all of the "action alternatives" that provided for bison reintroduction. The only definitive decision made in the document was the rejection of the no action alternative. Therefore, FWP committed the State to reintroduction of additional bison into Montana, but avoided the need to do a site specific analysis that would reveal deep flaws if it had done so.

It is clear that undue influence was placed on the decision-making process. For example, FWP did not give a reasoned explanation for rejecting the "no-action" alternative — the only alternative designed to maintain the status quo. The EIS acknowledges there are inherent risks associated with each of the alternatives it selected — including risks of environmental degradation and disease transmission — but it never explained why the action alternatives were better than the no-action alternative. Given the lack of evidence to support the decision, it is clear this was a political decision driven by a desire to get bison on the ground before the end of the Bullock Administration, leaving the next administration to deal with a bad decision and the

significant statutory liability FWP faces if it proceeds with bison reintroduction and the public or livestock are harmed.

Moreover, FWP failed to take the requisite “hard look” at the risks of disease transmission between bison, livestock, and wildlife. The Final EIS states that bison are a vector for a range of disease, pathogens, and parasites such as: anthrax, bluetongue, bovine anaplasmosis, bovine brucellosis, bovine spongiform encephalopathy (“BSE”), bovine tuberculosis, bovine viral diarrhea, Johne’s Disease, and malignant catarrhal fever. Final EIS at 30-4. The EIS even notes “the wild bison of [Yellowstone National Park] are considered to be chronically infected with brucellosis....” *Id.* at 35. Despite acknowledging that bison carry disease that can affect livestock and other wildlife, FWP did not study the issue further. FWP was required to take a “hard look” at the risks of disease transmission between reintroduced bison, livestock, and other wildlife, but failed to do so.

It is also obvious that the analysis in the EIS is stale. FWP prepared the Draft EIS in 2014 and 2015. However, the agency did not look to new scientific data before issuing the Final EIS in 2020. One example of a newly understood threat to wildlife, which has emerged since 2015, is the emerging issue of Chronic Wasting Disease (“CWD”). The Final EIS does not contain any discussion about CWD and the potential for the disease to be transmitted to, from, or by bison. Recent studies have recognized the possibility of cross-species infection of CWD. The Final EIS is also based on the false and outdated premise that, according to the Endangered Species Act (“ESA”), Montana *must* relocate additional bison into the State, beyond the burgeoning population in the Yellowstone area. The Final EIS cites the possibility of “listing of the American Bison as an imperiled species under the Endangered Species Act” as the reason FWP must proceed with one of the action alternatives. However, in 2016, FWP was told by the federal government that Bison are not a candidate for listing. AR 11814. Thus, the Final EIS’ reliance of the possibility of an ESA listing is misplaced and indicative of undue political pressure to avoid discussing facts and legal developments that would be contrary to the prior administration’s desired outcome.

Next, the Final EIS ignores Montana law when it states that bison “containment strategies”, which limit bison to “small landscapes” would not be acceptable to FWP. This conflicts with the findings made by the Montana Legislature stating that FWP must follow “animal containment measures that ensure [that bison] will be contained in designated areas.” Mont. Code Ann. § 27-1-216. The EIS also falsely states that FWP “is only liable for damage when all efforts to follow a management plan endorsed by the local citizen working group have not been made.” Final EIS at 70, 77, 133, 199. Montana law provides that FWP is “liable for all costs incurred, including costs arising from protecting public safety, and any damage to private property that occurs as a result of the department’s failure to meet the requirements of subsection (5).” Mont. Code Ann. § 87-1-216(7). Subsection (5) of the statute provides that FWP must create and follow a detailed bison management plan covering animal health, identification, contaminant measures, fencing, carrying capacity, and contingency measures. If FWP had properly analyzed its potential liability under the statute, it likely would have selected the no-action alternative given the possibility of millions of dollars of damages if bison relocation results in a second disease surveillance area or “DSA” and the accompanying restrictions placed on livestock producers and

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property owners. Further, FWP's liability ultimately falls on the taxpayers of Montana and the issue of the State's liability under the Final EIS should have been given serious consideration.

Not only does the Final EIS misstate FWP's statutory liability, the document intentionally avoids discussing the financial cost of the alternatives it selected. Earlier drafts of the EIS mention the "Fiscal Impacts to MFWP," and "Funding." AR 10864, 11328. These inconvenient topics were removed from the Draft EIS and the Final EIS. It appears that the deletion of the information regarding funding and fiscal impacts was driven by a desire to hide this information from the public. However, depositions and a trial on the merits will bring this information to light.

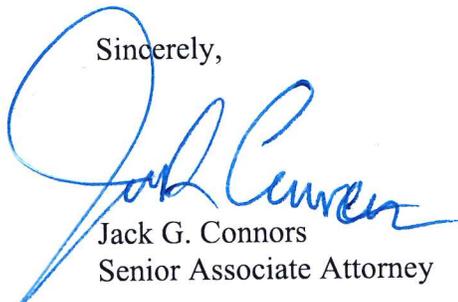
PROPOSAL FOR SETTLEMENT

I list the flaws above to point out why we are confident UPOM will prevail at trial. As you are aware, in 2014 Judge Oldenburg awarded attorney fees against FWP, and his order was affirmed on appeal by the Montana Supreme Court. Given the naked political decision to issue a flawed EIS just to get "hooves on the ground . . . before the end of Bullock's 4-year term and therefore harder to undo," we have no doubt that Judge Oldenburg will not only side with my client but also award significant attorney fees against FWP. My client has already incurred over \$10,000 in fees and costs in this matter and that amount will rise significantly if the case proceeds to trial.

While my client would like to see this case go to trial and obtain a judicial ruling publicly deriding FWP's decision making process and the EIS, it is also pragmatic and willing to settle this dispute. To that end, it is willing to settle on the following terms: (1) the parties stipulate to a judgment vacating the Final EIS; (2) FWP agrees to not undertake a similar EIS process (either programmatic or site specific) for a period of 10 years, unless bison are listed under the ESA; and (3) payment of \$5,000 to cover a portion of my client's attorney fees and costs.

Please let me know if this offer is acceptable to your client as soon as possible, as it will only remain open for 10 days from the date of this letter.

Sincerely,



Jack G. Connors
Senior Associate Attorney

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