COLT

COALITION OF LARGE TRIBES

Blackfeet Nation • Cheyenne River Sioux Tribe • Confederated Tribes of the Colville Reservation • Confederated Tribes of the Warm Springs Indian Reservation of Oregon • Crow Creek Sioux Tribe • Crow Nation • Eastern Shoshone Tribe • Fort Belknap Indian Community • Hopi Tribe • Mandan, Hidatsa & Arikara Nation • Mescalero Apache Tribe • Muscogee (Creek) Nation • Navajo Nation Northern Arapaho Tribe • Northern Cheyenne Tribe • Rosebud Sioux Tribe • San Carlos Apache Tribe • Shoshone-Bannock Tribes • Shoshone-Paiute Tribes of the Duck Valley Indian Reservation • Sisseton Wahpeton Sioux Tribe • Spirit Lake Nation • Spokane Tribe Standing Rock Sioux Tribe • Ute Indian Tribe • Ute Mountain Ute Tribe • Walker River Paiute Tribe

January 30, 2026

The Honorable Doug Burgum, Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Sonya Germann, State Director
Montana/Dakotas BLM State Office
5001 Southgate Drive
Billings, MT 59101

RE: Protest of BLM Notice of Proposed Decision Dated January 16, 2026 as to IBLA Appeals MT-010-22-01, MT-010-22-02 and MT-010-22-03

Dear Secretary Burgum and Director Germann:

I write to lodge the Coalition of Large Tribes' formal protest of the Proposed Decision and to follow up on COLT's letter to Secretary Burgum dated December 12, 2025,[1] more than a month before your Proposed Decision, outlining our concerns regarding potential implications for tribes attendant to the appeal and requesting a meeting, and my letter of January 23, 2026,[2] after publication of the Proposed Decision on January 16, 2026, again requesting to discuss large land base tribes' concerns about the potential unintended negative consequences this leasing issue presents for tribal buffalo herds, which are central to our ability to survive and thrive.

As you know, I am the Chairman of COLT—an intertribal organization representing the interests of the more than 50 tribes with the largest land bases (reservations of 100,000 acres or more), encompassing more than 95% of Indian Country lands and more than half the Native American population—and I write to express COLT's concerns regarding Bureau of Land Management's January 16, 2026 Notice of Proposed Decision, following your assumption of jurisdiction over administrative appeals challenging the BLM's July 28, 2022 Final Decision that modified grazing permits held by American Prairie (formally, American Prairie Reserve, "APR") to authorize a change in the kind of grazing animal from cattle only to cattle and/or bison on BLM-administered grazing allotments in Phillips County, Montana.

Mr. Secretary, we have always appreciated your leadership at the Department of the Interior and in North Dakota. You have an exceptional record of supporting tribes and tribal sovereignty, bison in North Dakota and the Theodore Roosevelt National Park, the DOI Bison Working Group, tribal bison co-stewardship, and the bison surplus program. Which is why we are confident that you did

[1] COLT December 12, 2025 Letter, Exhibit A hereto.

[2] COLT January 23, 2026 Letter, Exhibit B hereto.

not and do not intend to broadly and totally exclude tribally-managed buffalo from BLM grazing the way the Proposed Decision risks. You know how important bison are to tribes.

PROTEST. We are protesting the Proposed Decision because COLT member tribes and our sister organizations are very much the "interested public" and we have concerns about the Proposed Decision's unintended and negative consequences for tribal bison herds. As the Proposed Decision is currently written, it is unlikely that any tribal government or tribal citizen buffalo herd would ever be eligible for BLM grazing leases.

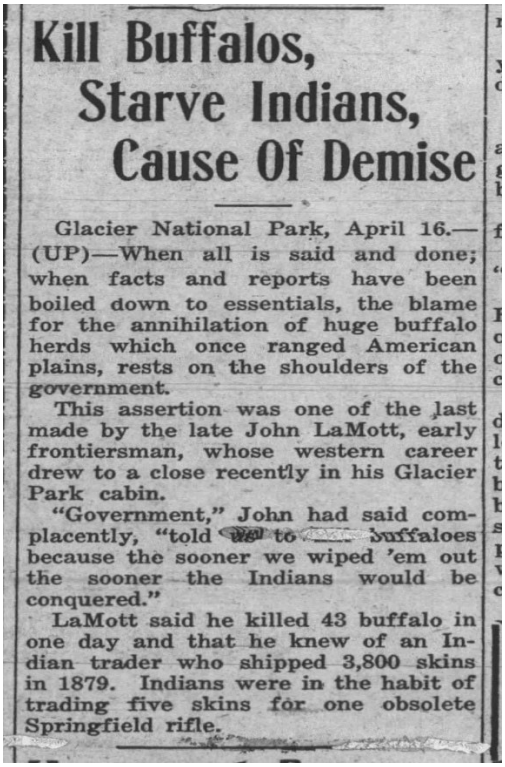
STANDING TO PROTEST. Bison are central to our survival. There is archeological evidence that Native American tribes hunted the bison over 10,000 years ago. David A. Dary, *The Buffalo Book: The Full Saga of the American Animal*, 53 (1974). When the bison population was at its peak, the animals moved across the United States, Canada, and Mexico in herds of hundreds of thousands, and the tribes who depended upon them for their subsistence planned their lives around the herds. Tom McHugh, *The Time of the Buffalo*, 50 (1972). The bison provided tribes with a means of food, shelter, clothing, and other necessities and affected Plains Indians' religions, philosophies, thinking, and way of life for thousands of years. Dary at 53.

Later, many tribes relied heavily on the trade of buffalo hides to sustain tribal economies. Alan M. Klien, *Political Economy of the Buffalo Hide trade: Race and Class on the Plains,* The Political Economy of Native American Indians, 130-166 (John H. Moore, ed., 1993). Following the destruction of the herds, the tribes were forced to survive on government rations of beef and other provisions.

In addition to relying on bison for subsistence and income in the past, tribes have a spiritual relationship with bison. Those who hunted the once-numerous animals believed the animals gave themselves in order to ensure the survival of the tribe. In exchange, members of the tribe followed important protocols before, during, and after the hunt to guarantee the bison would return. McHugh, *supra*, at 50-59. These beliefs remain sincerely held by COLT tribes today.

Buffalo are a Treaty resource. In a number of treaties tribes specifically reserved the right to hunt bison on lands not included in their reservations "so long as the buffalo may range thereon in such numbers to justify the chase." Art. XI, Treaty with the Sioux and Arapaho, 15 Stat. 635 (April 29, 1868); s*ee also* Art. XI, Treaty with the Kiowa and Comanche, 15 Stat. 581 (Oct. 21, 1867); Art. XI, Treaty with the Cheyenne and Arapaho, 15 Stat 593 (Oct. 28, 1867).

Yet, in his annual report of 1873, Secretary of the Interior Columbus Delano said that he "would not seriously regret the total disappearance of the buffalo from … western prairies, in its effect upon the Indians. [He] would regard it rather as a means of hastening [the tribes'] sense of dependence upon the products of the soil and their own labors." Dary, supra, at 127 (quoting *The Congressional Globe,* 43 Cong., 1 Sess., Pt. 3, 2105). Regrettably, this reflected the flawed policies of the United States and contemporaneous social morays:



Kill Buffalos, Starve Indians, Cause Of Demise

Glacier National Park, April 16.—(UP)—When all is said and done; when facts and reports have been boiled down to essentials, the blame for the annihilation of huge buffalo herds which once ranged American plains, rests on the shoulders of the government.

This assertion was one of the last made by the late John LaMott, early frontiersman, whose western career drew to a close recently in his Glacier Park cabin.

"Government," John had said complacently, "told me to kill buffaloes because the sooner we wiped 'em out the sooner the Indians would be conquered."

LaMott said he killed 43 buffalo in one day and that he knew of an Indian trader who shipped 3,800 skins in 1879. Indians were in the habit of trading five skins for one obsolete Springfield rifle.

"Buffalo," Laurel Outlook, April 16, 1930.

Happily, we have come a long way from those dark times. Today, the Department supports 19 bison herds in 12 states, for a total of approximately 11,000 bison over 4.6 million acres of DOI and adjacent lands. *See* Protecting Bison - Bison (U.S. National Park Service). The Proposed Decision, however, stands in stark contrast to the Department's otherwise strong, and appreciated support for our National Mammal.

Because of the central importance of bison to us, because we are sovereign tribal governments to which the Department owes Treaty and trust responsibilities, and because of the lack of any tribal

consultation here in violation of the Department's own policies, the Proposed Decision is appealable by tribes. Further, COLT sent the Secretary a letter on the record before the Proposed Decision on December 12, 2025, Exhibit A, following your December 9 assumption of jurisdiction. We did not participate earlier in these proceedings because we had no notice of the impacts that concern us until January 16, when the Proposed Decision was published. There was no discussion of new definitions under the Taylor Grazing Act set forth in the EIS. Nor was there any tribal consultation or notice related to the new unsupported definitions contained in the Proposed Decision.

The Proposed Decision constitutes classic impermissible regulation through enforcement and the members of interested public, like COLT tribes, have standing to protest it pursuant to 43 C.F.R. § 4160.2.

ARGUMENT

I. THE PROPOSED DECISION'S DEFINITIONS ARE UNWORKABLE.

The Proposed Decision states that "BLM lacks authority to issue grazing permits under the TGA where the animals to be grazed are treated as wildlife and will not be managed for production …"

The Taylor Grazing Act allows leasing to "livestock," but Congress did not feel it necessary to define "livestock." Taylor Grazing Act allows leasing for "domestic" purposes, but Congress did not feel it necessary to define "domestic." The words "production-oriented purposes" do not appear in the Taylor Grazing Act at all.

Yet, inexplicably, BLM took it upon itself to define each of these terms in the Proposed Decision.

A. The Proposed Decision's New Taylor Grazing Act Definitions Wrongfully Exclude Tribal Bison Herds from BLM Grazing Leases.

None of the terms that the BLM defines to justify the result in the Proposed Decision are defined by Congress—not "livestock," not "domestic," nor the new term BLM has inserted, "production-oriented purposes."[3] The overreaching Proposed Decision wrongfully excludes bison that are raised respectfully and managed otherwise in accordance with federal, state, and tribal law.

[3] BLM Decision Letter, at 3 ("As with the term *livestock*, the term *domestic* is left undefined by the statutes that use it." (emphasis in original)).

Livestock. The Taylor Grazing Act allows leasing for "livestock," grazing, but Congress did not define "livestock." There are dozens of definitions that are better suited, more relevant, and more inclusive than the one BLM created in the Proposed Decision.

The USFS—BLM's sister federal grazing agency—regulations use a very broad definition: "'Livestock' means *animals of any kind* kept or raised for use or pleasure."[4] The State of Montana, where these BLM leases are located, explicitly includes bison in its definition: "'Livestock' means cattle, horses, mules, asses, sheep, llamas, alpacas, *bison*, swine, ostriches, rheas, emus, goats, [and] alternative livestock[.]"[5]

The BLM's Proposed Decision uses a cramped reading from *Black's Law Dictionary* to try and define livestock as animals that must be "kept for sale or trade." In so doing, the BLM failed to address other, relevant regulations, binding Supreme Court precedent, and the United States' trust and Treaty obligations to tribes. This definition also ignores the fact that even though bison are managed as "wild" animals, they are still actively *managed*, marketed, sold, and traded like other livestock, and offered for commercial hunting enterprises.[6]

Livestock are simply animals kept under the control of humans for their purposes, whether that be for more tribal values such grasslands ecosystem regeneration, cultural preservation, gifting, or food sovereignty, or for more Western commodified values, such as sale and trade. Tribal bison are unequivocally kept and managed animals, confined by fencing and unable to freely engage in historic migratory patterns.[7]

Domestic. The Taylor Grazing Act does not define "domestic." The BLM's Proposed Decision defines it to exclude animals that are **"**treated as wild or intended to be released into the wild or integrated into a wild herd in the future[.]"[8] The BLM offers no support or legal authority for this exclusion.

[4] 36 C.F.R. § 222.1 (emphasis added).

[5] Mont. Code Ann. § 81-2-702(5) (emphasis added).

[6] BLM Decision Letter, at 3.

[7] *United States v. Richards*, 583 F.2d 491, 500 (10th Cir. 1978).

[8] BLM Decision Letter, at 3.

"Treated as wild" is a phrase used as an adjective to describe an animal management practice, not a noun. It is not a phrase associated in any statutory or other context as a noun to explicate or distinguish from "livestock." All tribal buffalo herds try to treat their animals as wild—to let them be buffalo—as is our cultural obligation. Many cattle ranchers with regenerative agricultural practices also manage their animals as wild. Raising animals as wild as possible does not make them "wild." They are still being actively managed by humans; they are still behind fences; they cannot roam freely; and if they escape, they are rounded up and brought back or taken down. Under no definition would someone consider bison confined behind fences, "wild."

What separates wild versus domestic animals is: (1) ownership; (2) control; and (3) captivity status. Animals under human ownership, human control, and under captivity behind fences—like every tribally-managed bison herd in the United States—should be defined as "domestic" for the purposes of federal grazing leases.

Production-Oriented Purposes. There is no statutory requirement that livestock be for "production-oriented purposes" for federal grazing leases. But the BLM's Proposed Decision for the first time anywhere in U.S. law, purports to create this additional requirement for any lessee to acquire a Taylor Grazing Act lease, and without engaging in appropriate consultation with tribes. The Proposed Decision states that animals cannot be "managed as wildlife in a way that is not meant for production" and elaborates with this "include[s] their being used for their meat, milk, fiber, or other animal products."[9]

The BLM's Proposed Decision is devoid of analysis about what counts as "production-oriented purposes." What about unprofitable cattle? Or cattle raised solely for a family homestead? What about bison hunting sold as a fundraiser for a tribe or tribal entity? Or bison raised solely for family consumption or tribal food programs? The "production-oriented" language is subjective and would create significant problems if the BLM were to apply it elsewhere.

And applying a "production-oriented" requirement under the Taylor Grazing Act would wrongfully exclude tribal bison, which serve critical roles to revitalize our grasslands and our cultures and ceremonies. They are our relatives. Their value cannot be measured by mere Western commodification. If the BLM intends on measuring "production" as a component of grazing lease

[9] *Id.* at 5.

eligibility, the BLM must measure "productivity," as bison dramatically increase the productivity of federally-owned lands.

- **Bison Increase Grass Health by Over 100% – Increasing Drought Resiliency of Federal Lands**. Leasing to bison operations is smart business for the federal land manager. A 30-year study by Kansas State University showed that sustainably managed cattle increased the diversity of native plants by about 50%, and sustainably managed bison increased the diversity of native plants by over 100%.[10] The study also found bison grazing contributed to increased resiliency to drought.

- **Bison Improve the Full Ecosystem Including Wild Game on Federal Lands**. When bison roll on their backs they create depressions in the earth, or wallows, that collect water supporting unique prairie plants, amphibians, and bird species. Their grazing patterns promote diverse vegetation composition and heights, accommodating various animals and creating unique habitat. Even their fur is crucial for the nests of a variety of prairie birds, improving nest success. They cohabit with other grasslands animals easily, including elk, deer, prairie dogs, coyote, wolves, and bears.[11]

- **Increasing Drought Resilience and Improving Soil Health is the Primary Purpose of the Taylor Grazing Act.** The Taylor Grazing Act, when originally enacted, was especially concerned with the carrying capacity of the land. The Taylor Grazing Act sought to address the challenges of grazing livestock on public lands that had, until its passage, led to severe overgrazing, soil depletion, and conflict between ranchers and homesteaders.[12] Montana played a key role in the passage of the Taylor Grazing Act by hosting one of the first test sites credited with generating the support needed to pass the Act and its associated controversial leasing of public lands. The Mizpah-Pumpkin Creek Grazing District (1926-1934) provided stock growers throughout the West with the proof necessary to show that federal grazing leases would help prevent the conditions that lead to the Dust Bowl, namely overgrazing and reducing the overall carrying capacity of the land.

[10] Zak Ratajczak et al., *Reintroducing Bison Results in Long-Running and Resilient Increases in Grassland Diversity*, 119 Proc. of Nat'l Acad. of Sci. 36 (2022), *available at* https://www.pnas.org/doi/10.1073/pnas.2210433119.

[11] *See, for example*, Wolf and bison coexistence subject of study, Rocky Mountain Outlook, June 9, 2011.

[12] *See* Donald W. Floyd, *Taylor Grazing Act*, EBSCO (2023), https://www.ebsco.com/research-starters/law/taylor-grazing-act.

> Impressed with the results achieved by the Mizpah-Pumpkin Creek Grazing District, stockgrowers throughout the West called for the establishment of similar reserves in the areas they ranched. Congress in 1934, after considerable debate, finally extended the lesson learned from the Mizpah-Pumpkin Creek Grazing District to the remainder of the public lands with the enactment of the Taylor Grazing Act. … Congress established the Mizpah-Pumpkin Creek Grazing District to determine whether leasing of the public domain for grazing purposes would remedy the problems of overcrowding and overgrazing associated with the long-standing policy of unrestricted grazing of the public lands. … By 1931 the reserve clearly demonstrated what could be accomplished through control of public lands. The Mizpah-Pumpkin Creek Grazing District's members withstood the onslaught of drought while their neighbors, who depended on the open public domain, were forced to remove their herds from the range.[13]

Preventing overgrazing and overcrowding were, and remain, the primary purposes of the Taylor Grazing Act; not simply the issuance of permits to graze livestock for commercial gain.[14] The need to pass the Taylor Grazing Act came only on the heels of the overgrazing that occurred across America's Great Plains after the near total eradication of bison.[15] Preventing the grazing of these keystone species in the exact habitat and biome to which they are genetically predisposed is antithetical to the intent and purpose of the Taylor Grazing Act, scientific principles of carrying capacity, and plain common sense. Bison's capacity to improve ecosystem and rangeland heath further support the BLM's multiple use and sustainable yield mandate.[16]

[13] James Allen Muhn, *The Mizpah-Pumpkin Creek Grazing District: Its History and Influence on the Enactment of a Public Land Grazing Policy, 1926-34*, at viii, 1–2, BLM Library (1987).

[14] BLM Decision Letter, at 2.

[15] *See* Floyd, *supra*.

[16] *See* 43 U.S.C. § 1701(a)(7).

II. THE PROPOSED DECISION'S DEFINITIONS RESULT IN BAD POLICY.

A. Tribes, Tribal Ranchers, And Bison Have Been Purposefully Wrongfully Excluded from Federal Grazing Leases; The Proposed Decision Is Equivalent to Affirmative Action for Cattle.

Until recently, tribes and tribal citizen ranchers were excluded from United States Forest Service-managed National Grasslands for federal grazing leases. United States Department of Agriculture regulations held that our land—trust lands—were considered "federal lands," which were excluded from being eligible for "base property" and excluded us from leasing additional federal grazing lands. Bison operators continue to similarly struggle obtaining federal BLM grazing leases, with generational preferences built in for cattle. But cattle are by far the least efficient animal to graze BLM lands. As explained more fully above, bison are far superior.

B. Buffalo Are Multi-Functional and Do Not Fit into a Single Category; They Are Both Livestock and Wildlife.

Had the Department engaged in notice-and-comment rulemaking or any tribal consultation regarding the proposed new definitions under the Taylor Grazing Act, COLT, our member tribes, and others would have explained that bison are multi-functional in our communities—simultaneously serving livestock, conservation, food security, and cultural roles. They cannot be pigeonholed into just one category. They are both "livestock" and "wildlife" and should count as both depending on what is required for the statute and situation.

Under Montana State law, bison are categorized as both, and are treated as livestock for grazing:

> "Livestock" means cattle, horses, mules, asses, sheep, llamas, alpacas, *bison*, swine, ostriches, rheas, emus, goats, alternative livestock as defined in [Mont. Code Ann. §] 87-4-406, and other animals for the purposes of disease prevention, control, and eradication.[17]

[17] Mont. Code Ann. § 81-2-702(5).

C. APR Emulates Tribal Buffalo Management Practices; BLM's Erroneous Focus on Management Practices Could Result in Future Wrongful Exclusion of Tribal Herds from Grazing Opportunities.

APR is ranching bison using techniques practiced by more than 50 tribal nations with buffalo herds. These animals in the lessee's herd are descendants of the animals the tribes saved from extinction. Every tribe tries to raise their bison as naturally, respectfully, and as "wild" as possible. The management practices and techniques employed by APR are largely indistinguishable from the practices and techniques employed by tribal herd managers. Thus, the BLM's decision to exclude the APR herd from BLM-managed lands based on these practices and techniques sets a precedent that may be applied against tribally-managed herds elsewhere.

D. The Proposed Decision Creates Immediate Impacts on Specific Tribes.

While many of the impacts of this Proposed Decision are longer term, COLT understands that there are several immediate impacts. First, several tribes in Montana receive animals from the APR herd as gifts to help ensure the health and genetic diversity of tribal herds. With the APR herd removed from the BLM leases, that exchange would no longer be available. Second, this decision takes place the treaty territory of multiple tribes, including the Fort Belknap Indian Community.[18] Fort Belknap has one of the largest and fastest growing tribal buffalo herds in the nation. Their exclusion from BLM grazing leases could hinder expansion opportunities in their, and other tribes', own territory. Third, some tribes, like the Chippewa Cree Tribe, sublease from and partner with APR to help grow and strengthen their expertise and capacity, which would be immediately impacted. Finally, several tribes, like Fort Bidwell Indian Community and the Pit River Tribe, are currently in conversations with their local BLM offices regarding tribal bison herd grazing leases. The Proposed Decision would likely prohibit those grazing leases, which is a dramatic blow for COLT's sister tribes with smaller land bases.

i. These Impacts Include Potential Treaty Violations.

In addition to Fort Belknap, within whose territory Phillips County sits, just as the BLM parcels in question, there are numerous tribes with Treaty lands that overlap with the BLM that have various treaty provisions to hunt and graze bison and to ensure their general welfare. There are

[18] *See* Treaty of Fort Laramie with Sioux, Etc., art. 5, Sept. 17, 1851, 11 Stat. 749; Treaty with the Blackfeet, Oct. 17, 1855, 11 Stat. 657.

numerous tribes that have adjudicated and unadjudicated Treaty rights regarding bison in Montana, including tribes located within and outside of the State. The Proposed Decision fails to consider its effects on Treaty-reserved rights.

Treaties between tribes and the United States are "contract[s] between two sovereign nations." The rights defined in them are reservations of rights made by the tribes, not grants of rights to them by the United States. As "the supreme Law of the Land[,]"[19] treaties are binding on federal agencies, and agencies' actions must comply with their terms. Only Congress can abrogate the terms of a Treaty; thus, federal agencies must ensure that their actions do not violate the terms of these treaties and, in effect, abrogate them.

ii. <u>These Impacts Include Constituting a Negative Precedent on Bison Set for Other DOI and Federal Agencies.</u>

Tribes have several ongoing relationships with other federal agencies on bison management that may be impacted by this decision and the precedent it sets regarding their status as livestock verses treating them as wild. Tribes are working with the BLM on bison grazing leases, as well as with the Fish & Wildlife Service and the National Park Service on bison co-stewardship and on bison surplus—which requires tribes to follow conservation protocols,[20] the USFS on grazing leases, and with the DOI Bison Working Group. The Proposed Decision is inconsistent with all of that work tribes are doing across federal agencies.

iii. <u>This New Rule Significantly Affects Tribes; Any Ambiguities in the Statute Must Be Construed in Favor of Tribes</u>.

The U.S. Supreme Court has clearly articulated that the interpretation of federal statutes that affect tribes is governed by a binding set of legal principles known as the Indian canons of construction.[21]

[19] U.S. Const. art. VI, cl. 2.

[20] "A ***conservation herd*** is defined for the purposes of this Protocol, consistent with that provided by 701 FW 5.3B, as a free-ranging (freely occupying habitat adequate in size and quality to provide for all biological needs and allowed to reproduce freely) population. A herd that routinely requires supplemental forage (hay or other feed not occurring naturally within the habitat) does not meet the conservation herd criteria. Recipients of bison donated for conservation purposes will provide documentation that their project or program meets the definition of a conservation herd as defined in this Protocol."

[21] *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("The State fails to appreciate, however, that the standard principles of statutory construction do not have their usual force in cases involving Indian law").

The Indian canons "are rooted in the unique trust relationship between the United States and the Indians."[22] The canons require federal statutes that affect tribes to be construed liberally in their favor and that all ambiguities in the statutes be resolved in their favor.[23] Said another way, statutes affecting tribes and any ambiguities in them must be interpreted "in favor of establishing Indian rights."[24]

This decision affects every tribe, as the APR herd management methods used here are learned from and are the same as those tribes utilize. COLT denies that "livestock" and "domestic" are ambiguous and require definitions now in 2026 when the Taylor Grazing Act was enacted in 1934.

To the extent "livestock" or "domestic" are ambiguous, the Indian canons require the BLM to interpret these terms to include bison being raised as naturally and wild as possible, and for tribal values including prairie grasslands ecosystem restoration, gifting, and food sovereignty, need to be included in expanded definitions of "domestic" and "livestock."

III. THE PROPOSED DECISION IS A NEW REGULATION/RULE WHICH MUST BE PROMULGATED THROUGH THE FORMAL RULEMAKING PROCESS AND REQUIRES TRIBAL CONSULTATION.

A. No Deference to the New Definitions Would Be Warranted.

The Proposed Decision creates completely new definitions and new requirements to obtain a BLM grazing lease that were not previously noticed for public comment, put into rulemaking, or opened to tribal consultation. The definitions of "livestock" and "domestic" are new; the requirement and definition of "production-oriented purposes" is invented whole-cloth.

The Proposed Decision engages in statutory interpretation of unambiguous terms that does more than resolve the status of the grazing permits at issue. As written, the Proposed Decision announces a new standard that constrains the BLM's authority under the Taylor Grazing Act and effectively revises the BLM's grazing permit regulations, including 43 C.F.R. § 4100.0-5, by

[22] *Cnty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985).

[23] *Id*.

[24] *Confederated Tribes of Chehalis Rsrv. v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996) (citation omitted).

excluding "wild" bison from eligibility for grazing permits unless they are managed for "production-oriented purposes."[25] A "rule" is "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."[26] The Proposed Decision, if made final, risks creating a new controlling standard, which may not be adopted absent compliance with the APA's rulemaking procedures.[27]

The BLM's analysis in the Proposed Decision is not presented as a fact-specific application of existing standards to APR's grazing leases. Instead, the BLM's Proposed Decision patchworks a categorical interpretation of "livestock" and "domestic livestock" across its Taylor Grazing Act / Federal Land Policy and Management Act / Public Rangeland Improvement Act framework,[28] upending the BLM's prior position on grazing permitting, as reflected in its 2022 authorization. If finalized, the Proposed Decision would establish a substantive rule that would govern who may obtain or keep grazing leases for bison on BLM-managed lands. When a federal agency adopts such a categorical interpretation that alters the legal landscapes and governs future permitting decisions, that decision amounts to a rulemaking, regardless of its adjudicatory form.[29] Agency permitting decisions, like the one here, can "easily fit within the APA's definition of rule" in appropriate circumstances.[30] The categorical nature and precedential effect of the BLM's Proposed Decision meet that standard. Accordingly, the BLM's failure to comply with the APA's rulemaking process in promulgating the definitions and standards adopted in the Proposed Decision is therefore unlawful.[31]

[25] BLM Decision Letter, at 2–4.

[26] 5 U.S.C. § 551(4).

[27] *See Appalachian Power Co. v. Envtl. Prot. Agency*, 208 F.3d 1015, 1025 (D.C. Cir. 2000) ("It is well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation." (citation omitted)).

[28] BLM Decision Letter, at 2–4.

[29] *See Safari Club Int'l v. Zinke*, 878 F.3d 316, 332–33 (D.C. Cir. 2017) (outlining principles distinguishing adjudication from de facto rulemaking); *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994) (same).

[30] *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs,* 417 F.3d 1272, 1284–85 (D.C. Cir. 2005) (finding permitting decision to be rulemaking because each permit was a "legal prescription of general and prospective applicability which the Corps has issued to implement [its] permitting authority").

[31] *See* 5 U.S.C. § 553.

The new definitions adopted in the BLM's Proposed Decision dramatically impact tribal governments and tribal ranchers. Tribal consultation is triggered when the Executive Branch issues "policy statements or actions that have substantial direct effects on one or more Indian tribes[.]"[32] The BLM's Proposed Decision and its potential precedential effect on the BLM's—and possible other DOI agencies' and the USFS's—future grazing lease decisions is a policy action that has substantial effects on more than 70 tribal governments. The BLM failed to consult with even a single tribe as required under its policies.

The BLM's Tribal Relations Manual states:

> The BLM affirms that government-to-government consultation is the official means for considering and incorporating tribal concerns into the BLM decision-making process. The BLM views consultation as a deliberative process that aims to create effective collaboration and informed land use decisions as addressed in Principle 6 of Secretarial Order 3335.[33]

Executive Order 13175 and the BLM's tribal consultation policies and procedures "require extra, *meaningful* efforts to involve tribes in the decision-making process."[34] The BLM cannot simply offer tribes the same opportunity to participate as the general public.[35] The BLM's failure to comply with its and the DOI tribal consultation "policies and procedures is arbitrary and capricious action[]" and unlawful.[36]

The United States Supreme Court has already determined that holders of BLM grazing leases are not required to engage in the livestock business. In *Pubic Lands Council v. Babbitt*, the Court noted that "[t]he legislative history [of the Taylor Grazing Act] to which the ranchers point shows that Congress expected that ordinarily permit holders would be ranchers, who do engage in the

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[32] Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13,175, §1(a), 65 Fed. Reg. 67,249, 67,249 (Nov. 9, 2000).

[33] Bureau of Land Mgmt., *BLM Manual 1780 Tribal Relations (P)*, 1-13 (Dec. 15, 2016).

[34] *Wyoming v. U.S. Dep't of Interior*, 136 F. Supp. 3d 1317, 1346 (D. Wyo. 2015) (emphasis in original).

[35] *Id*. at 1345–46.

[36] *Id*. at 1346.

livestock business, but does not show any such absolute requirement."[37] Thus, requiring that herds be managed for strictly livestock purposes, as opposed to conservation or wild management ones, which are beneficial to soil and water conservation—key objectives of the Taylor Grazing Act—is contrary to law.

As Justice O'Connor observed in her concurring opinion in *Public Lands Council*, "an agency that departs from its previous rules will be found to have acted arbitrarily and capriciously if it fails 'to supply a reasoned analysis for the change[.]'"[38] A reasoned analysis here would need to contend with the Supreme Court's holding in *Public Lands Council* that grazing lease holders do not have to be engaged in the livestock business to qualify for grazing permits. The Proposed Decision does not offer any reasoned legal analysis or confront *Public Lands Council* at all.

If finalized, the BLM's wholesale creation of new definitions found nowhere in the Taylor Grazing Act would not be entitled to deference. As the Supreme Court has recently affirmed, if a federal agency' interpretation of a statute "is not the *best*, it is not permissible."[39] The BLM's reading of the Taylor Grazing Act is far from the best as it directly contradicts the intent and purpose of the Act, and is unmoored from legal authority.

B. Regulation by Enforcement Is a Flashpoint; BLM Need Not Trigger It Anew.

Technology innovations have brought regulation by enforcement into recent sharp relief: "Nearly a century ago, Congress created the SEC to serve as a watchdog for securities markets, including by developing rules. The SEC insists that its old rules apply to the novel crypto market but refuses to spell out how." *Coinbase, Inc. v. SEC*, 126 F. 4th 175, 204 (3d Cir. 2025)(Bibas, J., concurring). Judge Bibas opined: "Crypto companies like Coinbase are confused about how to comply with the law and have repeatedly asked the SEC to clarify. Instead of doing so, the SEC sues the companies individually. **It wants to proceed with ex post enforcement without announcing ex ante rules or guidance**. … Its old regulations fit poorly with this new technology, and its enforcement

[37] 529 U.S. 728, 746 (2000) (citing H.R. Rep. No. 903, 73d Cong., 2d Sess., 2 (1934); *Hearings on H.R. 2835 and H.R. 6462 before the House Committee on the Public Lands*, 73d Cong., 1st & 2d Sess., 96 (1933–1934); *Hearings on H.R. 6462 before the Senate Committee on Public Lands and Surveys*, 73d Cong., 2d Sess., 40 (1934)).

[38] 529 U.S. at 751–52.

[39] *Loper Bright Entrs. v. Raimondo*, 603 U.S. 369, 400 (2024) (emphasis added).

strategy raises constitutional notice concerns." *Id*. So too with BLM here—BLM is ex post enforcing these definitions against APR without any ex ante announcement of such definitions or guidance as to how the definitions would not also eliminate access to federal grazing for tribal bison, regenerative cattle herds, resting herds or animals managed under other common practices that do not fit within BLM's new definitions of "livestock," "domestic," or "production-oriented."

Regulation through enforcement is controversial because it deprives the public of any opportunity for input. BLM should not continue down this path. To the extent BLM believes the underlying leasing issues cannot be resolved strictly within the scope of the EIS and require new definitions for the Taylor Grazing Act, such definition-writing must be subject to notice-and-comment rulemaking.

CONCLUSION

BISON ARE OUR RELATIVES – OUR FATES ARE INTERTWINED. Finally, and most importantly, bison are our relatives. We have ancestral and spiritual obligations to care for them, as they do us. Our success as a people is dependent on their success. Our history, our futures, and our fates are intertwined.

To the extent the Proposed Decision is finalized notwithstanding the arguments presented on appeal, COLT requests inclusion of very clear language exempting the application of the new definitions to any tribal lease application under the Taylor Grazing Act. This includes a request to accommodate the Chippewa Cree Tribe's sublease within the underlying leases here.

We thank you again for your leadership with tribal nations while Governor of North Dakota and for your service as Secretary. As a North Dakotan, you understand the importance of grasslands and you appreciate the role bison play for the health of our grasslands, our tribes and our Nation.

COLT leaders are happy to meet with you at any time to discuss our perspectives and hope to be a helpful resource to DOI on any bison matters. We understand and respect the advocacy Montana has advanced on this matter. COLT takes no position on the underlying leases or the analysis in the EIS. Our concerns are solely with respect to the Proposed Decision. We also believe that receiving information about our tribal perspective would also be helpful to you.

We request to meet with you, Mr. Scott Davis, and Mr. Troy Heinert as soon as practicable. We would appreciate some time to discuss tribal implications that could flow from the Proposed

Decision. We also believe there are many proactive amicable resolutions we could explore jointly with you, Governor Gianforte, and the Montana Delegation.

Thank you.

Respectfully,

Signed by:
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J. Garret Renville, Chairman
Coalition of Large Tribes; Chairman, Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota

CC: Governor Greg Gianforte
Senato Steve Daines
Senator Tim Sheehy
Rep. Troy Downing
Rep. Ryan Zinke