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March 29, 2010

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**Re: Request for Scoping Comments and Intent to Prepare an Environmental Assessment for the Proposed Designation of a Non-Essential Experimental Population of Wood Bison in Alaska**

To Whom It May Concern:

Thank you for the opportunity to submit comments on the U.S. Fish and Wildlife Service's (USFWS) proposal to reintroduce a non-essential experimental population of wood bison (*Bison bison athabascae*) in Alaska pursuant to the Endangered Species Act (ESA). See 75 Fed. Reg. 8,736 (Feb. 25, 2010). Members of the Resource Development Council (RDC) who live, recreate and work in and around the areas proposed for wood bison reintroduction generally support the goal of recovering wild populations of wood bison, but are concerned that reintroduction may have significant impacts on economic and recreational activities.

RDC is a statewide business association comprised of individuals and companies from Alaska's oil and gas, mining, forest products, tourism, and fisheries industries. RDC's membership includes Alaska Native corporations, local municipal governments, organized labor and industry support firms. The industries represented within RDC constitute the great majority of private sector economic activity and employment within Alaska. RDC's purpose is to encourage a strong, diversified private sector in Alaska and expand the state's economic base through the responsible development of our natural resources.

It is RDC's position that the reintroduction of wood bison currently being considered is not appropriate at this time given the uncertainty surrounding the status of the species and the lack of detailed information concerning potential impacts. As discussed in the comments below, prior to proceeding with any proposed rule, USFWS should: (1) clarify the status of wood bison under the ESA; (2) consult with landowners that will be potentially impacted by the reintroduction; (3) assess alternative locations for any reintroduction; and (4) prepare an

environmental impact statement that thoroughly examines the impacts of the proposed reintroduction.

### **1. USFWS Needs to Clarify the ESA Status of Wood Bison Prior to Reintroduction**

Based on the unusual listing history of the wood bison under the ESA, and the current uncertainty regarding the protection afforded the species in the United States, USFWS should clarify the ESA status of wood bison prior to proceeding with the reintroduction of an experimental population. Wood bison were originally listed under the Endangered Species Convention Act of 1969 as an endangered species located in Canada.<sup>1</sup> At the time, the geographic location of the species was intended to provide “a general guide to the native countries or regions where the named animals are found. It is not intended to be definitive.”<sup>2</sup> In 1973, pursuant to the current ESA, the species listed under the predecessor act were republished as the current list of threatened and endangered species. As a result, only the Canadian population of wood bison received protection under the ESA.

While USFWS has since stated that its intent was to list wood bison in its entirety, and recognized that the failure to do so was an oversight, the agency has declined to take the necessary procedural steps to list the species in the United States. In 1979, USFWS published a notice recognizing that, through an oversight, the United States populations of seven species, including wood bison, are not covered by the endangered classification given to the foreign populations of the species.<sup>3</sup> Specifically, due to the oversight, USFWS stated that “the native populations of these species are not listed as endangered, although foreign populations are listed and receive all the protection of the Act. . . . Until final action is taken on [a proposal to list the species], U.S. populations of the above species have no official standing under the Act.”<sup>4</sup> In 1980, USFWS proposed to remedy the oversight regarding the seven foreign-listed species; however, USFWS declined to propose listing wood bison as endangered domestically because “no pure bred individuals of this subspecies are known to occur in the United States.”<sup>5</sup> As a result, the ESA protections and prohibitions only apply to the wood bison in Canada.<sup>6</sup>

Further, the relevant regulations clearly demonstrate that any domestic wood bison do not have protection under the ESA. Specifically, in its list of threatened and endangered species, USFWS identifies only the vertebrate population of wood bison in Canada as endangered under the ESA.<sup>7</sup> While, like its processor statute, the relevant regulations caution that some of the data contained in the list are “nonregulatory in nature and are provided for the information of the reader,”<sup>8</sup> it is clear that other information in the list delineates the species and geographic areas to which ESA protection applies. Specifically, “[t]he columns entitled ‘Common Name,’

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<sup>1</sup> See 35 Fed. Reg. 8,491 (June 2, 1970).

<sup>2</sup> *Id.* at 8,495.

<sup>3</sup> 44 Fed. Reg. 43,705 (July 25, 1979). USFWS noted that “[i]t has always been the intent of the Service that all populations of the above seven species deserve to be listed as endangered whether they occur in the United States or in foreign countries.”)

<sup>4</sup> *Id.* (emphasis added).

<sup>5</sup> 45 Fed. Reg. 49,844, 49,844 (July 25, 1980).

<sup>6</sup> Because the ESA does not apply extraterritorially, the primary effect of the listing status is a restriction on the importation of wood bison.

<sup>7</sup> 50 C.F.R. § 17.11(h).

<sup>8</sup> 50 C.F.R. § 17.11(d).

‘Scientific Name,’ and ‘Vertebrate Population Where Endangered or Threatened’ define the species of wildlife within the meaning of the Act. Thus, differently classified geographic populations of the same vertebrate subspecies or species shall be identified by their differing geographic boundaries. . . .”<sup>9</sup> As a result, the regulatory distinction between designating wood bison as listed in Canada versus their entire range is significant because it establishes the geographic scope of ESA protections for the species.<sup>10</sup>

Until recently, USFWS and the Alaska Department of Fish and Game (ADF&G) concurred with this assessment of the wood bison’s status under the ESA. In 2004, in response to request from ADF&G, USFWS provided written confirmation that any wood bison imported into Alaska would not need to be listed under the ESA at that time and that USFWS did not “intend” to list the species in the future.<sup>11</sup> ADF&G interpreted this “policy determination” to mean that, following a reintroduction, “wood bison would not have any special legal status that could affect other land use activities.”<sup>12</sup> However, in 2008, the USFWS “clarified” the legal status of wood bison and provided recommendations on how to address wood bison in Alaska under the ESA.<sup>13</sup> Specifically, the USFWS stated that “[t]he wood bison is listed as endangered wherever found and, as such, would retain its endangered status if introduced into the United States.”<sup>14</sup> This latest guidance from the USFWS contradicts the previous information from the agency regarding the status of wood bison under the ESA and creates significant legal uncertainty regarding the implications of wood bison reintroduction in Alaska. As such, based on the USFWS’s correspondence, it is unclear if wood bison would be automatically treated as listed domestically under the ESA and what ESA protections would apply to wood bison in Alaska. Such uncertainty over a matter of introducing a listed species in the wild is unacceptable and the reintroduction should not proceed until it is resolved.

We strongly urge USFWS to definitively resolve the uncertainty regarding the listing status of the wood bison prior to proceeding with any reintroduction. Until this issue is settled, there will remain questions regarding the appropriate reintroduction procedures, the legality of establishing an experimental population, the impacts associated with any reintroduction, and the protections provided to affected landowners.

## **2. USFWS Should Delay Decision on Reintroduction until after a Determination on Whether Downlisting Wood Bison is Warranted**

We note that USFWS is currently considering a petition to reclassify the wood bison from endangered to threatened under the ESA.<sup>15</sup> USFWS recently announced that the petition

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<sup>9</sup> 50 C.F.R. § 17.11(b) (emphasis added).

<sup>10</sup> Courts have recognized the importance of the geographic distinction because protections afforded by the ESA for reintroductions may vary depending upon where the species is located. *E.g., Wyoming Farm Bureau Fed’n v. Babbitt*, 199 F.3d 1224, 1235 (10th Cir. 2000) (it is a “well-established fact [that] individual animals can and do lose [ESA] protection simply by moving about the landscape.”).

<sup>11</sup> Specifically, the USFWS stated that they “intend to treat any wood bison imported into Alaska as a foreign listed species and have no intention of revising the [ESA] list so that they are listed domestically.” Letter from USFWS to Kevin Duffy, Commissioner, Alaska Department of Fish and Game (Oct. 26, 2004).

<sup>12</sup> ADF&G, *Wood Bison Restoration in Alaska: A Review of Environmental and Regulatory Issues and Proposed Decisions for Project Implementation* at 15 (April 2007) (Environmental Review).

<sup>13</sup> Letter from USFWS to Denby Lloyd, Commissioner, Alaska Department of Fish and Game (Nov. 28, 2008).

<sup>14</sup> *Id.* (emphasis added).

<sup>15</sup> 74 Fed. Reg. 5,908 (Feb. 3, 2009).

presented substantial scientific and commercial information indicating that the reclassification of wood bison to threatened may be warranted and that it has commenced a status review of the species.<sup>16</sup> In its Request for Scoping Comments, USFWS also indicated that the status review may determine whether it would be appropriate to completely de-list the wood bison.<sup>17</sup> Given the uncertainty now associated with the future status of the wood bison, we request that USFWS complete its status review and establish the listing status of the species prior to making a determination on whether to establish an experimental population and/or proceed with reintroduction.

Notwithstanding the uncertainty regarding the current ESA status of the wood bison, a downlisting or de-listing could have significant implications for any reintroduction of the species into Alaska. If the species is downlisted to threatened, USFWS could reintroduce the species without establishing an experimental population and use its authority under section 4(d) to provide regulatory assurances similar to those provided pursuant to a section 10(j) reintroduction. However, we do not believe that this approach would be desirable, either for USFWS or affected landowners, because experimental populations provide greater assurances to landowners and reduce the statutory requirements and administrative burdens on USFWS. Notably, if the species is de-listed, there would arguably be no need, or legal justification, to establish an experimental population. However, as detailed below, this approach may impose significant risks for neighboring landowners should the reintroduced population falter in the future.

Assuming that the species is de-listed and the reintroduction successfully establishes a population of pure-bred wood bison in the United States, the USFWS could, either on its own initiative or pursuant to a petition by a third party, subsequently list the domestic wood bison population under the ESA.<sup>18</sup> We are aware of at least two examples where reintroduction projects resulted in the subsequent listing of the species under the ESA. First, in 1999 and 2000, the Colorado Division of Wildlife conducted a Canada lynx reintroduction program when the species was not listed under the ESA. However, on March 24, 2000, following litigation brought by environmental groups, the species was listed as threatened throughout the contiguous United States.<sup>19</sup> The USFWS classified all lynx, including the introduced individuals, as resident species and included them within the threatened species designation under the ESA. Second, from 1979 to 1988, a reintroduction program helped expand the Sierra Nevada segment of the California bighorn sheep from two to five subpopulations. In 1999, following a subsequent decline in numbers and a petition to list submitted by several environmental groups, USFWS listed the subpopulations as endangered.<sup>20</sup> These are cautionary examples to show that reintroduction of a species can result in an ESA listing which would (among other things) impact land use activity where the species has been reintroduced.

As a result of the uncertainty regarding the future listing status of wood bison under the ESA, we request that USFWS delay any decision on the proposed reintroduction program until after the status review is completed and any changes to the listing status are finalized. This

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<sup>16</sup> *Id.*

<sup>17</sup> 75 Fed. Reg. at 8,738.

<sup>18</sup> In response to a listing petition, USFWS would have to determine that any one of the five ESA section 4 listing factors was applicable. 16 U.S.C. § 1533(a)(1).

<sup>19</sup> 65 Fed. Reg. 16,051 (March 24, 2000).

<sup>20</sup> 64 Fed. Reg. 19,300 (Apr. 20, 1999) (emergency rule); 65 Fed. Reg. 20 (Jan. 3, 2000) (final rule).

would allow potentially affected landowners to more adequately assess the risks and impacts associated with the proposed reintroduction.

### **3. USFWS Should Clarify Its Policy on Revising the ESA Status of Experimental Populations Following a Reintroduction**

As an important component to its proposal to reintroduce wood bison as an experimental population, USFWS should clarify its policy regarding whether the ESA status of an experimental population can be revised in the future. Specifically, we note that on September 8, 2009, several environmental groups filed a petition with USFWS to reclassify three non-essential experimental populations of black-footed ferret as endangered under the ESA. The petitioners asserted that this redesignation is necessary, among other reasons, to guarantee the continued survival of the populations, satisfy the goals of USFWS's recovery plan, and ensure that viable ferret populations exist in the wild. To date, it does not appear that USFWS has responded to the petition.

As you are aware, Congress amended the ESA in 1982 to authorize the release of experimental populations. In creating section 10(j), Congress hoped to “[relax] certain restrictions otherwise applicable to listed species and [to authorize] the Secretary to relax others.”<sup>21</sup> The goal was to ease the concerns of impacted landowners and industries that reintroduced species would adversely impact their activities. To that end, and to provide some degree of regulatory stability, any regulation promulgated for a reintroduced experimental population “shall, to the maximum extent practicable, represent an agreement between the [USFWS] . . . and persons holding any interest in land which may be affected by the establishment of an experimental population.”<sup>22</sup> We are concerned that Congress's intent will be undermined if USFWS determines that it has authority to reclassify experimental populations to restore the typical protections afforded threatened and endangered species following a reintroduction. Until USFWS addresses the black-footed ferret petition, or provides policy guidance regarding this issue, the uncertainty associated with the future status of experimental populations will have a significant chilling effect on affected landowner's acquiescence to such programs.

### **4. USFWS is Required to Consult with Impacted Landowners Prior to Reintroduction**

Pursuant to its regulations, USFWS is required to “consult” with, among others, affected private landowners in “developing and implementing experimental population rules.”<sup>23</sup> While the scope of the consultation is unclear, the regulations appear to require more than merely requesting comments on the reintroduction. For example, a court has found that public hearings, meetings with private groups, and exchanging correspondence constituted acceptable consultation.<sup>24</sup> Several of our members own land in or near one or more of the areas currently proposed for wood bison reintroduction. To date, federal consultation with these property owners has been minimal or, in most cases, non-existent. Assuming that USFWS proceeds with

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<sup>21</sup> H.R. Rep. No. 97-567, at 33 (1982).

<sup>22</sup> 50 C.F.R. § 17.81(d).

<sup>23</sup> 50 C.F.R. § 17.81(d).

<sup>24</sup> *Wyoming Farm Bureau Fed'n v. Babbitt*, 987 F. Supp. 1349, 1365 (D. Wyo. 1997), *rev'd on other grounds*, 199 F.3d 1224 (10th Cir. 2000).

the establishment of an experimental population under section 10(j), we request that USFWS contact each landowner to begin the consultation process necessary to develop the appropriate regulations regarding the protections that will apply to any reintroduced wood bison.

#### **5. USFWS Should Include Regulatory Measures to Provide Assurances to Landowners that their Activities will not be Impacted by any Reintroduction**

If USFWS decides to proceed with the reintroduction of a nonessential experimental population of wood bison, USFWS should specify what regulatory measures will be included to minimize the impact of the reintroduction on neighboring landowners. As various groups have expressed opposition to ADF&G's reintroduction proposal over the years, these measures are necessary to reduce local opposition to the program by providing assurances that activities currently conducted, and planned for the future, will be able to continue unaffected by the reintroduction. Also, USFWS should provide this information as early as possible during the development of any proposed reintroduction to provide landowners with a better opportunity to assess the potential impacts of the proposal.<sup>25</sup>

A nonessential experimental population is treated as a threatened species for most purposes under the ESA.<sup>26</sup> As a result, USFWS can promulgate regulations to relieve certain management restrictions.<sup>27</sup> Based on past practices, when compared to typical threatened species, it appears that USFWS has greater flexibility to exempt a broader range of activities impacting experimental populations from the section 9 prohibitions. For example, for most experimental populations, USFWS has stated that there is no liability for the take of an individual when it is accidental and incidental to an otherwise lawful activity.<sup>28</sup> In some cases, for predator species, USFWS has authorized direct taking in self-defense, harassment, or following a depredation.<sup>29</sup> USFWS should develop, with input from affected landowners, similar and appropriate measures prior to reintroducing an experimental population of wood bison.

#### **6. Reintroduction Should Not Occur without Clarification of Appropriateness of Sport/Subsistence Hunting of the Species**

One of the goals of the proposed reintroduction project is to reestablish wood bison populations that can be harvested on a sustained yield basis.<sup>30</sup> Given the ESA's mandate to conserve threatened and endangered species and the ecosystems upon which they depend, and section 10(j)'s requirement that an experimental population be established only when it will further the conservation of the species, it is not apparent that USFWS could authorize sport/subsistence hunting of any reintroduced experimental population of wood bison. USFWS

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<sup>25</sup> Note that USFWS is also required to consult with affected landowners in developing and implementing experimental population rules. 50 C.F.R. § 17.81(d).

<sup>26</sup> 16 U.S.C. § 1539(j)(2)(C). The primary differences are that nonessential experimental populations are treated as a proposed species for purposes of section 7 consultation, unless the population occurs in a National Wildlife Refuge or National Park, and USFWS cannot designate critical habitat. *Id.*

<sup>27</sup> 16 U.S.C. § 1533(d); 50 C.F.R. § 17.81(c) ("Any regulation . . . shall provide: . . . (3) Management restrictions, protective measures, or other special management concerns of that population. . .").

<sup>28</sup> *See, e.g.*, 50 C.F.R. §§ 17.84 (special rules for vertebrates); 17.85 (special rules for invertebrates).

<sup>29</sup> *E.g.*, 50 C.F.R. §§ 17.84(c)(4) (red wolf); 17.84(k)(3) (Mexican gray wolf); 17.84(i)(3) & 18.84(n)(4) (gray wolf).

<sup>30</sup> 75 Fed. Reg. at 8,737.

should clarify its intentions and the legal justification supporting such a policy prior to proceeding with the reintroduction program.

As stated in sections 4(d) and 10(j), both the release of an experimental population and the applicable regulatory measures must provide for the conservation of the species. The ESA defines “conservation” as:

To use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot otherwise be relieved, may include regulated taking.<sup>31</sup>

While, at this time, courts have not examined whether the phrase “conservation of such species” would prevent the USFWS from authorizing the hunting of a reintroduced experimental population, courts have prevented USFWS from authorizing the hunting of threatened species.<sup>32</sup>

The relevant legislative history indicates that, once determined, experimental populations are to be treated as separately listed threatened species.<sup>33</sup> Congress stated that “[t]his provision obliges the Secretary to issue such regulations as he deems necessary and advisable to provide for the conservation of the experimental population, just as he now does under subsection 4(d) for any other threatened species.”<sup>34</sup> However, Congress also recognized a need to reduce conflicts with local landowners regarding the reintroduction of experimental populations. As a result, Congress stated that

[w]here appropriate, the regulations may allow for the direct taking of experimental populations. For example, regulations pertaining to the release of experimental populations of predators, such as red wolves, will probably allow for

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<sup>31</sup> 16 U.S.C. § 1532(3) (emphasis added).

<sup>32</sup> In *Sierra Club v. Clark*, the Eighth Circuit examined the validity of USFWS regulations that would allow the limited sport trapping of gray wolves, then listed as a threatened species in Minnesota. 755 F.2d 608, 611 (8th Cir. 1985). The court concluded that the definition of conservation “limits the discretion of the Secretary to allow public sport hunting of threatened species.” *Id.* at 615. As a result, the Eighth Circuit found that the Secretary could only authorize the regulated taking of a threatened species after a finding that population pressures within the species’ ecosystem cannot otherwise be relieved, as specified in the statutory definition of “conservation.” *Id.* at 613. Other courts have subsequently agreed that population pressure is the only circumstance that will justify authorizing the sport hunting of a threatened species. *E.g.*, *Christy v. Hodel*, 857 F.2d 1324, 1337-38 (9th Cir. 1988) (In upholding regulations allowing limited and controlled sport hunting of threatened grizzly bears in designated geographic region, the court concluded that “the Secretary is authorized to permit ‘regulated taking,’ *e.g.* limited sport hunting, but he must first find that ‘population pressures within a given ecosystem cannot be otherwise relieved.’”); *Fund for Animals, Inc. v. Turner*, No. 91-2201, 1991 WL 206232, at \*7 (D.D.C. Sept. 27, 1991) (“[T]he statute, as currently interpreted, does not authorize hunting whenever it would be a sound conservation tool. Congress has specifically limited the hunting of a threatened or endangered species to extraordinary cases of population pressures, and the Court is constrained to enforce that legislative restriction.”).

<sup>33</sup> S. Rep. 418, 97th cong., 2d Sess. 8 (1982).

<sup>34</sup> *Id.*

the taking of these animals if depredations occur or if the release of these populations will continue to be frustrated by public opposition.<sup>35</sup>

As a result, based on the ESA's statutory directives and Congressional intent, USFWS's ability to authorize directed taking is limited to relieving population pressures in extraordinary cases and, for predator species, if depredations occur or to alleviate public opposition.

On its face, it appears that reintroducing wood bison for the purpose of allowing hunting is contrary to the conservation requirements of the ESA and the need to recover the species. While we are not opposed to the authorization of sport/subsistence hunting in the future, should the species and experimental populations ever be de-listed, USFWS should clarify its intent regarding hunting of wood bison and identify the management measures and milestones that must be achieved before such an activity could be authorized.

## **7. USFWS Should Expand the Locations Being Considered for Reintroduction Beyond the Three Sites Currently Identified**

In its scoping notice, USFWS indicates that it is only considering the reintroduction of wood bison in one or more of three sites: Yukon Flats, Minto Flats, and/or the lower Innoko-Yukon River area.<sup>36</sup> While we presume that the selection of these three sites was based upon prior analysis conducted by ADF&G, given the controversial nature of this proposal, USFWS should conduct its own, independent analysis to determine which locations in Alaska may be suitable for wood bison reintroduction.

Pursuant to the National Environmental Policy Act (NEPA), USFWS is required to consider a range of alternatives to the proposed action. In addition to a no action alternative, the relevant regulations require that USFWS “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.”<sup>37</sup> The sufficiency of alternatives considered depends upon whether the “selection and discussion of alternatives fosters informed decision-making and informed public participation.”<sup>38</sup>

In identifying potential sites for wood bison reintroduction, ADF&G has not considered all reasonably appropriate sites in Alaska that may support such populations. In addition to the three sites identified in the scoping notice, ADF&G considered, but rejected, three other locations: Hogatza River, North Fork Kuskokwim River, and Aniak River.<sup>39</sup> The rationale for this decision was provided by an evaluation of potential wood bison habitat in Interior Alaska conducted during 2002-2005.<sup>40</sup> However, this study excluded large areas of potential wood

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<sup>35</sup> *Id.*

<sup>36</sup> 75 Fed. Reg. at 8,737.

<sup>37</sup> 40 C.F.R. § 1502.14(a) (emphasis added). Similarly, an EA must also include an examination of alternatives to the proposed action. 40 C.F.R. § 1508.9(b) (an EA “[s]hall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.”).

<sup>38</sup> *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 575 (9th Cir. 1998).

<sup>39</sup> *Id.* at 26.

<sup>40</sup> Gardner, C. L., M. Berger, and M. E. Taras, *Habitat Assessment of Potential Wood Bison Relocation Sites in Alaska*. ADF&G. Final Research Technical Report, Project 9.10 (2007).

bison habitat, notably areas that already support plains bison, occur within boroughs and national parks, and include large agricultural areas.<sup>41</sup> While we recognize the need to prevent conflicts between reintroduced populations and existing herds of native species and agricultural activities, there is no explanation for why borough or national park lands were omitted from consideration. This is particularly troubling when other private and federal lands have been identified as potential reintroduction sites and national park lands have served as successful reintroduction sites for other species, such as the gray wolf in Yellowstone National Park. Of the 365.5 million acres that make up Alaska, federal agencies currently claim 222 million acres, or 61% of the state. Further, Alaska is home to 147.9 million acres of conservation system units, of which 58 million acres are federally-designated Wilderness. Pursuant to its obligations under NEPA, USFWS should, at a minimum, examine these excluded federally owned lands to determine if areas suitable for wood bison reintroduction exist. Only after this analysis is conducted will USFWS be able to make a fully informed decision based on all the alternatives that may be reasonable and appropriate.

In addition, we note that USFWS has expressed reservations about the proposed reintroduction of wood bison into Yukon Flats. In 1997, and continuing to the present, USFWS has informed ADF&G that it could not support the proposal to reintroduce wood bison on Yukon Flats due to concerns about compatibility with the purposes of the Yukon Flats National Wildlife Refuge (YFNWR) and with USFWS policy on maintaining the biological integrity of refuges.<sup>42</sup> Recently, USFWS has indicated that it would prefer that the initial wood bison reintroduction occur in the Minto Flats or Innoko locations, but that its “concerns are not sufficient to object to [ADF&G’s] proposal to pursue reintroduction of wood bison onto private lands in the Yukon Flats. . .”<sup>43</sup> Similarly, the lower Innoko-Yukon River recommended area is adjacent to the Innoko National Wildlife Refuge. Recognizing that, if wood bison are reintroduced on private lands near the YFNWR, or private and State of Alaska lands near the Innoko NWR, animals will eventually occur on refuge lands. USFWS should clarify and further explain its position on whether reintroduction in these areas would be compatible with the purposes of each refuge. Presumably, if reintroduction directly to refuge lands is incompatible, arguably, reintroduction to neighboring lands would also be incompatible because the wood bison would eventually migrate into the refuges.

## **8. USFWS Needs to Consider the Impacts of Reintroduction on the Ecosystem**

Any time the reintroduction of a species is contemplated, it is important to consider the increased risks associated with impacts to the native ecosystem. This is true even if the species was once a part of the native ecosystem and was extirpated.

Wood bison have not been present in Alaska for at least 100 years. Arguably, in that time, the ecosystem has changed such that any reintroduction will disrupt existing ecological processes. USFWS must conduct a detailed and thorough examination of these impacts prior to authorizing any reintroduction. For example, and as discussed further below, USFWS needs to consider the effects of wood bison, and account for the magnitude of impacts associated with the number of species at carrying capacity, on native vegetation, water and soil quality, and native

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<sup>41</sup> *Id.* at 3.

<sup>42</sup> Environmental Review at 70.

<sup>43</sup> *Id.* at 71 (citing letter by USFWS dated Nov. 2, 2006) (emphasis in original).

and domestic wildlife. While ADF&G provided an overview of these impacts in its Environmental Review, the level of detail and depth of analysis is not sufficient to support the proposed reintroduction, especially considering the large geographic areas that may be affected.<sup>44</sup>

The reintroduction of wood bison may also increase the risk of transmitting diseases to domestic livestock and current native species, such as moose, caribou, and plains bison. ADF&G has acknowledged that there are disease and health risks associated with the importation of wood bison. For example, wood bison are susceptible to bovine spongiform encephalopathy (BSE or mad cow disease), tuberculosis and brucellosis. Indeed, the importation of wood bison from Canada was precluded until recently by the threat of an outbreak of BSE.<sup>45</sup> While ADF&G intends to take every precaution possible to ensure that released wood bison are healthy and not a threat to other native species, there is no guarantee that the introduction of disease will be prevented. Even in controlled conditions, wood bison may develop serious illnesses that could pose threats to other wood bison, native species, and humans.<sup>46</sup> As such, USFWS should explain why this increased risk of disease introduction and proliferation is justified.

## **9. USFWS Needs to Consider the Impacts of Reintroduction on Neighboring Landowners**

When considering appropriate sites for wood bison reintroduction, USFWS should also take into account the impacts any reintroduction program will have on neighboring landowners. Specifically, we are concerned that all three locations currently identified as potential reintroduction sites are also being considered for significant natural resource development projects. For example, various entities are currently considering: (1) natural gas exploration in the Nenana basin/Minto Flats; (2) natural gas and oil exploration in the Yukon Flats; (3) construction of a natural gas “bullet line” from North Slope Foothills to Anchorage which would cross a portion of the Minto Flats; and (4) the construction of the Donlin Creek gold project near the lower Innoko-Yukon River.

ADF&G has stated that it will first work to implement wood bison restoration in Minto Flats. This area is being strongly considered for a key in-state natural gas pipeline and where a group holding a State of Alaska Oil and Gas Exploration License and other leases has gathered over 200 miles of seismic data, recently drilled a well in 2009, and additional exploration for conventional natural gas is expected. ADF&G has also indicated that it will continue to pursue opportunities to restore wood bison in the Yukon Flats, which is also under serious consideration for major new economic developments. Recently, Doyon, Limited began conducting seismic testing in the Yukon Flats area to assess whether there are economic concentrations of oil and gas deposits. Finally, NovaGold Resources and Barrick Gold Corporation are proposing to develop the Donlin Creek gold mine on Calista land in the lower Innoko-Yukon River area approximately 30-40 miles east of potential wood bison habitat.

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<sup>44</sup> *Id.* at 33-45.

<sup>45</sup> *See* 72 Fed. Reg. 53,314 (Sept. 18, 2007).

<sup>46</sup> *See* 73 Fed. Reg. 50,834 (Aug. 28, 2008) (issuance of emergency permit to euthanize one adult wood bison held at the AWCC due to positive test for *Cryptosporidium*).

Each of these projects could provide an unprecedented economic boost to the respective regions and supply a steady source of jobs in areas that traditionally have high levels of unemployment. In addition, the projects will provide new business opportunities for companies to provide equipment, supplies, and other expertise in support of the resource exploration and extraction activities. Assuming that the projects proceed, there will be improved community sustainability and new tax and royalty revenue sources for the State of Alaska, the Alaska Mental Health Trust, the University of Alaska, the City of Nenana, Native corporations and others. Specific to Native Corporations, Congress enacted the Alaska Native Claims Settlement Act (ANCSA) to provide a means by which Alaska Natives could derive economic benefits from the resources around them. Native Corporations are the largest private landowners in Alaska, with title to tens of millions of acres of selected land throughout the state. ANCSA Section 7(i) ensures that 70% of all revenues received by each Regional Corporation from timber and subsurface estate resources must be divided among all 12 Regional Corporations in proportion to the number of Natives enrolled in each region. At least 50% of the revenues so received must be redistributed among the Village Corporations. It is therefore fair to assume that decisions made with respect to reintroduction of wood bison on Native Corporation lands will be felt statewide.

Regardless of the procedures used to reintroduce wood bison, by selecting one of the currently proposed sites, USFWS will create uncertainty and additional liability risks that may impact whether these valuable natural resource projects proceed. If USFWS authorizes reintroduction, the agency will be establishing a small number of animals in an ecologically-sensitive area. There is no guarantee that an interested party would not then petition USFWS to list the reintroduced species as threatened or endangered under the ESA, thereby triggering the section 9 take prohibitions, the designation of critical habitat, and section 7 consultation requirements. Even if, as USFWS recently stated, domestic wood bison are currently listed as endangered, a reintroduction without using the section 10(j) experimental population procedures would also impose the same ESA obligations. Likewise, even if the reintroduction proceeds pursuant to section 10(j), there are no assurances regarding how incidental take will be authorized and that, if circumstances change in the future, the experimental population or associated regulations will not be revised to provide greater protection to the species. Further, there is no means to provide assurances against third party litigation challenging any of these decisions.

It is well-established that the presence of a threatened or endangered species, even if designated as an experimental population, can have a chilling effect on any pending natural resource development project. This is caused by the additional administrative and regulatory burdens placed on the project proponent, the threat of potential liability for taking a listed species, and the possibility of litigation regarding the validity of the reintroduction or impacts of the proposed project on the species. USFWS should thoroughly consider these impacts on neighboring landowners, and the currently proposed projects, prior to authorizing any reintroduction of wood bison. Further, when considering a location for the reintroduction, USFWS should select an area with the least potential for future impacts with natural resource development activities. This will benefit both the economic viability of the proposed projects detailed above and reduce future anthropogenic impacts to the wood bison.

## **10. Because the Impacts of Any Wood Bison Reintroduction Are Likely to be Significant, USFWS Should Prepare an Environmental Impact Statement**

An Environmental Impact Statement (EIS) must be prepared for “major federal actions significantly affecting the quality of the human environment.”<sup>47</sup> The EIS provides a detailed and comprehensive analysis of the potential environmental impacts of the proposed action and must include an analysis of the environmental impact of alternatives to the proposed action.<sup>48</sup> In determining whether an action will have a significant impact, an agency may consider up to ten factors, including the degree to which the possible effects on the human environment are “highly uncertain or involve unique or unknown risks” and the “unique characteristics of the geographic area.”<sup>49</sup> While we recognize that USFWS may first prepare an environmental assessment (EA) to examine the significance of any effects associated with a proposed project, we strongly urge USFWS to develop an EIS as, in our opinion, the effects of any wood bison reintroduction will be significant, particularly in the Yukon Flats area.

Reintroducing a species into its historic habitat is fraught with unique and uncertain risks. The sheer size of the land areas proposed for reintroduction indicates that impacts are likely to be significant. For example, the Yukon Flats restoration site is approximately 3,800 square miles, an area significantly larger than the State of Delaware, and the lower Innoko–Yukon River site is approximately 1,348 square miles, almost the size of the State of Rhode Island. As wood bison would be permitted to range freely, impacts associated with the reintroduction would be felt throughout these large geographic areas. While it is unclear if, at this point, comprehensive assessments have been conducted to catalogue the biota and aquatic and terrestrial resources existing in each reintroduction site, USFWS should engage in a detailed examination prior to authorizing any reintroduction to determine the native species present (and their densities), the quality of land and water resources, and the nature and extent of human activities (both present, proposed, and culturally significant) in the areas, and analyze the impacts associated with any reintroduction. Further, based on expected population growth and the carrying capacity of the location, the number of wood bison could range from approximately 500 to over 2,000 animals. It seems that, as wood bison numbers approach these levels, there would be significant environmental impacts to water quality, terrestrial resources, native species, and human activities, not to mention an increased risk of disease transmission.

When examining impacts, the USFWS must also consider the “unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.”<sup>50</sup> We note that the Yukon Flats area contains large amounts of wetlands and two rivers, Beaver Creek and Birch Creek, that are designated as National Wild and Scenic Rivers. Pursuant to the NEPA requirements, USFWS should carefully examine any reintroduction-related impacts in this area given their heightened ecological sensitivity and intrinsic value.

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<sup>47</sup> 42 U.S.C. § 4332(2)(c).

<sup>48</sup> 42 U.S.C. §§ 4332(2)(C) & (E).

<sup>49</sup> 40 C.F.R. §§ 1508.27(b)(3)-(5). The human environment is defined to “include the natural and physical environment and the relationship of people with that environment.” 40 C.F.R. § 1508.14. The NEPA regulations state that “economic or social effects are not intended by themselves to require preparation of an [EIS].” *Id.* However, if there are economic or social effects that are interrelated with natural or physical environmental effects, then the EIS must discuss the impacts of all of those effects.

<sup>50</sup> 40 C.F.R. § 1508.27(b)(3).

## CONCLUSION

We believe that there are significant regulatory risks and environmental impacts associated with the proposal to reintroduce wood bison into Alaska. As we noted, at this time, there is uncertainty regarding the current listing status of wood bison under the ESA, and how the listing status may change in the future as USFWS determines whether to downlist or de-list the species. Further, it is unclear what assurances will be provided to impacted landowners through the section 10(j) process and what types of takings, sport/subsistence hunting or natural resource development, will be allowed in the future. These issues need to be resolved, through the clarification of relevant USFWS policies and consultations with impacted landowners, prior to the issuance of any proposed rule.

Further, we are concerned that ADF&G and USFWS have not sufficiently examined the potential environmental impacts associated with the currently proposed reintroduction. It is clear that the agencies have not properly considered other alternative sites that may provide suitable wood bison habitat. Further, the environmental effects analyses conducted to date are not comprehensive or detailed enough to provide sufficient information upon which to base a decision. Notably, ADF&G's Environmental Review only provided a cursory overview of the reintroduction areas, the potential habitat available, and the potential impacts that could be anticipated. This is particularly troubling given the huge geographic areas that may be affected should the reintroduction proceed. USFWS should take the requisite "hard look" at the environmental impacts associated with this proposal before authorizing any reintroduction of wood bison into Alaska.

Thank you for considering these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jason W. Brune", with a long, sweeping underline.

Jason W. Brune  
Executive Director