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February 6, 2015

VIA US PRIORITY MAIL & ELECTRONIC MAIL

National Park Service
Yellowstone National Park
P.O. Box 168
Yellowstone National Park, WY 82190-0168
Att'n: Dan Wenk, Superintendent
Al Nash, Director of Public Affairs

Re: Request for Constitutional Access to Yellowstone Bison Cull Activity

Dear Messr. Wenk and Nash:

Together with the American Civil Liberties Union of Wyoming, we represent the Buffalo Field Campaign, Stephany Seay (in her capacity as Media Coordinator for the Buffalo Field Campaign), and Christopher Ketcham, a widely-published freelance journalist (the Buffalo Field Campaign (collectively, our "Clients"). This letter is submitted in the context of the capture, shipment and slaughter of wild bison (the "Bison Cull Activity"), including the currently ongoing Bison Cull Activity located by the northern border of Yellowstone National Park (the "Park"), as conducted by employees and agents of the National Park Service (the "Park Service"), and the Park Service's refusal to fully and completely grant immediate, continuing, and future access to the Bison Cull Activity, as outlined below.

In particular, we are requesting the Park Service to permit our Clients and their colleagues immediate, continuing, and future access to all sites involved with Bison Cull Activity in accordance with the protocols in effect with past media access tours (the "Media Tour Protocols"), including, but not limited to, the following (hereinafter collectively referred to as "Constitutional Access"):

1. Access to within naked-eye observation distance of all trapping, herding, and sorting activities;
2. Access from scaffold-frame perspective of all trapping, herding, sorting, and to the extent observable, slaughter activities;
3. Regular right of inspection of any and all slaughter sites and mechanisms; and
4. Access to any and all books and records (including, but not limited to books, files, documents, photographs, video, and other media) relating to the size of the existing bison population, cull targets, commercial sales, commercial buyers and public health protocols, citations and other related records.

As explained in detail below, such access is nothing less than what our Clients are entitled to under the First Amendment to the United States Constitution, namely:

1. qualified access to observe the Bison Cull Activities in accord with the Media Tour Protocol;
2. access to a government activity historically open to the press and the general public;
3. access to public sites that have played and will play a significant positive role in the public conversation relating to important questions of animal welfare on federal land; and
4. access for observation and reporting that furthers the broader and more general right of the public-at-large to observe the Bison Cull Activity.

Finally, insofar as prior access in accordance the Media Tour Protocol has never resulted in any threat to health or safety, health and safety concerns do not override our Clients' right to Constitutional Access to the Bison Cull Activity.

**Our Clients Have a First Amendment
Right to Qualified Access to Observe the Bison Cull Activities**

The First Amendment of the U.S. Constitution provides the public a qualified right of access to certain government activities. U.S. Const. amend. I; *see Press-Enterprise Co. v. Superior Court* (“*Press-Enterprise II*”), 478 U.S. 1, 8-9 (1986) (finding a qualified right of access to preliminary hearings in criminal trials). This right of access is fundamental, “serv[ing] to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.” *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982). Indeed, “a major purpose of [the First] Amendment [is] to protect the free discussion of governmental affairs.” *Globe Newspaper*, 457 U.S. at 604. In furtherance of this goal, “[t]he

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Supreme Court has recognized that newsgathering is an activity protected by the First Amendment.” *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978); see *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (“[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.”).

Since the Supreme Court rulings in *Press-Enterprise II* and *Globe Newspaper*, courts have applied this right to a wide variety of government activities and processes. See *Leigh v. Salazar*, 668 F.3d 1126 (9th Cir. 2012) (right to view wild horse roundups); *AP v. Otter*, 682 F.3d 821 (9th Cir. 2012) (right to view executions); *Cal. First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002) (same); *Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 181 (3d Cir. 1999) (planning commission meetings); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1174 (3d Cir. 1986) (state environmental agency records); *Alexandria Real Estate Equities, Inc. v. Fair*, 2011 U.S. Dist. LEXIS 138455, at *4-6 (S.D.N.Y. Nov. 30, 2011) (arbitration award records); *Ginsberg v. DeHart*, 2011 U.S. Dist. LEXIS 31124, at *37-38 (D.N.H. Mar. 22, 2011) (attorney disciplinary proceeding records); *In re September 11 Litig.*, 723 F. Supp. 2d 526, 530-31 (S.D.N.Y. 2010) (settlement records in property damage litigation); *In re Guantanamo Bay Detainee Litig.*, 630 F. Supp. 2d 1, 10 (D.D.C. 2009) (habeas corpus proceedings); *ACLU v. Holder*, 652 F. Supp. 2d 654, 662 (E.D. Va. 2009) (sealed qui tam complaints); *Cincinnati Enquirer v. Cincinnati Bd. of Educ.*, 249 F. Supp. 2d 911, 915 (S.D. Ohio 2003) (resumes of candidates for school superintendent).

Whether this right attaches to a particular government activity is based on two elements: an “experience” element and a “logic” element. *Press-Enterprise II*, 478 U.S. 1, 8-11. First, the “experience” element relates to “whether the place and process have historically been open to the press and general public.” *Id.* at 8-9. Second, the “logic” element centers on the question of “whether public access plays a significant positive role in the functioning of the particular process in question.” *Id.* In analyzing the first prong of the qualified access inquiry, the requirement of historical openness “does not look to the particular practice of any one jurisdiction, but instead ‘to the experience in that *type* or *kind* of hearing throughout the United States.’” *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 150 (1993) (quoting *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 323 (1st Cir. 1992)). Thus, if an area of the general type for which the press seeks access is traditionally open to the public, the right of access exists even if the particular area at issue has traditionally not been so open. See, e.g., *Kohleriter v. Jewell*, 2013 U.S. Dist. LEXIS 150308 (D. Nev. Oct. 18, 2013) (allowing plaintiffs to attempt to prove openness through a showing that national wildlife refuges in general are more open than the horse-holding facility they sought to access).

A. *Our Clients Seek Access to a Government Activity Historically Open to the Press and the General Public.*

In the case of our Clients, the experience element is easily satisfied by the traditional access granted to press and activist groups to the Bison Cull Activity sites in the past. Indeed,

until such access was abruptly curtailed in or around 2006, news organizations and activists were regularly permitted to observe the Bison Cull Activity and related sites. In fact, in years past, the media was granted access to directly observe the exact activities that are being requested herein, and in the same manner. For example, individuals from the media could directly observe herding from a walkway above the herding area. Additionally, on the west side of the Park, media have been permitted, and continue to be permitted, Constitutional Access to Bison Cull Activity that occurs in that portion of the Park.

Since the Park Service limited access to the Bison Cull Activity in the north side of the park, our Clients and their colleagues have made many requests to obtain Constitutional Access, including by making numerous calls and sending a multitude of emails to the Park Service requesting media tours. However, the Park Service has not adequately responded to or acted upon these requests. Instead, our Clients have been limited to “access” outside of a seven-mile boundary in the Gardiner Basin around the Bison Cull Activity which our Clients are prohibited from crossing. This seven-mile boundary is too far away from the Bison Cull Activity to provide the opportunity to observe any substantive Bison Cull Activity in a meaningful way, as has been permitted in the past. The contours of the landscape in addition to the closure obstruct the view of individuals trying to observe the Bison Cull Activity.

Furthermore, the Park Service’s abrupt refusal to permit Constitutional Access at the very time public interest in the Bison Cull Activity is greatest (see below) suggests a change in policy that undermines the First Amendment’s paradigm of permitting qualified public access to news organizations for observation of controversial government activities on public lands.

B. Access to the Bison Cull Activity Sites Has Played and Will Play a Significant Positive Role in the Public Conversation Relating to Important Questions of Animal Welfare on Federal Land.

Our Clients’ satisfaction of the “logic” standard is equally conclusive. As a result of earlier reporting on the Bison Cull Activity, public interest in the subject has grown substantially and has been elevated to an issue of national prominence. *See, e.g., The Buffalo War*, www.pbs.org/buffalowar/war.html (2001); Colin Schultz, *The Park Service Wants to Cull 900 of Yellowstone’s 4,900 Buffalo*, *Smithsonian* (Oct. 6, 2014), <http://www.smithsonianmag.com/smart-news/park-service-wants-cull-900-yellowstones-4900-buffalo-180952951/?no-ist>; Laura Zuckerman, *Yellowstone To Kill 900 Bison During Winter Cull*, *Huffington Post* (Sept. 16, 2014), http://www.huffingtonpost.com/2014/09/16/yellowstone-kill-bison_n_5833016.html; Jim Robbins, *Anger Over Killing of Yellowstone’s Bison*, *New York Times* (Mar. 23, 2008), <http://www.nytimes.com/2008/03/23/us/23bison.html?pagewanted=all>. As such, the arbitrary refusal on the part of the Park Service to permit Constitutional Access at this juncture represents not only a dramatic reversal of past practice on the part of the Park Service, but an attempt to chill access to information vital to the ongoing and vigorous debate about the standards (or lack thereof) relating to the human stewardship of delicate animal

populations on federal land. Moreover, in the wake of further Park Service adjustments to the traditional protocols associated with the Bison Cull Activity (*see, e.g.*, Matthew Brown, *Yellowstone Begins Transferring Bison for Slaughter*, ABC News (Jan. 22, 2015), www.abcnews.go.com/Technology/wireStory/yellowstone-begins-transferring-bison-slaughter-28409022 (“[T]he park no longer plans to offer timely updates on how many bison are captured and shipped.”), the behavior of the Park Service in refusing media Constitutional Access to the Bison Cull Activity sites at this time suggests a material change in Park policy that makes media access more urgent now than it has ever been.

**The First Amendment Right of Our Clients to Observe the Bison Cull Activity
Furtheres the Broader and More General Right of the Public-At-Large to Do the Same**

The public has a strong interest in knowing what the government is doing. Not only is this interest valid for the mere knowledge and information itself, but “people must know to make fully-informed choices about the goods and services they purchase.” Bernard W. Bell, *Secrets and Lies: News Media and Law Enforcement Use of Deception As an Investigative Tool*, 60 U. Pitt. L. Rev. 745 (1999). However, the public often “lacks the time to observe government activities for itself.” *Id.* (quoting Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. Res. J. 523, 529-44). As such, “[t]he press operates as a nongovernmental institution that is empowered to observe government activities and to report to [the] populace.” *Id.* “By reporting about the government, the media are ‘surrogates for the public.’” *Leigh v. Salazar*, 668 F.3d 1126, 1133 (9th Cir. 2012) (quoting *Richmond Newspapers*, 448 U.S. at 573 (Burger, C.J., announcing judgment)); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 490-91 (1975) (“[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.”). Indeed, “[t]he free press is the guardian of the public interest.” *Id.* at 1134.

If the Park Service grants our Clients Constitutional Access to the Bison Cull Activity, our Clients can, as they have in the past, communicate to the general public information about how the government is using federal funds and other resources. Such reporting is a vital resource to individuals otherwise unable to observe these activities for themselves, which can foster public discussion and, where necessary, prompt changes to existing policy relating to the Park’s bison population. Moreover, to the extent that slaughtered bison continue to enter the commercial market from federal sources in larger numbers each year, greater public awareness on the conditions of and procedures used in the Bison Cull Activity can, at a minimum, ensure that consumers have full and accurate information relating to the sources of this product and the quality of its road to the commercial markets.

**Safety Concerns Do Not Override Our Clients' Right
to Constitutional Access to the Bison Cull Activity**

Our Clients acknowledge the potential safety concerns surrounding the Bison Cull Activities—indeed, as individuals who work to ensure the well-being of bison, they are heavily invested in making sure that the cull is safe. However, their observation of the activities will not create or contribute to any dangerous conditions. Constitutional Access to the Bison Cull Activity has been provided in the past and is currently provided in the western area of the park, and the presence of the press on these occasions has never caused a safety threat. Based on these experiences, it is clear that effectively denying Constitutional Access is not necessary to achieve safety goals.

In very similar situations, the courts have recognized that completely limiting access to animal gatherings would not be reasonable, as the safety concerns could be addressed in less restrictive ways. For example, in *Leigh v. Salazar*, a photojournalist sought additional access to a horse roundup conducted by the Bureau of Land Management, where the horses were driven by helicopters and guided through jute wings into a holding corral. 954 F. Supp. 2d 1090 (D. Nev. 2013). The Bureau of Land Management had already provided access in the form of designated areas from which the public could view both the horses being gathered and being held in the trap. *Id.* The court denied the claim for additional access only because “the placement of the viewing areas sufficiently accounted for [specific] safety concerns and did so in a reasonable and narrowly tailored way *to still allow the public to observe the gather activities and the horses after having been gathered.*” *Id.* at 1101 (emphasis added).

CONCLUSION

Our Clients have a clear and compelling right to gain Constitutional Access to immediate, continuing and future Bison Cull Activity in the Park in accord with the Media Tour Protocols because of: (1) the Park Service’s accommodation of media access in the past and the generally observed right of media access in comparable state and federal contexts nationwide (the “experience” component), and (2) the important and productive public interest in providing broad access to information relating to the Bison Cull Activity, as demonstrated in numerous prior federal precedents (the “logic” component).

Again, we request that the Park Service permit our Clients and their colleagues immediate, continuing, and future Constitutional Access to all sites containing Bison Cull Activity in the Park in accordance with the Media Tour Protocols, including, but not limited to, the following:

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1. Access to within naked-eye observation distance of all trapping, herding, and sorting activities;
2. Access from scaffold-frame perspective of all trapping, herding, sorting, and, to the extent observable, slaughter activities;
3. Regular right of inspection of any and all slaughter sites and mechanisms; and
4. Access to any and all books and records (including, but not limited to books, files, documents, photographs, video, and other media) relating to the size of the existing bison population, cull targets, commercial sales, commercial buyers and public health protocols, citations and other related records.

Although our Clients are fully prepared to seek an appropriate access order in Federal court if necessary, we are confident that upon your review of the legal standards set forth in this letter that the Park Service will consensually and promptly agree to grant our Clients immediate, continued, and future Constitutional Access to the Bison Cull Activity sites.

Considering that the Bison Cull Activities are already underway, we ask that the Park Service provide its full and complete written response to our Clients' request for Constitutional Access directly to me (using the contact information above) as quickly as possible, **but in no event later than Tuesday, February 17, 2015**. To be considered full and complete, the Park Service's response must provide either an unqualified agreement to grant our Clients Constitutional Access in full, or a detailed outline of what exact access to the Bison Cull Activity would be permitted, what precise restrictions would remain, and the exact reason(s) underlying the refusal to grant any portion of our Clients' request. If we do not receive a full and complete written response from the Park Service on or before February 17, 2015, we intend to commence legal action thereafter, and will seek an appropriate order permitting our Clients immediate, continued, and future Constitutional Access to the Bison Cull Activity.

Sincerely,

James J. Holman

JJH:kc

cc: Jonathan B. Jarvis (via FedEx)
Hilary Tompkins, Esquire (via FedEx)
Jennifer Horvath, Esquire (via electronic mail)
James G. Welch, Esquire (via electronic mail)
Meredith Carpenter, Esquire (via electronic mail)
Stephany Seay (via electronic mail)
Christopher Ketcham (via electronic mail)