



DECISION NOTICE

Lost River Wildlife Management Area Judith Fossils LLC Operating Plan Approval

July 8, 2024

ACTION

Decision Notice (DN). Montana Fish, Wildlife & Parks (FWP) shall prepare a DN for the proposed action. The DN must identify the agency decision, the reasons for the decision, and any special conditions surrounding the decision or its implementation.

With this action, FWP hereby adopts the Draft Environmental Assessment or Draft EA as final, without modification, and approves Alternative 2, the proposed action.

AUTHORITY: MONTANA ENVIRONMENTAL POLICY ACT

According to the applicable requirements of the Montana Environmental Policy Act or MEPA and its implementing rules and regulations, before a proposed action may be approved, environmental review must be conducted to identify, consider, and disclose any potential impacts of the proposed action on the affected human environment. The level of environmental review will vary with the complexity and seriousness of environmental issues associated with a proposed action. The level of public interest will also vary. The agency is responsible for adjusting public review to match these factors. *Title 75, Chapter 1, Parts 1 through 3, Montana Code Annotated (MCA)*.

Based on these factors, FWP determined a Checklist EA (Draft EA) constitutes the appropriate level of review for the proposed action. Therefore, to assess and disclose potential impacts of the proposed action, FWP prepared a Draft EA for public review and comment. See *Public Participation Process* below.

Further, FWP must consider any substantive comments received in response to an EA and proceed in accordance with one of the following steps: determine the EA did not adequately reflect the issues raised by the proposed action and issue an Environmental Impact Statement or EIS; determine the EA did not adequately reflect the issues raised by the proposed action and issue a supplemental EA; or determine the Draft EA adequately addressed the issues raised by the proposed action and make a final decision, with appropriate modification resulting from the analysis provided in the Draft EA and the analysis of any substantive public comments received. See *Public Comment and FWP Response* below.

PUBLIC PARTICIPATION PROCESS

The Draft EA was made available for public review and comment from June 17 – July 1, 2024. A legal notice

was published in the Havre Weekly Chronical and Great Falls Tribune, and the Draft EA was posted on FWP's Public Notice webpage: <https://fwp.mt.gov/news/public-notice>. The Draft EA was also made available for public review on the Environmental Quality Council or EQC website: <https://leg.mt.gov/mepa/search/>, by individual request, and through notice to identified interested parties. FWP received 9 comments during the public comment period.

DESCRIPTION OF PROPOSED ACTION

In December 2012, Montana Fish, Wildlife & Parks (FWP) purchased property in Hill County ("the Property") to be owned and managed by FWP as part of the Lost River Wildlife Management Area (WMA). As a part of the sale, the Seller reserved the paleontological and archeological rights to the Property under terms negotiated between FWP and the Seller, which are recorded in the deed to the property, hereafter Property Deed. Pursuant to the Property Deed, the Seller, who also constitutes the paleontological rights-holder, recently assigned the rights to explore and extract paleontological resources to Judith Fossils, LLC ("Judith Fossils"). Judith Fossils now seeks to exercise those rights and prospect for paleontological resources on the Property.

Under terms of the Property Deed, the Seller, or its designee Judith Fossils, must submit an operating plan to FWP meeting requirements of the Property Deed. Further, FWP must approve the operating plan prior to Judith Fossils initiation of prospecting for paleontological resources on the Property. FWP and Judith Fossils have negotiated terms of the draft operating plan, including any necessary mitigation, and Judith Fossils intends to begin allowable operations in 2024 should the final operating plan (2024 Operating Plan) be approved. The proposed term of the approved 2024 Operating Plan would be ten years.

The Property Deed requires FWP make a good faith effort to develop an acceptable operating plan and approval may not be unreasonably withheld. FWP believes the proposed 2024 Operating Plan satisfies all applicable requirements of the Property Deed and appropriately balances FWP's interests in maintaining the Lost River WMA's habitat and recreational values with the Seller's interest in exercising its private property right to explore and extract paleontological resources pursuant to the 2024 Operating Plan. Therefore, with this action, FWP proposes to approve the 2024 Operating Plan.

PURPOSE AND NEED

The purpose of the Draft EA is to evaluate, identify, and disclose potential impact(s) (beneficial and/or adverse) to the Lost River WMA (i.e., WMA surface resources) should the 2024 Operating Plan be approved and to determine if additional mitigation strategy(s), and associated negotiations between FWP and the Seller are necessary to limit potential adverse impacts. The need or benefit of approving the 2024 Operating Plan would be to ensure approved activities do not result in unacceptable impacts to wildlife, vegetation, and public recreational use of the Lost River WMA and that any ground disturbing activities are adequately mitigated through reclamation following such activities. The 2024 Operating Plan would be in effect for 10 years following approval.

ALTERNATIVES ANALYZED

Alternative 1: No Action

In addition to the proposed action, and as required by MEPA, FWP analyzes the "No-Action" alternative in the EA. Under the No-Action alternative, the proposed action would not occur. Therefore, no additional impacts to the human environment would occur. The No Action alternative forms the baseline from which the potential impacts of the proposed action may be measured.

Under the No Action alternative, the proposed project would not occur under the current proposed operating plan. FWP would be required to work with the Seller, and/or its designee Judith Fossils, to develop an approvable operating plan.

Alternative 2: Proposed Action

Under the Proposed Action, FWP would approve the 2024 Operating Plan. The 2024 Operating Plan would allow conditioned exploration and extraction of private paleontological resources on the property identified in Exhibit A the 2012 warranty deed.

PUBLIC COMMENT AND FWP RESPONSE

FWP received substantive public comments on the Draft EA. A substantive public comment was defined as the identification of a specific issue or impact. The following provides the *public comments* received and FWP response(s).

1. *If I am hunting in the LOST RIVER WMA and I find a fossil, buffalo tooth, antler, petrified wood, seashell, or other interesting article in an area NOT even close to current excavation – Will I be breaking a rule or considered a thief?*

FWP Response: The paleontological and archeology rights are held in private ownership on the Lost River WMA portion originally purchased in 2012 and included in the proposed operating plan. A member of the public would not be able to collect fossils, petrified wood, fossil seashells, etc., within the defined area in the operating plan without the permission of the paleontological right owner. The same restriction would apply for archeological items which include any human-made object or feature older than 50 years of age. This could include, but is not limited to, projectile points, hammerstones, historic structures, trash scatters, or stone rings. Archaeological features containing human remains are subject to state burial law.

Outside of the area defined within the Operating Plan but within Lost River WMA and all other FWP properties in Montana, FWP's public use rules apply: <https://fwp.mt.gov/conservation/wildlife-management-areas/public-use-rules>:

"While in a public use site it is prohibited to.... damage, destroy, possess, or permit the disturbance or removal of topsoil or subsoil, nonfossilized and fossilized paleontological specimens, cultural or archeological resources, or the parts thereof."

Other specimens that are not fossilized remains from animals such as antlers and modern age buffalo teeth and bones could be collected by a member of the public as they are not paleontological or archeological resources.

2. *I fully support this EA regarding the Lost River WMA project.*

FWP Response: None

3. *I have a few concerns about the proposed work plan. 1st of all I have concerns that no one with paleontological training was involved in the ea process. Wildlife biologists are fine people but aren't necessarily familiar with standard processes involved in paleontological excavations. These*

EA need to have input from people who are familiar with Paleontological prospecting and excavation. 2. How are they going to gain access to the ground they are working on? Are they going to be creating new roads and new river crossings for vehicles or are they going to be doing it all on foot? river crossings and such have federal regulations as well as state. if there isn't any access across the river are they going to take everything through canada? If so they need to file the appropriate export and import paperwork. also the long term effects of further excavation need to be taken into consideration. While prospecting may be low impact, commercial excavation is not. These excavations aren't like what you see at the Museum of the Rockies or other academic organizations, i know of one commercial quarry that is almost the size of a football field. Essentially I worry that this may lead to a death of 1000 cuts, this first assessment is low impact but the long term consequences are more than anticipated how many quarries are they going to be making before they need another ea? The plan also states that 5 acres is all they will be prospecting . This needs more clarity. 5 acres is nothing when it comes to looking for fossils. Which 5 acres is it? It seems to me that there needs to be a lot more thought put into it before giving them free reign. Who is going to police their efforts? Also the language needs to be more clear that these are not just exploratory activities, they are also extraction activities. Can they take a 20' by 30' quarry right next to a 20' by 30' quarry ? I hope this helps.

FWP Response: The EA was drafted utilizing the collective expertise of wildlife biologists, heritage staff, and legal staff to evaluate the impacts to the physical environment and human population. FWP heritage staff include professional archeologists and architectural historians. The proposed Operating Plan details road access including not establishing any new roads, restricting vehicle use during wet/muddy conditions, and reclaiming any newly created trails. An established road provides access to those portions of Lost River WMA north of the Milk River without needing to cross the Milk River or travel into Canada.

The proposed Operating Plan allows for exploration and extraction activities to take place on up to 5 ac. total at any one time and allows 1-6 people at a time to conduct digging with hand-held tools and hand power tools. If future extraction requires heavy excavation equipment, another Operating Plan would need to be submitted, which would require a subsequent EA for public review. Furthermore, no more than 3 non-contiguous active sites can be occupied at one time. An occupied site could be one location up to 5 acres, including the dig area, equipment storage, staging, topsoil segregation, signage, and other occupied uses to support or conduct exploration and extraction. The occupied site can change over the 10-year period following reclamation, removal of all signage and equipment and notification to FWP.

4. *My name is Eric Metz; I am the Paleontology Collections Manager-Registrar at Museum of the Rockies, Montana State University in Bozeman, Montana. This comment represents my personal opinion and is not submitted on behalf of Montana State University or Museum of the Rockies. The Lost River Wildlife Management Area includes outcrops of the Judith River Formation, which provides one of the best examples of the Late Cretaceous fauna and flora in Montana. Fossils from this formation represent the natural history of the State of Montana and are critical to understanding how Montana has changed over time.*

As commercial fossil collecting continues to expand, more specimens are leaving Montana never to return. It is crucial that specimens from state lands, including Montana Fish, Wildlife & Parks, be repositied in Montana institutions as the Montana State Antiquities Act requires. It would be a tremendous loss of Montana's natural history if fossils from the Lost River Wildlife Management Area and their accompanying field data were not repositied in a Montana Institution. It is only in these institutions where the specimens can be made accessible for research and to the public forever.

5. *My name is John Scannella; I am the Curator of Paleontology at Museum of the Rockies, Montana State University in Bozeman, Montana. This comment represents my personal opinion and is not submitted on behalf of Montana State University or Museum of the Rockies.*

The Lost River Wildlife Management Area is located on exposures of the Judith River Formation, a geologic formation that contains the fossils of numerous plants and animals, including dinosaurs, that lived in this region towards the end of the Cretaceous Period. An area like this can provide a window onto the deep past of our planet, revealing ancient species and how they and their environment changed over time. Studying the past can help us learn more about the present and future of our planet.

It is critical for scientific studies of fossils to be reproducible; for future researchers to be able to reexamine fossils and continually test ideas, perhaps using new methods and tools. For this to happen, the fossils need to be repositied in a collection where they will remain accessible for research. Following the Montana State Antiquities Act, fossils collected from all other Montana Fish, Wildlife & Parks lands are repositied in Montana institutions for future research and education. It would be unfortunate if fossils from the state-managed Lost River Wildlife Management Area and their accompanying field data were not repositied in a museum collection where they can be accessible for research and education in perpetuity.

6. *Hello, my name is Scott Williams, I am the Director of Exhibitions and Planetarium at the Museum of the Rockies at Montana State University. I am also a paleontologist with over 24 years of field and research experience and an instructor for the Paleontology Laboratory Technique Course at Montana State University. For over twenty years I have been a member of the Society of Vertebrate Paleontology. My comments represent my own opinions and thoughts that reflect my decades of training and experience. They are not submitted on behalf of the Museum of the Rockies, Montana State University or any other institution.*

The Lost River Wildlife Management area, located in northern Montana along the Milk River is an area of exceptional paleontological importance. The area has significant exposures of the famous Judith River geologic formation. This formation, which dates between 82 and 74.5 million years ago, represents the Late Cretaceous period as the end of the "Age of Dinosaurs neared. The fossils that are found in this formation represent a snapshot of the ancient ecosystem of this area and help to illuminate the geologic history of Montana. An area like this is full of not only dinosaur fossils, but other fossil plants and animals, including those new to science, that not only provide a portrait of a long gone paleoenvironment. Their discovery would provide a clearer understanding of Montana's past as well as provide a model for the present and future.

The only way that these fossils can contribute to our understanding is if they find themselves in a public institution, like a museum, college or university. In institutions like these they can be studied by students, professors, curators and scientists from all over the world. If these specimens find

themselves in someone's private collection in another country, they benefit no one. In fact, Montana loses an important resource. These fossil resources excite the imagination, spur people of all ages to learn more about science, perhaps causing a child to grow up to become a scientist. Fossil resources that are found in public institutions like museums are used for scientific research, student projects, public education and exhibitions. This "science for all" method ensures that many significant specimens are used for the enjoyment and education of hundreds of thousands to even millions of people during their curation at a public institution. For these benefits to be realized, these fossils must remain available to the public, not the select few or the individual.

In accordance with the Montana State Antiquities Act (1973), fossils collected from all Montana Fish, Wildlife and Park land are to be repositied in a Montana Institution for education and scientific research. Also, in 2019 the Montana State legislature overwhelmingly passed a bi-partisan bill that clearly states that fossils are not minerals, and they are part of the surface. This bill was upheld by the Montana Supreme Court in 2020. The State of Montana is very clear on what is a fossil, what is not, and where they should go if found on State Land. By allowing commercial fossil collecting to occur at the Lost River Wildlife Management area, not only does this set up a direct conflict with the 1973 Antiquities Act, but also the Court upheld the 2019 law. Moreover, it sets a terrible precedent that would allow important fossils, that help us better understand our past, educate our youth and provide evidence for peer-reviewed, tested scientific research, to be sold out of the state of Montana, where they could end up in other countries, belonging to individuals that have no intention of sharing Montana's heritage with others. This is shortsighted and does not protect Montana's values and interests.

Please delay the authorization of commercial fossil companies having access to this land until it can be properly surveyed by trained paleontologists and there is more opportunity for public commentary and public education on the importance of this area.

- 7. I am a research paleontologist working in Montana and have some concerns over this project. Allowing a team lacking paleontologists to excavate fossils is dangerous for fossil preservation sake. Many research valuable specimens are likely to be lost along with their data, either sold or accidentally destroyed. Additionally, if excavation is done without proper geologic knowledge, it can damage the surrounding environment. Thank you for your time.*
- 8. My name is Lee Hall and I am the Paleontology Lab and Field Manager for Museum of the Rockies at Montana State University in Bozeman, MT. I am submitting the following comments as a private citizen and not in an official capacity associated with or endorsed by my employer.*

Paleontological resources (fossils and associated contextual data) are non-renewable natural resources. They are fascinating remnants of our shared natural heritage, unique to the time and place of their preservation. The status of fossils (especially vertebrates) as scientifically significant is reinforced by laws protecting them from exploitation on federal lands, as well as collection permitting practices on federal and state-administered lands.

I am concerned to see that the proposed Operating Plan for the Lost River Wildlife Management Area (LRWMA) would deviate from an established practice of protecting paleontological resources by granting a private entity carte blanche extraction of fossils from lands administered by Montana Fish, Wildlife, and Parks. The LRWMA is situated on several thousand acres of Judith River

Formation exposures. This rock unit is one of the most fossiliferous Late Cretaceous deposits in North America. While the more southeasterly portions of this formation in Montana continue to be extensively studied by researchers, the northern portions near Canada are less well-sampled. In short, geologic formations are not uniform and will vary based on geography. Therefore, the information we learn from this deposit near Malta will not be the same as further north (further upland). Additionally, the strata exposed near the international border with Canada are key to answering several questions about the geologic associations of the Oldman and Judith River formations.

In short, this area represents a scientifically significant resource for paleontology and geology on FWP administered lands. The Montana State Antiquities act is clear that fossils collected from MTFWP lands are repositied in approved Montana repositories for scientific study and public education. As it stands, I believe the proposed LRWMA management strategy requires significant revision.

9. *I am concerned to hear that commercial sale of fossils from the Lost River WMA is now being considered. Although the surface rights to fossil resources on this land has been retained by the landowner, this sets a dangerous precedent both generally and in this particular case. Allowing agreements like this to be forged is damaging to paleontological and archaeological work in particular, and historical and cultural work more generally. Although I support moving private land into public access agreements in most cases, allowing these specific surface rights to be exempted from any Antiquities Act protection and to directly conflict with other governmental guidance (PRPA on BLM lands) in that pursuit will allow Montana's heritage to be removed from the state and possibly public viewing altogether. In many cases this results in Montana's heritage being removed from the United States entirely, which is not acceptable and leaves our state, its people, and our country bereft of scientifically valuable and culturally significant material. When a fossil (or archaeological material) is sold, there is no way to maintain public access and these materials risk ending up in someone's basement, thrown out by descendants, passed out of the country- including the loss of important scientific data associated with the specimen, not just the loss of the specimen itself. Although Indiana Jones is not the best arbiter, "it belongs in a museum" rings true, and we all deserve the right to see the rich history of this land remain publicly accessible.*

The highest value of paleontological and archaeological resources is in the usage by scientists and for public education, which cannot be served in the same ways through private avenues. Public land is for the benefit of all, not the benefit of some. Not to mention the depth of complexities around allowing archeological artifacts to be sold.

I do not believe the Lost River WMA should allow commercial sale of paleontological or archeological resources, and I believe this type of agreement should be disallowed on FWP lands in the future.

FWP Response to comments 4-9: The paleontological rights to the portion of Lost River WMA included within the proposed Operating Plan are privately owned and not part of FWP's property ownership. Per the property deed when Montana FWP purchased the property, FWP must work with the owner of those rights (and their assignee, Judith Fossils LLC) to allow exploration and

extraction of paleontological resources through an approved Operating Plan. Montana FWP does not own any paleontological resources within the area defined in the EA and proposed Operating Plan and therefore cannot control the eventual ownership, placement, or accessibility of associated paleontological specimens. The Montana Antiquities Act (Mont. Code Ann. §§ 22-3-401, et seq.) requires researchers interested in doing work on state land to obtain antiquities permits before excavating or removing antiquities from state owned land. However, in this case, because the rights to paleontological/archeological materials are privately owned, FWP's legal review has determined that the Antiquities Act does not apply.

DECISION

Based on the environmental review provided in the Draft EA, and in accordance with all applicable laws, rules, regulations, and policies, FWP determined the proposed action (Alternative 2), will not have significant adverse impacts on the human environment associated with the proposed action and constitutes a reasonable and appropriate strategy to achieve identified objectives. Therefore, preparation of an EIS is unnecessary. FWP hereby adopts the Draft EA as final and approves the Alternative 2, the proposed action.

Sincerely,



Drew Henry
Region 6 Supervisor
Montana Fish, Wildlife & Parks