Hon. John C. McKeon
District Judge
17th Judicial District
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MONTANA SEVENTEENTH JUDICIAL DISTRICT COURT, BLAINE COUNTY

CITIZENS FOR BALANCED USE; SEN. RICK RIPLEY; VALLEY COUNTY COMMISSIONERS; DUSTIN HOFELDT; VICKI HOFELDT; KEN HANSEN; JASON HOLT; SIERRA STONEBERG HOLT; ROSE STONEBERG; UNITED PROPERTY OWNERS OF MONTANA; and MISSOURI RIVER STEWARDS, Plaintiffs, vs. JOSEPH MAURIER; MONTANA DEPARTMENT OF FISH, WILDLIFE & PARKS; and MONTANA FISH WILDLIFE AND PARKS COMMISSION, Defendants and DEFENDERS OF WILDLIFE and NATIONAL WILDLIFE FEDERATION, Intervening Defendants.	No. DV 2012-1 **ORDER DENYING PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT**

Pending is the motion of Plaintiffs Citizens for Balanced Use, Senator Rick Ripley, Valley County Commissioners, Dustin and Vicki Hofeldt, Ken Hansen, Jason A. and Sierra

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Stoneberg Holt, Rose A. Stoneberg, United Property Owners of Montana, and Missouri River Stewards' (collectively, "Plaintiffs") for declaratory judgment. Pursuant to said motion, Plaintiffs seek judgment declaring that 1) bison held pursuant to the Interagency Bison Management Plan Quarantine Feasibility Study ("QFS bison"), including but not limited to those bison moved to the Ft. Peck and Ft. Belknap Indian Reservations, are not "wild bison" under Montana law; and 2) that the Montana Department of Livestock ("DoL"), and not the Department of Montana Fish, Wildlife, & Parks ("FWP"), has jurisdiction and management authority over bison which are not statutorily defined as "wild bison." Defendants Joseph Maurier, FWP, and Montana Fish Wildlife Parks Commission and Intervening Defendants Defenders of Wildlife and National Wildlife Federation (collectively, "Defendants") oppose. Briefing is complete. After due consideration, the Court determines that no further hearing is necessary and issues the following opinion.

PROCEDURAL HISTORY AND PERTINENT FACTS

This case arises from challenges presented to the State of Montana regarding the translocation of bison which seasonally migrate out of Yellowstone National Park ("YNP"). This action was initiated with complaint filed in January of 2012. The Court notes the following established facts and pertinent procedural history.

The QFS bison are bison from YNP that are genetically-pure (not influenced by genes from domestic cattle).[1] YNP is located in southern Montana and northern Wyoming. In 2004, FWP began a quarantine program for the purpose of isolating and studying bison that migrate

[1] See *Citizens for Balanced Use v. Maurier*, 2013 MT 166, ¶ 3, 370 Mont. 410, 412-13, 303 P.3d 794, 796 (the Supreme Court, while reviewing a different issue in this case, undertook a thorough review of many facts relevant to the present inquiry).

into areas of Montana outside of YNP.[2] Brucellosis is a contagious disease.[3] The goal of the quarantine program was the creation of a brucellosis-free herd that could be relocated from the YNP area, as a bison control measure.[4]

In 2005, FWP created a fenced quarantine facility north of YNP.[5] The facility housed or confined 100 calves that were micro-chipped and repeatedly tested negative for brucellosis.[6] These bison matured and many subsequently bred with others involved in the study. The resultant offspring have also tested negative for brucellosis.[7]

In 2011, FWP considered relocation of approximately 68 of the QFS bison for a five-year period of continued quarantine and testing.[8] FWP looked at several pasturing sites for these bison.[9] In September, 2011, FWP released a draft of an environmental assessment which analyzed and weighed options for translocating these QFS bison.[10] Three months later, FWP decided to translocate these bison to a pasture on the Ft. Peck Reservation, with plans to eventually again transfer half of those bison to the Ft. Belknap Reservation.[11]

On January 11, 2012, Plaintiffs filed their Complaint for Declaratory and Injunctive Relief, challenging the FWP decision to translocate any QFS bison.[12] In their Complaint,

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[2] *Maurier*, 2013 MT 166, ¶ 3

[3] Brucellosis is a serious disease for animals and humans, causing sterility and fetal abortions in livestock and undulant fever in humans. It infects some of the bison from YNP, having been passed to them from domestic cattle. The disease can be spread back to cattle. Montana achieved a brucellosis-free state designation in 1985 after decades of effort and expense. This designation allows cattle producers to ship animals without testing. *Maurier*, fn # 1.

[4] *Maurier*, ¶ 3

[5] Id.

[6] Id.

[7] Id.

[8] Id. at ¶ 4.

[9] Id.

[10] Id.

[11] Id.

[12] Complaint for Declaratory and Injunctive Relief (filed Jan. 11, 2012) p. 2 ¶ 1.

Plaintiffs requested an injunction prohibiting this movement until FWP complied with §§ 87-1-216 and -217, MCA.[13] Plaintiffs further alleged that 1) FWP violated Senate Bill 212 (now codified in § 87-1-216, MCA) by not completing a bison management plan before relocating the QFS bison; 2) FWP violated § 87-1-216, MCA by failing to inform the public or Legislature how they would implement its decision to transfer the QFS bison to the reservations; 3) FWP failed to analyze the impacts that QFS bison escapes would have on the human environment; 4) FWP failed to analyze the impact of possible brucellosis transmission from QFS bison to commercial bison herds; and 5) FWP failed to conduct a an essential environmental impact statement.[14]

Prior to a response to their initial Complaint, Plaintiffs filed an Amended Complaint for Declaratory and Injunctive Relief.[15] In their Amended Complaint, Plaintiffs sought injunctive relief prohibiting the FWP from implementing a plan to translocate the bison in question or entering into a memorandum of understanding ("MOU") for others to receive the bison until it had complied with applicable Montana law.[16] Plaintiffs alleged that 1) FWP's bison transplant decision without a bison management plan violated § 87-1-216, MCA; 2) FWP violated § 87-1-216, MCA by failing to involve the public in creating a bison management plan; 3) FWP failed to hold public hearings in all counties affected by the transplant as required by § 87-1-216(6), MCA; 4) FWP violated the Montana Environmental Policy Act, § 75-1-101, MCA et. seq. by failing to consult with counties affected by the transplant; 5) FWP violated FWP Administrative Rules by failing to cooperate with the counties in which the transplants

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[13] See *Maurier*, 2013 MT 166, ¶ 8.
[14] Complaint for Declaratory and Injunctive Relief (filed Jan. 11, 2012) pp. 11-15.
[15] Amended Complaint for Declaratory and Injunctive Relief (filed March 9, 2012).
[16] Id. at 23-25.

occurred; 6) FWP failed to consult and coordinate with counties before large game animal movement, as required by § 87-1-217, MCA; 7) FWP did not adequately analyze disease and genetic information of the QFS bison; 8) FWP failed to analyze the impact of the QFS bison on the human environment; 9) FWP failed to analyze the risk of brucellosis transmission; and 10) FWP failed to conduct a full environmental impact statement.[17] The Amended Complaint also included a demand for declaration affirmatively stating that Defendant FWP had an obligation to promulgate a state-wide bison management plan.[18]

On March 16, 2012, FWP entered into a Memoranda of Understanding ("MOU") with the Ft. Peck Tribes.[19] On March 19, 2012, a majority of the group of 68 QFS bison were transported to the Fort Peck Reservation.[20] On that same day, Plaintiffs filed their application for a temporary restraining order against shipment of these bison.[21] The application came before the Court on March 20, 2012, but was denied on account of procedural defects (lack of notice and lack of a sworn complaint or affidavit).[22] Shortly thereafter, Plaintiffs filed a second application for a temporary restraining order and this Court granted a temporary restraining order on March 22, 2012. However, most of the bison had been shipped by this time.

The Court subsequently held a hearing and issued a preliminary injunction which, in part, prohibited FWP from transferring any QFS bison from the Ft. Peck Reservation to the Ft. Belknap Reservation.[23] On May 15, 2012, Defendants appealed the issuance of this preliminary

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[17] Amended Complaint for Declaratory and Injunctive Relief (filed March 9, 2012) pp. 14-22.
[18] Id.
[19] Id.
[20] Id.
[21] Order Granting Preliminary Injunction (filed May 9, 2012) p. 3 ll. 14-18.
[22] Id. at 18-20.
[23] Id. at p. 3 ll.14-18.

injunction and the matter was taken up by the Montana Supreme Court.[24]

While the appeal was pending, Plaintiffs filed a Second Amended Complaint for Declaratory and Injunctive Relief. In that Complaint, Plaintiffs largely retained the allegations of their Amended Complaint, but also alleged that FWP wrongly enacted a bison management plan without the input of the DoL.[25] Absent from the any of these complaints was an allegation that the QFS bison are not "wild bison." In fact, Plaintiffs repeatedly referred, in their pleading, to the QFS bison as "wild bison."[26]

On June 19, 2013, the Montana Supreme Court issued its decision holding that the preliminary injunction was improperly granted and therefore vacated it.[27] The *Maurier* Court based its decision on findings that the District Court 1) improperly concluded that tribal land falls within the definition of "public or private land" under § 87-1-216, MCA; 2) misbalanced the equities of the parties affected by the bison transfer; and 3) incorrectly applied § 27-19-201(3), MCA.[28] In its opinion, the Supreme Court also held that:

> Under the express terms of § 87–1–216, MCA, it applies only when "wild buffalo or bison" are relocated to "public or private land in Montana." A "wild buffalo or bison" is defined as a bison "that has not been reduced to captivity and is not owned by a person." Sections 81–1–101(6) and 87–2–101(1), MCA. *The brucellosis quarantine bison involved in this case have been reduced to captivity for a number of years and therefore arguably are not "wild buffalo or bison" as defined in Montana law, rendering § 87–1–216, MCA, inapplicable to this case.* The parties did not raise or brief this issue and it was not addressed by the District Court.[29] (italics added)

Following remittitur, this Court vacated the preliminary injunction, dismissed

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[24] Notice of Appeal (filed May 15, 2012).
[25] Second Amended Complaint for Declaratory and Injunctive Relief (filed Nov. 20, 2012) pp. 15-24.
[26] Id. at p. 15 ¶¶ 53-55.
[27] *Maurier*, 2013 MT 166 at ¶¶ 31-32.
[28] Id. at ¶¶ 21- 29.
[29] Id. at ¶ 15.

all claims based on §§ 87-1-216 and 87-1-217, MCA and ordered Plaintiffs to file a status report.[30] Plaintiffs then filed a Status Report wherein they withdrew all claims other than those presented by the pending Motion for Declaratory Judgment.[31]

ANALYSIS

I: Judicial Estoppel

Defendants contend that the doctrine of judicial estoppel precludes Plaintiffs from deviating from a long-held position that FWP had authority over the QFS bison. Defendants base their argument on the fact that "for nearly two years, Plaintiffs have proceeded with this litigation recognizing FWP's authority over these bison[.]"[32] In response, Plaintiffs maintain the doctrine of judicial estoppel is clearly inapplicable.

Four criteria must be satisfied in order for a Court to apply judicial estoppel: 1) the party being estopped must have knowledge of the facts at the time the original position is taken; 2) the party must have succeeded in maintaining the original position; 3) the position presently taken must be actually inconsistent with the original position; and 4) the original position must have misled the adverse party so that allowing the estopped party to change its position would injuriously affect the adverse party. *Fiedler v. Fiedler*, 266 Mont. 133, 140, 879 P.2d 675, 680 (1994).

The doctrine of judicial estoppel does not apply to a change of position regarding matters of law. *DeMers v. Roncor, Inc.*, 249 Mont. 176, 180, 814 P.2d 999, 1002 (1991) (citing *Colwell v. City of Great Falls*, 117 Mont. 126, 157 P.2d 1013, 1019 (1945) overruled by

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[30] Order to Vacate Preliminary Injunction and to Require Plaintiffs File a Status Report (filed Aug. 12, 2013).
[31] Plaintiff's Status Report (filed Sept. 3, 2012), pp. 2-3.
[32] Defendants' Response to Plaintiffs' Brief in Support of Motion for Declaratory Judgment (filed Oct. 16, 2013) p. 4 ¶ 3.

Prezeau v. City of Whitefish, 198 Mont. 416, 646 P.2d 1186 (1982)).

With the pending motion, Plaintiffs do change their previously asserted position that FWP has authority over the QFS bison. However, the issue of authority over the QFS bison is a matter of law, not one of fact. Because judicial estoppel does not apply to a change of position regarding matters of law, it follows that Plaintiffs may not be judicially estopped from presenting the pending motion.

II: Attempt to Amend Complaint

Defendants contend that Plaintiffs' Motion for Declaratory Judgment is an attempt to amend their complaint without the proper motion required by Rule 15, M.R.Civ.P. Plaintiffs counter that because their Second Amended Complaint sought relief in the form of a Declaratory Judgment on the general proposition that FWP's transfer of bison was unlawful, their motion falls within the scope of said complaint and no amendment is necessary. In the alternative, Plaintiffs request that the Court allow them to amend their complaint.

In Montana, a complaint must comply with the spirit and intent of the rules of pleading but need not adhere to a rigid formula or invoke specific diction. *See R.H. Schwartz Constr. Specialties v. Hanrahan*, 207 Mont. 105, 672 P.2d 1116 (1983). However, it is mandatory that a complaint contain, "a short and plain statement of the claim showing that the pleader is entitled to relief." *McKinnon v. W. Sugar Co-Op. Corp.*, 2010 MT 24, ¶ 17, 355 Mont. 120, 124, 225 P.3d 1221, 1224 (quoting M. R. Civ. P. 8(a)).

In addition, a complaint must state a demand for judgment for the relief sought. Rule 8(a), M. R. Civ. P. Thus, a party cannot seek relief beyond the case stated by him in his complaint. *See Gallatin Trust & Sav. Bank v. Darrah*, 152 Mont. 256, 261, 448 P.2d 734, 737 (1968). "It is elementary that the complaint must support the judgment[.]" *Crenshaw v.*

Crenshaw, 120 Mont. 190, 201, 182 P.2d 477, 483 (1947).

In their Motion for Declaratory Judgment, Plaintiffs seek a declaration that 1) the bison at issue are not "wild bison" and 2) that the DoL has jurisdiction and management authority over bison that are not "wild bison." Plaintiffs' Second Amended Complaint fails to proffer any legal argument for or raise the issue that the QFS bison are not "wild bison." Further, there is not even an allegation in the complaint that the bison are subject to DoL jurisdiction and management authority.

Plaintiffs' Motion for Declaratory Judgment seeks relief which is unrelated to the case stated in their complaint or any other pleading. Rule 8(a), M. R. Civ. P. proscribes such action. Unless the complaint is amended, the motion must be denied.

A plaintiff's complaint is a pleading. Rule 7(a)(1), M.R.Civ.P. As such, it is subject to certain procedural rules of pleading. Under said rules,

> A party may amend its pleading once as a matter of course within 21 days after serving it; or, if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires. Rule 15(a), M. R. Civ. P.

Although leave to amend should be freely given when justice so requires, this does not mean that a court must automatically grant leave to amend. *Kershaw v. Mont. DOT*, 2011 Mont. 170, ¶ 25. In order to amend a pleading, "a party must file an appropriate motion, and brief accompanying that motion." *Nimmick v. Hart*, 248 Mont. 1, 11, 808 P.2d 481, 487 (1991). Montana courts have specifically disallowed parties to amend their pleadings in briefs regarding other motions. *See e.g., Id.*

Plaintiffs have not filed an appropriate motion for leave to amend. Plaintiffs have

simply dedicated one line of their Reply Brief in Support of Motion for Declaratory Judgment to the conclusory declaration that the Court ought to permit them to amend their Complaint. Such declaration falls short of the procedure necessary for amendment.

While Montana law generally favors amendment to a pleading,[33] it still imposes baseline procedures for amendment to which parties must adhere. Plaintiffs have failed to follow such procedures. Due to these procedural defects, this Court need not analyze the substantive issues raised by the pending motion.

However, the motion does contain a request for amendment. It would be a simple matter for Plaintiffs to follow up with a written motion for leave to amend and parties have adequately briefed key issues that would need to consider such motion. Thus, for the sake of judicial economy, the Court will undertake an analysis to ascertain whether just reason exists to allow amendment of Plaintiffs' complaint.

III: Non-binding Dictum

Plaintiffs contend that they are entitled to a declaratory judgment under the Montana Declaratory Judgment Act, MCA § 27-8-102 *et seq.*, that 1) that the QFS bison, including but not limited to the bison moved to private or public land on the Ft. Peck and Ft. Belknap Reservations, are not within the statutory definition of "wild bison"; and 2) that the DoL, and not the FWP, has management authority over "non-wild bison." Plaintiffs support their argument with the following excerpt from the Montana Supreme Court's decision in *Maurier*:

> The brucellosis quarantine bison involved in this case have been reduced to captivity for a number of years and therefore arguably are not 'wild buffalo or bison' as defined in Montana law, rendering § 87–1–216, MCA, inapplicable to

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[33] See *Donaldson v. State*, 2012 MT 288, 367 Mont. 228, 232, 292 P.3d 364, 367.

this case.[34]

Defendants counter that the *Maurier* Court statement is merely dictum, and therefore not binding. Defendants further assert that the language of § 87-1-216, MCA clearly categorizes the bison at issue as "wild bison" and for that reason, the Court must hold that the bison are under the authority of FWP.

The principle of *stare decisis* obligates Montana courts to apply the legal precedent established in the holdings of the highest court of the State. *State ex rel. Peery v. Dist. Court of Fourth Judicial Dist.*, 145 Mont. 287, 310, 400 P.2d 648, 660 (1965). However, it is ubiquitously acknowledged that dictum is exempt from the mandates of *stare decisis*. *State v. Otto*, 2012 MT 199, ¶ 17, 366 Mont. 209, 285 P.3d 583; *Exelon Corp. v. Dep't of Revenue*, 234 Ill. 2d 266, 288, 917 N.E.2d 899, 913 (2009); *Edwards v. Kaye*, 9 S.W.3d 310, 314 (Tex. App. 1999); *Engweiler v. Persson*, 354 Or. 549, 557, 316 P.3d 264, 270 (2013). The traditional rule is that dictum is not binding on courts as a controlling precedent. *State v. Gopher*, 193 Mont. 189, 194, 631 P.2d 293, 296 (1981).

"*Dictum* is short for '*obiter dictum*,' Latin for 'something said in passing.' *Engweiler* 354 Or. at 557 (citing *Black's Law Dictionary* 1102 (8th ed.2004))(internal quotation mark omitted). *Obiter Dictum* is defined as"[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential". *Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, 354 Mont. 15, 23, 221 P.3d 666, 672. When a court makes a determination of an issue, but its judgment is not dependent upon the determination, the determination is a dictum. *State ex rel. Lovins v. Toole Cnty.*, 278 Mont.

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[34] *Maurier*, 2013 MT 166, ¶ 15.

253, 259, 924 P.2d 693, 696 (1996) (citing Restatement (Second) of Judgments, § 27, cmt. h (1982)). A dictum is "a gratuitous opinion, an individual impertinence which, whether it be wise or foolish, right or wrong, bindeth none—not even the lips that utter it." *Empire Theater Co. v. Cloke*, 53 Mont. 183, 163 P. 107, 109 (1917).

A court's decision on a matter that is properly before it, fully argued by counsel, and purposefully considered by the court will not be considered dictum. *Bottomly v. Ford*, 117 Mont. 160, 167, 157 P.2d 108, 112 (1945).

The issue of whether or not the QFS bison are "wild bison" was never properly before the *Maurier* Court. See *Mortgage Source, Inc. v. Strong*, 2003 MT 205, 317 Mont. 37, 42, 75 P.3d 304, 308 (the Supreme Court does not consider issues that were not raised before the district court); *In re Parenting of D.A.H.*, 2005 MT 68, ¶ 7, 326 Mont. 296, 298, 109 P.3d 247, 249 (same). Moreover, prior to the appeal, the proper classification of the QFS bison was not fully argued by counsel before this Court. The *Maurier* Court noted so in the very next line of its opinion (stating "[t]he parties did not raise or brief this issue and it was not addressed by the District Court.")

In *Maurier*, the only question before the Supreme Court was whether the District Court properly entered a preliminary injunction.[35] The Court's analysis of the propriety of the preliminary injunction hinged upon three issues: 1) whether the District Court properly concluded that tribal land falls within the definition of "public or private land" under § 87-1-216, MCA; 2) whether the District Court properly concluded, after balancing the equities of the parties affected by the bison transfer, that the scales tipped in favor of issuing an injunction;

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[35] Id. at ¶ 10

and 3) whether the District Court properly concluded that Plaintiffs were entitled to an injunction under § 27-19-201(3), MCA.[36] The Supreme Court's comment on QFS bison arguably not being "wild bison" was immaterial to, and unnecessary for the Court's resolution of any of these issues.

Furthermore, the Supreme Court never purposely considered the issue of classification of the QFS bison. To the contrary, the Supreme Court specifically noted in its decision that the issue was neither raised nor briefed before the District Court, and that the District Court never addressed the issue.[37] The Court went on to explicitly state that the issues before it on appeal were limited to those issues on which the District Court based its ruling.[38] The Supreme Court never had to address, and by its own precedent,[39] should not have addressed the classification of the QFS bison.

Indeed, with use of the term "arguably," it appears that the *Maurier* Court was not addressing the issue of classification but merely identifying the issue and noting arguments existed on the same. Yet, the statement does reference § 87-1-216, MCA and definitions of "wild buffalo or bison" found in Montana law. Even if this statement could be construed as a suggestion regarding the issue, such suggestion is not binding.

Suggestions concerning rules of law or legal propositions that are not essential to the decision are classified as dictum. *United States v. Crawley,* 837 F.2d 291, 292 (7th Cir.1988) (quoting *Stover v. Stover,* 60 Md.App. 470, 476, 483 A.2d 783, 786 (1984)). It was not

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[36] Id. at ¶¶ 16-29.
[37] Id. at ¶ 15
[38] Id. at ¶ 10 ("The parties did not raise or brief this issue and it was not addressed by the District Court. Because the District Court based its ruling on an interpretation of the statute's 'public or private land' language...we will consider [the public or private land language] on appeal").
[39] See *Strong supra.*

essential to the *Maurier* decision that the Court conclude definitions of "wild buffalo or bison" otherwise found in Montana law apply to § 87-1-216, MCA. The *Maurier* Court's decision rested on the definition of "public or private land" under § 87-1-216, MCA, a consideration of the equities affected by the bison transfer, and application of § 27-19-201(3), MCA. The *Maurier* judicial comment on QFS bison arguably not being "wild bison" is *obiter dictum* and has no binding effect on this Court.

However, the fact that a statement is dictum does not mean it is incorrect and has no force; instead, it means that the Court is not *required* to follow it. *Halperin v. Pitts*, 352 Or. 482, 494, 287 P.3d 1069, 1076 (2012). Although non-binding precedent, a suggestion or expression of the law made in dictum by the Montana Supreme Court still has persuasive weight. *Cf. Gopher*, 193 Mont. at 191, 631 P.2d at 294 ("Although *dictum*, such a clear expression by this Court [...] cannot be ignored"); *See also Horton v. Unigard Ins., Co.*, 355 So. 2d 154, 155 (Fla. Dist. Ct. App. 1978) (Supreme Court dictum is persuasive due to its source); *Ko v. Eljer Indus., Inc.*, 287 Ill. App. 3d 35, 41, 678 N.E.2d 641, 645 (1997). Yet, if the dictum is incorrect, courts will refuse to follow it. *See e.g., Gopher*, 193 Mont. At 194, 631 P.2d at 296.

Under Montana law, when a word is defined anywhere in the Montana code, that definition may be applied to the same word when it appears elsewhere in the Montana code *except where a contrary intention plainly appears*. § 1-2-107, MCA (emphasis added). When the legislature specifies that a definition has application only within certain sections of the Montana code, the legislature has plainly expressed its intention that the definition is to have no applicability outside of the specified section. *Richter v. Rose*, 1998 MT 165, ¶¶ 17-18, 289 Mont. 397, 962 P.2d 583.

The *Maurier* decision does not specifically state what other Montana law defines "wild buffalo or bison." In this Court's search, it finds that the only code provisions doing so are § 87-2-101 and 81-1-101(6), MCA.

The express language of § 87-2-101, MCA specifies that its definitions are only applicable in chapters 2 and 3 of Title 87 ("As used in Title 87, chapter 3, and this chapter, unless the context clearly indicates otherwise, the following definitions apply: ..." Hence, it cannot be used to construe § 87-1-216, MCA. Likewise, § 81-1-101, MCA specifies that its definitions are only applicable in Title 81.

The context of Title 87, chapter 1 gives no clear indication or requirement that the definition of "wild bison" from §§ 87-2-101 or 81-1-101, MCA should apply. This Court deviates from any suggestion of the *Maurier* Court that definitions of "wild bison" set forth in Title 87, chapter 2, and Title 81, chapter 1 apply to § 87-1-216, MCA. Given the request to amend, the Court proceeds to conduct further analysis on the status of the QFS bison.

IV: Status of QFS Bison

Plaintiffs contend that the QFS bison are no longer under FWP management authority as they are no longer "wild bison" due to the fact that they have been reduced to captivity for the period of their quarantine. Defendants assert that bison originating from YNP statutorily remain "wild bison" even as FWP, or perhaps DoL, undertake management actions that require fencing, captivity or containment (such as done with the QFS bison). Defendants also contend that Plaintiffs' interpretation would make meaningless various statutory provisions by declaring that any fenced or confined "wild bison" would result in reclassifying the animal. Defendants maintain that such an interpretation runs contrary to Montana's rules of statutory construction.

Montana courts have established several rules of statutory construction. First, it is noted that as a general rule, Montana public policy is set by the legislature through enacting laws that are later codified into statute. *Diaz v. State,* 2013 MT 331, ¶ 19 (J. Cotter concurring); *Fisher v. State Mut. Automobile Ins. Co.,* 2013 MT 208, ¶ 25; *Gryczan v. State,* 283 Mont. 433, 454, 942 P.2d 112, 125 (1997). A court's duty in interpreting statutes is to ascertain the intent of the legislature. *Friends of the Wild Swan v. Dep't of Natural Res. & Conservation,* 2005 MT 351, ¶ 13, 330 Mont. 186, 190, 127 P.3d 394, 397.

In performing its duty, a court must ascertain and declare what, in terms or substance, is contained in a statute; it is not the role of the court to insert what has been omitted or omit what has been inserted. *Matter of Estate of Langendorf,* 262 Mont. 123, 125-26, 863 P.2d 434, 436 (1993) (citing § 1–2–101, MCA).

Where a word is defined in a statute, a court must apply the statutory definition, even when the statutory definition differs from the plain meaning of the word. *City of Great Falls v. Montana Dep't of Pub. Serv. Regulation,* 2011 MT 144, ¶ 18, 361 Mont. 69, 74, 254 P.3d 595, 599; *Montana Beer Retailers' Protective Ass'n v. State Bd. of Equalization,* 95 Mont. 30, 25 P.2d 128, 130 (1933). This rule of statutory interpretation is because the statutory definition explicitly reflects the will of the legislature. *Montana Beer Retailers' Protective Ass'n,* 95 Mont. at 30, 25 P.2d at 130.

In the absence of a statutory definition, there is an assumption that the legislature intended the words to be interpreted according to their plain meaning. *Haker v. Southwestern Railway Co.*, 178 Mont. 364, 578 P.2d 724 (1978); *McClure v. State Compensation Ins. Fund,* 272 Mont. 94, 98, 899 P.2d 1093, 1096 (1995). Where the intent of the legislature can be determined from the plain meaning of the words used in a statute, the court may not go further

and apply other means of interpretation. *Stratemeyer v. Lincoln Cnty.*, 276 Mont. 67, 73, 915 P.2d 175, 178 (1996); *State v. Ruona*, 133 Mont. 243, 248, 321 P.2d 615, 618 (1958). When construing the plain meaning of statutory terms, the court must interpret terms reasonably and logically, and must accord them the "natural and popular meaning in which they are usually understood." *Jones v. Judge,* 176 Mont. 251, 254, 577 P.2d 846, 848 (1978).

If the plain words of a statute are ambiguous, the court must use other rules of statutory interpretation to decipher the intent of the legislature. *Jordan v. State,* 2007 MT 165, ¶ 8, 338 Mont. 113, 162 P.3d 863. A term is considered ambiguous when it lends itself to numerous interpretations. *See State v. Knudson*, 2007 MT 324, ¶ 23, 340 Mont. 167, 172, 174 P.3d 469, 472-73. When a term has more than one generally accepted meaning, it will be considered ambiguous and the court will resort to other rules of statutory interpretation. "The rules of statutory [interpretation] require [a court's] construction of a statute to account for the statute's text, language, structure, and object." *Van der hule v. Mukasey*, 2009 MT 20, ¶ 10, 349 Mont. 88, 92, 217 P.3d 1019, 1021.

However, there are notable exceptions to the rule that in the absence of a statutory definition, plain meaning controls. A court may interpret a term as varying from its plain meaning when doing so is the product of considering the statute in its entirety and the term is interpreted in accord with the manifest intent of the legislature. In giving effect to the purpose of the statute and the will of the legislature, "the context in which the words are used is more important than precise grammatical rules or a dictionary definition." *Burritt v. City of Butte*, 161 Mont. 530, 535, 508 P.2d 563, 566 (1973) (citing *Home Bldg. & Loan v. Bd. of Equalization*, 141 Mont. 113, 375 P.2d 312) "[S]tatutes must be read and considered in their entirety and the legislative intent may not be gained from the wording of any particular section

or sentence, but only from a consideration of the whole." *State v. Heath,* 2004 MT 126, ¶ 27, 321 Mont. 280, 90 P.3d 426 (citing *Home Bldg. & Loan Ass'n of Helena v. Fulton* (1962), 141 Mont. 113, 115, 375 P.2d 312, 313). When the plain meaning of a term clashes with the meaning the legislature has assigned to that term, as manifested by the context of the statute when read in its entirety, a court will disregard the term's plain meaning in favor of applying the contextual meaning. *See e.g., Burritt*, 161 Mont. at 535, 508 P.2d at 566.

Furthermore, a court must endeavor to "give effect to all statutory provisions within [the] statutory scheme." *Friends of the Wild Swan v. Dep't of Natural Res. & Conservation*, 2005 MT 351, 330 Mont. 186, 191, 127 P.3d 394, 398. It is only by reading and applying relevant statutory schemes in their entirety that a court may give effect to the will of the legislature. *Dukes v. City of Missoula,* 2005 MT 196, ¶ 14, 328 Mont. 155, 119 P.3d 61. As such, a court must avoid interpreting a statute in such a way that renders any sections of the statute superfluous. *State v. Berger*, 259 Mont. 364, 367, 856 P.2d 552, 554 (1993).

"The court must give effect to all relevant provisions of the statute." *Darby Spar, Ltd. v. Dept. of Revenue*, 217 Mont. 376, 379, 705 P.2d 111, 113 (1985). When the application of the plain meaning of a statutory term would render any portion of a statute superfluous, the court will decline to apply the plain meaning of the term, in favor of applying a meaning that can be reconciled with the entirety of the statute's provisions.

Using these rules of statutory construction, the Court now considers the statutes in question. Those statutes are found in Title 87, chapter 1, MCA, pertaining to FWP and Title 81, MCA, pertaining to the DoL.

a.) Title 87, chapter 1, MCA

FWP has management responsibilities for "wild buffalo or bison in this state that have

not been exposed to or infected with a dangerous or contagious disease but may threaten persons or property." § 87-1-216(2)(a), MCA. The Montana legislature did not define the term "wild buffalo or bison" for Title 87, chapter 1, MCA. Accordingly, the Court must interpret the term by its plain meaning unless 1) the plain meaning is ambiguous; 2) the context of the statute suggests that the legislature prescribed a definition that differs from its plain meaning; or 3) if by applying the plain meaning, the Court would render a section of the statute in question superfluous.

The dispositive word is "wild." Although there are numerous dictionary definitions of that term, the Court notes two particular definitions having application here. One such definition is "living in a state of nature, as animals that have not been tamed or domesticated." *The New Century Dictionary* Vol. 2, 2209 (1952). The other applicable definition is "feral"; or "[...] produced without the cultivation or the care of man." *The New Century Dictionary*, *supra* at 2209.

Clearly, the QFS bison are currently not living in a state of nature, as they have been removed from their natural environment, placed into fenced pastures for quarantine, and have been artificially denied freedom to roam. Under the first definition, the QFS bison are not "wild bison." Using the latter definition, the QFS bison are "wild bison" as they have been produced without the cultivation or care of man and remain feral or undomesticated.

Because the term "wild" has more than one generally accepted meaning leading to opposite conclusions when used to reference "wild bison," the Court finds that term as used in Title 87, chapter 1, MCA to be ambiguous. The Court must then look to the rules of statutory interpretation to determine the intent of the legislature.

As part of the legislature's grant of power to FWP to manage wild buffalo or bison,

FWP has authority to transplant and release "wild buffalo or bison" onto private or public land in Montana. § 87-1-216(5), MCA. Additionally, the statute mandates that FWP implement containment measures such as "contingency plans to eliminate or decrease the size of designated areas, including the expeditious relocation" of wild bison if FWP is "unable to effectively manage or *contain*" the wild bison. § 87-1-216(5)(c)(iv), MCA (emphasis added). The statute also provides that, "prior to making a decision to release or transplant wild buffalo or bison onto private or public land in Montana, the department shall respond to all public comment received[.]" § 87-1-216(6), MCA.

The legislature repeatedly uses diction such as "transplant," "relocate," "contain," and" release" when referring to actions that FWP may take in managing "wild bison." The consummation of each of the aforementioned actions demands that the bison be placed in captivity. Bison cannot be transplanted, relocated, contained, or released absent a period of confinement.

Despite the unavoidable implication of § 87-1-216, MCA that the bison it is referencing have been placed captivity for management purposes, the legislature, in every instance, attaches to the bison the nomenclature of "wild bison." Tellingly, the nomenclature of "wild bison" even succeeds, in some instances, the FWP management action that would necessarily subject the bison to captivity. *See e.g.,* § 87-1-216(6), MCA. The context of the statute clearly demonstrates that the legislature did not intend that being placed in captivity for purposes of FWP management should deprive the bison of their status as "wild."

Because the manifest intent of the legislature is such that a wild bison that is reduced to captivity by FWP for management purposes under § 87-1-216, MCA does not cease to be a wild bison, the Court must interpret the term "wild bison" accordingly. The clear will of the

legislature as understood through the context of the statute, as a whole, must be given effect. Bison originating from YNP that have been placed in captivity by FWP for management purposes remain "wild bison."

Furthermore, Plaintiffs' interpretation of the term "wild bison" would render much of Title 87, chapter 1 superfluous. Upon developing and adopting a management plan and obtaining appropriate owner authorization, Title 87 gives FWP authority to transplant and release wild bison. § 87-1-216(4) and (5), MCA. However, under Plaintiffs' construction of the term "wild bison," the instant that a bison is captured in order to be transplanted or released into a new location, the bison would become non-wild and FWP would lose its authority over the bison. FWP would no longer be able to exercise its legislatively delegated powers of transplantation and release.

Such a construction would also prove problematic for § 87-1-216(5)(c)(iv), MCA, wherein FWP is given authority to expeditiously relocate wild bison. In order to relocate the bison, FWP would need to capture or control them. However, under Plaintiffs' construction, the moment that FWP captures or controls the bison in order to relocate them, the bison would cease to be "wild bison" and FWP would lose its ability to complete the relocation.

The text of Title 87 itself shows the legislature intended FWP retain authority over bison from YNP that are placed in captivity for management purposes. The QFS bison are within the meaning of "wild bison" described in Title 87 chapter 1.

b.) Title 81, MCA

The Montana legislature has provided DoL also with certain management responsibilities for "wild buffalo or bison" under Title 81, MCA. *See* §§ 81-2-120 and 81-2-121, MCA. The definitional statute, § 81-1-101, MCA, defines "wild buffalo" or "wild bison"

as a bison 1) that has not been "reduced to captivity"; and 2) that is not owned by a person. It is evident that the QFS bison are not owned by any person. Whether or not the QFS bison are classified as "wild bison" for purposes of the DoL's management role hinges on whether they have been "reduced to captivity."

The statute does not define the term "reduced to captivity." Unless the statute read in its entirety and in context suggests that the legislature assigned a definition to that term that differs from its plain meaning, the Court must apply its plain meaning.

The dictionary definition of "reduced" is, "brought to another state or form." *The New Century Dictionary* Vol. 2, 1498 (1952). The dictionary defines "captivity" as "the state or period of being kept in confinement or restraint." *The New Century Dictionary* Vol. 1, 209 (1952). Taken together, the plain meaning of "reduced to captivity" is "to be brought to the state of being kept in confinement or restraint." Under this plain-meaning definition, the QFS bison certainly have been "reduced to captivity." As such, using the plain-meaning analysis, the QFS bison are not "wild bison" under Title 81, MCA.

However, the exception applies. It is clear that when the statutory scheme is read in its entirety and context, the legislature intended a more narrow definition of "reduced to captivity." The pertinent statutory language provides,

> The live wild buffalo or wild bison may be physically removed by the safest and most expeditious means from within the state boundaries, including but not limited to hazing and aversion tactics or capture, transportation, quarantine, or delivery to a department-approved slaughterhouse.
> § 81-2-120(1)(a), MCA.

> This chapter may not be construed to impose, by implication or otherwise, criminal liability on a landowner or the agent of the landowner for the taking of a publicly owned wild buffalo or wild bison that is suspected of carrying disease and that is present on the landowner's private property and is potentially associating with or otherwise threatening the landowner's livestock if the

> landowner or agent: (a) notifies or makes a good faith effort to notify the department in order to allow as much time as practicable for the department to first take or remove the publicly owned wild buffalo or wild bison that is present on the landowner's property … .
> § 81-2-121(1)(a), MCA.

Quarantine, transportation, and delivery alike necessitate bison being "brought to the state of being kept in confinement or restraint." Likewise, the taking or removal can require confinement or restraint. In addition, § 81-2-120(1)(d), MCA allows the DoL to not only quarantine but to capture, test and vaccinate "wild bison." Yet, under Title 81, the nomenclature "wild bison" remains attached to bison even upon such quarantine, transport, and delivery.

Indeed, most compellingly, § 81-2-120(1)(d), MCA explicitly refers to captive bison that have, after both testing and quarantine, been "certified as brucellosis-free" as "wild bison." The statute goes on to allow the certified, brucellosis-free "wild bison" to be "sold to help defray the costs that the [DoL] incurs in building, maintaining and operating necessary facilities related to the capture, testing, quarantine, or vaccination of the…wild bison." § 81-2-120(1)(a)(i). Clearly, with this language, the legislature distinguishes between being placed in captivity for management purposes and being "reduced to captivity."

Despite being in captivity for numerous procedures, some of which may require a significant duration of time to complete, bison still are not "reduced to captivity." Because being placed in captivity for management purposes differs from being "reduced to captivity," it follows that being placed in captivity for management purposes does not remove a bison from its status as a "wild bison." Since the QFS bison have been placed into captivity solely for purposes of management, specifically, quarantine, and are not owned by any person, they retain their status as "wild bison" for purposes of Title 81, MCA.

V: Conclusion

Judicial estoppel does not apply since the pending motion for declaratory judgment represents a change of position regarding matters of law. Due to procedural defects relative to amendment of pleadings, the motion could summarily be denied. However, it does include a request to amend and it is in the interest of judicial economy to analyze whether justice requires leave for amendment.

Plaintiffs have withdrawn all claims in this action excepting those asserted in the pending motion. The *Maurier* statement on the status of QFS bison as non-wild is at best suggestive and non-binding dictum. QFS bison, including but not limited to those bison moved to the Ft. Peck and Ft. Belknap Indian Reservations, are "wild bison" under Montana's statutory law. The other issue, namely, whether the DoL, and not FWP, has jurisdiction and management authority over these bison, which are not statutorily defined as "wild bison," is moot.

A Court may refuse to render a declaratory judgment on a moot question. *State ex rel. Miller v. Murray*, 183 Mont. 499, 503, 600 P.2d 1174, 1176 (1979) (citing *Chovanak v. Mathews*, 120 Mont. 520, 188 P.2d 582 (1948)). "A moot question is one which existed once but because of an event or happening, it has ceased to exist and no longer presents an actual controversy." *Murray*, 183 Mont. at 503, 600 P.2d at 1176.

Justice does not exist to allow leave to amend Plaintiff's complaint to assert the claims identified in the pending motion.

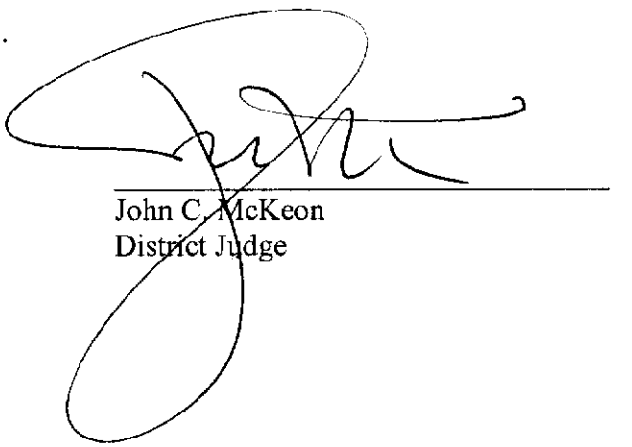
Good cause appearing, **IT IS HEREBY ORDERED that**

1) Plaintiffs' Motion for Declaratory Judgment is DENIED.

2) To the extent Plaintiffs' motion is recognized as a request for leave to amend its complaint, the motion is DENIED.

3) The Clerk shall forthwith send a copy of this order to counsel of record.

DATED this 3rd day of April, 2014.



John C. McKeon
District Judge

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MONTANA SEVENTEENTH JUDICIAL DISTRICT COURT, BLAINE COUNTY
****
CAUSE DV2012-1

CITIZENS FOR BALANCED USE, ET AL
V
JOSEPH MAUIER

CERTIFICATE OF SERVICE
****

Kay Johnson, being duly sworn, says that she is the Clerk of the District Court of Blaine County, Montana, that on April 7, 2014, sent or delivered, correct and true copies of ORDER DENYING PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT

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