

Timothy J. Preso  
Earthjustice  
313 East Main Street  
Bozeman, Montana 59715  
(406) 586-9699 | Phone  
(406) 586-9695 | Fax  
tpreso@earthjustice.org

*Attorney for Intervening Defendants*

MONTANA SEVENTEENTH JUDICIAL DISTRICT COURT,  
BLAINE COUNTY

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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,	)	
	)	Cause No. DV-2012-1
Plaintiffs,	)	
	)	
v.	)	<b>INTERVENING DEFENDANTS'</b>
	)	<b>BRIEF IN RESPONSE TO</b>
DEPARTMENT OF FISH, WILDLIFE &	)	<b>PLAINTIFFS' MOTION FOR</b>
PARKS; and MONTANA FISH, WILDLIFE	)	<b>DECLARATORY JUDGMENT</b>
& PARKS COMMISSION,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
DEFENDERS OF WILDLIFE and	)	
NATIONAL WILDLIFE FEDERATION,	)	
	)	
Intervening Defendants.	)	

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## INTRODUCTION

Following rejection of the central theory of their case by the Montana Supreme Court and completion of the wild bison transfers to the Fort Peck and Fort Belknap Reservations that they sought to preclude, plaintiffs Citizens for Balanced Use, et al. (“CBU”), seek to salvage this litigation through a motion for declaratory judgment. CBU asks this Court for a judgment declaring that all bison within a Quarantine Feasibility Study (“QFS”) conducted pursuant to the Interagency Bison Management Plan—including any of the transferred bison that might ever escape reservation boundaries—constitute livestock under the jurisdiction of the Montana Department of Livestock, not wildlife under the jurisdiction of the Montana Department of Fish, Wildlife and Parks (“FWP”). CBU contends that issuance of the requested judgment is virtually pre-ordained because of an observation made by the Montana Supreme Court in the course of rejecting CBU’s preliminary injunction argument.

This Court should deny CBU’s motion. CBU illegitimately attempts to transform a dictum from the Montana Supreme Court into binding precedent and relies on inapplicable statutory authorities. CBU also disregards a number of statutory provisions that undermine its position, ignores a contrary interpretation by the administrative agency charged with implementing the relevant statute, and glosses over the implausible and troubling implications of its argument. This Court should not accept CBU’s invitation to enter a declaratory judgment that is supported by neither law nor logic. CBU’s motion should be denied.

## ARGUMENT

CBU’s declaratory judgment motion proceeds from a flawed premise: CBU asserts that the Montana Supreme Court’s decision in Citizens for Balanced Use v. Maurier, 2013 MT 166, 370 Mont. 410, 303 P.3d 794, “essentially requires” this Court to declare that any QFS bison escaping reservation boundaries would not constitute wildlife under the jurisdiction of FWP but

instead would constitute livestock under the jurisdiction of the Montana Department of Livestock because the bison “have been reduced to captivity” during the quarantine and transfer program. Plaintiff’s Brief in Support of Motion for Declaratory Judgment (“CBU Br.”) at 4, 6.

CBU is wrong. The Supreme Court discussion cited by CBU is dictum that is not binding on this Court and is not persuasive in resolving the issue raised by CBU’s motion. Instead, this Court must independently address the status of the transferred bison under applicable authorities. As those authorities make clear, there is no statutory definition of the term “wild buffalo or bison” that applies to Mont. Code Ann. § 87-1-216, which is the statute authorizing FWP to manage the QFS bison. See Mont. Code Ann. § 87-1-216(2). In the absence of a definition prescribed by statute, this Court should accept FWP’s reasonable interpretation of § 87-1-216 to encompass the bison at issue.

**I. CBU WRONGLY ATTEMPTS TO BIND THIS COURT TO THE MONTANA SUPREME COURT’S DICTUM**

CBU wrongly asserts that the Montana Supreme Court “held” in Citizens for Balanced Use v. Maurier that bison involved in the Quarantine Feasibility Study do not qualify as “wild buffalo or bison” under Mont. Code Ann. § 87-1-216.<sup>1</sup> CBU Br. at 5. The Montana Supreme Court held no such thing. Regarding the application of § 87-1-216 to this case, the Supreme Court addressed the issue whether that statute’s references to “private or public land in Montana,” § 87-1-216(4)-(6), included tribal lands. Citizens for Balanced Use, ¶¶ 15-16. As to that issue, the Supreme Court held only that

the Legislature did not intend that the phrase ‘private or public land in Montana’ include tribal lands and did not intend that § 87-1-216 apply to the transfer of the quarantined Yellowstone bison to tribal lands of the Ft. Peck and Ft. Belknap Tribes.

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<sup>1</sup> All statutory references in this brief are to the Montana Code Annotated. Further statutory references will be limited to the relevant section number.

Id., ¶ 20; see also Order to Vacate Preliminary Injunction and to Require Plaintiffs File a Status Report (Aug. 12, 2013), at 2 (describing Montana Supreme Court’s ruling regarding application of § 87-1-216).

In contrast, the passage from Citizens for Balanced Use quoted and relied upon by CBU does not reflect the Court’s holding. In that passage, which is found in paragraph 15 of the Supreme Court’s opinion, the Court quoted a statutory definition of the term “wild buffalo or bison,” which it attributed to two definitional provisions of the Montana Code (§§ 81-1-101(6) and 87-2-101(1)), and then observed that “[t]he 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.” Citizens for Balanced Use, ¶ 15. The Supreme Court explicitly did not reach any holding on this definitional issue because “[t]he parties did not raise or brief this issue and it was not addressed by the District Court.” Id. Rather, the Supreme Court focused on interpreting the statutory language “private or public land” in § 87-1-216 because it constituted the basis for this Court’s preliminary injunction and the parties’ arguments on appeal. See id.

In short, the passage from the Citizens for Balanced Use opinion relied upon by CBU is not the Supreme Court’s holding but rather obiter dictum—“[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, ¶ 28, 354 Mont. 15, 221 P.3d 666 (quoting Black’s Law Dictionary 1102); see Giambra v. Kelsey, 2007 MT 158, ¶ 54, 338 Mont. 19, 162 P.3d 134 (stating that “general observation” that “was unnecessary to this Court’s decision” constituted “dicta”).

Further, contrary to CBU’s assertion that the Supreme Court’s definitional observation “essentially requires” this Court to hold that “quarantined bison reduced to captivity are not wild bison,” CBU Br. at 6, the Montana Supreme Court has held that “[d]ictum is not binding upon this Court as controlling precedent, and it is not persuasive authority for this Court in resolving the issue before [it.]” State v. Otto, 2012 MT 199, ¶ 17, 366 Mont. 209, 285 P.3d 583; accord State v. Marble, 2005 MT 208, ¶ 26, 328 Mont. 223, 119 P.3d 88; State v. Montoya, 1999 MT 180, ¶ 24, 295 Mont. 288, 983 P.2d 937; State v. Gopher, 193 Mont. 189, 194, 631 P.2d 293, 296 (1981). Such dictum is no more binding upon this Court than it would be upon the Supreme Court itself; the Supreme Court has reversed a district court for improperly relying on dictum from the Montana Supreme Court and thereby failing to independently adjudicate the issue before it. See In re Marriage of Fontenot, 2006 MT 324, ¶¶ 23-27, 335 Mont. 79, 149 P.3d 28 (“We hold that the District Court improperly relied on the dictum from Fontenot I and thus erred in concluding, as a matter of law, that it had jurisdiction over this custody dispute.”).

In sum, the dictum cited by CBU is not binding upon this Court in addressing the issue raised by CBU’s motion for declaratory judgment. Nor is it even persuasive in light of the authorities that actually govern that issue. As set forth below, those authorities require denial of CBU’s motion.

## **II. THE STATUTORY DEFINITIONS CITED BY CBU FAIL TO SUPPORT ITS ARGUMENT**

CBU’s definitional argument fails at the outset because the definitions upon which CBU relies are inapplicable to FWP’s bison-management authority under § 87-1-216. In fact, there is no statutory definition of the term “wild buffalo or bison” in § 87-1-216. Further, even if this Court were to examine the definitions cited by CBU in interpreting § 87-1-216, they would not

support CBU's argument that "quarantined bison reduced to captivity are not wild bison." CBU Br. at 6.

**A. The Definitional Provisions Cited By CBU Are Inapplicable**

CBU primarily seeks to rely on two definitional provisions from Montana's "Livestock" code, which is contained within Title 81. CBU first cites § 81-1-101, which defines a "wild buffalo" or "wild bison" as "a bison that has not been reduced to captivity and is not owned by a person." § 81-1-101(6); see CBU Br. at 5. However, this definition applies only "in Title 81" of the Montana Code. § 81-1-101. FWP's authority over wild bison is set forth in § 87-1-216, which is, of course, contained within the Title 87 "Fish and Wildlife" code—not the Title 81 "Livestock" code. Accordingly, by its plain terms § 81-1-101 is inapplicable to FWP's authority to manage bison.

CBU also cites § 81-2-702, claiming that this provision of "[t]he Montana Code provides that bison other than 'wild bison' are 'livestock.'" CBU Br. at 7. Contrary to CBU's argument, § 81-2-702 applies even more narrowly than the inapplicable § 81-1-101. Not only do the definitions contained in § 81-2-702 apply only in the Title 81 "Livestock" code, but they apply only in Chapter 2, Part 7 of Title 81, addressing "Importation Permits and Health Certificates." See § 81-2-702 (setting forth definitions for terms "[a]s used in this part"). Accordingly, this provision too does not apply to Title 87 concerning "Fish and Wildlife," including § 87-1-216.

With respect to definitional provisions within the Title 87 "Fish and Wildlife" code, there is no provision defining the term "wild buffalo or bison" in § 87-1-216. CBU nevertheless references the Montana Supreme Court's dictum citing a definition of "wild buffalo" contained in another part of the "Fish and Wildlife" code, § 87-2-101(1), although CBU does not otherwise cite or discuss this provision. See CBU Br. at 5 (quoting Citizens for Balanced Use, ¶ 15, which cites § 87-2-101(1)). The quoted dictum appears to cite the wrong definitional subsection of §

87-2-101, because subsection (1)—the definition cited by the Supreme Court—defines the terms “angling” or “fishing”; the term “wild buffalo” is defined in subsection (14), which was not cited by the Supreme Court or CBU. However, even if this Court were to examine the “wild buffalo” definition in subsection (14) of § 87-2-101, it is inapplicable. Although this provision is at least contained within Title 87, it defines words only as they are “used in Title 87, chapter 3, and [chapter 2],” which address licensing and regulation of hunting and fishing. § 87-2-101. By contrast, the statute authorizing FWP’s management of QFS bison, § 87-1-216, is not contained in chapters 2 or 3 of Title 87, but instead is contained in chapter 1 of Title 87, which concerns the organization and operation of FWP. Accordingly, § 87-2-101 does not apply to the FWP bison-management statute at issue.

In sum, none of the definitional provisions directly or even indirectly relied upon by CBU applies to FWP’s authority to manage bison as wildlife under Mont. Code Ann. § 87-1-216 and, indeed, there is no statutory definition that applies to this authority.

**B. Even If They Were Applicable, The Cited Provisions Do Not Support The Requested Declaratory Judgment**

Even if the statutory provisions cited by CBU were applicable to inform an interpretation of § 87-1-216, they would not support CBU’s requested declaratory judgment. CBU focuses on statutory definitions from the Title 81 “Livestock” code that divide wild bison from domestic bison based on, among other things, whether they have been “reduced to captivity.” CBU Br. at 4, 5 (discussing definitions contained in § 81-1-101). Contrary to CBU’s argument, however, the Montana Legislature has made clear that wild bison remain wildlife under the cited definitions regardless of confinement as part of an authorized bison transfer program.

Section 81-1-101 defines “wild buffalo,” “wild bison,” and “domestic bison” for purposes of the Title 81 “Livestock” code. See § 81-1-101(4), (6). While “wild buffalo” and

“wild bison” mean “a bison that has not been reduced to captivity and is not owned by a person,” § 81-1-101(6), the Legislature’s own use of the term “wild buffalo or wild bison” within Title 81 demonstrates that it did not intend the definition of those terms to mean that “quarantined bison reduced to captivity are not wild bison.” CBU Br. at 6. Specifically, under another provision of Title 81, § 81-2-120, the Legislature provided for the Department of Livestock to, among other things, “capture[], test[], quarantine[], and vaccinate[]” a “live wild buffalo or wild bison” that enters Montana from a herd infected with disease. § 81-2-120(1)(d) (emphases added). The Legislature made clear that such a captured and quarantined bison remains a “wild buffalo” or “wild bison” under the Title 81 definitions even after being reduced to quarantine captivity, as § 81-2-120 goes on to provide that such quarantined “[w]ild buffalo or wild bison that are certified by the state veterinarian as brucellosis-free” may be “transferred to qualified tribal entities” that participate in a disease control program. § 81-2-120(1)(d)(ii) (emphasis added). The Legislature further established that bison emerging from such a quarantine program remain “wild buffalo” or “wild bison” under the Title 81 definitions, providing that, upon completion of quarantine captivity, “[a]cquisition of wild buffalo or wild bison by a qualified tribal entity” must be done so as not to jeopardize compliance with state or federal livestock disease control programs. Id. (emphasis added).

The Legislature’s repeated references to wild bison confined in, and emerging from, quarantine captivity as “wild buffalo or wild bison” in § 81-2-120(1)(d) establish that such confinement as part of a bison transfer program does not disqualify the affected bison as “wild buffalo” or “wild bison” under the Title 81 definitions specified in § 81-1-101(6)—the very definitional provision upon which CBU principally relies. See Mont. Sports Shooting Ass’n, Inc. v. Mont. Dep’t of Fish, Wildlife & Parks, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003

(stating that courts must “construe a statute by reading and interpreting the statute as a whole, without isolating specific terms from the context in which they are used by the Legislature”) (quotations and citation omitted). This combination of statutory definitions and subsequent usages reflects a deliberate legislative choice, as evidenced by the fact that the relevant definitions and substantive provisions were enacted in the same bill. Senate Bill 207 (“S.B. 207”) from the 2011 Montana Legislature added the applicable definition of “wild buffalo” and “wild bison” in Mont. Code Ann. § 81-1-101(6) and then added the word “wild” to existing provisions of § 81-2-120(1)(d) authorizing the capture, quarantine and transfer of bison. See S.B. 207, 2011 Leg. (Mont. 2011), at 2, 3 (attached as Exhibit 1). CBU’s argument that “quarantined bison reduced to captivity are not wild bison,” CBU Br. at 6, cannot be reconciled with this legislative action.<sup>2</sup>

Turning to the Title 87 “Fish and Wildlife” code, the “wild buffalo” definition in § 87-2-101 (which was cited by the Montana Supreme Court in the dictum quoted by CBU, see CBU Br. at 5 (quoting Citizens for Balance Use, ¶ 15)), indicates no legislative intention to treat quarantined wild bison as livestock. As discussed, § 87-2-101 defines “wild buffalo” for purposes of chapters 2 and 3 of Title 87, which address licensing and regulation of hunting and fishing. See § 87-2-101(14). In that context, it makes sense to define a “wild buffalo” as “buffalo or bison that have not been reduced to captivity,” § 87-2-101(14), because the Legislature would not wish to authorize hunting of captive bison. For example, chapter 2 of

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<sup>2</sup> CBU’s citation of § 81-2-702, see CBU Br. at 7, adds nothing to this statutory analysis. Section 81-2-702 defines the term “livestock” to include “bison” for the purposes of the Livestock Department’s importation permit and health certificate authorities and responsibilities under Part 7 of Title 81. See § 81-2-702(5). In turn, § 81-1-101(1) defines the term “bison” throughout Title 81—including as used in the definition of “livestock” under § 81-2-702. See § 81-1-101(1)(a), (b). Accordingly, the meaning of the term “bison” in § 81-2-702(5) is derivative of § 81-1-101(1), which, as discussed above, does not define as livestock those wild bison held in captivity as part of a bison transfer program.

Title 87 categorizes “wild buffalo” as “game animals,” *id.* § 87-2-101(4), and provides the opportunity for hunters to apply for licenses to shoot “wild buffalo,” *id.* §§ 87-2-701(1)(g), 87-2-702(5). A “wild buffalo” definition that excludes captive bison from these provisions ensures that hunters are not authorized to shoot confined animals. However, nothing in this statutory scheme indicates a legislative intent to reach beyond the hunting context to classify quarantined wild bison as livestock in the context of an authorized bison transfer program.

In sum, even if this Court were to consider the statutory provisions cited by CBU, they do not support CBU’s argument that wild bison held in captivity for a period of time as part of a bison transfer program are transformed into livestock under Montana law. Rather, they support the opposite conclusion.

**III. THIS COURT SHOULD DEFER TO FWP’S INTERPRETATION OF THE TERM “WILD BUFFALO OR BISON” IN § 87-1-216**

Given that there is no controlling statutory definition of the term “wild buffalo or bison” as used in § 87-1-216, this Court should defer to FWP’s interpretation of that statutory term to include wild bison held captive as part of an authorized bison transfer program. FWP has stated that the QFS bison “originated from Yellowstone National Park as wild bison”; “[t]hey continue to be wild bison, under the jurisdiction of FWP;” and “[i]f they escaped and moved off the reservation, they would be considered wildlife under jurisdiction of MFWP.” FWP, Decision Notice: Interim Translocation of Bison (Dec. 2011), at 12; see also Memorandum of Understanding Between FWP and the Assiniboine & Gros Ventre Tribes, Fort Belknap Indian Community (Aug. 13, 2013), at 4 (“QFS bison that move off the reservation will be considered wildlife by MFWP, subject to applicable wildlife statutes and rules under Title 87 MCA.”) (attached as Exhibit 2); Memorandum of Understanding Between FWP and the Assiniboine &

Sioux Tribes of the Fort Peck Reservation for Quarantine Feasibility Study Bison (Mar. 16, 2012), at 3 (same).<sup>3</sup>

FWP’s administrative construction of the statute is a key factor for this Court to consider in interpreting § 87-1-216. See Bostwick Properties, Inc. v. Mont. Dep’t of Nat. Resources & Conservation, 2013 MT 48, ¶ 23, 369 Mont. 150, 296 P.3d 1154 (stating that among factors for courts to consider in statutory interpretation is “whether an agency charged with administration of the statute has placed a construction on the statute”). “[I]t is clear that, when faced with problems of statutory construction, the court must show deference and respect to the interpretations given the statute by the officers and agencies charged with administration.” State ex rel. Dep’t of Highways v. Midland Materials Co., 204 Mont. 65, 70, 662 P.2d 1322, 1325 (1983); see Molnar v. Fox, 2013 MT 132, ¶ 27, 370 Mont. 238, 301 P.3d 824 (stating that, although administrative interpretations are not binding on the courts, “they are entitled to respectful consideration” in resolving statutory construction issues) (quotations and citation omitted). Here, this Court should respect and accept FWP’s interpretation that the bison at issue remain wildlife under FWP’s jurisdiction pursuant to § 87-1-216—and reject CBU’s contrary interpretation—for three reasons.

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<sup>3</sup> To avoid burdening the Court with redundant filings, intervening defendants have not appended record documents previously filed with earlier submissions in this case. The FWP Decision Notice is attached as Exhibit 1 to intervening defendants’ brief in opposition to CBU’s preliminary injunction motion, filed on April 3, 2012. FWP’s Memorandum of Understanding with the Fort Peck Tribes is attached as Exhibit 2 to the state defendants’ brief in opposition to CBU’s preliminary injunction motion, filed on April 9, 2012.

**A. FWP’s Interpretation Comports With Existing Statutory Direction Concerning The Status Of Wild Bison Confined In Quarantine**

First, FWP’s interpretation comports with the only guidance provided by the Montana Legislature concerning the legal status of wild bison confined as part of an authorized bison transfer program. As discussed at Point II.B, supra, a provision of Montana’s Title 81 “Livestock” code, § 81-2-120, establishes that wild bison that are captured and quarantined before transfer to a qualified tribal entity remain “wild buffalo or wild bison” under the applicable statutory definitions of those terms. See Mont. Code Ann. § 81-2-120(1)(d). Although this provision of Title 81 does not apply to FWP, it is the only provision of the Montana Code that addresses the status of wild bison subjected to captivity as part of a transfer program. Further, given that FWP is required to cooperate with the Department of Livestock in managing bison under § 81-2-120, see § 87-1-216(2)(c), it was reasonable for FWP to interpret its own authorizing statute to align with the Legislature’s usage of the term “wild buffalo or wild bison” in § 81-2-120. See Citizens for Balanced Use, ¶¶ 16, 20 (looking to § 81-2-120(1)(d) to inform interpretation of FWP authority under § 87-1-216). For this reason alone, this Court should accept FWP’s statutory interpretation in this case.

**B. CBU’s Contrary Interpretation Would Render § 87-1-216(4)-(7) (S.B. 212) Effectively Meaningless**

Second, CBU’s contrary interpretation—that bison that have been “reduced to captivity” are no longer wildlife under the jurisdiction of FWP, CBU Br. at 4—would effectively nullify statutory provisions governing FWP’s transfer of bison under § 87-1-216(4)-(7), also known as the 2011 Legislature’s Senate Bill 212 (“S.B. 212”). S.B. 212 established a number of planning, public involvement, and landowner permission requirements that must be satisfied before FWP may “release, transplant, or allow wild buffalo or bison on any private or public land in Montana.” § 87-1-216(4) (emphasis added); see Citizens for Balanced Use, ¶ 13 (summarizing

S.B. 212 provisions). As this language demonstrates, the presence of “wild buffalo or bison” under the jurisdiction of FWP is a prerequisite for any application of S.B. 212.

Despite CBU’s own extensive reliance on S.B. 212 throughout the preliminary injunction proceedings in this case, CBU now espouses an argument that, if accepted, would lead to an implausible outcome where S.B. 212 would never apply to any bison. As to wild bison that naturally migrate into Montana from Yellowstone National Park, S.B. 212 was never intended to reach such bison and the Sixth Judicial District Court, Park County, has so held. See Final Order and Judgment on (Amended) Joint Petition, Park County Stockgrowers Ass’n v. Mont. Dep’t of Livestock, Nos. DV-11-77 & DV-11-78, slip op. at 57-58 (6th Jud. Dist. Ct. Jan. 7, 2013) (attached as Exhibit 3). In reaching its conclusion, the Park County court relied on numerous statements from S.B. 212 and its legislative history demonstrating that the Legislature intended for this statute to apply only where wild bison are “released or transplanted onto private or public land.” Id., slip op. at 57 (quoting S.B. 212, 2011 Leg. (Mont. 2011), at 1) (emphasis in original). However, under CBU’s interpretation, S.B. 212 also would never apply even to wild bison that are released or transplanted onto private or public land in Montana. This is because, as a practical matter, all such bison must be “reduced to captivity,” CBU Br. at 4, before they may be released or transplanted by FWP. A period of captivity is inherent in any program undertaken to capture wild animals, potentially quarantine them (depending upon their source), and load them on to vehicles for release at a different site. See FWP Final Env’tl. Assessment for Interim Translocation of Bison (Nov. 2011), at 10 (explaining that federal brucellosis-prevention rules “discourage the movement of animals from brucellosis-affected herds unless the animals have first cleared quarantine”) (attached to CBU Br. as Exhibit A). Yet, under CBU’s theory, such captivity means that the affected bison “are not ‘wild bison’ but are non-wild ‘bison’”—i.e.,

livestock—under the jurisdiction of the Montana Department of Livestock rather than FWP. See CBU Br. at 7. Accordingly, such bison would not qualify as “wild buffalo or bison” under FWP’s jurisdiction within the meaning of S.B. 212, and S.B. 212 would be inapplicable.

This ramification of CBU’s argument raises a critical question: If S.B. 212 does not apply to wild bison that naturally migrate into Montana, and S.B. 212 also does not apply to wild bison that are transplanted or released into Montana after a period of captivity, then to what wild bison does S.B. 212 apply? CBU offers no help in answering that question, merely stating that “FWP would have jurisdiction and management authority with respect to ‘wild bison’ on Montana public and private lands for the limited areas where such authority is granted in § 87-1-216”—without explaining what those “limited areas” may be. CBU Br. at 7. However, given that captivity will necessarily precede any transplant or release of bison by FWP, CBU’s argument would, as a practical matter, nullify S.B. 212 because no bison would fall within its terms. This Court should not accept such a result. See Oster v. Valley Cnty., 2006 MT 180, ¶ 17, 333 Mont. 76, 140 P.3d 1079 (“A presumption exists that the Legislature does not pass meaningless legislation ...”).

CBU’s argument is particularly ironic because one of the plaintiffs, Montana Senator Rick Ripley, was the primary sponsor of S.B. 212. See Second Amended Compl. (filed Nov. 19, 2012) ¶ 5. As plaintiff Ripley alleged in his own complaint in this case, he sponsored S.B. 212 in response to a purported “state-wide outcry over the [FWP] Commission’s interest in bison transplantation.” Id. ¶ 21. In so doing, plaintiff Ripley crafted legislation that regulates FWP’s actions with respect to transplant and release only of “wild buffalo or bison.” § 87-1-216(4)-(6). Yet Senator Ripley himself now sponsors a legal argument before this Court that would render his own S.B. 212 provisions inapplicable to transplanted bison, because, under that argument, the

very act of reducing bison to captivity as a precursor to transplantation would render those bison no longer “wild buffalo or bison” under the jurisdiction of FWP. This absurd outcome offers further reason to reject CBU’s position. See Mont. Sports Shooting Ass’n, ¶ 11 (“Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it.”).

**C. CBU’s Argument, If Accepted, Would Significantly Impede Wildlife Restoration Programs**

Third, and finally, the practical implication of CBU’s argument—i.e., that individuals of a wildlife species are no longer legally classified as wildlife once “they have been reduced to captivity,” CBU Br. at 4—provides further reason to deny the requested declaratory judgment. Because capture and confinement are inherent aspects of many wildlife restoration efforts, acceptance of CBU’s theory would impede the kinds of wildlife restoration programs that have brought numerous valued species back from the brink of extinction across Montana.

As explained in the attached Affidavit of Keith Aune, former FWP Chief of Research and Technical Services and now Senior Conservation Scientist for the Wildlife Conservation Society, “[w]ildlife restoration efforts frequently require holding individual members of a species in captivity prior to releasing them to repopulate appropriate natural habitats.” Affidavit of Keith Aune (“Aune Aff.”) ¶ 5 (attached as Exhibit 4). Indeed, wildlife species such as deer, elk, and pronghorn antelope are abundant across large areas of Montana today only because of historical restoration programs that captured wild individuals and confined them for a period of time before shipping them to release sites. See id.; see also Harold D. Picton & Terry N. Lonner, Montana’s Wildlife Legacy: Decimation to Restoration 83-92 (mule deer), 93-99 (white-tailed deer), 100-113 (pronghorn antelope), 114-34 (Rocky Mountain elk) (2008) (excerpt attached as Aune Aff. Exhibit 2). With respect to Rocky Mountain elk alone, a series of more than 200 such capture-and-release actions from 1910 through 1997 restored this species from a severely reduced range

in two mountainous areas of western Montana to its present widespread abundance across large stretches of western, central, and southeastern Montana. See Picton & Lonner, supra, at 125-33.

While some wildlife restoration programs involve relatively short periods of animal confinement, others require longer periods of captivity. See Aune Aff. ¶ 6. For example, because of the difficulty of successfully handling adult pronghorn antelope, pronghorn antelope fawns must be hand-reared in captivity for at least a year to provide animals for release. See id. Other species, such as peregrine falcons and black-footed ferrets, have required extensive and lengthy captive propagation programs to provide animals for restoration efforts that were essential to preserve these species from extinction. See id. Quarantine programs also frequently play a role in wildlife restoration activities to prevent spread of disease or parasites, and must be applied for as long as the known incubation period for the disease or parasite of concern. See id. ¶ 7.

If, as CBU's argument would suggest, a period of captivity were sufficient to disqualify the affected animals from legal classification as wildlife—thereby removing them from the jurisdiction of wildlife managers and requiring them to be treated under the law as domestic animals or livestock—the consequence would be to significantly reduce and perhaps eliminate the opportunity for such wildlife restoration programs, with a commensurate reduction in the opportunity for public enjoyment of wildlife through hunting, observation, and other activities. See id. ¶¶ 9-10. CBU offers no justification for such a frustration of the public interest. For this reason too, CBU's motion should be denied.

**CONCLUSION**

For the foregoing reasons, intervening defendants Defenders of Wildlife and National Wildlife Federation respectfully request that this Court deny CBU's Motion for Declaratory Judgment.

Respectfully submitted this 15th day of October, 2013.



Timothy J. Preso  
Earthjustice  
313 East Main Street  
Bozeman, Montana 59715  
(406) 586-9699 | Phone  
(406) 586-9695 | Fax  
tpreso@earthjustice.org

*Attorney for Intervening Defendants*

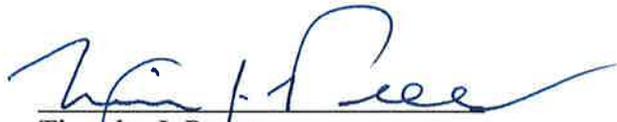
## CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2013, I caused the foregoing document, with exhibits, to be sent by First-Class Mail, postage prepaid, to:

Hon. John C. McKeon  
District Judge  
17th Judicial District  
304 3rd Avenue West  
Malta, MT 59538

J. Daniel Hoven  
Steve Wade  
Chad E. Adams  
Christy S. McCann  
Browning, Kaleczyc, Berry & Hoven, P.C.  
800 N. Last Chance Gulch, Suite 101  
P.O. Box 1697  
Helena, MT 59624-1697

Rebecca Jakes Dockter  
Chief Legal Counsel  
Montana Department of Fish, Wildlife and Parks  
1712 9th Avenue  
P.O. Box 200701  
Helena, MT 59620-0701



Timothy J. Preso

## **Exhibit 4**

## AFFIDAVIT OF KEITH AUNE

I, Keith Aune, declare as follows:

1. I am a resident of Bozeman, Montana.

2. I am a certified wildlife biologist. I hold a Bachelor of Science degree in Wildlife Biology from the University of Montana and a Master of Science degree in Fish and Wildlife Management from Montana State University. I have spent the past 35 years working as a wildlife biologist and conservation scientist for public and private institutions. For 28 of those years, I worked for the Montana Department of Fish, Wildlife and Parks ("FWP") in various capacities, including wildlife biologist, research biologist, wildlife laboratory supervisor, and chief of research and technical services. My curriculum vitae is attached as Exhibit 1.

3. My work has involved the study of, and participation in, numerous wildlife restoration efforts, including restoration of wildlife species to habitats that the species previously occupied but from which they had been eliminated. I have worked on the recovery and restoration of tundra swans, beaver, grizzly bears, bighorn sheep, mountain goats and bison in Montana.

4. In my current capacity as senior conservation scientist for the Wildlife Conservation Society ("WCS"), my work focuses on the ecological recovery of bison. Founded in 1895, WCS seeks to conserve wildlife and wild places across the globe. I manage WCS's North America work on the American bison and currently lead WCS's American Bison Society Initiative, which is an effort to achieve the second recovery of the American bison in North America. The American Bison Society formed in 1905 and accomplished the first recovery of any wildlife species by preserving the American bison from extinction at the end of the 19th century. WCS has re-established the American Bison Society in 2006 and began the modern

ecological restoration of the species. To advance this initiative, we have identified suitable large landscapes for the restoration of bison to benefit grassland ecosystems and human cultures.

Several restoration efforts are already under way in the Great Plains of Canada, the United States, and Mexico. I am the chair of the Bison Specialist Group for the International Union for Conservation of Nature (“IUCN”), which is the world’s leading international research authority on conservation of species and related environmental issues.

5. Wildlife restoration efforts frequently require holding individual members of a species in captivity prior to releasing them to repopulate appropriate natural habitats. In some instances this even requires captive propagation to bring a species back from the brink of extinction. In other instances the captivity serves the purpose of quarantine to prevent unintended spread of disease to vulnerable populations. Finally, this methodology also enables genetic rescue of species or subspecies that are extremely rare or endangered. Limited periods of captivity have been applied to nearly all taxa in the natural world including, birds, amphibians, fish, mammals, and reptiles. Such periods of captivity have constituted essential aspects of numerous wildlife restoration programs around the nation and the world. Holding wildlife in captivity for quarantine, translocation and even propagation has been a standard method employed to restore many highly valued wildlife including turtles, frogs, turkey, Canada geese, whooping cranes, tundra swans, peregrine falcons, swift fox, beaver, black footed ferrets, bighorn sheep, mountain goats, wolves or grizzly bears. In Montana, even common species that are plentiful today, including elk, deer, and pronghorn antelope, are present in parts of the state only because of historic transplantation, captive propagation and release programs that required holding animals in captivity for various periods of time. At the end of the 19th century, populations of many wildlife species were severely reduced in Montana due to decades of

excessive hunting and habitat destruction. For example, elk in the early 1900s existed in Montana only in the area bordering Yellowstone National Park and in a mountainous region of northwest Montana. Even mule deer had vanished from many areas of central and eastern Montana. Beginning in the 1890s and continuing extensively through the 1960s, private individuals and wildlife managers captured animals from remnant populations of deer, elk, pronghorn antelope, and other game species. These animals were frequently confined in fenced enclosures before being transported by rail, truck, and wagon to release sites around the state. Such efforts were critical to restoring these species to many locations throughout western, central, and eastern Montana, where they provide significant public benefits today. In their book, "Montana's Wildlife Legacy: Decimation to Restoration," published in 2008, Harold D. Picton and Terry N. Lonner catalog literally dozens of such wildlife restoration activities across Montana, each of which required confinement of individual animals for a period of time to achieve its objectives. A relevant excerpt from the Picton and Lonner book is attached as Exhibit 2.

6. While some wildlife restoration efforts have required holding individual animals in captivity for a relatively brief period of time, others have involved more extended periods of confinement. For example, because adult pronghorn antelope are difficult to transport and frequently were harmed or killed during capture, wildlife managers developed a technique of hand-rearing antelope fawns to provide suitable animals for restoration programs. Such fawns are raised in captivity until they are at least 1 year old at which point they are transported to appropriate habitats and released. Similarly, black-footed ferrets, which are a native species of the Great Plains, have been the subject of an intensive restoration program that required captive breeding of adult ferrets to provide animals for release at restoration sites, including in Phillips

County, Montana. Another example is the peregrine falcon, which suffered a major population collapse as a result of exposure to heavy pesticide use in the 1950s and early 1960s. Wildlife managers restored this species by rearing hatchling falcons in captivity to provide birds for restoration to suitable habitat. In each of these cases, and others, an extended period of captivity and intensive human stewardship were essential to produce animals suitable for wildlife restoration programs.

7. Quarantine programs also frequently play an important role and are commonly used in efforts to restore wildlife populations. It is highly recommended that quarantine protocols be applied to the translocation of all wild animals to prevent the unintended spread of a disease or parasites. Quarantine is a well established best management practice in wildlife management associated with translocating wildlife (Wobeser 1994) and must be applied for as long as the known incubation period for a disease or parasite of concern. The failure to apply quarantine in transplantation has led to many ecological disasters and the spread of disease to animals in new geographies and habitats. For example, tuberculosis in northern bison, brucellosis in elk, pneumonia in wild sheep and brainworm in moose are all the result of historic human instigated movement of diseased animals without quarantine protocols in livestock or wildlife.

8. Confinement and captive propagation have been used to rescue important genetics of many wildlife species to preserve the diversity of the genome. Zoological Institutions across the U.S. and many research facilities are frequently engaged in species conservation by hosting animals for extended periods until restoration programs enable the release of animals into the wild. In many species, like bison, captivity and propagation have been essential following very narrow genetic bottleneck bison experienced at the turn of the century when they were reduced

to fewer than 1000 animals. By good fortune the capture of bison from disparate parts of its historic range may have saved important diversity which now must be retained and even enhanced to assure genetic diversity of bison across its current range.

9. In sum, holding animals in captivity for varying periods of time, including sometimes in quarantine, has long been an essential part of many wildlife conservation and restoration programs. Without such programs, including the ability to confine animals as necessary to facilitate restoration efforts, the public resource of wildlife in Montana and many other parts of the nation and the world would be significantly less widespread and plentiful, and the public's opportunity to enjoy and benefit from such wildlife through hunting, observation, and other activities would be reduced.

10. In my opinion, if holding individual members of wildlife species in captivity for a period of time as part of a restoration program were to have the consequence of re-classifying those animals as livestock under the law, thereby removing them from the jurisdiction of wildlife managers and subjecting them to the legal regime governing domestic livestock animals, then the result would be a significant reduction and perhaps elimination of wildlife restoration activities, with a corresponding reduction in associated public benefits.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 11, 2013 in Bozeman Montana.

  
\_\_\_\_\_  
Keith Aune

SUBSCRIBED AND SWORN before me this 11<sup>th</sup> day of October, 2013.

Name Judith A. Rau  
Notary Public for the State of Montana  
Residing in: Bozeman  
My Commission expires: 10-3-2016

