



Montana Legislative Services Division
Legal Services Office

TO: Members of the SJ 15 Federal Lands Study Working Group
FROM: Helen Thigpen, Staff Attorney, Environmental Quality Council
DATE: December 13, 2013
RE: Jurisdiction Over Wild Bison From Yellowstone National Park

Background

The purpose of this memorandum is to respond to questions from members of the SJ 15 (2013) federal lands working group regarding jurisdiction over wild bison from Yellowstone National Park (YNP). Other members of the Environmental Quality Council (EQC) have also inquired about jurisdiction over wild bison. To more fully explain the existing jurisdictional framework for bison management in Montana, this memorandum discusses the basis for the state and federal government's authority to manage wildlife, outlines the existing framework for bison management in Montana, and summarizes the ongoing litigation surrounding the transfer of bison to the Fort Peck and Fort Belknap Tribes.

Discussion

I. Foundations of Wildlife Law

As discussed in more detail below, the state has broad authority to manage wildlife under the theory that the state holds title to the wildlife within the state and may regulate wildlife for purposes of protecting public health, safety, and welfare. The concept in which the state holds title to wildlife can be traced to the status wildlife have historically held within the American legal system. Courts across the country have held that wildlife are not owned but are held in trust by the states for the benefit of the people. This concept has its roots in Roman and English legal traditions where wild animals were classified as a public commodity. Under English law, for example, wildlife were owned by the monarchs who granted the right to hunt and fish to individual citizens. As the concept developed over time, the general rule in England was that the monarchy held title to the country's wildlife not in its personal capacity but in its sovereign capacity for the benefit of the citizens. This legal tradition was subsequently adopted by courts across the U.S.¹

The U.S. Supreme Court articulated the rule regarding the state's ownership of wildlife in an 1895 decision regarding the interstate transportation of game birds. In *Geer v. Connecticut*, the U.S. Supreme Court upheld a Connecticut statute that prohibited game birds that were lawfully

¹ For a general primer on wildlife law, see *Wildlife Law: A Primer*, by Eric T. Freyfogle and Dale D. Goble, Island Press (2009).

taken within the state from being transported to other states.² Although the statute specifically burdened interstate commerce, the Court held that it did not violate the Commerce Clause of the U.S. Constitution because the state owned the wildlife and could therefore choose to prohibit them from being taken out of the state. According to the Court, "common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose".³

The Montana Supreme Court adopted similar language with respect to the state's ownership of wildlife in a 1923 decision regarding whether game wardens unlawfully confiscated beaver pelts. In addressing the question, the Montana Supreme Court stated:

*that the ownership of wild animals is in the state, held by it in its sovereign capacity for the use and benefit of the people generally, and that neither such animals nor parts thereof are subject to private ownership except in so far as the state may choose to make them so, are principles now too firmly established to be open to controversy.*⁴

The U.S. Supreme Court clarified the state's power to regulate wildlife in a 1920 decision in which the Court addressed the Migratory Bird Treaty Act of 1918. In *Missouri v. Holland*, the Court rejected Missouri's argument that the Act violated Missouri's sovereign authority to control wildlife, holding that while the state has broad authority to regulate wildlife, the authority is not exclusive and must be consistent with the U.S. Constitution.⁵ The Court stated:

*The State as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership.*⁶

In 1979, the U.S. Supreme Court overruled the *Geer* decision in *Hughes v. Oklahoma* and held that an Oklahoma statute that prohibited minnows from being shipped out of state was unconstitutional because it unlawfully discriminated against interstate commerce.⁷ In reaching

² 161 U.S. 519 (1896).

³ *Id.* at 530.

⁴ *Rosenfeld v. Jakways*, 67 Mont. 558, 216 P. 776 (1923).

⁵ 252 U.S. 416 (1920).

⁶ *Id.* at 434.

⁷ 441 U.S. 322 (1979).

its decision, the Court stated that the ownership theory was "no more than a 19th-century legal fiction" and that the pertinent "question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution".⁸

The Montana Supreme Court continues to recognize the state ownership rule, but also specifically recognizes the police power as a basis for the state's authority to regulate wildlife.⁹ As noted in *St. v. Fertterer*, "Montana has long recognized that Montana has the power to regulate game animals under both a title ownership and police power theory."¹⁰ The police power is the general power of the state to regulate for public health, safety, and welfare. Under either the state ownership rule or the police power doctrine, the state maintains significant authority to regulate the wildlife within its borders.

While the state has broad authority to manage wildlife, that authority is constrained by the federal government's power to regulate federal property. The legal framework for wildlife management on federal property depends on whether the federal government has asserted jurisdiction over the property at issue. The federal government has exclusive authority to manage federal property pursuant to the Property Clause of the U.S. Constitution, which provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States".¹¹ In a 1976 decision, the U.S. Supreme Court stated that the power to regulate federal property "necessarily includes the power to regulate and protect the wildlife living there".¹² In general, if Congress acts and chooses to assert jurisdiction over federal property, any conflicting state law would be preempted by the Supremacy Clause of the U.S. Constitution.¹³

In the case of national parks, the federal government has generally asserted its intent to regulate wildlife within park boundaries. The purpose of the park system, as described in the legislation that authorized its creation, is "to conserve the scenery and the natural and historic objects and

⁸ *Id.* at 335.

⁹ *St. v. Fertterer*, 255 Mont. 73, 841 P.2d 467 (1992) (overruled on other grounds in *St. v. Gatts*, 279 Mont. 42, 928 P.2d 114 (1996) (stating that "the ownership of wild animals is in the state, held by it in its sovereign capacity for the use and benefit of the people generally, and that neither such animals nor parts thereof are subject to private ownership except in so far as the state may choose to make them so, are principles now too firmly established to be open to controversy."))

¹⁰ *Id.* at 79.

¹¹ U.S. Const., Art. IV, § 3, cl. 2.

¹² *Kleppe v. New Mexico*, 426 U.S. 529, 541 (1976).

¹³ *Id.* at 543 (stating that "when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause").

the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations".¹⁴ The Park Service allows hunting and trapping only where it is specifically authorized by Congress. In YNP, for example, hunting and trapping are prohibited in the park. Recreational fishing is allowed in national parks if it has not been specifically prohibited by other federal law. If recreational fishing is allowed, it must be "conducted in accordance with applicable federal laws and treaty rights, and nonconflicting state laws and regulations".¹⁵

Outside of the National Park System, the federal government generally has not asserted exclusive jurisdiction over wildlife on federal property. For example, fishing and hunting may be allowed on federal land so long as applicable state laws are followed and there is no conflicting federal law in place that prohibits or limits the activity.

II. Existing Framework for Wild Bison Management in Montana

Yellowstone bison are an example of the unique jurisdictional challenges that arise in the context of wildlife management. As described above, differing wildlife management laws and practices may apply depending on whether an animal is located on state or federal property.

In Montana, wild bison originating from YNP are managed by both the Department of Fish, Wildlife, and Parks (FWP) and the Department of Livestock (DOL). The dual management of wild bison was established through the passage of Senate Bill 312 in 1995, which authorized DOL to take certain actions with respect to wild bison that enter the state and required FWP to cooperate with DOL in managing bison from YNP. The roles and responsibilities of DOL and FWP with respect to wild bison management are discussed in more detail below.

The state's policy with respect to wild bison is found in the fish and wildlife statutes under 87-1-216, MCA, which provides that "significant potential exists for the spread of contagious disease to persons or livestock in Montana and for damage to persons and property by wild buffalo or bison". Under this section, bison originating from YNP are designated as a species requiring disease control and all other bison are designated as a species in need of management.¹⁶

As noted above, bison requiring disease control are jointly managed by FWP and DOL. FWP is required to cooperate with DOL "in managing publicly owned wild buffalo or bison that enter the state on public or private land from a herd that is infected with a dangerous disease, as provided in 81-2-120, under a plan approved by the governor".¹⁷ With the approval of DOL, FWP may

¹⁴ The National Park Service Organic Act of 1916 (16 U.S.C. § 1).

¹⁵ 2006 National Park Service Management Policies at pg. 102.

¹⁶ Section 87-1-216(1)(a) and (1)(b), MCA.

¹⁷ Section 87-1-216(2)(c), MCA.

authorize the public hunting of wild bison that "have been exposed to or infected with a contagious disease, pursuant to 87-2-730".¹⁸ With regard to transfers of bison within the state, FWP is prohibited from transferring or releasing wild bison "on any private or public land in Montana that has not been authorized for that use by the private or public owner".¹⁹ In addition, FWP is required to "develop and adopt a management plan before any wild buffalo or bison under the department's jurisdiction may be released or transplanted onto private or public land in Montana".²⁰

DOL is authorized to manage publicly owned wild bison that "pose a threat to persons or livestock in Montana through the transmission of contagious disease".²¹ Under the livestock statutes, a wild bison is defined as a bison "that has not been reduced to captivity and is not owned by a person".²² "Whenever a publicly owned wild buffalo or wild bison from a herd that is infected with a dangerous disease enters the state of Montana on public or private land and the disease may spread to persons or livestock or whenever the presence of wild buffalo or wild bison may jeopardize Montana's compliance with other state-administered or federally administered livestock disease control programs", DOL may:

- physically remove the wild bison from state land "by the safest and most expeditious means" through hazing, aversion tactics, capture, transportation, quarantine, or delivery to a slaughterhouse;
- destroy the wild bison through use of a firearm;
- along with the state veterinarian, authorize bison to be "taken through limited public hunts pursuant to 87-2-730, MCA"; or
- capture, test, quarantine, and vaccinate the wild bison.²³

If the state veterinarian certifies the wild bison as brucellosis-free, the bison may be sold or "transferred to qualified tribal entities that participate in the disease control program".²⁴ A tribe's acquisition of any transferred bison "must be done in a manner that does not jeopardize compliance with a state-administered or federally administered livestock disease control

¹⁸ *Id.*

¹⁹ Section 87-1-216(4), MCA.

²⁰ Section 87-1-216(5), MCA.

²¹ Section 87-1-216(2)(c), MCA.

²² Section 81-1-101(6), MCA.

²³ Section 81-2-120(1), MCA.

²⁴ Section 81-2-120(1)(d)(ii), MCA.

program".²⁵ DOL is authorized to adopt rules that govern tribal participation in the program or to "enter into cooperative agreements with tribal organizations for the purposes of carrying out the disease control program".²⁶

In addition to these management authorities and responsibilities, FWP and DOL are parties to the Interagency Bison Management Plan (IBMP), which has the dual purposes of managing wild bison to reduce the risk of brucellosis transmission between wild bison and cattle and to maintain a wild, free-ranging bison population. The IBMP was adopted in 2000 and is a joint management effort between the U.S. Animal and Plant Health Inspection Services (APHIS), U.S. Forest Service, and National Park Service, as well as Montana DOL and FWP. The rationale for the IBMP is stated in Montana's Record of Decision, which provides that:

*Several state and federal agencies each have limited authority for the management of bison, the management of brucellosis in bison and/or the management of lands used by bison. None of the agencies, acting alone, has sufficient authority to manage bison across all jurisdictional boundaries. Therefore, cooperation of the agencies and their shared commitment to a single management plan is essential to effectively manage bison and the risk of transmission of brucellosis from bison to domestic livestock.*²⁷

The Record of Decision from the U.S. Department of the Interior (National Park Service) and the Department of Agriculture (APHIS and Forest Service) describes the jurisdiction between the various agencies as follows:

*When bison leave Yellowstone National Park and enter Montana, the management responsibilities and authorities change. Within the boundaries of Yellowstone National Park, the Secretary of the Interior has exclusive jurisdiction to manage the park's natural resources, including the bison. Outside the park the State of Montana has the management authority over the bison. When the bison are on national forest system lands, the U.S. Forest Service has responsibilities under federal laws to provide habitat for the bison, a native species. Federal law requires APHIS to control and prevent the spread of communicable and contagious diseases of livestock. Because of these mandates, the agencies recognize that a coordinated, cooperative management regime would provide consistency and reliability to the process.*²⁸

Substantively, the IBMP incorporates a multi-agency approach for bison management and to

²⁵ *Id.*

²⁶ *Id.*

²⁷ Interagency Bison Management Plan for the State of Montana and Yellowstone National Park, Record of Decision (December 22, 2000).

²⁸ Record of Decision for Final Environmental Impact Statement and Bison Management Plan for the State of Montana and Yellowstone National Park (December 20, 2000).

control the risk of brucellosis transmission in and around YNP. The stated goals of the plan are to:

- Maintain a wild, free-ranging bison population;
- Reduce the risk of brucellosis transmission from bison to cattle;
- Manage bison that leave Yellowstone National Park and enter the State of Montana; and
- Maintain Montana's brucellosis-free status for domestic livestock.

More information about the IBMP may be accessed at the following website: <http://www.ibmp.info/>.

III. Litigation Concerning Jurisdiction over Wild Bison

In 2013, the Montana Supreme Court issued a decision in *Citizens for Balanced Use v. Maurier*, which addressed a dispute over the state's transfer of bison from YNP to the Fort Peck and Fort Belknap Reservations.²⁹ The bison at issue were part of the Quarantine Feasibility Study (QFS), which was established in 2004 pursuant to the IBMP to isolate and study bison in the greater Yellowstone area. In 2011, FWP sought to relocate some of the quarantined bison and considered transferring the bison to the Fort Peck and Fort Belknap Reservations. FWP issued a draft environmental assessment in September 2011 that assessed the potential impacts of placing the bison on tribal property.³⁰ FWP issued a final decision notice in November 2011 and formally approved the transfer to the Fort Peck and Fort Belknap Reservations.³¹ FWP then entered into a memorandum of understanding (MOU) with the Fort Peck tribes. The MOU provided that half of the bison sent to the Fort Peck Reservation would be transferred to the Fort Belknap Reservation after adequate facilities were constructed.³²

Citizens for Balanced Use, Valley County Commissioners, and other property owners, referred to here as CBU, filed suit against the transfer in January 2012.³³ CBU alleged the state failed to comply with the provisions of 87-1-216, MCA, by not issuing a management plan before the

²⁹ 2013 MT 166, 370 Mont. 410, 303 P.3d 794.

³⁰ Draft Environmental Assessment for Interim Translocation of Bison (September 2011): http://leg.mt.gov/content/publications/mepa/2011/fwp0919_2011001.pdf.

³¹ Interim Translocation of Bison Decision Notice (December 2011): http://leg.mt.gov/content/publications/mepa/2011/fwp1201_2011001.pdf.

³² Memorandum of Understanding between FWP and the Assiniboine and Sioux Tribes of the Fort Peck Reservation for Quarantine Feasibility Study Bison (March 16, 2012): <http://fwp.mt.gov/fishAndWildlife/management/bison/>.

³³ Plaintiff's Complaint for Declaratory and Injunctive Relief (January 11, 2012).

bison were transferred.³⁴ The District Court in Blaine County issued a temporary restraining order against the transfer on March 22, 2013, but the order was not issued until after the final bison shipment occurred. In May 2013, CBU obtained a preliminary injunction that: (1) prohibited FWP from entering into any agreement with a tribal entity or any public or private landowner for the purpose of transplanting or receiving transplanted bison from YNP; (2) prohibited FWP from transferring bison that had been quarantined; and (3) prohibited FWP from transferring any bison from Fort Peck to Fort Belknap.³⁵

FWP and two wildlife advocacy groups that intervened in the litigation appealed the decision to the Montana Supreme Court, which vacated the preliminary injunction and returned the case to the District Court.³⁶ As before, CBU argued that FWP failed to comply with the requirement in 87-1-206, MCA, to adopt a management plan before transferring bison to private or public land in Montana. However, the Supreme Court held that 87-1-216, MCA, did not apply because the reference to "public or private land" did not expressly reference tribal land.³⁷ The Court stated that "reservations and tribal lands are neither public property nor private property, but are in a special class" and that nothing in the statutes regarding land ownership indicated that "public or private land" included tribal lands.³⁸

In discussing the applicability of 87-1-216, MCA, to the bison transfer, the Court stated that the quarantined bison arguably did not fall within the definitions of wild bison under either the livestock or fish and wildlife statutes.³⁹ Those definitions both state in part that a wild bison is one that has not been reduced to captivity. The Court stated:

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. Because the District Court based its ruling on an interpretation of the statute's "public or private land" language and because the parties focused upon that language in their arguments, we will consider it on appeal.⁴⁰

³⁴ *Id.* at pg. 11.

³⁵ Order Granting Preliminary Injunction, pgs. 3-4 (May 9, 2012).

³⁶ *Maurier*, ¶ 32.

³⁷ *Id.* at ¶ 30.

³⁸ *Id.* at ¶ 19.

³⁹ *Id.* at ¶ 15.

⁴⁰ *Id.*

In September 2013, following the Supreme Court's decision in *Maurier*, CBU filed a request for a declaratory ruling from the District Court that any bison from YNP that had been subject to quarantine do not constitute "wild bison" and should be declared livestock since "wild bison" are defined as bison that have not been reduced to captivity.⁴¹ CBU alleged the quarantined bison had been reduced to capacity and are therefore not "wild bison" under Montana law.⁴² CBU also requested a ruling that "FWP does not have jurisdiction or management authority over non-wild bison because pursuant to the Montana code non-wild bison are livestock, subject to Department of Livestock jurisdiction."⁴³

In response, FWP raised several procedural arguments against the requested rulings, including that CBU has "taken a new position that is entirely inconsistent with their previous position in this case that the bison fell within FWP's jurisdiction".⁴⁴ In addition, FWP argued that the statement from the Supreme Court in the *Citizens for Balanced Use v. Maurier* decision regarding the definition of wild bison is dictum and is not binding on the District Court.⁴⁵ FWP also argued that the statutes provide that quarantined bison remain wild bison "even when the agencies take management actions that unquestionably require them to be fenced or otherwise confined".⁴⁶ According to FWP, the relief requested by CBU would render the bison management statutes meaningless. Finally, to fall solely within DOL jurisdiction, FWP argued that CBU must make an affirmative showing that the bison at issue are either "domestic" or "feral" bison.⁴⁷

The wildlife advocacy groups that intervened in the original proceeding also raised several arguments against the request, including that there is no applicable definition of "wild bison" within 87-1-216, MCA, and that the definition of "wild bison" in the fish and game statutes under 87-2-101(14), MCA, does not apply to 87-1-216, MCA.⁴⁸ These defendants also argued that the translocation provision in 87-1-216(4), MCA, would be meaningless if the Court accepted CBU's

⁴¹ Plaintiff's Brief in Support of Motion for Declaratory Judgment, pg. 4.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Defendant FWP's Response Brief at pg. 2.

⁴⁵ *Id.* at pg. 3. In the legal context, dictum or "obiter dictum" is defined as "a judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)." *See* Blacks Law Dictionary.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Intervening Defendant's Brief at pgs. 4-6.

argument, stating: "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".⁴⁹ Finally, they argued that CBU's interpretation would impede wildlife restoration efforts because any period of captivity, no matter how short, would limit an animal from being classified as wildlife. They argue that such a result would "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".⁵⁰

As of the date of this memorandum, a decision on CBU's request for declaratory judgment is pending in the Seventeenth Judicial District Court in Blaine County.

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⁴⁹ *Id.* at pg. 13.

⁵⁰ *Id.* at pg. 15.