

NOTE

THE SPIRIT OF THE BUFFALO: THE PAST AND FUTURE OF AN AMERICAN PLAINS ICON

By
William Holland*

*Though bison are iconically associated with the United States, their historical fortunes have often been opposite those of the U.S. As the nation expanded westward, government policy, demand for bison products, and changing land use perilously reduced bison numbers. Efforts to restore bison have been complicated by overlapping legal concerns: state, federal, tribal, and constitutional. This Article examines the legal context surrounding bison restoration, focusing particularly on the critical herd connected with Yellowstone National Park. Former members of the Yellowstone herd, in turn, are the subjects of the Montana Supreme Court's 2013 ruling in *Citizens for Balanced Use v. Maurier*, which this Article examines closely, arguing it will significantly improve the legal landscape in which Native American bison restoration efforts function. Finally, this Article ends on a hopeful note: suggesting that federal and tribal efforts, combined with economic and environmental interests may presage the resurgence of bison herds.*

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* J.D. Candidate, Brooklyn Law School, 2015. B.A., University of Minnesota, 2010. I would like to thank my wife, LeAnn, for her constant support, and the staff of *Animal Law Review* for all of their hard work and thoughtful editing. I dedicate this Article to the resilient people of South Dakota's Rosebud Sioux Reservation, and to their hauntingly beautiful landscape that frequently makes me daydream about America's wild and open spaces.

In my body, in my blood runs the spirit of the buffalo.

—Arvol Looking Horse, quoted in *Buffalo Nation: American Indian Efforts to Restore the Bison*¹

The bison—or buffalo, as the species is commonly named—is synonymous with the American West.² The species is the namesake of several towns and cities,³ as well as the mascot of several colleges and professional sporting teams.⁴ The animal's image also appears on coins,⁵ state flags,⁶ and the logos of the National Park Service and Department of the Interior.⁷ The bison runs through every impression of the frontier. At the dawn of America's westward expansion, herds of bison ranged over vast tracts of land, from Oregon in the Northwest, through the Rockies, to Georgia and Texas in the South, and as far east as upstate New York.⁸ As America expanded westward, the bison

¹ KEN ZONTEK, *BUFFALO NATION: AMERICAN INDIAN EFFORTS TO RESTORE THE BISON* 1 (2007) (quoting Arvol Looking Horse, a tribal leader of the Cheyenne River Sioux Reservation in South Dakota).

² See e.g., John Calvelli, *The Bison: A National Symbol for All Americans*, NAT'L GEOGRAPHIC, <http://newswatch.nationalgeographic.com/2012/08/08/the-bison-a-national-symbol-for-all-americans> (Aug. 8, 2012) (accessed Sept. 29, 2014) (calling bison the most "iconic" mammal in North America, and discussing congressional efforts to designate bison the National Mammal of the U.S. with the National Bison Legacy Act) [<http://perma.cc/HC4Z-QJCK>].

³ E.g., The cities of Buffalo in Texas, Minnesota, and New York respectively.

⁴ Higher education institutions with bison mascots include Howard and Gallaudet Universities, and the University of Colorado, Boulder; professional sports teams with bison mascots include the Oklahoma City Thunder and the Buffalo, New York Buffalo Bills. See e.g., *Meet Our American Bison*, SMITHSONIAN INST. NAT'L ZOO, <http://www.americanbison.si.edu/meet-our-american-bison> (accessed Nov. 23, 2014) ("Esteemed Washington, D.C. colleges Howard University and Gallaudet University have bison as their school mascot.") [<http://perma.cc/LY5M-U3D9>]; *History & Traditions*, UNIV. OF COLO. BOULDER, <http://www.colorado.edu/about/history-traditions> (accessed Nov. 23, 2014) ("CU-Boulder has one of the most majestic and popular college mascots in all of intercollegiate athletics, a real buffalo named Ralphie.") [<http://perma.cc/7B65-YNSR>]; *Rumble the Bison Named NBA Mascot of the Year*, NBA, http://www.nba.com/thunder/news/release_090813.html (Aug. 13, 2009) (accessed Nov. 23, 2014) (recognizing the anthropomorphic bison mascot representing Oklahoma City's professional basketball team as mascot of the year) [<http://perma.cc/8H4V-GXGX>]; *Billy Buffalo*, BUFFALO BILLS, <http://www.buffalobills.com/team/coaches/billy-buffalo/f862860a-3576-4550-a202-4ed3dedc5b80> (accessed Nov. 23, 2014) (presenting a fictional biography of the team's blue, anthropomorphic bison mascot) [<http://perma.cc/MH4P-BNJ5>].

⁵ E.g., *American Buffalo: Gold Coin Program*, U.S. MINT, http://www.usmint.gov/mint_programs/buffalo24k/ (accessed Nov. 22, 2014) [<http://perma.cc/62L5-CWTK>].

⁶ E.g., *Wyoming Facts and Symbols*, STATE OF WYOMING, <http://www.wyo.gov/about-wyoming/wyoming-facts-and-symbols> (accessed Nov. 22, 2014) [<http://perma.cc/6AK3-C4ND>].

⁷ *History of NPS Visual Identity*, NAT'L PARK SERV., <http://www.nps.gov/hfc/services/identity/identity-history.cfm> (accessed Sept. 29, 2014) (explaining the inclusion of a bison in the National Park Service logo) [<http://perma.cc/23ZH-LJNM>]; *Flags, Seals and Emblems Nationwide*, U.S. DEP'T OF THE INTERIOR, <http://www.doi.gov/ofas/asd/flag.cfm> (accessed Sept. 29, 2014) [<http://perma.cc/FM3K-MGM2>].

⁸ LIVINGSTON FARRAND, *BASIS OF AMERICAN HISTORY: 1500–1900*, Vol. 2, at 63 map (Albert Bushnell Hart, ed., 1904).

population declined perilously.⁹ While the bison population has grown in recent decades, proper management remains difficult for the federal government, state governments, tribal bodies, and other groups.¹⁰ There has been an ongoing battle, complete with legislation, regulations, court cases, and protests on both sides. The history of the bison is bloody and turbulent, but hope remains that the species can return to a semblance of its past vitality.

This Note outlines the history and biology of the American bison, examines current restoration efforts, introduces arguments from concerned ranchers and property owners, and explains recent court decisions involving the species. This Note then hypothesizes on the future of the species, both as relatively undisturbed wildlife and as a more intensely managed commercial industry. This Note argues that the bison is a unique species in terms of its potential economic value and its important connection to American cultural heritage. This Note then explains why bison warrant protection under federal and local plans for responsible growth, particularly with respect to Native American communities.¹¹ Finally, this Note explains why bison cannot trigger the Takings Clause of the Constitution, are of paramount importance to the Great Plains ecosystem, and offer an important opportunity to reverse the federal government's historically brutal policy towards Native Americans.

The latest chapter in the bison's saga began on a cold Montana evening in late March 2012. On that evening, sixty-three bison, formerly of the Yellowstone National Park wild herd, were emptied out of truck trailers and scattered across the snow-covered plains of the Fort Peck Reservation in eastern Montana.¹² Despite the cold, the Assiniboine tribal members had gathered to celebrate and rejoice the return of the buffalo.¹³ One tribal member stated, "This is a historical moment for us. We're rebuilding our lives. We're healing from histori-

⁹ See *The American Bison Society*, WILDLIFE CONSERVATION Soc'y, <http://www.wcs.org/saving-wildlife/hoofed-mammals/bison/the-american-bison-society.aspx> (accessed Oct. 2, 2014) (describing the near extinction of the American bison in the early twentieth century, and the subsequent restoration efforts that brought the North American bison population back up to a "revitalized" 500,000 animals) [<http://perma.cc/B3GQ-WRBJ>].

¹⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08291, *YELLOWSTONE BISON: INTER-AGENCY PLAN AND AGENCIES' MANAGEMENT AND IMPROVEMENT TO BETTER ADDRESS BISON-CATTLE BRUCELLOSIS CONTROVERSY* 11 (2008). See discussion *infra*, Parts II–IV.

¹¹ This Article uses 'Native American' to refer to indigenous people predominantly living within the modern United States of America. Similarly, 'First Nations' is used to refer to indigenous people predominantly living within modern Canada. Acknowledging that these terms do not account for the scope of indigenous geographic experiences or cultural interchanges, the terms are used to clarify which nations and groups are under discussion.

¹² Jack McNeel, *Bison Return to Fort Peck: A Special Day, 200 Years in the Making*, INDIAN COUNTRY TODAY, <http://indiancountrytodaymedianetwork.com/gallery/photo/bison-return-to-fort-peck%3A-a-special-day,-200-years-in-the-making-104208> (Mar. 22, 2012) (accessed Sept. 29, 2014).

¹³ *Id.*

cal trauma.”¹⁴ National environmental groups like the National Wildlife Federation applauded the efforts of the groups involved in the transfer, seeing in the reintroduction of bison a victory for the tribe, the bison, and ultimately, the Northern Plains ecosystem.¹⁵

But not every Montanan celebrated the return of the bison. Beef cattle ranchers and other concerned citizens quickly teamed up to fight the creation of what they saw as a “giant game refuge.”¹⁶ Arguing for the protection of their individual property rights and livelihoods, the ranchers succeeded in getting a court to issue a preliminary injunction blocking future bison transfers.¹⁷ In *Citizens for Balanced Use v. Maurier*, the Montana Supreme Court lifted the lower court’s injunction.¹⁸ The court cited the significance of the species to the cultural heritage of the Fort Belknap and Fort Peck Tribes.¹⁹ In vacating the injunction, the Montana Supreme Court determined that, as a matter of law, a Montana statute restricting transfer of bison did not apply to transfers to tribal lands.²⁰ The case of *Citizens for Balanced Use v. Maurier* is an important step for the tribal restoration movement in Montana and may give hope to tribes in other states involved in their own restoration efforts.

I. BISON, A NATURAL HISTORY

This Part will briefly examine bison biology and provide an abbreviated natural history of the species. The American bison is an impressive physical specimen. They are covered with thick fur and layers of fat to survive cold winters.²¹ A large hump located between the bison’s shoulders contains strong muscles that support the animal’s head and neck as it pushes snow out of its path in winter.²² Bulls can weigh up to 2,000 pounds and stand six feet tall at the shoulders.²³ In spite of their size, bison possess great speed and are capable of reaching speeds in excess of 30 miles per hour.²⁴

The nomadic nature of bison—their tendency to wander over a wide geographic range—is an important aspect of bison behavior when

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Dan Springer, *Where Should the Buffalo Roam? Tribes, Ranchers Battle over Bison Relocation*, FOXNEWS.COM, <http://www.foxnews.com/politics/2012/04/09/where-should-buffalo-roam-tribes-ranchers-battle-over-bison-relocation/> (Apr. 9, 2012) (accessed Sept. 29, 2014) [<http://perma.cc/W8ZZ-CP5R>].

¹⁷ *Id.*; *Citizens for Balanced Use v. Maurier*, 303 P.3d 794, 797 (Mont. 2013).

¹⁸ *Maurier*, 303 P.3d at 799.

¹⁹ *Id.* at 800.

²⁰ *Id.* at 799.

²¹ *Frequently Asked Questions: Bison*, NAT’L PARK SERV., <http://www.nps.gov/yell/naturescience/bisonfaq.htm> (updated Sept. 30, 2014) (accessed Sept. 30, 2014) [<http://perma.cc/MJ8S-5K3R>].

²² *Id.*

²³ *American Bison*, NAT’L GEOGRAPHIC, <http://animals.nationalgeographic.com/animals/mammals/american-bison/> (accessed Sept. 30, 2014) [<http://perma.cc/X8G3-3JEK>].

²⁴ *Id.*

considering human management of potential herds.²⁵ Bison usually live in groups of five to fifty animals.²⁶ Through personal journal entries and memoirs written by American settlers, we know that those numbers could sometimes grow much larger. Teeming herds of bison, numbering in the thousands were possible—if unrepresentative.²⁷ Regardless, the sheer density of bison (or, bison herds) at their population peak must have been an impressive sight for settlers. Some frontier travelers estimated the number of bison they saw to be in the hundreds of thousands, or even more.²⁸ Because bison were unevenly distributed over a wide geographic range, estimates of peak bison population vary. Though a peak population of 60 million was long assumed, more recent scholarship suggests a lower number—perhaps 30 million—is more realistic.²⁹ Stampedes of thousands of bison could be terrifying for nearby humans.³⁰ This tendency of bison to stampede en masse was used to the advantage of Native American hunters, driving members of a herd off cliffs to their deaths.³¹

The hearty populations of the American bison would not last. The near destruction of the American bison, from millions of animals to the brink of extinction, was caused by several factors too numerous to compile and explain in depth for this Note.³² However, the impact of non-

²⁵ Dean Lueck, *The Extermination and Conservation of the American Bison*, 31 J. LEGAL STUD. 609, 616 (2002).

²⁶ ZONTEK, *supra* note 1, at 17.

²⁷ *Id.*

²⁸ Politician Horace Greeley observed bison while traveling across the American plains just before the Civil War: “What strikes the stranger with most amazement is their immense numbers. I know a million is a great many, but I am confident we saw that number yesterday. Often, the country for miles on either hand seemed quite black with them.” HORACE GREELEY, AN OVERLAND JOURNEY, FROM NEW YORK TO SAN FRANCISCO, IN THE SUMMER OF 1859 87 (1860) (available at https://openlibrary.org/books/OL271274M/An_overland_journey_from_New_York_to_San_Francisco_in_the_summer_of_1859 (accessed Sept. 19, 2014)) [<http://perma.cc/SN79-K75C>].

²⁹ See DALE F. LOTT, AMERICAN BISON: A NATURAL HISTORY 69–74 (2002) (discussing how the 60 million estimate was reached, reasons why that number is likely inflated, and how subsequent research has arrived at a bison estimate of around 30 million).

³⁰ See e.g., Philip St. George Cooke, *Scenes in the West; Or, A Night on the Santa Fe Trail*, No. III, 8 S. LITERARY MESSENGER 145, 146 (1842) (available at <http://quod.lib.umich.edu/m/moajrnl/acf2679.0008.002?node=acf2679.0008.002:6&view=text&seq=155> (accessed Oct. 3, 2014)) (After witnessing a buffalo herd stampede, one Plains traveler wrote: “Still onward they came—Heaven protect me! It was a fearful sight.”) [<http://perma.cc/Y9CW-5T4G>].

³¹ See Joseph Mussulman, *A Buffalo Jump*, DISCOVERING LEWIS & CLARK, <http://lewis-clark.org/content/content-article.asp?ArticleID=441> (accessed Sept. 15, 2014) (discussing the hunting technique known as a “buffalo jump”) [<http://perma.cc/8FEK-ZZU7>]; see also *Buffalo Jump within Wind Cave National Park*, NAT’L PARK SERV., <http://www.nps.gov/wica/parknews/buffalo-jump-within-wind-cave-national-park.htm> (updated Sept. 11, 2014) (accessed Oct. 1, 2014) (discussing the “buffalo jump” technique, as well as the geologic formations commonly used for it) [<http://perma.cc/U6D6-JTDL>].

³² See e.g., ANDREW C. ISENBERG, *THE DESTRUCTION OF THE BISON: AN ENVIRONMENTAL HISTORY, 1750–1920* (2000) (explaining the decline of the North American bison population from an estimated 30 million in 1800 to fewer than 1000 a century later);

indigenous demand for bison products and the drive to kill bison is difficult to overstate.³³ Demand for bison hides encouraged hunters—native and not—to take over 600,000 animals per year at the peak of the robe trade.³⁴ One hunter chronicled killing 107 bison within a single hour without changing position.³⁵ In winter months, bison skinners would often fail to keep up with their hunters, leaving bison carcasses to freeze, thus ruining the hide.³⁶

The federal government initiated a war against bison as part of its nineteenth century Native American policy. Army officers instigated wasteful mass killings, provided ammunition to hunters, and personally lobbied against protection measures for the species introduced in Congress, making their stance on the species and on its intimate relationship with Native people unquestionably clear.³⁷ United States (U.S.) Army Colonel, Richard Dodge, reportedly told his men to, “Kill every buffalo you can. Every buffalo gone is an Indian gone.”³⁸ Anti-bison sentiment was not isolated to the wild frontier; in 1872 then-Congressman (later President) James A. Garfield explicitly stated on the House of Representatives floor that destroying the bison would solve the “Indian question” and ease westward expansion.³⁹

DAVID S. WILCOVE, *NO WAY HOME: THE DECLINE OF THE WORLD’S GREAT ANIMAL MIGRATIONS* (2008) (explaining the growing threats to migratory animals); Larry Schweikart, *Buffaloed: The Myth and Reality of Bison in America*, *THE FREEMAN*, http://www.freem.org/the_freeman/detail/buffaloed-the-myth-and-reality-of-bison-in-america#axzz2mY4D2JWU (Dec. 1, 2002) (accessed Sept. 30, 2014) (suggesting that Native American hunting had a significant impact, straining the bison population, and arguing this was later heightened by disruptive colonial contact) [<http://perma.cc/6WBS-EWZ4>].

³³ See e.g., ZONTEK, *supra* note 1, at 18 (quoting fur trade scholar Merrill Burlingame: “That the twentieth-century America might exist, the buffalo and the Indian had to go.”).

³⁴ *Id.* at 20.

³⁵ WILLIAM TEMPLE HORNADAY, *THE EXTERMINATION OF THE AMERICAN BISON* 510 (Smithsonian Inst. Press 2002) (1889).

³⁶ ROGER L. DI SILVESTRO, *THEODORE ROOSEVELT IN THE BADLANDS: A YOUNG POLITICIAN’S QUEST FOR RECOVERY IN THE AMERICAN WEST* 30 (2011).

³⁷ ZONTEK, *supra* note 1, at 25.

³⁸ R.D. ROSEN, *A BUFFALO IN THE HOUSE: THE TRUE STORY OF A MAN, AN ANIMAL, AND THE AMERICAN WEST* 17 (2007).

³⁹ 43 CONG. REC. 2107 (1874) (statement of Congressman Garfield: “the best thing which could happen for the betterment of our Indian question . . . would be that the last remaining buffalo should perish . . . [for] so long as the Indian can hope to subsist by hunting buffalo, so long will he resist all efforts to put him forward in the work of civilization. . . .”). Garfield also noted this approach met approval from the Secretary of the Interior, who “would rejoice, so far as the Indian question was concerned, when the last buffalo was gone.” *Id.* See also ERNEST STAPLES OSGOOD, *THE DAY OF THE CATTLEMAN* 79 n.89 (1929) (“It was commonly understood that the Government was interested in the rapid extinction of the buffalo, the basis on which the independent existence of the plains Indian depended. In a debate in Congress in 1874, Representative James A. Garfield stated that the Secretary of the Interior had declared that he would rejoice, so far as the Indian question was concerned, when the last buffalo was exterminated.”). Less than a decade after making this statement, Garfield would become President. *James Garfield*, *THE WHITE HOUSE*, <http://www.whitehouse.gov/about/presidents/james-garfield>.

Without reliable access to bison, struggling Native American populations had no choice but to farm or starve, a situation that pressured tribal leaders to cede their ‘surplus’ lands to the federal government.⁴⁰ Federal land acquisition grew rapidly in the early nineteenth century, with an annual average of three major sales from various tribes to the federal government.⁴¹ Avid hunter and naturalist, President Theodore Roosevelt, later remarked that “[t]he extermination of the buffalo was the only way of solving the Indian question,” with the crash in bison population being for “humanity at large . . . a blessing.”⁴²

Agriculture seized the American plains during the 1870s and 1880s.⁴³ In areas once dominated by bison herds, farming settlements put further stress on an already embattled species. Beef cattle took over grazing lands, while farmers broke the land’s dense sod to sow wheat and corn.⁴⁴ This monoculture, with vast fields of manicured crops, was a shocking change to the minority of Native tribes who supplemented their hunting and gathering with small-scale farming.⁴⁵ Even when settlers refrained from wasteful bison hunting, transportation across the Great Plains adversely affected bison populations. Travelers in covered wagons on the famous Oregon Trail decimated the Platte River region of western Nebraska.⁴⁶ Grazing sheep and horses destroyed the short grasses of the prairie, causing bison migrating to the area in the autumn to suffer and starve.⁴⁷

The relationship between bison and humans likely predates written history. Paleolithic cave art in Europe features a distant relative of modern bison.⁴⁸ The creatures have long been the subject of tales passed down by the oral tradition of storytelling in indigenous peoples. The Arapaho and Crow tribes speak of the bison living on Earth long before the arrival of humans.⁴⁹ For the Lakota Sioux, humans and bison both emerged from Wind Cave together at the beginning of the world.⁵⁰ Indeed, the impact of bison on humans is occasionally signifi-

garfield (accessed Nov. 20, 2014) (noting that James A. Garfield became the twentieth U.S. President in 1881) [<http://perma.cc/CUG3-6VQK>].

⁴⁰ JEFFREY OSTLER, *THE LAKOTAS AND THE BLACK HILLS: THE STRUGGLE FOR SACRED GROUND* 70 (2010).

⁴¹ STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* 146 (2005).

⁴² DI SILVESTRO, *supra* note 36, at 117.

⁴³ Debra Spielmaker, *Growing a Nation: The Story of American Agriculture, Historical Timeline—Farmers and the Land*, https://www.agclassroom.org/gan/timeline/farmers_land.htm (accessed Dec. 22, 2014) [<http://perma.cc/W433-MZBG>].

⁴⁴ ZONTEK, *supra* note 1, at 26.

⁴⁵ *See id.* (noting that “farming Indian tribes of the plains, including the Mandans, Hidatsas, and Pawnees, among others . . . sought a comprehensive food culture mixing agricultural produce and bison beef”).

⁴⁶ OSTLER, *supra* note 40, at 36.

⁴⁷ *Id.*

⁴⁸ ZONTEK, *supra* note 1, at 2.

⁴⁹ *Id.* at 3.

⁵⁰ OSTLER, *supra* note 40, at 4.

cant enough to change how humans conceive of the very land they inhabit: traditional Lakota beliefs hold that geological formations, like ridges and gaps in western South Dakota's Black Hills region, were formed by movements of ancient bison.⁵¹

Tribal members used many parts of the bison for tools, containers, cordage, and clothing, in addition to eating the bison meat.⁵² Bulls, on average, yield around 550 pounds of meat, and with one pound of bison meat averaging 635 calories, bison meat was a staple for energy and sustenance for tribes across the Plains.⁵³

II. NATIVE EFFORTS TO RESTORE BISON

Because of the special cultural significance of the bison to the Native tribes of the U. S. and Canada, they are the ones who would most wholeheartedly wish for the bison to return to a healthy population size. One restoration project director stated: "The bison once took care of us. Now we're in the position where we must take care of the bison."⁵⁴ Yet tribal bodies were unable to boost bison population numbers on their own. They needed help from outside sources, including the American federal government. In the 1930s Yellowstone National Park donated several bison to the Crow Reservation in southeast Montana.⁵⁵ This transfer served as the beginning of the American bison restoration movement.

Tribe members have served as stewards who look after bison herds on Native American reservations.⁵⁶ These stewards have sought to let the animals roam "as unfettered as possible."⁵⁷ Still, these caretakers step in to help the herds when needed, in some instances augmenting herds to prevent inbreeding and matching animal numbers to the carrying capacity of their range.⁵⁸ Today, Native Americans from more than sixty tribes in the U. S. and Canada work with bison herds containing over 20,000 animals.⁵⁹ Located in northern South Dakota, the Cheyenne River Reservation boasts the largest herd under Native American management with over 3,000 bison occupying 40,000 acres of open plains.⁶⁰

Perhaps no group has been more influential in the American bison restoration movement than the InterTribal Bison Cooperative (ITBC).⁶¹ Founded by representatives of several Native tribes in 1991,

⁵¹ *Id.* at 4–5.

⁵² ZONTEK, *supra* note 1, at 9.

⁵³ *Id.* at 10.

⁵⁴ *Id.* at 102.

⁵⁵ *Id.* at 67.

⁵⁶ *Id.* at 78.

⁵⁷ *Id.* at xv.

⁵⁸ ZONTEK, *supra* note 1, at 78–79.

⁵⁹ *Id.* at 1.

⁶⁰ *Id.* at 158.

⁶¹ The InterTribal Bison Cooperative (ITBC) is also known as the InterTribal Buffalo Council. See *Who We Are*, INTERTRIBAL BUFFALO COUNCIL, <http://itbcbuffalo.com/>

the ITBC has been instrumental in bringing about growth in the number of participating tribes, head of bison managed, and acreage of bison range.⁶² The ITBC's stated mission is to "reestablish healthy buffalo populations on tribal lands."⁶³ The cultural and spiritual significance of the species is paramount to members of the ITBC.⁶⁴ The group's philosophy regarding the style of managing bison has long been to uphold notions of "wild integrity" and to refuse to treat and manage the species like beef cattle.⁶⁵

ITBC President Fred DuBray once petitioned Congress to allow the U. S. Department of Agriculture (USDA) food program to buy bison meat from tribal programs, for distribution to reservation residents who receive food assistance through the USDA.⁶⁶ DuBray believed this would greatly benefit Native people. He argued that such a strategy would enhance the nutrition offered by the government program by offering leaner protein; restore the species to tribal lands; and offer Native tribes regained use of bison, thereby making "amends for ending a bison-based lifestyle."⁶⁷ Efforts of the ITBC and tribal bison stewards, like the Winnebago's Louis LaRose, have been partially successful: in March 2014, the USDA allocated \$1 million specifically to purchase bison meat from Native American tribes for the emergency assistance program.⁶⁸ The ITBC, however, notes that the program's requirement that tribes pay for the cost of shipping bison to USDA-designated processing plants, where they must additionally pay for processing, makes the program inaccessible to tribal groups.⁶⁹

The ITBC offers careful guidance for individual tribes wishing to start herds on their reservations, but lacking experience and knowledge of how to move forward.⁷⁰ The ITBC offers bison management training programs, marketing help, and other technical assistance.⁷¹ Secondary projects include the Yellowstone Rescue Facility Initiative

node/3 (2011) (accessed Sept. 19, 2014) (presenting the InterTribal Buffalo Council and InterTribal Bison Cooperative as synonymous) [<http://perma.cc/S9RD-BB9C>].

⁶² ZONTEK, *supra* note 1, at 75–76.

⁶³ INTERTRIBAL BUFFALO COUNCIL, *supra* note 61.

⁶⁴ Louis LaRose, *Bison Restoration Developments among Inter Tribal Bison Cooperative Members*, BISON PRODUCERS OF ALBERTA, <http://bisoncentre.com/index.php/producers-2/resource-library/ibc2000-proceedings/primary-sessions/bison-restoration-developments-among-inter-tribal-bison-cooperative-members> (Aug. 2000) (accessed Oct. 1, 2014) (offering transcription of an ITBC presentation on the significance of bison to Native Americans) [<http://perma.cc/J3QM-BHHL>].

⁶⁵ ZONTEK, *supra* note 1, at 81.

⁶⁶ *Id.* at 87–88.

⁶⁷ *Id.* at 88.

⁶⁸ *Buffalo Man*, HELENA INDEP. RECORD, http://helenair.com/business/buffalo-man/article_7fe52ed1-a2b8-5095-ba83-5e83b41f4b60.html (Sept. 28, 2003) (accessed Oct. 29, 2014) [<http://perma.cc/CVC6-9J3L>].

⁶⁹ *Id.*

⁷⁰ ZONTEK, *supra* note 1, at 76–77.

⁷¹ Carla Rae Brings Plenty, *Restoring the Bison, Restoring the Spirit*, TERRAIN.ORG: J. BUILT & NAT. ENV'TS, <http://www.terrain.org/columns/5/guest.htm> (Autumn 1999) (accessed Oct. 2, 2014) [<http://perma.cc/T33U-XK55>].

and the Native American Bison Refuge, which helped establish policies to ease the transfers of bison from National Parks and wildlife refuges to reservations.⁷² The ITBC tries to keep to Native American traditions by partnering with tribal colleges for research and management.⁷³ The group boasts an expansive membership, including fifty-six tribes spread over nineteen states, with a collective herd of over 15,000 animals.⁷⁴ The ITBC does more than work on tribal relationships with buffalo; it has also been instrumental in helping reservations in other ways. In 2009, the ITBC received a \$175,000 grant from the USDA, which it used to create farm market stores on reservations in South Dakota, offering much-needed jobs and a place to sell goods and food.⁷⁵

III. THE YELLOWSTONE HERD DEBACLE

The Yellowstone National Park wild bison herd is perhaps the most notable example of bison's fragile relationship with federal and state governments, environmental groups, and anti-bison activists.⁷⁶ Once home to a hearty bison population, by the turn of the twentieth century the species was "nearly eliminated" within Yellowstone's boundaries.⁷⁷ After the Park introduced members of outside herds to increase the numbers of breeding pairs, the Yellowstone herd population began to grow, numbering over 1,000 by 1930.⁷⁸ However, with more road access and increased yearly visitors in the Park, the bison population reached a tipping point, requiring more active management and leading to decreased numbers.⁷⁹ In 1997, over 1,000 bison, nearly a third of the entire National Park herd, were shot and killed by gov-

⁷² ZONTEK, *supra* note 1, at 76.

⁷³ *Id.* at 83.

⁷⁴ INTERTRIBAL BUFFALO COUNCIL, *supra* note 61.

⁷⁵ *Intertribal Bison Cooperative Awarded \$175,000 Grant*, LAKOTA COUNTRY TIMES (Sept. 28, 2009) (available at http://www.lakotacountrytimes.com/news/2009-10-06/Headlines/Intertribal_Bison_Cooperative_awarded_175000_grant.html (accessed Sept. 19, 2014)) [<http://perma.cc/86JE-EDTV>].

⁷⁶ Some ecologists describe the Yellowstone herd as "among the most critical" for bison conservation and restoration efforts. Natalie D. Halbert et al., *Genetic Population Substructure in Bison at Yellowstone National Park*, 103 J. OF HEREDITY 1 (2012) (available at <http://jhered.oxfordjournals.org/content/early/2012/02/08/jhered.esr140.full.pdf+html> (accessed Oct. 1, 2014)) [<http://perma.cc/8BMU-5LH6>].

⁷⁷ NAT'L PARK SERV., DEP'T OF THE INTERIOR, RECORD OF DECISION FOR FINAL ENVIRONMENTAL IMPACT STATEMENT AND BISON MANAGEMENT PLAN FOR THE STATE OF MONTANA AND YELLOWSTONE NATIONAL PARK 3 (2000) (available at <http://www.nps.gov/yell/parkmgmt/upload/yellbisonrod.pdf> (accessed Oct. 1, 2014)) [hereinafter RECORD OF DECISION FOR FINAL ENVIRONMENTAL IMPACT STATEMENT] [<http://perma.cc/TUW9-7TZ6>].

⁷⁸ Zachary L. Lancaster, *Restraining Yellowstone's Roaming Bison*, 20 J. LAND USE & ENVT'L. L. 423, 427 (2005).

⁷⁹ See *History of Bison and Bison Management in Yellowstone National Park*, MONTANA FARM BUREAU FEDERATION 21-24 (2010) (available at http://mfbf.org/wp-content/uploads/2010/09/MFBF-Bison-Study_1007.pdf (accessed Dec. 22, 2014)) (noting that property damage from accidents involving motorists and free-ranging bison within the Park requires more active management) [<http://perma.cc/NSM3-GBR2>].

ernment officials.⁸⁰ Combined with a winter that brought record low temperatures and record high snowfall to the region, the situation for the herd was dire.⁸¹ Citing a “national tragedy,” environmental groups filed suit against the National Park Service (NPS), arguing that it had violated its own regulations as well as the Organic Act.⁸²

The State of Montana and the federal government currently implement two options for bison that stray outside the Yellowstone Park boundaries: hazing and culling.⁸³ Hazing consists of using riders on horseback, all-terrain vehicles, or even helicopters to herd bison back into the Park.⁸⁴ Culling involves killing off a number of bison in the herd.⁸⁵

In the winter months, bison may migrate to lower elevation areas.⁸⁶ Each spring, to make way for grazing beef cattle, the bison must be moved back.⁸⁷ Some residents near West Yellowstone refuse to allow riders to cross their private land to haze the bison.⁸⁸ Diane Winter, a resident of Horse Butte, just north of West Yellowstone, expressed frustration about the hazing process and said she feels it creates an unnecessarily dangerous situation: “I’ve watched this every year, and I don’t like it. . . . I like bison. They’re one of the reasons I moved here.”⁸⁹

A concerned environmental group sought an injunction against the practice, arguing that hazing by low-altitude helicopters would dis-

⁸⁰ ZONTEK, *supra* note 1, at 99; Intertribal Bison Coop. v. Babbitt, 25 F. Supp. 2d 1135, 1137 (D. Mont. 1998) (“[D]uring the unusually harsh winter of 1996-97 . . . some 1,100 bison [were] killed by government personnel and an additional number [died] due to weather conditions.”).

⁸¹ See Mark McBeth, *Bison and Cattle Wars: The Battle for Public Lands in Greater Yellowstone* 3 (1998) (available at <http://www.forwolves.org/ralph/bison/pap-mc-beth.htm> (accessed Dec. 24, 2014)) (noting the winter of 1997 was marked by “heavy snow and severely cold temperatures” in Yellowstone) [<http://perma.cc/7DYL-W5CG>]; Don Knapp, *Yellowstone Bison Roam into Killing Fields*, CNN, <http://www.cnn.com/EARTH/9702/18/buffalo.wars/> (Feb. 17, 1997) (accessed Dec. 24, 2014) (noting that “slaughtering, shooting and the winter’s severity will likely claim half the park’s 3,200 head of bison”) [<http://perma.cc/UM5U-CD95>].

⁸² *Intertribal Bison Coop.*, 25 F. Supp. 2d at 1135; ZONTEK, *supra* note 1, at 99.

⁸³ *Yellowstone Bison Given More Room to Roam*, ENV’T NEWS SERV., <http://www.ens-newswire.com/ens/apr2003/2003-04-29-10.asp> (Apr. 29, 2003) (accessed Oct. 2, 2014) [<http://perma.cc/KH5T-RQAB>].

⁸⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-291, *YELLOWSTONE INTERAGENCY BISON MANAGEMENT PLAN 4* (2008).

⁸⁵ *Frequently Asked Questions: Bison Management*, NAT’L PARK SERV., <http://www.nps.gov/yell/naturescience/bisonmgntfaq.htm> (accessed Oct. 25, 2014) [<http://perma.cc/SRA4-8GYY>].

⁸⁶ W. WATERSHEDS PROJECT & BUFFALO FIELD CAMPAIGN, *BISON WITHOUT BORDERS: STOPPING THE SENSELESS SLAUGHTER OF AMERICA’S LAST WILD BISON* (n.d.) (available at <http://www.westernwatersheds.org/2009/11/yellowstone-bison-suit-2/> (accessed Dec. 22, 2014)) [<http://perma.cc/2N6R-PK7B>].

⁸⁷ *Id.*

⁸⁸ Laura Lundquist, *Bison Hazing Begins near West Yellowstone*, BOZEMAN DAILY CHRONICLE, http://www.bozemandailychronicle.com/news/wildlife/article_3de5d03c-bdd3-11e2-a0c6-0019bb2963f4.html (May 16, 2013) (accessed Oct. 2, 2014) [<http://perma.cc/8Q3E-EDBM>].

⁸⁹ *Id.*

place and harass protected grizzly bears in the area—to no avail.⁹⁰ A potential solution to the problems presented by hazing the Yellowstone herd may be to gain permission for the herd to gather in areas surrounding the Park. The National Wildlife Federation (NWF) has negotiated grazing allotments to pay fair market value for the use of the land, and in return bison are allowed to return to the high elevations in the Park at their own leisure in the spring.⁹¹ Proponents of an increased range for the herd believe it could allow for a “more functional ecosystem” because “bison levels will be dictated by natural factors” rather than humans managing the herd and creating a population cap.⁹²

Although the time of fur-trade hunters with large-bore rifles has passed, cattle ranchers have proved to be the bison’s greatest contemporary enemy—particularly in the political realm. Any movement to increase the amount of acreage and resources devoted to bison is a sign of unpleasant changes for America’s cattle ranchers and other members of the agricultural industry. While ranchers are certainly not a homogenous group with respect to their views on bison,⁹³ many in the beef industry fear the animals roaming near their property.⁹⁴ Many ranchers’ primary concern—outside of the obvious economic argument that an increase in the popularity of bison meat may decrease demand for beef—is the possibility of bison transferring brucellosis to cattle.⁹⁵

Brucellosis is a disease that causes spontaneous abortions in pregnant cattle.⁹⁶ However, there has never been a confirmed incident of a bison-to-cattle transfer of brucellosis in the wild.⁹⁷ Observations during the winter of 1989 to 1990 revealed the rarity of bison spreading brucellosis, “when 900 Yellowstone bison mingled on twenty separate

⁹⁰ Associated Press, *Appeals Court Won't Block Yellowstone Bison Hazing*, BILLINGS GAZETTE, http://billingsgazette.com/news/state-and-regional/montana/appeals-court-won-t-block-yellowstone-bison-hazing/article_11a54eb4-d125-5359-bdbc-5c89e5d79260.html (May 21, 2013) (accessed Oct. 2, 2014) [<http://perma.cc/CD8H-FXZQ>].

⁹¹ See NWF's *Adopt a Wildlife Acre Program*, NAT'L WILDLIFE FEDERATION, <http://www.nwf.org/wildlife/adopt-a-wildlife-acre.aspx> (accessed Jan. 17, 2015) (offering a “fair price in exchange for [ranchers'] agreement to retire their public land grazing leases”) [<http://perma.cc/F4D7-FWMD>].

⁹² Lancaster, *supra* note 78, at 450.

⁹³ Several bison ranching advocates gained experience by working as cattle ranchers. ZONTEK, *supra* note 1, at 90.

⁹⁴ Laura Zuckerman, *Yellowstone Seeks to Cull 900 Bison from Famed Herd*, REUTERS, <http://www.reuters.com/article/2014/09/17/us-usa-bison-yellowstone-idUSKBN0HC01F20140917> (Sept. 17, 2014) (accessed Oct. 2, 2014) [<http://perma.cc/YG6P-PBL4>].

⁹⁵ ZONTEK, *supra* note 1, at 90. Some bison restoration advocates point out that along with fear of bison, an underlying reason for many ranchers opposing bison restoration efforts is racism against Native Americans. Tania Branigan, *Groups Lock Horns over Bison Range; Conservationists Criticize Administration Plan That Would Let Tribes Run Montana Refuge*, WASH. POST, Sept. 2, 2003, at A19.

⁹⁶ L.B. Lopes et al., *Brucellosis—Risk Factors and Prevalence: A Review*, 4 OPEN VETERINARY SCI. J. 72, 72 (2010).

⁹⁷ ZONTEK, *supra* note 1, at 90.

cattle herd range areas and not a single cow tested positive for brucellosis.”⁹⁸ The few bison that tested positive for brucellosis in the Yellowstone herd likely contracted the disease from their ancestors, who initially acquired it by mingling with domestic cattle in Yellowstone National Park between 1915 and 1917.⁹⁹ A recent DNA genotyping study compared the DNA of bison, elk, and cattle in the Greater Yellowstone Area in an attempt to ascertain the origins of the brucellosis disease. The study found that, unlike bison isolates, “elk and cattle isolates are virtually identical genetically,” suggesting that elk, rather than bison, are the source of brucellosis outbreaks in cattle.¹⁰⁰

Currently, there are efforts to improve a brucellosis vaccine that would protect both cattle and bison from the disease.¹⁰¹ In his article *Restraining Yellowstone’s Roaming Bison*, Zachary Lancaster asserts that a brucellosis vaccine would likely serve as a “desirable solution” to problems presented by roaming bison because it would address the concerns of brucellosis transmission from bison to cattle, or at least prevent anti-bison activists from relying on the disease as a reason to oppose bison restoration.¹⁰² The Park Service had considered remote-vaccination of bison in Yellowstone using air rifles, but decided against this option in early 2014.¹⁰³

Following the mass Yellowstone bison cull in 1997, another management plan, nicknamed the “Tribal Alternative,” proposed the elimination of the existing permit system for grazing, adoption of a paradigm meant to support local flora and fauna, and implementation of land as bison refuges.¹⁰⁴ The U.S. Department of Agriculture (USDA) considered the plan, but did not decide to implement it.¹⁰⁵ The InterTribal Bison Cooperative (ITBC) campaigned for another plan, nicknamed “The Citizen’s Plan,” but the USDA rejected that as well.¹⁰⁶

⁹⁸ *Id.* at 101.

⁹⁹ *Id.*

¹⁰⁰ Albano Beja-Pereira et al., *DNA Genotyping Suggests that Recent Brucellosis Outbreaks in the Greater Yellowstone Area Originated from Elk*, 45 J. WILDLIFE DISEASES 1174, 1176 (2009).

¹⁰¹ See NAT’L PARK SERV., U.S. DEP’T OF THE INTERIOR, RECORD OF DECISION: REMOTE VACCINATION PROGRAM TO REDUCE THE PREVALENCE OF BRUCELLOSIS IN YELLOWSTONE BISON 3 (2014) (available at <http://parkplanning.nps.gov/showFile.cfm?projectID=10736&MIMETType=application%252Fpdf&filename=YELL%5FBison%5FVacc%5FPROD%2Epdf&sfid=178264> (accessed Oct. 2, 2014)) [hereinafter RECORD OF DECISION: REMOTE VACCINATION PROGRAM] (analyzing alternatives to the strain RB51 vaccine, including strain 82 and DNA, which are undergoing testing) [<http://perma.cc/K632-CABK>]. Brucellosis is so politicized that some scientists refer to it as a “political disease” because approaches to controlling the illness “[vary] with the political strength of the infected animal’s advocates.” ZONTEK, *supra* note 1, at 101.

¹⁰² Lancaster, *supra* note 78, at 452.

¹⁰³ RECORD OF DECISION: REMOTE VACCINATION PROGRAM, *supra* note 101, at 5.

¹⁰⁴ ZONTEK, *supra* note 1, at 149.

¹⁰⁵ *Id.*

¹⁰⁶ Stephen Torbit & Louis LaRose, *A Commentary on Bison and Cultural Restoration*, 11 GREAT PLAINS RES. J. 175, 177–78 (2001). See also RECORD OF DECISION FOR

Montana's then-Governor Marc Racicot and members of the state legislature set out to put a stop to the spread of bison, proposing policies which would allow state officials and private parties to shoot stray bison.¹⁰⁷ The Montana Legislature moved management of bison from the Montana Department of Livestock to the Montana Fish, Wildlife, and Parks Department in order to facilitate culling bison.¹⁰⁸ The ITBC stepped in, coordinating with the NWF to save bison scheduled to be killed in Yellowstone.¹⁰⁹ The partnership proposed a quarantine program on a reservation in Oklahoma to serve as a haven and distribution point for animals that tested negative for brucellosis.¹¹⁰ Governor Racicot, meanwhile, refused to stop the culling of any bison who wandered outside of Yellowstone Park boundaries, and the executive officer of the State Department of Livestock stated: "We don't want any diseased animals anywhere in the State."¹¹¹

IV. THE BISON ISSUE IN THE COURTS AND LEGISLATURES

With a resource as important as the American bison, legislation on both sides of the matter has been introduced at both the federal and state level for roughly a century and a half. As early as the 1870s, some Americans sought to protect the bison from extinction, only for the bill to be pocket-vetoed by President Ulysses S. Grant.¹¹² Some members of Congress argued the bill made a good deal of economic sense, because the federal government at the time was footing the bill for vast quantities of beef to send to the reservations while elsewhere bison meat was being wasted.¹¹³ State laws outlawing leaving bison carcasses to rot where they fell, presumably to halt over-hunting, were almost completely unenforced.¹¹⁴

During the late nineteenth century, the Dawes Act broke up communal reservation lands, effectively destroying protected bi-

FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 77, at 60 (noting that a number of "proposed alternatives, including the Citizen's Plan," were not adopted, despite wide popular support).

¹⁰⁷ See *Wild Bison Dispute Deepens as Montana Governor Faults U.S.*, N.Y. TIMES, Feb. 2, 1997 (available at <http://www.nytimes.com/1997/02/02/us/wild-bison-dispute-deepens-as-montana-governor-faults-us.html> (accessed Nov. 30, 2014)) (noting the bill introduced in the Montana State Senate "would authorize the State Department of Livestock to call for a bison hunt 'in a crisis situation'" [<http://perma.cc/L9KJ-Y3UA>]; see also ZONTEK, *supra* note 1, at 100 (Montana's U.S. Senator Conrad Burns suggested that "The problem with Yellowstone National Park has always been they had too many buffalo. What we're saying is get the numbers down . . .").

¹⁰⁸ ZONTEK, *supra* note 1, at 100.

¹⁰⁹ *Id.* at 103.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 104.

¹¹² *Id.* at 25.

¹¹³ DI SILVESTRO, *supra* note 36, at 32.

¹¹⁴ *Id.*

son ranges.¹¹⁵ It was not until the Indian Reorganization Act of 1934¹¹⁶ that Native Americans received federal assistance to take control of reservation lands and began planning to raise bison herds.¹¹⁷ In 1923, Congress permitted the Secretary of Interior to remove surplus animals, including beaver, bear, and bison from national parks for relocation elsewhere.¹¹⁸ The 1950s complicated the bison issue with the National Park Service (NPS) giving jurisdiction over bison transfers from their parks to the U.S. Fish and Wildlife Service (FWS).¹¹⁹ Activism in the 1970s gave Native Americans greater autonomy nationwide through the Indian Self-Determination Act, and brought a restoration of tribes' bison projects.¹²⁰

In 1991, Fund for Animals, an animal rights group, sought to prevent the Department of the Interior from culling the Yellowstone herd.¹²¹ The group's request for emergency injunctive relief was denied primarily due to its inability to demonstrate probable success on the merits, the possibility of irreparable harm, and a favorable public interest.¹²² The Ninth Circuit affirmed the judgment, citing a lack of irreparable harm or "a balance of hardships tipping in" the group's favor.¹²³ The appeals court reasoned that since bison populations in the park were not shrinking, culling the herd by shooting bison that strayed outside the park boundary was not detrimental to the human environment.¹²⁴ *Fund for Animals v. Lujan* is significant, in part, because other courts have made reference to the factual findings when evaluating a plaintiff's request for a preliminary injunction.

The InterTribal Bison Cooperative (ITBC) suffered a setback in 1998, when the group failed to convince the District court for the District of Montana that the bison management plans, including culling and hazing, did not follow the law.¹²⁵ An argument that the National Park Service was violating the NPS Organic Act¹²⁶ failed to hold trac-

¹¹⁵ Act of Feb. 8, 1887, ch. 119, § 1, 24 Stat. 388 (repealed 2000) (authorizing surveys of Indian lands and the allotting of land parcels to individuals). *See also* ZONTEK, *supra* note 1, at 58 (describing the "the alienation of the tribes from reservation lands" as a result of the Dawes Act); Armen H. Merjian, *An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and Cobell v. Salazar*, 46 GONZ. L. REV. 609, 615–18 (2011) (explaining the implementation of the Dawes Act and the distressing consequences that followed).

¹¹⁶ Indian Reorganization Act of 1934, 25 U.S.C. §§ 461–79 (2006).

¹¹⁷ ZONTEK, *supra* note 1, at 66–67.

¹¹⁸ Act of Jan. 24, 1923, ch. 42, 42 Stat. 1214 (current version at 16 U.S.C. § 36 (2012)).

¹¹⁹ ZONTEK, *supra* note 1, at 68.

¹²⁰ *Id.* at 69.

¹²¹ *Fund for Animals, Inc. v. Lujan*, 794 F. Supp. 1015, 1017 (D. Mont. 1991), *aff'd*, 962 F.2d 1391 (9th Cir. 1992).

¹²² *Id.* at 1020.

¹²³ *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992).

¹²⁴ *Id.* at 1402.

¹²⁵ *Intertribal Bison Coop.*, 25 F. Supp. 2d at 1140.

¹²⁶ Act of Aug. 25, 1916, ch. 408, § 1, 39 Stat. 535 (current version at 16 U.S.C. § 1 (2012)) (tasking the newly created National Park Service with conserving the wildlife

tion in the courts, since the Park Service already had authority to remove the surplus animals.¹²⁷ The approved Interagency Bison Management Program increased tolerance for bison, enlarged their migratory range, and resulted in less lethal removal by Montana state officials.¹²⁸ However, the Montana District court found that enjoining the NPS from culling the herd would not serve the critical public interest, citing concerns over brucellosis, human safety, and property damage caused by migrating bison herds.¹²⁹ The court opined that the emotional appeal of “stop the slaughter” wasn’t enough, and that lethal removal was a necessary wildlife management tool for the bison population.¹³⁰

The bison hunt protest line of cases is an interesting part of the battle over bison in Montana. A single hunt on Horse Butte in the spring of 1990 sparked the controversy. An animal rights activist, John Lilburn, obstructed the aim of a hunter intending to shoot a bison just outside of Yellowstone National Park.¹³¹ Lilburn was prosecuted under the Hunter Harassment Act, which criminalized interference with law-abiding hunters.¹³² In turn, Lilburn sued in District court for the District of Montana, seeking a declaratory judgment that the Hunter Harassment Act was an unconstitutionally vague restriction on speech.¹³³ The federal court denied intervention, wishing to avoid stepping in the way of a then-ongoing state criminal suit.¹³⁴ Still, the District court supported the statute, since the goal of the law was “reasonable.”¹³⁵

In 1993, a Montana district court judge declared the statute unconstitutionally overbroad, since any conduct, even mere verbal speech, that would dissuade hunters from taking game was illegal under the Act.¹³⁶ The court found the statute to be vague and not narrowly tailored to actually promote physical safety—certainly insufficient to restrict speech based on its content.¹³⁷ This victory for bison activists would prove to be short lived. The very next year, the Montana Supreme Court reversed the trial court decision, finding the law

within the national parks). See *What Does the 1916 Organic Act Require of the National Park Service?*, NAT’L PARK SERV., <http://www.nps.gov/protect/> (accessed Oct. 3, 2014) (discussing NPS’s approach to the Organic Act’s mandate, “this most important provision of law”) [<http://perma.cc/QM5N-7WL2>].

¹²⁷ *Intertribal Bison Coop.*, 25 F. Supp. 2d at 1138.

¹²⁸ *W. Watersheds Project v. Salazar*, 766 F. Supp. 2d 1095, 1118–19 (D. Mont. 2011) *aff’d in part*, 494 F. App’x 740 (9th Cir. 2012).

¹²⁹ *Id.* at 1121.

¹³⁰ *Id.* at 1122.

¹³¹ *State v. Lilburn*, No. DC 92-70, 1993 Mont. Dist. LEXIS 701 at *2–3 (1993).

¹³² *Id.* at *3; An Act to Prohibit Harassment of Hunters and Trappers, ch. 492, 1987 Mont. Laws 1198–1199 (repealed 2011).

¹³³ *Lilburn v. Racicot*, 855 F. Supp. 327, 328 (D. Mont. 1991).

¹³⁴ *Id.* at 328–30.

¹³⁵ *Id.* at 329.

¹³⁶ *Lilburn*, 1993 Mont. Dist. LEXIS 701, at *7–8.

¹³⁷ *Id.* at *18.

was not overbroad.¹³⁸ The Montana Supreme Court found the law, and its intent to promote safety for hunters and protesters, “reasonably clear.”¹³⁹

Hunters and ranchers were not the only groups of concerned citizens with respect to Montana’s bison. An outdoor group concerned with recreational snowmobiling joined the discussion in the early 2000s. Yellowstone National Park has experienced a contentious relationship with snowmobiles, with thousands of riders wishing to enjoy the scenic beauty of the area every winter.¹⁴⁰ However, the snowmobiles were so noisy and caused so much air pollution that rangers began to wear respirators.¹⁴¹

An earlier rule by the NPS banned the machines in several national parks.¹⁴² An updated rule, however, proposed to delay implementation for the phase-out.¹⁴³ Fund for Animals stepped in, filing suit and arguing that the new rule was arbitrary.¹⁴⁴ The animal rights activists won the case, with the court finding that the NPS had ignored expert scientific opinions stating that snowmobile trail grooming would adversely affect bison and other sensitive animal populations within Park boundaries.¹⁴⁵ In 2013, the Park announced a modification of the rules, allowing no more than fifty groups of snowmobilers—with a limit of 10 vehicles per group—access to the park per day.¹⁴⁶ By 2015, snowmobiles will have to pass increasingly rigorous tests for noise and air pollution levels.¹⁴⁷ This rule provides something of a policy compromise between the wishes of environmentalists and recreationalists. Such willingness of the Department of the Interior to strike a balance between competing interests is a welcome sign for the bison debate’s future.

Some environmentalists believe that classification as an endangered species would be an important victory to secure a more prosper-

¹³⁸ State v. Lilburn, 875 P.2d 1036, 1044 (Mont. 1994).

¹³⁹ *Id.*

¹⁴⁰ Elizabeth Shogren, *15 Years of Wrangling over Yellowstone Snowmobiles Ends*, NPR, <http://www.npr.org/2013/10/22/239705610/new-rules-mean-more-and-cleaner-snow-mobiles-in-yellowstone> (Oct. 22, 2013) (accessed Oct. 3, 2014) [<http://perma.cc/Z829-YR3Z>].

¹⁴¹ *Id.*

¹⁴² Special Regulations, Areas of the National Park System, 66 Fed. Reg. 7260, 7260 (Jan. 22, 2001) (to be codified at 36 C.F.R. pt. 7) (available at http://www.nps.gov/yell/parkmgmt/upload/1-22-01_finalrule.pdf (accessed Nov. 22, 2014)) (planning to phase-out snowmobile use in Yellowstone and Grand Teton National Parks and the John D. Rockefeller Jr., Memorial Parkway) [<http://perma.cc/FE29-STNV>].

¹⁴³ Special Regulations; Areas of the National Park System, 68 Fed. Reg. 69268, 69268 (Dec. 11, 2003) (to be codified at 36 C.F.R. pt. 7) (available at <http://www.nps.gov/yell/parkmgmt/upload/finalrule-2.pdf> (accessed Nov. 22, 2014)) [<http://perma.cc/B9JH-UKM3>].

¹⁴⁴ Fund for Animals v. Norton, 294 F. Supp. 2d. 92, 96–97 (D.D.C. 2003).

¹⁴⁵ *Id.* at 110–11.

¹⁴⁶ Special Regulations; Areas of the National Park System; Yellowstone National Park; Winter Use, 78 Fed. Reg. 63069, 63069 (Oct. 23, 2013).

¹⁴⁷ *Id.*

ous future for bison. In 1999, an individual petitioned the government to list at least the Yellowstone Herd as an endangered species.¹⁴⁸ Since distinct population segments, and not just species as a whole can gain the same protected status, the petition averred that the Yellowstone Park herd was worthy of protection.¹⁴⁹ After a delayed review, the FWS concluded that there was not substantial information to show that the herd was threatened or endangered in either of the potentially significant portions of the range reviewed.¹⁵⁰ Another effort to grant wild bison protection under the Endangered Species Act failed in 2011, with the FWS failing to find information in the petition warranting inclusion of the species.¹⁵¹

In 1994 the Kootenai and Salish tribes of Montana's Flathead Indian Reservation took over bison production on their land by convincing the federal government to allow the tribes, under the Indian Self-Determination Act, to participate in the management of resources on tribal lands possessing geographic, historic, or cultural significance.¹⁵² The tribes banded together to conduct a public relations campaign in the tribal communities to gain access to more bison, imploring individuals interested in supporting the cause to "join the herd."¹⁵³ The Salish-Kootenai program ultimately resulted in drafting an Annual Funding Agreement to manage the National Bison Range with the FWS.¹⁵⁴ This partnership between the Salish-Kootenai tribes and FWS laid a foundation for future tribal involvement in the National Bison Range.¹⁵⁵

¹⁴⁸ Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Yellowstone National Park Bison Herd as Endangered, 72 Fed. Reg. 45,717, 45,717 (Aug. 15, 2007) (available at <http://www.gpo.gov/fdsys/pkg/FR-2007-08-15/pdf/E7-16004.pdf> (accessed Oct. 3, 2014)) [<http://perma.cc/5DWX-GP9J>].

¹⁴⁹ *Id.* See Policy Regarding the Recognition of Distinct Vertebrate Population Segments under the Endangered Species Act, 61 Fed. Reg. 4,722, 4,723–24 (Feb. 7, 1996) (available at <http://www.gpo.gov/fdsys/pkg/FR-1996-02-07/pdf/96-2639.pdf> (accessed Oct. 3, 2014)) (outlining the new policy allowing distinct population segments of species to gain protected status) [<http://perma.cc/BZH5-43QG>].

¹⁵⁰ Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Wild Plains Bison or Each of Four Distinct Population Segments As Threatened, 76 Fed. Reg. 10299, 10299 (Feb. 24, 2011) (available at <http://www.gpo.gov/fdsys/pkg/FR-2011-02-24/pdf/2011-4121.pdf> (accessed Nov. 30, 2014)) [<http://perma.cc/USV6-ERVE>].

¹⁵¹ *Id.*

¹⁵² ZONTEK, *supra* note 1, at 150 (noting that the buffalo easily qualified as a resource of "significance").

¹⁵³ Melissa Cheung, *A Home Where the Buffalo Roam*, CBS NEWS, <http://www.cbsnews.com/news/a-home-where-the-buffalo-roam/> (July 10, 2003) (accessed Nov. 22, 2014) [<http://perma.cc/ZX5J-7XTJ>]. Indeed, the tribe's public relations campaign went by the name "Join The Herd."

¹⁵⁴ *Id.* at 151.

¹⁵⁵ See Erin Patrick Lyons, "Give Me A Home Where the Buffalo Roam": *The Case in Favor of the Management-Function Transfer of the National Bison Range to the Confederated Salish and Kootenai Tribes of the Flathead Nation*, 8 J. GENDER RACE & JUST. 711, 713, 732–33 (2005) (arguing that the federal government would have much to gain

Despite the progress evidenced by the Salish-Kootenai/FWS partnership, struggles over the future of bison continued. In 2013, the Montana State Legislature sought to combat growing numbers of bison by introducing several anti-bison bills, three of which were vetoed by Governor Steve Bullock.¹⁵⁶ One particularly brutal bill introduced that did not make it to the governor's desk was H.R. 249.¹⁵⁷ Introduced by Representative Alan Doane, the measure would have allowed private landowners to shoot and kill trespassing bison on sight with no repercussions.¹⁵⁸ In support of the bill, Representative Doane cited the bison's dangerous nature and defended the importance of private property rights in Montana.¹⁵⁹

That same year, Governor Bullock vetoed S. 256, which would have made the Montana Fish, Wildlife, and Parks Department liable for the damages caused by bison to private property.¹⁶⁰ Another bill that did not make it past the Governor's desk was S. 305, which would have defined "wild buffalo" or "wild bison" as an animal that "has never been owned by an individual, partnership, corporation, association, firm or other entity, except for the state or a state agency."¹⁶¹ The broadest relevant legislation, which died in committee, was S. 341.¹⁶² S. 341 would have imposed several limitations on bison transfers in the state, including the limitation that wildlife may not be introduced that would restrict or limit the use of private property.

by allowing the tribes to assume significant roles in managing the National Bison Range).

¹⁵⁶ Terri Hansen, *Montana Governor Vetoes Three Anti Bison Bills, Lets the Hunt Stand*, INDIAN COUNTRY TODAY MEDIA NETWORK, <http://indiancountrytodaymedianet.com/2013/05/12/montana-governor-vetoes-three-anti-bison-bills-lets-hunt-stand-149320> (May 12, 2013) (accessed Oct. 3, 2014).

¹⁵⁷ H.R. 249, 63d Leg., Reg. Sess. (Mont. 2013). As of April 24, 2013, H.R. 249 died in Standing Committee. Montana Legislature, *Detailed Bill Information*, [http://laws.leg.mt.gov/legprd/law0203w\\$.startup?P_SESS=20131](http://laws.leg.mt.gov/legprd/law0203w$.startup?P_SESS=20131) (choose "2013 January Regular Session" from the drop-down menu, search "HB 249") (accessed Nov. 22, 2014) [<http://perma.cc/V4DG-ECLC>].

¹⁵⁸ H.R. 249 § 1.

¹⁵⁹ Eve Byron, *Bison Shoot-on-Sight Bill Gets Mixed Comment*, HELENA INDEPENDENT RECORD, http://helenair.com/news/legislature/bison-shoot-on-sight-bill-gets-mixed-comment/article_02f70ece-64f4-11e2-97c6-0019bb2963f4.html (Jan. 22, 2013) (accessed Oct. 3, 2014) [<http://perma.cc/6QFN-MMA2>].

¹⁶⁰ S. 256, 63d Leg., Reg. Sess. (Mont. 2013); *Detailed Bill Information*, [http://laws.leg.mt.gov/legprd/law0203w\\$.startup?P_SESS=2013](http://laws.leg.mt.gov/legprd/law0203w$.startup?P_SESS=2013) (choose "2013 January Regular Session" from the drop-down menu, search "SB 256") (accessed Jan. 17, 2015) [<http://perma.cc/V4DG-ECLC>].

¹⁶¹ S. 305, 63d Leg., Reg. Sess. (Mont. 2013); *Detailed Bill Information*, [http://laws.leg.mt.gov/legprd/law0203w\\$.startup?P_SESS=2013](http://laws.leg.mt.gov/legprd/law0203w$.startup?P_SESS=2013) (choose "2013 January Regular Session" from the drop-down menu, search "SB 305") (accessed Jan. 17, 2015) [<http://perma.cc/V4DG-ECLC>].

¹⁶² S. 341, 63d Leg., Reg. Sess. (Mont. 2013); *Detailed Bill Information*, [http://laws.leg.mt.gov/legprd/law0203w\\$.startup?P_SESS=2013](http://laws.leg.mt.gov/legprd/law0203w$.startup?P_SESS=2013) (choose "2013 January Regular Session" from the drop-down menu, search "SB 341") (accessed Jan. 17, 2015) [<http://perma.cc/V4DG-ECLC>].

Governor Bullock did sign one bison bill into law in 2013, H.R. 328, which was perhaps an olive branch offering to anti-bison constituents.¹⁶³ Thereafter, H.R. 328 permitted state officials to notify hunters of the physical location of bison herds during the hunting season.¹⁶⁴ Overall, Governor Bullock has been an important ally for pro-bison restoration groups in Montana because he vetoes most of the anti-bison bills.

V. *CITIZENS FOR BALANCED USE v. MAURIER*

The case of *Citizens for Balanced Use v. Maurier* was decided by the Montana Supreme Court in 2013, and is currently an important part of the restoration puzzle. *Maurier* ensures that, at least in Montana, anti-bison groups cannot block the transfer of bison to Native lands.¹⁶⁵ The bison at issue in *Maurier* were former members of the Yellowstone National Park herd that had tested negative for brucellosis.¹⁶⁶ The Montana Fish, Wildlife, and Parks Department (FWP) planned to relocate about sixty of these animals to Indian reservations in 2012 when Citizens for Balanced Use (CBU) sued to enjoin the bison transport.¹⁶⁷ The tribes and the FWP had entered into a Memorandum of Understanding to contain and quarantine the bison.¹⁶⁸ CBU argued FWP could not engage in any further transport of bison to the reservations unless FWP complied with two state statutes.¹⁶⁹ One statute, MCA 87-1-216, outlines department duties in reference to bison, specifically those from Yellowstone National Park.¹⁷⁰ The provision of MCA 87-1-216 at issue in *Maurier* states that “the department may not release, transplant, or allow wild buffalo or bison on any private or public land in Montana that has not been authorized for that use by the private or public owner.”¹⁷¹ The district court granted the preliminary injunction, and the State and intervenor defendants appealed.¹⁷²

In the Montana Supreme Court’s analysis, the district court had granted the preliminary injunction because it found that the FWP had violated MCA 87-1-216 by failing to either have a management plan in place or receive the consent of impacted landowners before the trans-

¹⁶³ S. 328, 63d Leg., Reg. Sess. (Mont. 2013); *Detailed Bill Information*, [http://laws.leg.mt.gov/legprd/law0203w\\$.startup?P_SESS=2013](http://laws.leg.mt.gov/legprd/law0203w$.startup?P_SESS=2013) (choose “2013 January Regular Session” from the drop-down menu, search “SB 328”) (accessed Jan. 17, 2015) [<http://perma.cc/V4DG-ECLC>].

¹⁶⁴ MONT. CODE ANN. 87-2-730 (2003), *amended by* 2013 MT Laws Ch. 181, § 1.

¹⁶⁵ See *Maurier*, 303 P.3d at 801 (vacating a preliminary injunction against the transfer of bison to tribal lands, finding the only statutory limit on transfers to tribal land is a requirement for disease control measures).

¹⁶⁶ *Id.* at 796.

¹⁶⁷ *Id.* at 796–97.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 797.

¹⁷⁰ MONT. CODE ANN. § 87-1-216 (2011).

¹⁷¹ *Id.*

¹⁷² *Maurier*, 303 P.3d at 797.

fer.¹⁷³ The Montana Supreme Court reversed the decision of the district court, partly on the basis that the statute could only be applied when bison were relocated to “public or private land in Montana.”¹⁷⁴ The Montana Supreme Court determined that the district court improperly balanced the equities.¹⁷⁵ There was no evidence of latent disease, and in fact, the Memorandum of Understanding outlined many conditions for protecting the property rights of nearby ranchers and citizens, while still allowing the Fort Peck Reservation to accomplish the goals of building the bison population and reconnecting with their “long-held and deeply rooted” historic relationship with the species.¹⁷⁶

VI. BISON AND PRIVATE PROPERTY RIGHTS

Historically, the Anglo-American system of private property rights has operated to the detriment of the American buffalo.¹⁷⁷ Today, property rights form the basis for potent anti-bison arguments. How much power do private landowners have over wildlife, or alternatively, livestock, that wander onto their properties? If bison ‘owned’ by a Native American community escape, what rights are community members afforded as the caretakers of the animals, as opposed to the rights of private landowners whose property may be damaged by the bison? Property rights to land are much easier to enforce than property rights in mobile resources like air, water, and animals.¹⁷⁸ It was easier for settlers to create property rights in live cattle than live bison, hence the removal of bison, in part, to secure grazing space for beef cattle.¹⁷⁹

In Montana, a landowner cannot generally recover from damage caused by a trespassing livestock animal unless the owner has constructed a fence to keep animals out.¹⁸⁰ An “implied license” for livestock to graze openly on empty land in “those states where there were great plains and vast tracts of unenclosed land, suitable for pasture” has been entrenched as custom by the Supreme Court since 1911.¹⁸¹ This concept of the open range was codified in Montana law in the

¹⁷³ *Id.* at 798.

¹⁷⁴ *Id.* at 799.

¹⁷⁵ *Id.* at 801.

¹⁷⁶ *Id.* at 800.

¹⁷⁷ See generally Lueck, *supra* note 25, at 641–50 (examining how different property rights regimes have affected bison exploitation and conservation).

¹⁷⁸ TERRY L. ANDERSON & LAURA E. HUGGINS, *PROPERTY RIGHTS: A PRACTICAL GUIDE TO FREEDOM AND PROSPERITY* 39 (2003).

¹⁷⁹ *Id.* See generally Lueck, *supra* note 25, at 645–50 (hypothesizing that trying to contain the “nomadic” bison with fencing was far too expensive for settlers, discussing the difficulties of handling the “nervous and excitable” bison, and the comparative ease with which cattle could be handled such that bison were less readily regulated as property). Similarly, settlers may have found it easier to enforce property rights in a dead bison than a live bison, as a mobile resource.

¹⁸⁰ *Larson-Murphy v. Steiner*, 15 P.3d 1205, 1212 (Mont. 2000) (stating “the law of the open range remains the law of this state”).

¹⁸¹ *Light v. U.S.*, 220 U.S. 523, 535 (1911).

1880s.¹⁸² The open range standard, however, began to erode in the face of technology: the rise of automobiles, and the increasing potential for fatal crashes with free roaming livestock shifted the standard towards ordinary care negligence.¹⁸³ This would prove to be a sign of change regarding how citizens and animals interacted. By 1982, the legal status of Montana as an open range state had significantly changed, with the State's high court noting: "The open range tradition has become increasingly eroded over the years as a greater number of motorists have appeared on Montana's roads and highways."¹⁸⁴

The question of what entity owns or is responsible for the management of an area's wildlife, and to what extent, remains somewhat dynamic.¹⁸⁵ Americans in general have a strong connection with the outdoors, and it is usually assumed that the country's wildlife are owned, or at least entrusted to, the public.¹⁸⁶ The Supreme Court has established that each state has conditioned state trusteeship over the wildlife located there.¹⁸⁷ As to federal public land, the Supreme Court has determined that the Property Clause extends federal power over wildlife on the federal land, state law notwithstanding.¹⁸⁸ Regarding private land, protected animal status is often difficult and controversial to determine.¹⁸⁹ The area surrounding Yellowstone National Park is not just the epicenter of the bison debate; the continuing legal battle over gray wolf reintroduction also grips the public and further concerns area cattle ranchers.¹⁹⁰ If the public trust doctrine¹⁹¹ applies to

¹⁸² Compiled Statutes of Montana, 1887, 5th Div., §1119. Domestic bison are specifically listed as one of the animals covered by the statute within the text of the modern statute. MONT. CODE ANN. § 81-4-215 (2013).

¹⁸³ See Roy H. Andes, *A Triumph of Myth over Principle; The Saga of the Montana Open-Range*, 56 MONT. L. REV. 485, 492 (1995) (noting the connection between rising motor vehicle traffic and a national shift towards holding livestock owners to the same duty of care standards as other road users).

¹⁸⁴ *Ambrogini v. Todd*, 642 P.2d 1013, 1018 (Mont. 1982).

¹⁸⁵ See generally Michael. C Blumm & Lucas Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673 (2005) (discussing the historic roots of wildlife capture law and its relation to evolving state ownership doctrine).

¹⁸⁶ J. M. Kelley, *Implications of a Montana Voter Initiative That Reduces Chronic Wasting Disease Risk, Bans Canned Shooting, and Protects a Public Trust*, 6 GREAT PLAINS NAT. RESOURCES J. 89, 92 (2001-2002).

¹⁸⁷ See generally *Hughes v. Oklahoma*, 441 U.S. 322, 324-25 (1979) (noting that resources within each state belong to that state for the benefit of its people).

¹⁸⁸ *Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976).

¹⁸⁹ *Id.* at 547. *Kleppe* notably left open the issue of federal power over wild horses and burros on private land.

¹⁹⁰ See Anna R.C. Caspersen, Comment, *The Public Trust Doctrine and the Impossibility of "Takings" by Wildlife*, 23 B.C. ENVTL. AFF. L. REV. 357, 389-90 (1996) (discussing the tension between those seeking to reintroduce wolves to Yellowstone National Park and the local ranchers).

¹⁹¹ See COASTAL STATES ORGANIZATION, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 3 (David Slade et al. eds., 2d ed. 1997) (available at <http://www.shoreline.noaa.gov/docs/8d5885.pdf> (accessed Dec. 23, 2014)) ("The Public Trust Doctrine provides that public trust lands, waters and living resources in a State are held by the State in trust

natural resources, including wildlife, then the state must protect wildlife as a trustee to protect the resource for the public.

Some citizens argue that when an animal protected by the government enters onto their land and causes damage to a fence or other private property, then the Fifth Amendment Takings Clause is implicated,¹⁹² and the landowner should be justly compensated by the government.¹⁹³ However, if the public trust doctrine applies as one of the “background principles of the State’s law of property” exemption from *Lucas v. South Carolina Coastal Council*,¹⁹⁴ then it arguably “trumps” the Takings Clause.¹⁹⁵ Such arguments have been successfully applied to protected wildlife that have damaged private property, even when the state relocated the wildlife into the area where the damage subsequently occurred, and especially when the wildlife was being reintroduced to an area it once inhabited before being “driven to the brink of extinction.”¹⁹⁶

An older line of cases similarly shields the government from tort liability resulting from reintroduced wildlife. In the early 1900s, the State of New York reintroduced beavers to wooded areas, and the animals—characteristically—caused damage to valuable woodlands.¹⁹⁷ The New York Court of Appeals ultimately dismissed a tort claim brought by an owner of some of the damaged woodlands, holding not only that the state had a right to protect wild animals, particularly when “without special protection [they] would be destroyed,”¹⁹⁸ but that the state could exercise that power to safeguard animals not for their utility, but for their intrinsic value: “not for [the animal’s] use, but for its beauty.”¹⁹⁹ Moreover, acting as “a trustee for the people,” the state could not be held liable for “liberating these beaver,” in the

for the benefit of all of the people, and establishes the right of the public to fully enjoy public trust lands, waters and living resources for a wide variety of recognized public uses.”) [<http://perma.cc/3Q83-8GJB>].

¹⁹² U.S. CONST. amend. V (“nor shall private property be taken for public use, without just compensation”).

¹⁹³ Caspersen, *supra* note 190, at 359.

¹⁹⁴ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992).

¹⁹⁵ Caspersen, *supra* note 190, at 373. See also James L. Huffman, *A Fish out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527, 558–59 (1989) (further explaining the relationship between the Public Trust Doctrine and the Takings Clause, among other constitutional principles).

¹⁹⁶ See *Moerman v. State*, 21 Cal. Rptr. 2d 329, 333 (1993) (“The majority of courts that have considered the question of whether the government owes compensation for damage to property caused by protected wildlife have held that the government does not. . . . The fact that the state has chosen to return some of the animals to their native habitat does not mean it caused Moerman’s damages. Clearly it is unreasonable to argue that because the animals were once eliminated from Lake and Mendocino Counties and driven to the brink of extinction, that they are now nothing more than a public improvement or pet, under the control of the state.”) (citations omitted).

¹⁹⁷ *Barrett v. State*, 116 N.E. 99, 100–02, (N.Y. 1917).

¹⁹⁸ *Id.* at 100.

¹⁹⁹ *Id.*

same way private parties would if they kept “wild animals in captivity.”²⁰⁰

Montana is no stranger to the dispute over wildlife takings controversies. After a protected grizzly bear in Montana was shot by a sheep farmer, the Department of the Interior fined the farmer for killing the bear in violation of the Endangered Species Act (ESA).²⁰¹ The sheep farmer then filed suit seeking to enjoin the Department of the Interior from enforcing the fine, positing that the bear, as a governmental actor due to its protected status, physically ‘took’ his private property, the sheep.²⁰² The Ninth Circuit found for the Department of the Interior, maintaining that while the bear had physically taken the sheep, the broad argument of the bear as a governmental agent was improper.²⁰³ The Ninth Circuit also found the ESA and the grizzly bear regulations at issue in *Christy* did not constitute a taking of plaintiff’s sheep because the plaintiff was “in full possession of the complete ‘bundle’ of property rights” in the sheep, the action of the grizzly bear was not attributable to the government, and the government does not have title over the grizzly bear, but is empowered to protect them.²⁰⁴

Nonetheless, variations on the plaintiff’s argument have been employed by commentators who argue that if animal species are introduced to areas they have never been, or reintroduced to areas where the species has not proliferated in several years, the animals should not be considered indigenous wildlife and the government should bear responsibility.²⁰⁵

VII. THE FUTURE

The future of the American bison is uncertain. With intense political lobbying on both sides, traction occurs slowly and can yield underwhelming results. Bison advocates are not completely unified. Reservations managing wild herds and private commercial bison ranchers have different sets of goals and tactics, and while connected, each have their own struggles.

Native Americans cannot likely restore the bison to prominence on their own. Conservation groups have stepped in, joining forces with private individuals. Cable news mogul Ted Turner maintains roughly 51,000 bison on fourteen ranches in the Western U.S.²⁰⁶ Preservation

²⁰⁰ *Id.*

²⁰¹ *Christy v. Hodel*, 857 F.2d 1324, 1327 (9th Cir. 1988).

²⁰² *Id.* at 1334.

²⁰³ *Id.* at 1335.

²⁰⁴ *Id.* at 1334. See generally Stephen P. Foley, *Does Preventing “Take” Constitute an Unconstitutional “Taking”? An Analysis of Possible Defenses to Fifth Amendment Taking Claims Based on the Endangered Species Act*, 14 UCLA J. ENVTL. L. & POL’Y 327 (1996) (analyzing a different sort of Takings Clause claim with respect to endangered species, primarily in the context of protected California redwood forests).

²⁰⁵ Caspersen, *supra* note 190, at 386.

²⁰⁶ *Turner Ranches FAQ*, TED TURNER ENTERS., <http://www.tedturner.com/turner-ranches/turner-ranches-faq> (accessed Nov. 22, 2014) [<http://perma.cc/NF4J-EXM4>].

groups, such as the Nature Conservancy, work with private ranchers, like Turner, coordinating bison ranching with Great Plains habitat restoration.²⁰⁷ Ranchers, potentially eager to abandon the overwhelmingly difficult maintenance and work involved in managing traditional beef cattle herds, may be willing to make the switch to a species that is “half the work and twice the money.”²⁰⁸ Particularly in South Dakota, bison ranching may have found some new proponents after a freak blizzard in October 2013 left beef cattle dead by the thousands.²⁰⁹ The cattle were soaked by a cold rain and then frozen by a blast of arctic wind, partly because their thick winter coats had not yet developed.²¹⁰ Economic losses ran to millions of dollars, with Silvia Christen, the director of the South Dakota Stockgrowers Association, predicting that many commercial beef ranching operations “will never recover.”²¹¹ Final reports state that only 40 bison were killed in the blizzard, as compared to reports of 13,977 cattle killed.²¹²

The InterTribal Bison Cooperative (ITBC) offers two arguments on the superiority of bison to cattle for the production of meat. First, beef cattle have trouble surviving harsh winters that bison populations have long endured.²¹³ Second, bison tend not to overgraze the land, lessening their ecological impact and easing herd maintenance.²¹⁴ The ITBC suggests that bison, being once plentiful on the American plains now dominated by beef cattle, have a relatively lower ecological impact on the actual land as a resource and can potentially be cultivated in a “form of nonintensive pastoralism.”²¹⁵ Grazing cattle require “intense management”²¹⁶ due to their habit of overgrazing narrow types of grass, loitering in an area to the point where they have thoroughly trampled their surroundings, and overusing areas around water sources—particularly in the winter, when ranchers must keep water unfrozen for them.²¹⁷ In contrast, bison roam widely, consume a range of fodder, and chew snow for water when other sources are frozen,

²⁰⁷ Deborah E. Popper & Frank J. Popper, *The Onset of the Buffalo Commons*, 45 J. WEST, 29, 32 (2006).

²⁰⁸ ZONTEK, *supra* note 1, at 146.

²⁰⁹ See Irina Zhorov, *Why Did South Dakota Snowstorm Kill So Many Cattle?*, NAT'L GEOGRAPHIC, <http://news.nationalgeographic.com/news/2013/10/131022-cattle-blizzard-south-dakota-winter-storm-atlas/> (Oct. 22, 2013) (accessed Oct. 3, 2014) (documenting ranchers' woes after snowstorm) [<http://perma.cc/6552-DRXC>].

²¹⁰ *Id.*

²¹¹ See *id.* (noting estimated losses at \$2,000 per cow).

²¹² Press Release, Bureau of Land Management, SD Continues to Deal with Blizzard Impacts (Nov. 15, 2013) (available at http://www.blm.gov/mt/st/en/info/newsroom/2013/november/sd_continues_to_deal.html (accessed Oct. 3, 2014)) [<http://perma.cc/4DJY-2Y8T>].

²¹³ See ZONTEK, *supra* note 1, at 92 (describing bison's adaptation to the American landscape, in contrast to beef cattle); see e.g., Press Release, Bureau of Land Management, *supra* note 212.

²¹⁴ ZONTEK, *supra* note 1, at 92.

²¹⁵ *Id.* at 146.

²¹⁶ *Id.*

²¹⁷ *Id.* at 92.

avoiding the destruction cattle wreak upon “riparian areas and valuable prairie wetlands.”²¹⁸ Phasing out cattle in favor of bison would not be a simple matter of swapping one for the other—bison are not, in the words of First Nations representatives, just “furry cattle.”²¹⁹ Nonetheless, the potential advantages bear further investigation.

Bison should be reintroduced to the American plains to increase the biodiversity of the ecosystem. The American bison historically had an important role as a keystone species.²²⁰ Their grazing positively impacts the biodiversity of plant life due to their irregular feeding habits.²²¹ Grazing bison can create homes for nesting birds in the ground and in plant matter.²²² The biodiversity that bison create could help support larger populations of scavengers and predators.²²³ There have been major negative shifts in the function of the Great Plains ecosystem since beef cattle and other livestock have replaced bison.²²⁴ Bison programs on Native American reservations should be embraced by federal and state governments as a symbolic reversal of poor policy towards the people indigenous to the bison’s former range.²²⁵

Poverty affects Native Americans more than any other racial group within the U.S., with over 25% of the population living at or below the national poverty line.²²⁶ Native Americans can reclaim bi-

²¹⁸ *Id.*

²¹⁹ Bob Church, *Bison Are Back—The Final Millennium*, BISON PRODUCERS OF ALBERTA, <http://bisoncentre.com/index.php/producers-2/resource-library/ibc2000-proceedings/primary-sessions/bison-are-back-the-final-millennium> (Aug. 2000) (accessed Oct. 3, 2014) (offering an article from an ITBC conference discussing attitudes toward bison) [<http://perma.cc/Z29T-C4LU>].

²²⁰ See Joe C. Truett et al., *Managing Bison to Restore Biodiversity*, 11 GREAT PLAINS RES. 123, 125–29, 133 (2001) (available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1542&context=greatplainsresearch> (accessed Oct. 3, 2014)) (noting the role of bison as a keystone species in the Great Plains ecosystem) [<http://perma.cc/VA5J-YZDZ>]. A keystone species is a species whose presence is “crucial [and exceptional, relative to other animals] in maintaining the organization and diversity of their ecological communities.” L.C. Mills et al., *The Keystone-Species Concept in Ecology and Conservation*, 43 BIOSCIENCE 219, 219 (1993).

²²¹ See Truett et al., *supra* note 220, at 125 (“Bison played a significant role in maintaining the historic abundance and diversity of Plains biota. . . . They grazed heavily in some areas and lightly in others, . . . which influenced not only the plant community but a diverse suite of animals as well.”).

²²² *Id.* at 129.

²²³ See *id.* at 125 (noting how predators like “wolves, bears, wolverines, bald eagles, ravens, coyotes, and swift foxes” have benefited from the presence of bison).

²²⁴ See George Wuerthner, *Are Cows Just Domestic Bison? Behavioral and Habitat Use Differences between Cattle and Bison*, W. WATERSHEDS PROJECT, <http://www.westernwatersheds.org/gw-cattle-v-bison/> (accessed Oct. 26, 2014) (noting how different cattle behavior “may lead to degraded rangeland”) [<http://perma.cc/BA2E-KSGY>].

²²⁵ See generally BANNER, *supra* note 41 (providing a detailed history of American Indian policy from the seventeenth century onwards).

²²⁶ *Poverty Affects American Indians and Alaska Native Population More Than All Races*, INDIAN COUNTRY TODAY MEDIA NETWORK, <http://indiancountrytodaymedianetwork.com/2013/02/28/poverty-affects-american-indians-and-alaska-native-population-more-all-races-147929> (Feb. 28, 2013) (accessed Oct. 3, 2014). See also Nicholas D. Kristof, Op-Ed., *Poverty’s Poster Child*, N.Y. TIMES, <http://www.nytimes.com/2012/05/>

son, not just for their own cultural heritage, but for a part of a new economic future. While bison restoration cannot solve all of the problems contemporary Native Americans face,²²⁷ it could prove beneficial as a starting point, along with other plans for rejuvenation.

Indeed, a historic treaty signed in late September 2014 between Native American and First Nations leaders clearly contemplates Native reclamation of both bison and bison policy as a means to “support ecological restoration and the restoration of tribal cultures . . . attempt[ing] what once seemed unlikely for an oppressed people.”²²⁸ Dubbed the Buffalo Treaty, the agreement is based in part on recognition that while individual tribes have limited resources, influence, and land with which to restore bison, together “Tribes and First Nations . . . own and manage a vast amount of . . . intact grasslands [providing] suitable habitat for American buffalo”²²⁹ The compact calls for partnership and engagement between ranchers, conservationists, indigenous peoples, and both the U.S. and Canadian governments at national and local levels.²³⁰ While the Buffalo Treaty’s full effects remain to be seen, it offers a promise of new hope for bison restoration, both as the signatories work across borders to restore bison and as the treaty itself encourages action from other parties, such as the U.S. government.²³¹

The American government—having been instrumental in removing the bison—is in a strong position to help them return in the future, and should support the sort of unified bison range envisioned by the Buffalo Treaty. A “federally sponsored buffalo commons”—complete

10/opinion/kristof-povertys-poster-child.html?_r=0 (May 9, 2012) (accessed Oct. 3, 2014) (noting the Pine Ridge Reservation in southern South Dakota has the lowest per capita income in the country, with other Sioux reservations not far behind) [http://perma.cc/HL4L-5J86].

²²⁷ See generally Tim Giago, *High Suicide Rate on Indian Reservation Nears Epidemic Proportions*, HUFFINGTON POST, http://www.huffingtonpost.com/tim-giago/high-suicide-rate-on-indi_b_594794.html (updated May 25, 2011) (accessed Oct. 3, 2014) (discussing problems such as family dysfunction, drug and alcohol abuse, and extreme poverty) [http://perma.cc/5L5R-ACPQ]; Andrew Van Dam, *Meth and Other Drugs Overwhelm Reservations*, ASS’N HEALTH CARE JOURNALISTS, <http://healthjournalism.org/blog/2012/06/meth-and-other-drugs-overwhelm-reservations/> (June 19, 2012) (accessed Oct. 3, 2014) (specifically discussing the prevalence of drugs and the effects on reservations) [http://perma.cc/NKQ5-7ZVS].

²²⁸ Leroy Little Bear et al., Op-Ed., *Historic Treaty: Bring Buffalo Home, Heal the Prairie*, LIVESCIENCE, <http://www.livescience.com/47998-tribal-treaty-to-restore-territory-american-bison.html> (Sept. 24, 2014) (accessed Nov. 30, 2014) (Native American and First Nation leaders, ITBC President, and Buffalo Treaty signatories describe the just-signed Buffalo Treaty as “an important step by native people to practice conservation while preserving our cultures . . . a first step . . . to create a national agenda to bring buffalo home”) [http://perma.cc/R5MQ-6T2M].

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ Press Release, Wildlife Conservation Society, *Historic Buffalo Treaty Signed by Tribes and First Nations along U.S. and Canada Border* (Sept. 24, 2014) (available at <http://www.wcs.org/press/press-releases/historic-buffalo-treaty.aspx> (accessed Nov. 11, 2014)) [http://perma.cc/3GAH-6FSP].

with thousands of bison—may be a productive use of resources for several areas of the Plains suffering from “land distress.”²³² Frank and Deborah Popper—Rutgers University professors, whose work on bison issues have caused them to be described as “the most controversial pair to wander the West since Bonnie and Clyde”²³³—suggest that such a commons

foresees a Plains whose land uses fall between cultivation on the one hand and wilderness on the other . . . [suggesting] a way for the region to avoid the excesses of its past boom-and-bust cycles . . . the Buffalo Commons means that many short- and mixed-grass Plains places will have more buffalo and fewer cattle, more environmental protection and less extraction, and more ecotourism and less emphasis on conventional rural development.²³⁴

Specifically, the Poppers propose areas of Montana, Nebraska, and South Dakota would be best used as a government sponsored buffalo commons.²³⁵ Less radically, some environmental groups believe the Charles M. Russell National Wildlife Refuge, a 1.1 million-acre wildlife sanctuary in northeastern Montana, not far from the Fort Peck Reservation, could be the first stronghold for a renewed buffalo commons campaign.²³⁶

As with so many struggles in environmental and land use policy, compromise would be an important and valuable step forward. Heated discussions and demonizing the enemy only halt progress. Wildlife activists should realize that in tough economic times, ranchers’ concerns about more bison moving in are justified. Education programs and meetings between the various factions should occur regularly to work out better solutions. One wonderful example is Defenders of Wildlife teaming up with the Greater Yellowstone Coalition, the Natural Resources Defense Council, and the Sierra Club to reimburse landowners

²³² See ZONTEK, *supra* note 1, at 146–47 (describing locales suffering from land distress as areas that have lost 10% of their population over time, have fewer than four people per square mile, and possess a high median age and poverty rate). Such a federally-sponsored buffalo commons could take the form of a national park.

²³³ After the Poppers’ proposal spread in the late 1980s, Kansas’s then-Governor Mike Hayden retorted: “Tell the Poppers that America’s Great Plains do not equal the Sahara.” Anne Matthews, *The Poppers and the Plains*, N.Y. TIMES, <http://www.nytimes.com/1990/06/24/magazine/the-poppers-and-the-plains.html?pagewanted=all&src=pm> (June 24, 1990) (accessed Oct. 3, 2014) [<http://perma.cc/QQX4-RETX>].

²³⁴ Deborah E. Popper & Frank J. Popper, *The Buffalo Commons: Its Antecedents and Their Implications*, 6 ONLINE J. RURAL RES. & POL’Y, <http://policy.rutgers.edu/faculty/popper/Bufalo07.pdf> (2006) (accessed Oct. 4, 2014) [<http://perma.cc/G2KV-AXS9>].

²³⁵ *Id.*

²³⁶ Andrew McKean, *New Bison War: Should Buffalo Be Reintroduced to the West?*, OUTDOORLIFE, <http://www.outdoorlife.com/blogs/open-country/2013/09/new-bison-war> (Sept. 16, 2013) (accessed Oct. 3, 2014) [<http://perma.cc/3NFR-9PPG>]. See also *Restoring Bison to the Charles M. Russell National Wildlife Refuge*, NAT’L WILDLIFE FOUND., <http://www.nwf.org/what-we-do/protect-wildlife/bison-restoration/cmr-bison.aspx> (accessed Oct. 3, 2014) (discussing the National Wildlife Foundation’s vision of returning free-ranging bison to Charles M. Russell National Wildlife Refuge) [<http://perma.cc/9RPP-9PC5>].

in some areas outside of Yellowstone National Park half the cost of purchasing and installing anti-bison fences, up to \$1,000 per landowner.²³⁷

Likewise, with the U.S. cattle herd falling to a sixty-three-year low, and U.S. beef production at a twenty-year low,²³⁸ perhaps ranchers will be able to welcome a few thousand more bison without fearing substantially adverse impacts to their industry and livelihood.²³⁹ Tribes and national environmental groups should remain realistic about their goals. The number of bison on a range should match its carrying capacity,²⁴⁰ and tribes should continue their educational programs through resources, like the ITBC, to remain good stewards of the bison and of the land itself. Groups that manage bison herds should ensure the herds remain a public good, while minimizing negative impacts.

The struggle for American bison restoration has been both long and turbulent, and a resolution favorable to bison advocates will not be simple or fast. Combined with major steps forward like *Citizens for Balanced Use v. Maurier*, Native American communities, local and national environmental groups, and private commercial bison ranchers working together offer the potential to help increase the stock and improve the health of the species. Federal and state governments can turn control and management of the resource over to those who used to depend on it most, with important oversight provided by the U.S. Fish and Wildlife Service.²⁴¹ As more tribes join as partners with the ITBC, the hope is that more native tribes will be working to regain an impor-

²³⁷ John Motsinger, *Good Fences Make Good Neighbors*, DEFENDERS OF WILDLIFE, <http://www.defendersblog.org/2012/08/good-fences-make-good-neighbors/> (Aug. 23, 2012) (accessed Oct. 3, 2014) [<http://perma.cc/TB2K-UMN5>].

²³⁸ Elizabeth Campbell & Alan Bjerga, *U.S. Cattle Herd Shrinking to 63-Year Low Means Record Beef Cost*, BLOOMBERG, <http://www.bloomberg.com/news/2014-01-31/u-s-cattle-herd-shrinking-to-63-year-low-means-record-beef-cost.html> (Jan. 30, 2014) (accessed Nov. 22, 2014) [<http://perma.cc/3Q9U-WRDT>].

²³⁹ See Farm Progress, *It's a Waiting Game for Beef Herd Expansion*, BEEF PRODUCER, <http://beefproducer.com/story-waiting-game-beef-herd-expansion-0-108270> (Feb. 5, 2014) (accessed Nov. 22, 2014) (noting that in 2013, U.S. beef cattle numbers "fell by 253,000") [<http://perma.cc/VJM3-JB8B>]. Nonetheless, the magnitude of the beef cattle industry cannot be ignored. With 5 billion pounds of beef exported every year, the American beef cattle industry is a more than \$40 billion dollar endeavor. *Beef Industry Statistics*, NAT'L CATTLEMEN'S BEEF ASS'N, <http://www.beefusa.org/beefindustrystatistics.aspx> (2014) (accessed Oct. 3, 2014) [<http://perma.cc/JS8X-M6D2>].

²⁴⁰ While widely used, the precise definition of 'carrying capacity' is a source of some debate, depending on whether it is treated as a static or dynamic value, as well as what factors are looked to in determining carrying capacity, and over what period of time. Practically, however, "we may regard carrying capacity as represented by the maximum number of animals of [a] given species and quality that can in a given ecosystem survive through the least favorable environmental conditions [typically] occurring" R. Y. Edwards & C. David Fowle, *The Concept of Carrying Capacity*, in *ESSENTIAL READINGS IN WILDLIFE MANAGEMENT & CONSERVATION* 589, 597 (Paul R. Krausman and Bruce D. Leopold eds., 2013) (reviewing historical and present use of 'carrying capacity' as a term, and its practical meaning vis-à-vis wildlife management).

²⁴¹ Lyons, *supra* note 155, at 725.

tant part of their culture. With the recent victory in the Montana Supreme Court, tribes in Montana can build their herds on tribal land with reduced fear of interference from private landowners. Combined with increased collaboration with private landowners, head of bison and acreage of bison range may be able to continue growing.

Bison steaks and burgers are on the menu at an increasing number of restaurants across the nation,²⁴² and more cattle ranchers may make the switch to raising bison. Altogether, the future for the species, and those who have joined various movements to restore the bison, is cautiously, but optimistically bright. Pending congressional action, bison may soon become the U.S. National Mammal.²⁴³ Indeed in both 2013 and 2014, Congress passed resolutions making the first Saturday in November “National Bison Day.”²⁴⁴ These animals, a stalwart symbol of the American West, could soon be celebrated as they deserve.

²⁴² See Steve Karnowski, *Growing Demand for Bison Meat Strains Ranchers*, HUFFINGTON POST, http://www.huffingtonpost.com/2010/12/29/bison-meat-consumer-demand-ranchers_n_802188.html (Dec. 29, 2010) (updated May 25, 2011) (accessed Oct. 3, 2014) (noting that while demand for bison meat continues to grow, bison take longer than cattle to reach reproductive maturity, putting a strain on bison ranchers to keep up with their orders) [<http://perma.cc/TLZ5-DWPW>].

²⁴³ National Bison Legacy Act, H.R. 3400, 113th Congress (2013). If passed, the bison would join the bald eagle as the only other national animal. See *FAQs*, VOTEBISON.ORG, <http://www.votebison.org/faqs> (accessed Oct. 3, 2014) (serving as the Bison for National Mammal movement’s main website) [<http://perma.cc/85MZ-HKHQ>]. But see *National Bison Legacy Act (S. 2464)*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/s2464> (accessed Nov. 22, 2014) (noting the bill was referred to committee on June 11, 2014, and scoring it as having a 5% chance of passage) [<http://perma.cc/M3A9-MD8R>].

²⁴⁴ S. Res. 543, 113th Cong. (2014); S. Res. 254, 113th Cong. (2013). See also John Calvelli, *Honoring an American Icon with National Bison Day*, NAT’L GEOGRAPHIC, <http://newswatch.nationalgeographic.com/2013/11/01/honoring-an-american-icon-with-national-bison-day/> (Nov. 1, 2013) (accessed Oct. 3, 2014) (detailing the events honoring the species in the inaugural year of the celebration, as well as praising bipartisan support of the resolution in the Senate) [<http://perma.cc/HK5B-U5A4>].