IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 12-0306

CITIZENS FOR BALANCED USE; SEN. RICK RIPLEY; VALLEY COUNTY COMMISSIONERS, DUSTIN HOFELDT; VICKI HOFELDT; KEN HANSEN; JASON HOLT; SIERRA STONEBERG HOLT; ROSE STONEBERG; UNITED PROPERTY OWNERS OF MONTANA; and MISSOURI RIVER STEWARDS, Plaintiffs and Appellees,

vs.

JOSEPH MAURIER; MONTANA DEPARTMENT OF FISH, WILDLIFE & PARKS; and MONTANA FISH, WILDLIFE & PARKS COMMISSION, Defendants and Appellants,

and

DEFENDERS OF WILDLIFE and NATIONAL WILDLIFE FEDERATION, Defendants-Intervenors and Appellants.

BRIEF OF APPELLANTS DEFENDERS OF WILDLIFE AND NATIONAL WILDLIFE FEDERATION

On Appeal from the Montana Seventeenth Judicial District Court, Blaine County, Cause Number DV-2012-1, Hon. John C. McKeon

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II. Whether the district court incorrectly applied Mont. Code Ann. § 87-1-217(6), addressing state policy decisions concerning "large predators," to enjoin the state's transfer of wild bison.

III. Whether the district court abused its discretion in holding that the balance of equities favored plaintiffs.

IV. Whether the district court abused its discretion in holding that the Fort Peck tribes are not indispensable parties pursuant to Montana Rule of Civil Procedure 19(b).

STATEMENT OF THE CASE

This case concerns a path-breaking effort by the Montana Department of Fish, Wildlife and Parks ("FWP") to restore wild bison to their historic habitat on the prairies of eastern Montana. By this appeal, defendant intervenors-appellants Defenders of Wildlife and National Wildlife Federation ask this Court to reverse a May 9, 2012, preliminary injunction ruling by Montana's Seventeenth Judicial

District Court, Blaine County, that halted FWP's bison translocation program before it could be fully implemented.

Pursuant to a December 2011 decision, FWP on March 19 and 22, 2012, released 61 bison originating from the wild population occupying the Yellowstone National Park region for transportation to northeast Montana's Fort Peck Indian Reservation. The translocated bison are subjects of a quarantine program initiated by FWP in 2005. While some Yellowstone-area bison are infected with bacteria that may cause the disease brucellosis, each of the quarantined animals was tested multiple times in the years preceding the translocation (most of the adults were tested more than nine times) and found to be free of the brucellosis-causing bacteria. The authorized translocation provided for completion of the quarantine study over five years while the bison are under tribal management, with FWP reserving the right to reclaim up to 25 percent of the translocated bison's progeny upon completion of the quarantine.

FWP's translocation of these wild bison to northeastern Montana established a milestone in the conservation of this iconic species, which once thundered by the millions across the American West. It also marked a reunion between wild bison and the Assiniboine and Sioux tribes occupying the Fort Peck Reservation, for whom the bison had assumed a central role as a source of food, equipment, and

cultural and spiritual meaning for centuries prior to the heedless bison slaughters of the late nineteenth century.

FWP's plan promised another such milestone. Pursuant to FWP's December 2011 decision and a subsequent memorandum of understanding between FWP and the Fort Peck tribes, half of the translocated bison were to be moved again—this time to the custody of the Gros Ventre and Assiniboine tribes of north central Montana's Fort Belknap Indian Reservation—as soon as adequate bison-holding facilities were installed on Fort Belknap lands.

However, a coalition of individuals and organizations led by Citizens for Balanced Use (collectively, "CBU") filed a legal challenge to FWP's bison translocation decision in Montana's Seventeenth Judicial District Court, Blaine County, on January 11, 2012. In response to their application, the Blaine County court on March 22, 2012, issued a temporary restraining order that prohibited FWP from, among other things, transferring any bison from the Fort Peck to the Fort Belknap reservation and from entering into any agreement with the Fort Belknap tribes to facilitate such a transfer. The district court proceeded to hold a hearing on April 11, 2012, concerning CBU's application to convert the temporary restraining order into a preliminary injunction and, on May 9, 2012, issued the requested injunction. Defenders of Wildlife and National Wildlife Federation timely noticed this appeal on May 14, 2012.

STATEMENT OF FACTS

I. The Last Wild Bison

The translocation of bison at issue in this case represents a historic restoration of wild bison to eastern Montana's Great Plains after an absence of more than a century. Prior to the late 1800s, great herds of bison roamed for millennia across most of Montana, primarily east of the Continental Divide, where their grazing and wallowing activities created diverse grassland environments that provided habitat for a variety of other wildlife. See FWP, Final Envtl. Assessment for Interim Translocation of Bison (Nov. 2011), at 44-48 ("EA") (Pl. Ex. 2, see Transcript of Proceedings (Apr. 11, 2012) ("Tr.") at 35) (Supp. App. Tab A). However, by 1901, the mass slaughters of the nineteenth century reduced wild bison in the United States to a herd of 25 animals occupying Yellowstone National Park ("YNP"). See Interagency Bison Mgmt. Plan, Final Envtl. Impact Statement (Aug. 2000), at vii ("IBMP FEIS") (D.C. Doc. 10, Ex. 2). The approximately 4,000 bison that occupy the Yellowstone area today are descendants of those last individuals—the only population of bison that has continually existed in the wild in the United States. As a result, the Yellowstone population is among the few public bison herds whose genetic heritage remains untainted by introduced cattle genes. See FWP, Decision Notice: Interim Translocation of Bison (Dec. 2011), at 12 ("Decision Notice") (Pl. Ex. 2, see Tr. at 35) (Supp. App. Tab B).

Nevertheless, until recently, Montana's state agencies have not welcomed a return of native bison. Acting pursuant to an Interagency Bison Management Plan ("IBMP") developed in 2000, state and federal agencies have captured and slaughtered more than 3,000 wild bison as they attempted to move into the state from Yellowstone National Park.[1] See Annual Report, IBMP, July 1, 2009 to July 31, 2010, at 23 (D.C. Doc. 10, Ex. 4). The IBMP partner agencies attempted to justify these slaughters based on fears that bison might transmit brucellosis—a wildlife and livestock disease carried by some bison and elk in the Yellowstone region—to cattle herds in Montana. See IBMP FEIS at viii, xxii-xxiv. Prior to 1917, domestic cattle infected Yellowstone's bison with a bacterium known as Brucella abortus, which causes brucellosis. Id. at ix. This disease, which can cause cattle to abort their first calf after infection, may affect ranchers' ability to sell or transport their livestock. Id. at ix, xii-xiii.

However, in recent years the IBMP partner agencies have begun to ease their opposition to the return of wild bison. Beginning in 2004, these partner agencies began investigating a quarantine program that would allow for capture and relocation of brucellosis-free bison as an alternative to slaughter. See EA at 10. In 2005, FWP and APHIS established a bison quarantine facility near Yellowstone

[1] The IBMP partner agencies are FWP, the Montana Department of Livestock, the U.S. Animal and Plant Health Inspection Service ("APHIS"), the U.S. Forest Service, and the National Park Service. See Order Granting Preliminary Injunction (May 9, 2012) ("PI Order"), at 7 n.2.

National Park to begin a Quarantine Feasibility Study in accordance with the IBMP. See id. In the first phase of the study, which occurred in 2005 and 2006, 100 bison calves that had migrated from Yellowstone were captured, quarantined, and repeatedly tested for brucellosis. Id. Those testing negative were allowed to breed in the study's second phase, during which brucellosis testing continued. Id. at 10-11. Pregnant bison within the quarantine program were allowed to calve, after which they were tested, again, to confirm that brucellosis had not developed during their pregnancies, as hormone surges associated with pregnancy are believed to stimulate the Brucella organism. Id. at 11. Each of these stages was successful, as test after test confirmed that the bison are brucellosis-free. Id. As a result, FWP worked in 2011 to identify lands where the quarantined bison could be moved for the study's final phase—a five-year period of continued quarantine and testing. Id. at 10-12.

II. Senate Bill 212

While this activity was unfolding, the Montana Legislature considered several proposed bills addressing management and classification of bison. One bill to emerge from this process was Senate Bill 212 ("SB 212"), which the governor signed on May 12, 2011. SB 212 made various amendments and additions to Mont. Code Ann. § 87-1-216, which addresses FWP's duties concerning management of "wild buffalo or bison." Mont. Code Ann. § 87-1-216(1). Most

relevant here, SB 212 provided that FWP "may not release, transplant, or allow wild buffalo or bison on any private or public land in Montana" absent landowner authorization, id. § 87-1-216(4), and must "develop and adopt a management plan" with specific components "before any wild buffalo or bison under the department's jurisdiction may be released or transplanted onto private or public land in Montana," id. § 87-1-216(5).

As this statutory language makes clear, application of the cited provisions is triggered only by a transfer of bison to "private or public land in Montana." Id. § 87-1-216(4), (5). SB 212 does not explicitly reference tribal lands or other lands within the boundaries of an established Indian reservation, or transfers of wild bison to Indian tribes. The absence of any such reference prompted questioning during legislative debate. During a March 30, 2011, House floor session addressing SB 212, a legislator asked Rep. Knudsen, the House sponsor of the bill, whether his legislation applied to transfers of bison to Indian tribes. Rep. Knudsen responded:

> I asked that specific question when I was asked to carry this in the House, whether or not this applied to tribal. My understanding is that this bill would have no impact on the IMBP, Interagency Management Buffalo Program [sic], I think that's what it's called, and I apologize if I got the name wrong, but I wanted to make absolutely sure that we were not, that this bill would have no effect on that, so it's my understanding talking with the sponsor and the people involved in this bill that it would have no effect on the tribe's ability to receive buffalo from the department.

H. Floor Sess. on SB 212, 2011 Legis. Sess. (Mar. 30, 2011), at minute 9:52 ("House Sponsor Statement") (emphases added) (D.C. Doc. 22, Ex. 4) (Supp. App. Tab D).

III. The Bison Translocation Program

In September 2011, FWP released a draft environmental assessment pursuant to the Montana Environmental Policy Act ("MEPA"), Mont. Code Ann. § 75-1-101 et seq., evaluating, among other options, concluding the IBMP Quarantine Feasibility Study by placing quarantined wild bison on fenced ranges within the Fort Peck and Fort Belknap reservations. See Decision Notice at 1-4. The examined sites included a 4,800-acre fenced range on the Fort Peck Reservation and an 800-acre fenced range on the Fort Belknap Reservation. See EA at 35, 38. While both reservations also harbor domestic bison herds—which will be separated from any quarantined bison—the Fort Belknap tribes planned to eliminate their domestic herd within three years after receiving wild bison from FWP, ultimately allowing the wild bison access to a 22,000-acre range within the reservation. Id. at 36. Following publication of its draft analysis, FWP allowed 35 days for public comment on its proposal and held public hearings in Deer Lodge, Shelby, and Glasgow, as well as an informal meeting in Chinook after the public-comment period had closed. See Decision Notice at 4, 6.

FWP issued a final environmental assessment and decision in November 2011. See EA; Decision Notice. In the decision, FWP announced that bison "will be translocated to the tribal properties" following "negotiations between FWP and each Tribe and approval of Memorandums of Understanding." Decision Notice at 5. In response to concerns raised by some members of the public about inadequate fencing at the Fort Belknap Reservation, FWP made clear that wild bison would be transported to that reservation only after a new fence is constructed around its designated bison range. See EA at 36; Decision Notice at 2. Although fences are expected to contain the bison, FWP also stated that it is "committed to responding to escaped bison off the reservation if the Tribe doesn't quickly and effectively respond." Decision Notice at 17. The Montana Fish, Wildlife & Parks Commission approved the agency's decision at a public meeting on December 9, 2011. See Mont. Fish, Wildlife & Parks Comm'n, Agenda Item Cover Sheet: Bison Translocation to Fort Belknap and Fort Peck Reservations (Dec. 9, 2011) (D.C. Doc. 6, Ex. 2).

On March 16, 2012, FWP moved to effectuate the decision by entering into a Memorandum of Understanding with the Fort Peck tribes. See Memorandum of Understanding Between FWP and the Assiniboine & Sioux Tribes of the Fort Peck Reservation (Mar. 2012) ("MOU") (D.C. Doc. 27, Ex. 2) (Supp. App. Tab C). The MOU provided, among other things, that the Fort Peck tribes would be "solely

responsible for the care and management" of the translocated bison "and any subsequent offspring," while FWP retained the right to request return of "up to 25% of the progeny" of the bison for "conservation purposes." Id. at 2, 3. Under the MOU, the tribes would contain the bison within a pasture surrounded by "at least a seven foot, woven wire fence"; the tribes would return any escaped bison to the quarantine pasture "as early as practicable" but no later than 72 hours after learning of their escape; and, if bison escape reservation boundaries more than three times over the five-year term of the MOU due to tribal negligence, causing substantial uncompensated damage, the tribes would return the original bison and up to 25 percent of their progeny to FWP. Id. at 2-3. The MOU also provided that half of the bison received by the Fort Peck tribes would be further transferred to the Fort Belknap Reservation "as soon as is practical, following MFWP's indication that adequate facilities are in place" to handle the bison. MOU Addendum. FWP planned to enter into a similar MOU with the Fort Belknap tribes. See EA at 8.

IV. The Fort Peck Translocations and This Litigation

By a complaint filed in the Blaine County district court on January 11, 2012, and amended on March 8, 2012, a coalition including CBU, a state senator, the Valley County commissioners, six other individuals, and two property rights groups challenged FWP's bison translocation decision, alleging violations of SB

212, MEPA, and Mont. Code Ann. § 87-1-217. Although CBU sought injunctive relief in its complaint, and although FWP's December 2011 decision notice announced that bison "w[ould] be translocated to the tribal properties" without further public involvement, Decision Notice at 5, 16, CBU made no injunction motion in the district court until FWP released the first shipment of 59 bison from the agency's quarantine facility for translocation to Fort Peck on March 19, 2012.[2] CBU's application for a temporary restraining order on that date was denied "due to procedural defects involving lack of notice and a sworn complaint or affidavit." PI Order at 3. CBU renewed its application and the district court issued a temporary restraining order on March 22, 2012—but only after FWP had already released a second shipment of four bison to Fort Peck. See Temporary Restraining Order and Order Setting Show Cause Hearing (Mar. 22, 2012).

The district court's temporary restraining order prohibited FWP from, among other things, further transferring or transplanting the quarantined bison and from entering into agreements with tribal officials to permit such transfers. See id. at 6. Nevertheless, as a result of FWP's releases of bison from the quarantine facility before the order was issued, the Fort Peck tribes received 61 bison from the quarantine program. See Tr. at 76-77. At CBU's request, the district court

[2] Although FWP released 59 bison for translocation to Fort Peck on March 19, 2012, two died during shipment. Tr. at 74-76.

followed its temporary restraining order by issuing a preliminary injunction on May 9, 2012.[3]

V. The Preliminary Injunction Order

The district court's preliminary injunction order provides:

- "Until otherwise ordered, Defendants are enjoined during the pending of this action from entering into any memorandum of understanding or similar agreement with Tribal entities or any other private or public landowner for the purpose of transplanting or receiving transplanted YNP bison."

- "Until otherwise ordered, Defendants are enjoined during the pending of this action from transferring or transplanting any YNP bison from existing quarantine pastures or facilities. This injunction shall not apply to movement of the YNP bison currently located within the boundaries of Ft. Peck in accordance with the MOU."

- "Until otherwise ordered, Defendants are enjoined during the pending of this action from transferring or transplanting to Ft. Belknap any of the YNP bison at Ft. Peck."

PI Order at 37-38.

The district court found preliminary injunctive relief to be justified pursuant to Mont. Code Ann. § 27-19-201(1), which applies "when it appears that the applicant is entitled to the relief demanded" and that relief "consists in restraining the commission … of the act complained of," and Mont. Code Ann. § 27-19-201(3), which applies when the adverse party is "about to do … some act in violation of the applicant's rights, respecting the subject of the action, and tending

[3] CBU filed a motion in the district court asking that the state defendants be held in contempt of court for the March 22 shipment. The district court has scheduled a hearing on the motion for September 21, 2012.

to render the judgment ineffectual." See PI Order at 37. The linchpin of the district court's findings under both provisions was that FWP violated SB 212, Mont. Code Ann. § 87-1-216(4)-(6), by authorizing shipment of wild bison "onto private or public land in Montana" without obtaining the consent of affected landowners or preparing a management plan as required by that statute. See PI Order at 22-27.

In reaching this conclusion, the district court relied on what it termed "the plain language of the statute" and therefore declined to review or consider the legislative history of SB 212 in which the House sponsor reported and endorsed the Senate sponsor's position that SB 212 "would have no effect on the tribe's ability to receive buffalo from the department." Id. at 26-27; House Sponsor Statement. Further, in applying SB 212's "private or public land in Montana" language to the Indian reservations at issue, the district court relied on evidence that the Fort Peck tribes' bison pasture includes "non-public land owned by certain named individuals." PI Order at 16, 23. However, the court's injunction was not directed at the Fort Peck bison range and instead prohibited translocations of bison to the Fort Belknap range, which the district court acknowledged consists entirely of "tribal lands." Id. at 17, 37-38.

The district court also asserted that "bison are a large predator" and indicated agreement with CBU's contention that FWP violated Mont. Code Ann. §

87-1-217(6) by failing to consult and coordinate with affected counties before making a policy decision regarding "large predators." PI Order at 7, 21.[4]

Although the district court found injunctive relief warranted under the statutory provisions discussed above, the court found that CBU did not qualify for injunctive relief under a separate provision, Mont. Code Ann. § 27-19-201(2), because CBU failed to demonstrate any likely irreparable injury absent an injunction. See PI Order at 29-30. The court further concluded that CBU failed to establish that the requested injunction would not be adverse to the public interest. See id. at 30.

Finally, the district court took up defendant intervenors-appellants' argument that CBU's preliminary injunction request must be denied and its claims dismissed because the affected tribes are indispensible parties pursuant to Montana Rule of Civil Procedure 19 who cannot be joined due to tribal sovereign immunity. See id. at 32-37. The district court rejected the argument, reasoning that the Fort Belknap tribes are not necessary parties because they have not yet entered into a MOU with FWP, and, while the Fort Peck tribes' MOU with FWP renders them necessary parties, they are not indispensable because a judgment halting only future bison

[4] The district court concluded that injunctive relief was unavailable under MEPA pursuant to Mont. Code Ann. § 75-1-201(6)(c). See PI Order at 17-18. CBU has not cross-appealed this ruling.

transfers from Fort Peck to Fort Belknap would not implicate their interest. Id. at 35-37.

STANDARD OF REVIEW

This Court generally reviews a district court's decision to grant a preliminary injunction for "a manifest abuse of discretion," meaning "one that is obvious, evident, or unmistakable." State v. BNSF Ry. Co., 2011 MT 108, ¶ 16, 360 Mont. 361, 254 P.3d 561 (quotations and citation omitted). However, where, as here, a trial court rests its preliminary injunction "upon its interpretation of a statute, no discretion is involved" and this Court reviews the lower court's "conclusion of law to determine whether it is correct." Reier Broad. Co. v. Kramer, 2003 MT 165, ¶ 9, 316 Mont. 301, 72 P.3d 944 (quotations and citation omitted). "Accordingly, [this Court reviews] a trial court's statutory interpretations and the resulting conclusions of law for correctness." Id.; see, e.g., J.M., Jr. v. Mont. High Sch. Ass'n, 265 Mont. 230, 875 P.2d 1026 (1994) (reversing injunction where district court's statutory interpretation was incorrect).

The district court's conclusions under Rule 19 are "reviewed for an abuse of discretion." Mohl v. Johnson, 275 Mont. 167, 169, 911 P.2d 217, 219 (1996).

SUMMARY OF THE ARGUMENT

The decision below should be reversed. First, the district court incorrectly applied SB 212 to FWP's transfer of bison to federally recognized Indian tribes

within an established Indian reservation. Multiple statutory construction tools—including plain language, harmonization with related statutes, and legislative history—establish that SB 212 does not apply to such transfers. See Points I.A and I.B, infra. Even assuming for the sake of argument that SB 212 could apply to such transfers, the district court erred in applying the statutory reference to "private or public land in Montana," Mont. Code Ann. § 87-1-216(4), (5), to enjoin a transfer of wild bison to exclusively tribal land on the Fort Belknap Reservation. See Point I.C, infra.

Second, to the extent the district court rested its injunction on Mont. Code Ann. § 87-1-217, its statutory reading was incorrect because wild bison do not constitute a "large predator" as a matter of law or fact. See Point II, infra.

Third, the district court abused its discretion by balancing the equities in CBU's favor. The district court mistakenly found a threat to CBU's interest, but the management scheme accompanying the challenged bison transfers actually would improve the regulatory status quo for landowners adjoining the Fort Belknap Reservation, where CBU's concern is focused. See Point III, infra.

Fourth, and finally, the district court abused its discretion in concluding that the Fort Peck tribes are not indispensable parties under Montana Rule of Civil Procedure 19(b). Contrary to the district court's reasoning, requiring the Fort Peck tribes to pasture approximately 30 additional bison for the indefinite period

required to conclude this litigation and any ensuing remand proceedings—instead of the short period required to fence the Fort Belknap bison range—prejudices the tribes' interest and renders them indispensable parties. See Point IV, infra.

ARGUMENT

The district court's preliminary injunction order should be reversed. The district court issued a preliminary injunction despite CBU's failure to demonstrate that the requested injunction would prevent irreparable injury to CBU or harm to the public interest. See PI Order at 29-30. In so doing, the district court primarily relied on its finding that CBU presented "a prima facie case" that FWP violated provisions of SB 212 codified at Mont. Code Ann. § 87-1-216(4)-(6). PI Order at 22-23. Based on this statutory interpretation, the district court found that CBU was "entitled to the relief demanded" under Mont. Code Ann. § 27-19-201(1) and that CBU established a "violation of [its] rights" under Mont. Code Ann. § 27-19-201(3). See PI Order at 27, 30-31. However, the district court's statutory interpretation was incorrect and its preliminary injunction was unjustified. Further, the district court's Rule 19 findings failed to grapple with the real impacts of its decision on the Fort Peck tribes.

I. THE DISTRICT COURT INCORRECTLY APPLIED SB 212

The district court incorrectly interpreted SB 212 to apply to FWP transfers of wild bison to a range operated by federally recognized Indian tribes within an

established Indian reservation. Although the district court devoted much of its ruling to questions of state court jurisdiction over lands within Indian reservations, see PI Order at 24-27, the pivotal issues here are only those of statutory construction. The Court need not address issues of jurisdiction over Indian tribes and property within their reservations if the Legislature did not attempt to reach such matters in the relevant statute. The Legislature made no such attempt in SB 212. In reaching a contrary conclusion, the district court relied on what it termed the "'clear and unambiguous'" meaning of the specific phrase "private or public land in Montana" in SB 212. Id. at 26 (citation omitted). However, the district court's statutory reading is wrong for numerous reasons.

A. SB 212 Does Not Apply To Transfers Of Quarantined Wild Bison To Indian Tribes Within An Indian Reservation

Beginning with the plain language of the statute, the district court's construction is contrary to precedent from this Court interpreting a similar statutory provision in an analogous context concerning a tribal enterprise within an Indian reservation. In Flat Center Farms, Inc. v. State Department of Revenue, 2002 MT 140, 310 Mont. 206, 49 P.3d 578, this Court considered an attempt to apply Montana's corporation license tax to a tribally chartered corporation conducting a farming operation on fee simple and Indian trust lands within the Fort Peck Reservation. Similar to the statute at issue here, which reaches bison transfers to "private or public land in Montana," Mont. Code Ann. § 87-1-216(4), (5)

(emphasis added), the corporation license tax statute reached any corporation exercising "the privilege of carrying on business in this state," id. § 15-31-101(3) (emphasis added). Nevertheless, this Court held that the "plain language" of the tax statute did not apply to "a tribally chartered corporation owned and operated by Indians" and "conduct[ing] business entirely on the Fort Peck Reservation." Flat Ctr. Farms, ¶¶ 15, 16.

The Court reasoned that "the statutory language pursuant to which the State asserts taxing authority limits that authority based on the situs of the activity from which income is earned," and the corporation "conducts all its commercial activity and generates all the value that the State now targets for taxation on the Fort Peck Reservation." Id. ¶ 20. Because the Reservation is a "sovereign state," the targeted income was "not earned in Montana" within the meaning of the statute. Id. ¶ 16. The Court also observed that the corporation represented an enterprise owned by "enrolled members of tribes served by the Fort Peck Reservation," chartered by the Fort Peck tribes, and deriving income from land owned by Indians or held in trust for Indians, and concluded that this " coalescence of situs (reservation) and status (Indian)" rendered the Montana-specific language of the license tax statute inapplicable. Id. ¶ 21 (quotations and citation omitted).

The same reasoning applies here. Like the statute in Flat Center Farms, SB 212's application is triggered by the "situs" of regulated activity—transfers of wild

bison to "private or public land in Montana." Mont. Code Ann. § 87-1-216(4), (5). As in Flat Center Farms, the "situs" of the challenged activity here is "within the exterior boundaries of the Fort Peck Reservation"—a "sovereign state." Id. ¶¶ 16, 20. Accordingly, just as the corporation's income was "not earned in Montana" under the statute at issue in Flat Center Farms, id. ¶ 16, the transfer of wild bison here does not implicate "private or public lands in Montana" under SB 212. Further, the challenged activity here represents even more of a tribal enterprise than the farming corporation addressed in Flat Center Farms; while that corporation was merely chartered by the Fort Peck tribes, the wild bison quarantine program on the Fort Peck Reservation represents an enterprise conducted by the tribal government itself, which is "solely responsible for the care and management" of the translocated bison. MOU at 2. As in Flat Center Farms, this "coalescence of situs (reservation) and status (Indian)" is beyond the scope of the Montana-specific statutory language at issue. Flat Ctr. Farms, ¶¶ 15, 21.

This construction is bolstered by consideration of a separate Montana statute that—unlike SB 212—specifically addresses the state's transfer of quarantined bison to Indian tribes. This Court "must harmonize statutes relating to the same subject, as much as possible, giving effect to each." Mont. Sports Shooting Ass'n v. FWP, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003. Moreover, "where one statute deals with a subject in general and comprehensive terms and another deals

with a part of the same subject in a more minute and definite way, the special statute will prevail over the general statute to the extent of any necessary repugnancy between them." Boyd v. Zurich Am. Ins. Co., 2010 MT 52, ¶ 21, 355 Mont. 336, 227 P.3d 1026 (quotations and alteration omitted), overruled on other grounds by Ford v. Sentry Cas. Co., 2012 MT 156, 365 Mont. 405, 282 P.3d 687. Here, that "special statute" is Mont. Code Ann. § 81-2-120, which applies to FWP's fellow IBMP partner agency, the Montana Department of Livestock. Under that section, whenever any "publicly owned wild buffalo or wild bison from a herd that is infected with a dangerous disease enters the state of Montana," that bison may be "captured, tested, quarantined, and vaccinated," and—if "certified by the state veterinarian as brucellosis-free"—may be "transferred to qualified tribal entities that participate" in a "disease control program" as described in that provision. Mont. Code Ann. § 81-2-120(1)(d)(ii) (emphasis added).

This statute imposes none of the detailed pre-transfer landowner-permission and planning requirements set forth in SB 212. Accordingly, if SB 212 were deemed to apply to tribal transfers, state officials could easily avoid it simply by identifying the Department of Livestock, rather than FWP, as the transferring agency, rendering SB 212 virtually meaningless in the context of transactions with Indian tribes. However, the most reasonable way to reconcile these authorities is not to conclude that an intended application of SB 212 may be so readily

sidestepped, but rather to conclude that SB 212 was never intended to reach transfers of bison to Indian tribes—especially given SB 212's silence on transfers to tribes in comparison to their explicit mention in section 81-2-120. See Oster v. Valley Co., 2006 MT 180, ¶ 17, 333 Mont. 76, 140 P.3d 1079 ("A presumption exists that the Legislature does not pass meaningless legislation … .").

To hold otherwise would be to conclude that the Legislature intended to strictly require landowner consent, development of a management plan containing specific requirements, and public comment and hearings in affected counties whenever a transfer of quarantined wild bison to Indian tribes is contemplated—but only if the transfer is undertaken by FWP; if undertaken by the Department of Livestock, all such requirements may be disregarded. This absurd result offers another reason to reject the district court's reading. See Mont. Sports Shooting Ass'n, ¶ 11 ("Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it.").[5]

[5] FWP undertook the bison translocation at issue pursuant to its general authorities "to set policies for the protection, preservation, and propagation" of state wildlife pursuant to Mont. Code Ann. § 87-1-201, and to manage "wild buffalo or bison" that have not been infected with a dangerous disease, id. § 87-1-216(2)(a), see EA at 12. Nevertheless, FWP's action here—transferring bison to Indian tribes participating in a quarantine and testing program—parallels the action authorized for the Department of Livestock under Mont. Code Ann. § 81-2-120(1)(d)(ii). See Mont. Code Ann. § 87-1-216(2)(c) (requiring FWP to cooperate with Department of Livestock in managing bison under section 81-2-120).

Moreover, numerous other statutes addressing the state's transactions with Indian tribes demonstrate that the Legislature knows how to express its intent to reach relations with Indian tribes when it wishes to do so. See Pengra v. State, 2000 MT 291, ¶ 9, 302 Mont. 276, 14 P.3d 499 (rejecting argument that plaintiff's child enjoyed elevated privacy rights; "The fact that the Legislature has enacted statutes granting minors elevated privacy rights in other areas shows that the Legislature knows how to express its intent to allow for confidentiality of proceedings involving children."). Although Mont. Code Ann. § 81-2-120(1)(d)(ii) is the state law most specifically addressing the precise activity at issue, it is only one of numerous Montana statutory provisions explicitly referencing Indian tribes when their inclusion was intended. See, e.g., Mont. Code Ann. §§ 2-15-3112(1) (establishing eligibility requirements for state livestock loss mitigation program that apply "on state, federal, and private land and on tribal land"); 7-6-2230(3)(c) (providing for disbursements from county land information account for projects shared "with any other county, city, state, federal, or Indian tribal agency"); 10-3-315(2)(a) (requiring authorization from any "affected political subdivision, tribal government, corporation, organization, or individual" before emergency debris removal); 60-4-202(2)(a)(i) (providing for agency sales of real property without public auction to "a federal, state, tribal, or local government"); 90-1-404(1)(b) (providing for agency to "work with all federal,

state, local, private, and tribal entities to develop and maintain land information") (emphases added). The Legislature's inclusion of language in other statutes specifically referencing transactions with Indian tribes underscores the omission of any such reference in SB 212 as an indication that such transactions were not included.

The district court found the existence of these statutory provisions unpersuasive, stating that, regardless of such provisions, the "parties do not point to any legal authority that specifically requires reference to lands within an Indian reservation to reflect an intent to cover those lands." PI Order at 23-24. If this reasoning were sound, then this Court's Pengra decision was wrongly decided, because there is equally no "legal authority" requiring specific reference to the elevated privacy rights of minors if they are to be included in a statutory provision. However, the district court's reasoning misses the point. The applicable statutory construction principle in Pengra—and here—turns not on "legal authority" requiring specific mention of the relevant matter, but rather on the reasonable judgment that the Legislature's choice to include certain terms in some statutes but not in others should be afforded meaning by the courts. See Pengra, ¶ 9; see also, e.g., Whitfield v. United States, 543 U.S. 209, 216 (2005) (declining to read overt-act requirement into money-laundering statute where other federal criminal statutes explicitly include this requirement; Congress "clearly demonstrat[ed] that it knows

how to impose such a requirement when it wishes to do so" and the courts "will not override that choice"). The district court applied no such reasonable judgment, and its decision should be reversed.

B. Legislative History Confirms That SB 212 Is Inapplicable

Even if there were any doubt about the correct construction of SB 212, it is resolved by the statute's legislative history. This Court may look to legislative history when "the legislative intent cannot be readily derived from the plain language, or when it is helpful to determine the correct interpretation of the statute," Stockman Bank of Mont. v. Mon-Kota, Inc., 2008 MT 74, ¶ 17, 342 Mont. 115, 180 P.3d 1125, and must "abide by the intentions reflected therein," Montanans for Justice v. State ex rel. McGrath, 2006 MT 277, ¶ 60, 334 Mont. 237, 146 P.3d 759.

Here, the legislative history of SB 212 makes clear that the Montana Legislature did not intend to reach transfers of wild bison to Indian tribes. Rep. Knudsen stated during the March 30, 2011, House floor session addressing SB 212 that he had conferred with the Senate sponsor of the bill concerning its potential impact on FWP's transfers of bison to tribes, and both sponsors intended that SB 212 "would have no effect on the tribe's ability to receive buffalo from the department." House Sponsor Statement (emphasis added). It is hard to imagine a clearer statement that SB 212 does not apply in this case.

The district court declined to consider this legislative history. See PI Order at 26-27. Yet, for the reasons discussed, the district court erred in concluding that SB 212 clearly and unambiguously reaches transfers of wild bison to Indian tribes. Moreover, while deeming examination of the legislative history both unnecessary and "inappropriate," id. at 26-27, the district court proceeded to enforce an application of SB 212 that was never intended by its drafters. For this reason too, the district court's decision should be reversed.

C. Even If SB 212 Could Be Applied To Transfers Of Wild Bison To Indian Tribes, The District Court Misapplied The Statute Here

Even assuming, for the sake of argument, that SB 212 could be applied to FWP's transfer of wild bison to a recognized tribal entity operating within its reservation—which it cannot be—the district court still misapplied SB 212 by extending it to tribal lands on the Fort Belknap reservation. The district court found that FWP transferred wild bison to a pasture on the Fort Peck Reservation that included certain "non-public land owned by certain named individuals." PI Order at 23. On this basis, the district court found that CBU presented a "prima facie case" that FWP violated provisions of SB 212 applying to transfers of wild bison to "private or public land in Montana." Id. at 22-23; Mont. Code Ann. § 87-1-216(4), (5). Yet, upon reaching this finding, the district did not issue any injunction concerning FWP's transfer of bison to land within the Fort Peck Reservation. To the contrary, the district court acknowledged that "injunctive

relief is not available" for any "past injury," such as the bison transfer to the Fort Peck tribes that was completed by the time the district court ruled. PI Order at 22 n.6 (citing BNSF Ry., ¶ 19). Further, the district court recognized that injunctive relief affecting the Fort Peck tribes' custody of the transferred bison would implicate those tribes' sovereign immunity—and potential dismissal of CBU's claims under the indispensable party provisions of Rule 19. See id. at 35.

Caught between the pincers of past injury and tribal sovereign immunity with respect to bison translocation to the Fort Peck Reservation, the district court responded by enjoining any further bison translocation to the Fort Belknap Reservation. See id. at 37-38. However, pursuant to the district court's own findings, the Fort Belknap Reservation's bison range contains no "private or public land" that could even arguably fall within the scope of SB 212. Mont. Code Ann. § 87-1-216(4), (5) (emphases added). As the district court recognized, evidence indicated "the entire pasture to be tribal lands." PI Order at 17 (emphasis added). Such tribal lands are not private lands under the law. Compare Mont. Code Ann. § 70-1-102 (private property in Montana is that owned by an "individual") with E. Band of Cherokee Indians v. United States, 117 U.S. 288, 306-07 (1886) (tribal lands belong to tribe "as a political body, and not to its individual members"). Nor are they public lands within the legal meaning of that term. See 43 U.S.C. § 1702(e)(2) (definition of "public lands" excludes "lands held for the benefit of

Indians"); see also Hagen v. Utah, 510 U.S. 399, 413-14 (1994) (holding that "restoration of unallotted reservation lands to the public domain" is "inconsistent with the continuation of reservation status"). In short, the district court leveraged a finding that SB 212 was violated in the past on one Indian reservation to issue a preliminary injunction prohibiting future wild bison transfers to a different Indian reservation where the statutory prerequisites for applying SB 212 do not exist.

This was error. Issuance of a preliminary injunction under Mont. Code Ann. § 27-19-201(1) or (3) required, at a minimum, a finding that "the applicant is entitled to the relief demanded" or that an act is threatened "in violation of the applicant's rights." Yet SB 212's provisions imposing requirements for translocations of wild bison to "private or public land in Montana," Mont. Code Ann. § 87-1-216(4), (5), give CBU no entitlement to relief preventing translocation of wild bison to tribal lands. Nor does a translocation of wild bison to such tribal lands violate any rights that might be granted by SB 212. For this reason too, the district court's decision was incorrect and should be reversed.[6]

[6] Even as to bison movement to the Fort Peck Reservation, the district court wrongly found that CBU presented "a prima facie case" that FWP violated Mont. Code Ann. § 87-1-216(4) by failing to obtain landowner consent. PI Order at 23. CBU established that the Fort Peck bison range includes "non-public land owned by certain named individuals," Id.; see also Tr. at 39-40, 43-44, but not that those "individuals" withheld their consent for bison movement to their properties, and the district court could not assume that fact. See Atkinson v. Roosevelt County, 66 Mont. 411, 214 P. 74, 77 (1923) ("[T]he party who seeks relief by injunction has the burden of establishing a prima facie right to it.").

II. THE DISTRICT COURT'S INTERPRETATION OF THE "LARGE PREDATOR" STATUTE WAS LIKEWISE INCORRECT

To the extent the district court rested its preliminary injunction order on its interpretation of Mont. Code Ann. § 87-1-217, which concerns FWP's "policy decisions" involving "large predators," Mont. Code Ann. § 87-1-217(6), that interpretation also was incorrect. The district court did not explicitly find that CBU had presented a "prima facie case" that FWP violated section 87-1-217(6), but it did assert that "YNP bison are a large predator," PI Order at 7, and appeared to indicate agreement with CBU's contention that FWP violated a statutory duty to "'ensure that county commissioners and tribal governments in areas that have identifiable populations of large predators have the opportunity for consultation and coordination with state and federal agencies prior to state and federal policy decisions involving large predators and large game species.'" PI Order at 21 (quoting Mont. Code Ann. § 87-1-217(6)) (emphasis in original).

These findings were incorrect. As a matter of law, bison are not "large predators" under Mont. Code Ann. § 87-1-217(6). This term includes only "bears, mountain lions, and wolves." Mont. Code Ann. § 87-1-217(2)(b). As a matter of fact, bison are not predators at all as they do not prey on other animals. Their diet "consists primarily of grasses," with occasional inclusion of "forbs and woody

vegetation." EA at 46. Accordingly, the district court's "large predator" findings were incorrect and cannot support an injunction.[7]

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN BALANCING THE EQUITIES

In addition to its incorrect statutory readings, the district court abused its discretion in concluding that the balance of equities favored CBU's preliminary injunction request. The district court ruled that, even though injunctive relief was not warranted under Mont. Code Ann. § 27-19-201(2), which demands evidence of irreparable injury to the plaintiff, "the balance of equities element of this subsection favors issuance of a preliminary injunction under § 27-19-201(1), MCA." PI Order at 30. The district court was wrong.

First, the district court generally concluded that the "threatened injury" to CBU "outweighs whatever damage the proposed injunction would cause to Defendants." Id. at 28. In reaching this conclusion, the district court characterized CBU's threatened injury as "FWP movement of a disease prone species" absent procedural compliance with SB 212. Id. Even apart from SB 212's inapplicability, this was error. As the district court itself recognized later in its decision, the translocated bison cannot accurately be characterized as "disease prone." See id. at 29-30. To the contrary, "the evidence is the YNP bison have

[7] Nor do bison constitute "large game species" under Mont. Code Ann. § 87-1-217(6). That term refers only to "deer, elk, mountain sheep, moose, antelope, and mountain goats." Mont. Code Ann. § 87-1-217(2)(a).

been tested multiple times and certified as brucellosis-free by [APHIS-Veterinary Services ("APHIS-VS")]." Id.; see also Decision Notice at 10 ("Most of the adults have been tested >9 times—and tested negative each time."). Accordingly, as the district court found, "[p]laintiffs present[ed] no evidence of a reason to believe these bison have a latent infection." Id. at 30. Indeed, this factual finding represented a key justification for the district court's conclusion that CBU failed to demonstrate any irreparable injury. See id. at 29-30. Given the district court's findings that (1) all evidence indicates the translocated bison do not carry brucellosis, and (2) this evidence supports a finding that CBU failed to establish irreparable injury, the district court abused its discretion in relying on the alleged "disease prone" nature of these bison to place CBU's "threatened injury" above all other considerations. See Wells v. Young, 2002 MT 102, ¶ 20, 309 Mont. 419, 47 P.3d 809 (holding that district court abused its discretion in issuing injunction based on general finding of breach of duty that contradicted district court's own specific findings on underlying facts; "[W]hen a general finding is inconsistent with a specific finding, the general finding will be rejected."), overruled on other grounds by Shammel v. Canyon Resources Corp., 2003 MT 372, 319 Mont. 132, 82 P.3d 912.

Second, the district court wrongly stated that FWP violated promises made in the agency's environmental assessment document, or duties under Mont. Code

Ann. § 87-1-216(1), by negotiating "a MOU that places sole responsibility for the care and management of the YNP bison with the [Fort Peck] Tribes, including the administration of [brucellosis] testing." PI Order at 28. While the district court appeared to identify a breach of the EA's promise for "continued testing of the YNP bison by APHIS VS" during the five-year quarantine term, id. at 28, FWP's MOU with the Fort Peck tribes provides that APHIS will participate in the tribes' testing of quarantined bison, MOU at 4, consistent with the EA's statement that "[t]he Tribes will maintain a working relationship with USDA APHIS in monitoring/testing of the herd," EA at 41. Further, the district court wrongly faulted FWP's failure to necropsy bison that died during shipment to the Fort Peck Reservation. See PI Order at 28. The transported bison had been tested for brucellosis just before shipment, and FWP deemed it unnecessary to necropsy the dead animals in light of the testing that had only just occurred. See Tr. at 131-32. Even before this eve-of-shipment test, most adult bison in the shipment tested brucellosis-negative more than nine times. See Decision Notice at 10. Accordingly, the lack of a necropsy of these bison—which did not commingle with cattle in any event—does not threaten any harm to CBU, much less tip the balance of equities in CBU's favor.

Third, the district court misinterpreted FWP's MOU with the Fort Peck tribes in asserting that it "places sole responsibility on the Tribes to return escaped

bison and allows up to 72 hours of such escape for their return." PI Order at 28. In fact, the MOU demands that the tribes return escaped bison to the quarantine surveillance pasture "as early as practicable, but no more than within 72 hours of [the tribes'] knowledge of such escape." MOU at 2 (emphases added). Further, under the MOU, if wild bison escape from the quarantine surveillance pasture during the calving season and are not returned within 72 hours but remain within reservation boundaries, the tribes "upon MFWP's request" will take appropriate "lethal removal, quarantine, or testing actions." Id. at 3 (emphasis added). If wild bison escape reservation boundaries at any time of year and are not returned within 72 hours, "MFWP reserves the right to lethally remove escaped … bison." Id. And, if wild bison escape reservation boundaries more than three times during the five-year term of the MOU due to tribal negligence, with uncompensated substantial damage to third parties or property, the tribes, "upon MFWP request, will return original [translocated] bison and up to 25% of their progeny to MFWP." Id.

Indeed, although the district court viewed the MOU management framework as an equitable factor supporting injunctive relief, application of that framework would actually improve the status quo for property owners living adjacent to the Fort Belknap Reservation. CBU's opposition to FWP's bison translocation appears to stem from allegations of past property damage caused by escapes of

bison from the Fort Belknap tribes' domestic herd. See Amend. Compl. ¶¶ 26, 29 (D.C. Doc. 6). As CBU's witness, Curt McCann, testified, local landowners have no recourse to state agencies or officials if domestic bison escape reservation boundaries. See Tr. at 61-62; see also Amend. Compl. ¶ 26. However, the MOU framework contemplates action by FWP if wild bison escape reservation boundaries and are not returned within 72 hours. See MOU at 3. Moreover, in contrast to CBU's complaints that the Fort Belknap tribes have not paid past claims for damage caused by escaped domestic bison, see Amend. Compl. ¶¶ 28-29, the MOU framework demands that tribes "keep liability insurance to cover any claims" for damage to persons or property by escaped wild bison. MOU at 3. Given that the Fort Belknap tribes intend to eliminate their domestic herd within three years of receiving wild bison from FWP, see EA at 8, application of the MOU framework on the Fort Belknap Reservation promises a comprehensive new program to address nearby landowners' concerns about bison. The district court abused its discretion in deeming this management improvement to support an injunction.

Fourth, for much the same reason, the district court erred in relying on evidence of defects in the existing fence surrounding the Fort Belknap tribes' bison range. See PI Order at 28. Whatever the state of existing fencing, wild bison will be transported to the Fort Belknap Reservation only after a new fence is

constructed to contain them. See EA at 36; Decision Notice at 2. The new fence "is anticipated to be [a] 7-8 foot high woven game fence," EA at 36, and FWP must determine that "adequate facilities are in place on the Fort Belknap Reservation" before any wild bison may be shipped there, MOU Addendum. This too represents an improvement over the status quo, which offers adjacent landowners no assurance of an improved bison fence on the Fort Belknap Reservation, much less a requirement for FWP to approve such fencing. See Tr. at 62.

Fifth, the district court wrongly asserted deficiencies in the MOU management scheme based on comparison to a "'Sample Management Plan'" proffered by FWP concerning a hypothetical translocation of wild bison to a state wildlife management area that never occurred. See PI Order at 22 & n.5, 29. In fact, FWP's MOU with the Fort Peck tribes explicitly addressed each matter that the district court found lacking. Compare PI Order at 22 n.5 (finding "detail lacking" to include "applicable animal health protocol, identification and tracking protocol, animal containment and public safety measures, reasonable carrying capacity and dedicated long-term funding source") with MOU at 2 (requiring disease testing of wild bison "as per [Quarantine Feasibility Study] protocol" and mandating "individual identification system"), 2-3 (establishing containment and safety measures), 3 (requiring "supplemental feeding or culling" to address

carrying capacity and "adequate resources … to maintain the surveillance pasture and care of … bison"). While the district court further took issue with the MOU's "format" and "paragraph headings," PI Order at 22, these quibbles cannot tip the equities in CBU's favor.

Sixth, the district court erroneously found the equities to favor CBU because "[d]efendants evidently knew of Plaintiffs' allegations and request for declaratory and injunctive relief at the time of the March 16, 2012 MOU." Id. at 29. However, the mere fact that a state agency knows of a plaintiff's challenge cannot suffice to tip the equities in the challengers' favor, or else equity would favor every party who bothered to serve a complaint on the state. Nor must state officials halt all action regarding matters challenged in such a complaint—especially when plaintiffs fail to seek temporary or preliminary injunctive relief. See City of Great Falls v. Forbes, 2011 MT 12, ¶ 15, 359 Mont. 140, 247 P.3d 1086 (proper procedure for obtaining injunctive relief involves "filing an application for an injunction, requesting that the District Court set a hearing date, and providing reasonable notice" to adverse party). Here, while plaintiffs filed a complaint seeking declaratory relief and an injunction, they did not actually file an injunction motion for more than three months after FWP announced that bison "w[ould] be translocated to the tribal properties" without further public involvement. Decision Notice at 5, 16. Plaintiffs include a state senator and three advocacy groups that

are no strangers to litigation. They had every opportunity to request an injunction prior to any negotiation of MOU terms or shipment of bison. For whatever reason, they failed to do so. However, their failure to take timely action does not shift the balance of equities in their favor.

IV. THE DISTRICT COURT'S RULE 19 ANALYSIS WRONGLY EVALUATED IMPACTS TO THE FORT PECK TRIBES

Finally, the district court abused its discretion in concluding that the Fort Peck tribes are not indispensable parties under Montana Rule of Civil Procedure 19, which would necessitate denial of injunctive relief and dismissal of CBU's claims. Rule 19(a) first requires a determination whether it is necessary to join absent parties because, in their absence, "the court cannot accord complete relief among existing parties," or because the absent parties claim "an interest relating to the subject of the action" such that litigating the case without them may "impair or impede" their ability to protect that interest or expose an existing party to multiple "or otherwise inconsistent obligations." Mont. R. Civ. P. 19(a); see also Blaze Constr. Co. v. Glacier Elec. Coop. Inc., 280 Mont. 7, 11, 928 P.2d 224, 226 (1996) (discussing Rule 19 standard). "[I]f the absent party is necessary but joinder is not possible," the Court must determine "whether the absent party is indispensable under Rule 19(b), that is, whether in equity and good conscience the action should

proceed or should be dismissed." Blaze Constr. Co., 280 Mont. at 11, 928 P.2d at 226 (quotations and alterations omitted); see also Mont. R. Civ. P. 19(b).[8]

Here, the district court correctly determined that the Fort Peck tribes are necessary parties under Rule 19(a) because of FWP's "MOU with Ft. Peck Tribes," and because "YNP bison have been relocated to Ft. Peck." PI Order at 35-36; see, e.g., Quileute Indian Tribe v. Babbitt, 18 F.3d 1456, 1458-59 (9th Cir. 1994) (holding that tribal interest in escheated property made tribe necessary party in action to recover that property); McClendon v. United States, 885 F.2d 627, 633 (9th Cir. 1989) ("Because the Tribe is a party to the lease agreement sought to be enforced, it is an indispensable party under Fed. R. Civ. P. 19."). However, the district court determined that the Fort Peck tribes are not indispensable parties under Rule 19(b) because "judgment can be shaped to avoid implicating the Ft. Peck Tribes' interest." PI Order at 36. Specifically, the district court reasoned:

> Should final judgment be applicable only to future movement of YNP bison until statutory compliance is achieved, said judgment would provide adequate relief to Plaintiffs and avoid implicating any Ft. Peck Tribes' legally protected interest. The MOU Addendum states that some of the YNP bison would be moved to Ft. Belknap "as soon as is practical," but otherwise specifies no timeframe. No modification of the MOU is needed; the term "practical" allows for completion of this action. If the YNP bison remain at Ft. Peck while

[8] Any party may raise a Rule 19 issue concerning nonjoinder of indispensable parties, and trial and appellate courts may raise this issue on their own initiative at any stage of the proceedings. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 111 (1968); Pit River Home & Agric. Coop. Ass'n v. United States, 30 F.3d 1088, 1099 (9th Cir. 1994).

> FWP completed any required statutory procedures, this action would not prejudice any protected interest of the Ft. Peck Tribes.

Id. at 36-37.[9]

This reasoning was erroneous because pasturing all 61 translocated bison on the Fort Peck Reservation until "statutory compliance" with SB 212 is achieved—which presumably would occur only after a final judgment and any appeals in this litigation—does not "avoid implicating any Ft. Peck Tribes' legally protected interest." Id. at 36. Under their MOU with FWP, the Fort Peck tribes agreed to pasture the approximately 30 bison to be transferred to Fort Belknap only pending "MFWP's indication that adequate facilities are in place on the Fort Belknap Reservation to receive [Quarantine Feasibility Study] bison." MOU Addendum; see also Decision Notice at 2 ("If a boundary fence for the 800-acre pasture is not completed in time to receive study bison, the Tribes at the Fort Peck Reservation have offered to provide temporary pasture for these bison … until Fort Belknap's fencing effort is completed.") (emphasis added).

In other words, the Fort Peck tribes accepted an obligation to provide a range for these bison until the Fort Belknap tribes' fence is built—not until

[9] Joinder of the tribes is impossible because, as sovereign entities, the tribes are immune from unconsented suit in state or federal court. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (recognizing that Indian tribes are generally "exempt from suit") (quotations and citation omitted); accord Koke v. Little Shell Tribe, 2003 MT 121, ¶ 18, 315 Mont. 510, 68 P.3d 814.

completion of what promises to be a lengthy litigation followed by whatever remand procedures might be ordered. Accordingly, the MOU's statement that the bison transfer to Fort Peck "will take place as soon as is practical," MOU Addendum, must be read in the context of the practicalities involved in the MOU's provision for assuring adequate fencing—not whatever practicalities may be involved in "complet[ing] any required statutory procedures" required by a final judgment if CBU were to win this case. PI Order at 37; see K & R P'ship v. City of Whitefish, 2008 MT 228, ¶ 26, 344 Mont. 336, 189 P.3d 593 (court interpreting agreement "will not isolate tracts, clauses, or words, but rather … grasp the instrument by its four corners and in the light of the entire instrument … ascertain the parties' intent") (quotations omitted). The district court's conclusion that holding these bison on the Fort Peck Reservation for some undefined, longer period "would not prejudice any protected interest of the Ft. Peck Tribes," PI Order at 37, is equivalent to concluding that a homeowner who agrees to provide free room and board to a lodger for a month is not prejudiced if that lodger stays on for a year. This manifest error should be reversed.

Further, because the Fort Peck tribes are both necessary and indispensable parties, CBU's claims should be dismissed under Rule 19(b). Although there is no alternative forum for CBU's claims, see Mont. R. Civ. P. 19(b)(4), "lack of an alternative forum does not automatically prevent dismissal of a suit," Makah

Indian Tribe v. Verity, 910 F.2d 555, 560 (9th Cir. 1990). To the contrary, "[s]overeign immunity may leave a party with no forum for its claims." Id. In particular, "a plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity." Confederated Tribes of Chehalis Indian Reservation v. Lujan, 928 F.2d 1496, 1500 (9th Cir. 1991); accord Davis ex rel. Davis v. United States, 343 F.3d 1282, 1293-94 (10th Cir. 2003); Clinton v. Babbitt, 180 F.3d 1081, 1090 (9th Cir. 1999); Quileute Indian Tribe, 18 F.3d at 1460-61. As the U.S. Supreme Court has stated:

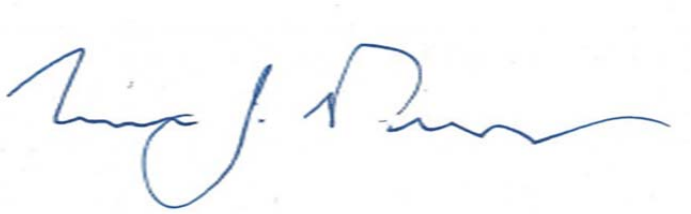
> Dismissal under Rule 19(b) will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims. But that result is contemplated under the doctrine of … sovereign immunity.

Republic of the Philippines v. Pimentel, 553 U.S. 851, 872 (2008). This is such a case.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order granting CBU's motion for a preliminary injunction, vacate the preliminary injunction, and order dismissal of CBU's claims pursuant to Montana Rule of Civil Procedure 19(b).

Respectfully submitted this 11th day of September, 2012.



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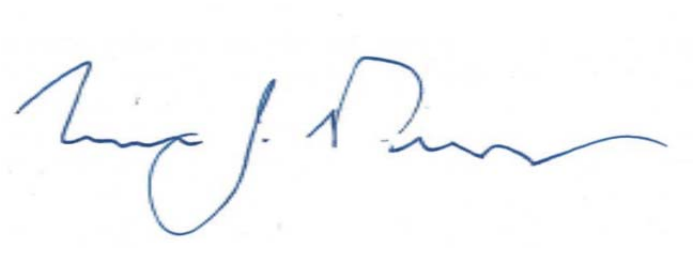
CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I hereby certify that the foregoing document has double-spaced line spacing and proportionately spaced, Times New Roman, 14-point font. The foregoing document contains 9,971 words, excluding the tables, certificates, and appendix, and therefore complies with this Court's word limitation of 10,000 words for principle briefs.



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CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of September, 2012, I caused a true and accurate copy of the foregoing Brief of Appellants Defenders of Wildlife and National Wildlife Federation to be submitted to the Clerk of the Montana Supreme Court; and caused additional true and accurate copies of the foregoing brief to be served upon the following by first-class mail:

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