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

on appeal from the Montana Seventeenth Judicial District Court, Blaine County
Hon. John C. McKeon Presiding

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

Plaintiffs/Appellees.

v.

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

Defendants/Appellants,

and

DEFENDERS OF WILDLIFE and NATIONAL WILDLIFE FEDERATION

Defendant Intervenors/Appellants.

APPELLANTS DIRECTOR JOSEPH MAURIER; MONTANA DEPARTMENT OF FISH, WILDLIFE & PARKS; AND MONTANA FISH, WILDLIFE & PARKS COMMISSION OPENING BRIEF

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STATEMENT OF THE ISSUES

1. Whether the district court erred when it found Fort Belknap Tribes not to be a necessary party under M.R.Civ.P. 19(a) and found Fort Peck Tribes to be a necessary but not an indispensable party under Rule 19(b), and whether both Fort Belknap and Fort Peck Tribes are both indispensable parties.

2. Whether the district court erred when it applied Senate Bill 212, addressing the release of bison to "private or public land in Montana," to the transfer of bison by Montana Department of Fish, Wildlife and Parks' (FWP) to Indian tribes.

3. Whether the district court erred when it held that bison are "large predators" under Mont. Code Ann. §87-1-217, a statute the court concluded FWP did not follow in this case.

4. Whether the district court erred when it issued an overbroad order enjoining FWP from entering any memorandum of understanding (MOU) or agreement with any private or public landowner for the purpose of bison transfers and enjoined FWP from transferring any YNP bison from existing quarantine pastures or facilities.

STATEMENT OF THE CASE

This case is about FWP's and Fish, Wildlife and Parks Commissions' (Commission) actions to move bison to historic ranges on tribal lands in Montana. FWP was enjoined by an Order Granting Preliminary Injunction by Montana's

Seventeenth Judicial District Court, Blaine County (Order). This appeal requests the Court reverse the May 9, 2012 Order.

The Commission authorized a translocation of bison to the Assiniboine and Sioux (Fort Peck) and Gros Ventre and Assiniboine (Fort Belknap) Tribes at its meeting on December 9, 2011 conditioned upon successful negotiation of a memorandum of understanding (MOU) with the Tribes. On January 11, 2012, a group of landowners and a citizen-group called Citizens for Balanced Use (collectively CBU or Plaintiffs) filed suit challenging the Commission's decision and seeking to enjoin transport of bison to Fort Peck and Fort Belknap Reservations.

The MOU between Fort Peck Tribes and FWP was fully executed on March 16, 2012 and transport of bison to Fort Peck was planned for March 19, 2012.

The transport on March 19 and March 22, 2012, while authorized by the FWP and the Commission, was executed by partners to the conservation effort, Defenders of Wildlife, National Wildlife Federation, and the Animal Plant Health Inspection Service (APHIS) of Department of the Interior, along with Fort Peck Tribes. The Commission decision authorized further transport of half the bison to Fort Belknap. Fort Belknap fencing was not yet secured and the bison were all sent to Fort Peck until adequate fencing was constructed and approved by FWP. The MOU required Fort Peck Tribes transfer bison "as soon as practical" after

FWP approved fencing to be adequate.

On the eve of the bison transfer and unbeknownst to FWP, CBU requested and the district court, on the second application, granted a TRO on March 22, 2012 while bison transfer was in progress. The TRO restrained, among other things, any future movement of bison from Fort Peck to Fort Belknap Tribes. The promised movement of bison was forestalled.

The district court heard CBU's application to convert the TRO to a preliminary injunction on April 11, 2012 and subsequently issued its Order Granting Preliminary Injunction (Order) May 9, 2012. FWP timely appealed the Order.

STATEMENT OF THE FACTS

FWP, along with its partners to a conservation effort to enhance the population of genetically-pure, brucellosis-free Yellowstone National Park (YNP) bison, transported 61 bison to Fort Peck Tribes on March 19 and 22, 2012 from a quarantine facility at Corwin Springs just outside of YNP. The Commission authorized the translocation of bison to both Fort Peck and Fort Belknap Tribes in its December 9, 2011 decision during its regular public meeting. Tr. 114:15-23. Currently, only Fort Peck cares for and manages the promised bison. Order p. 16.

The translocation was part of a broader Quarantine Feasibility Study (study) conducted by partners to the management of bison that originate from YNP under

the Interagency Bison Management Plan (IBMP). *Id*. at 7. The IBMP was adopted by FWP and its partners in 2000. Those partners to the study, of which the current bison transfer is part, are the Montana Department of Livestock (DOL), U.S. Animal and Plant Health Inspection Service (APHIS), U.S. Forest Service, and National Park Service. *Id*. The study was analyzed in various phases through three environmental assessments (EAs) and their associated public processes. *Id*. at 8. In addition, this particular action to move bison to Fort Peck and Fort Belknap Tribes was further analyzed in a separate EA and the Decision Notice issued by FWP and endorsed by the Commission on December 9, 2011. *Id*. .

The EA and Decision Notice analyzed, among other potential locations, proposals by Fort Peck and Fort Belknap Tribes for acceptance of bison from the study onto tribal lands. *Id*. The requests for proposals (RFP) submitted by both Fort Peck and Fort Belknap Tribes were submitted years prior when an original and first "cohort[1]" of bison had progressed through the first three phases of the study. Tr. 102:12-105:20. Only two cohorts were planned for the study. With the completion of the two cohorts through this final phase IV at the completion of the MOU terms, the study is complete and dismantled. *Id*.

During the time when FWP and the Commission were considering the bison

[1] The word "cohort" is the word used by FWP and partner to describe the group of bison that moved together through each phase of the study and are ultimately together on Fort Peck in this final Phase IV of the study. Tr. 105:21-106:1.

transfer, the Montana Legislature was considering several bison-related bills. One bill, Senate Bill 212 (SB 212), was signed into law on May 12, 2011 and amended Mont. Code Ann. §87-1-216 to address translocation of wild bison by FWP to "private or public land in Montana." With these amendments, FWP's release, transplant, or allowance of bison onto "private or public land in Montana" must be authorized by the private or public landowners under a management plan containing specific requirements for bison management. Additionally, when developing management plans, FWP must hold public hearings in "affected counties." *See* Mont. Code Ann. §87-1-216(4)-(6).

SB 212 does not specifically mention or apply to FWP's release, transplant, or allowance of bison onto tribal lands or any lands, regardless of ownership, within the exterior boundaries of a reservation. *See* Mont. Code Ann. §87-1-216(4)-(6). The legislative history of the amendments makes it clear that this legislation "would have no effect on the tribe's ability to receive buffalo from the department." Statement of Rep. Knudsen, House sponsor of SB 212, H. Floor Sess. on SB 212, 2011 Legis. Sess. (Mar. 30, 2011), at minute 9:52.

The decision by the Commission that resulted in transfer of 61 bison to Fort Peck Tribes was conditioned upon successful negotiation of an MOU to address issues raised by the public. Tr. 114:10-23. Notwithstanding its understanding that SB 212 did not apply to the transfer of bison to Montana Indian tribes, during

negotiation of the MOU, FWP intended and did apply provisions of SB 212 to the MOU. Tr. 162:9-17. Point-by-point, FWP considered the requirements of SB 212 and negotiated and agreed to a provision for every statutory item. *Compare* subsection (5)(a) of Mont Code Ann. §§87-1-216 *with* MOU at 2 (requiring disease testing of wild bison and lethal removal of bison subjected to disease); subsection (5)(b) *with* MOU at 2 (mandating individual identification system); subsection (5)(c) *with* MOU at 2-3 (establishing fencing measures, contingency plans to relocate bison that escape containment, and measures for FWP to retake possession if bison continually escape confinement); subsection (5)(d) *with* MOU at 2 (requiring immediate response to potential bison safety issues and allowing FWP retake possession absent Tribes' timely response); subsection (5)(e) *with* MOU at 3 (requiring supplemental feeding or culling to address carrying capacity and adequate resources to maintain care of bison); and subsection (5)(f) *with* MOU at 3(requiring Tribes to keep liability insurance) and 4 (requiring FWP to provide adequate funding for fencing).

The MOU was fully executed on March 16, 2012 and the transfer of 61 bison was conducted on March 19 and 22. Tr. 73:8, 75:8. The entire bison cohort was planned to be moved on March 19. Because of injuries and capacity issues, five bison remained at study facilities until March 22 when they were moved to Fort Peck Tribes. Tr. 75:11-14.

CBU filed a complaint in Blaine County on January 11, 2012 and amended its complaint on March 8, 2012. CBU sought injunctive relief based upon the FWP's Decision Notice signed in November 2011 and the Commission's December 9, 2011 decision. However, CBU did not file an application for a TRO until the first shipment of bison occurred on March 19, 2011. CBU's application was denied based upon procedural defects. Order p. 3. CBU renewed its application, which was granted the morning of March 22, 2012 after the separate shipment of bison was already in progress.

The TRO restrained FWP from transferring bison from current facilities to the Tribes. In addition, the TRO forbade FWP from entering into agreements with the Tribes to effectuate a bison transfer to tribal lands. *Id*. at 4. At the conclusion of the April 11, 2012 hearing of this matter, the district court issued its Order continuing the TRO. *Id*. The Order effectively halted transfer of any YNP bison anywhere with the exception of the movement of bison currently located on Fort Peck under the MOU. *Id*. at 37.

STANDARD OF REVIEW

This Court typically reviews the grant of a preliminary injunction under a "manifest abuse of discretion" standard. *St. James Healthcare v. Cole*, 2008 MT 44, ¶ 21, 341 Mont. 368, 178 P.3d 696. However, this deferential standard is inapplicable where, as here, the grant of the injunction is based solely upon

conclusions of law such as interpretation of a statute. In such a case, no discretion is involved and this Court reviews the district court's conclusions of law to determine whether the interpretation of the law is correct. *Id*.; *see also, M.H. v. Montana High School Ass'n*, 280 Mont. 123, 130, 929 P.2d 239, 243 (1996).

This Court reviews denial of a Rule 19 motion under an "abuse of discretion" standard. *John Alexander Ethen Trust Agreement v. River Res. Outfitters, LLC*, 2011 MT 143, ¶ 49, 361 Mont. 57, 256 P.3d 913.

SUMMARY OF ARGUMENT

The district court abused its discretion when it determined under M.R.Civ.P 19(a) that the Fort Belknap Tribes were not necessary parties because they did not yet have an agreement with FWP for the transfer of bison to the reservation lands. The district court also abused its discretion when it determined that neither Fort Peck nor Fort Belknap Tribes were indispensable parties under M.R.Civ.P 19(b). The court misapplied the relevant factors weighing in favor of the Tribes' indispensability and erroneously believed it could fashion an order that avoided implicating the Tribes' interests.

Additionally, the district court's grant of a preliminary injunction under subsections (1) and (3) of Mont. Code Ann. §27-19-201 was erroneous as a matter of law. A preliminary injunction may be proper under subsection (1) where "it appears that the applicant is entitled to the relief demanded." It may be proper

under subsection (3) when it appears the party opposing the injunction "is doing some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual." Under both subsections (1) and (3), the district court based its order on its erroneous construction of two Montana wildlife statutes.

Subsections (4)–(6) of Mont. Code Ann. §87-1-216 do not apply to transfer of bison to Montana Indian tribes, and the district court's holding that CBU "made a prima facie case of violation of §87-1-216," Order p. 27, 31, and 32, and reliance on that conclusion as the foundation for its order granting the preliminary injunction, constitutes legal error.

The district court also appears to have based the injunction on its erroneous construction of Mont. Code Ann. §87-1-217, addressing FWP's responsibilities in managing large predators. Order p. 7, 21. Bison are not predators, as a matter of fact and as a matter of law. The statute defines "large predators" to mean "bears, mountain lions, and wolves." To the extent the district court relied on its erroneous construction of §87-1-217 as a basis for its Order granting injunctive relief, that ruling was not proper and constitutes legal error.

Finally, the district court's Order is overbroad. This case was brought challenging FWP's actual translocation of bison to Fort Peck and its intended translocation of bison to Fort Belknap. The Court's order prohibits FWP from

entering into agreements to transfer YNP bison to "any" private or public landowner and from transferring "any" YNP bison, irrespective of whether such agreements or transfers involve Fort Peck, Fort Belknap, or any other Montana Indian Tribe. The Court's order goes far beyond the contours of this case and, at a very minimum, must be rejected as to its overbroad aspects.

I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DETERMINED UNDER RULE 19 THAT FORT BELKNAP TRIBES WERE NOT NECESSARY TO THE CASE, FAILED TO DETERMINE THAT THEY WERE INDISPENSIBLE, AND DETERMINED FORT PECK TRIBES WERE NOT INDISPENSABLE.

The district court abused its discretion when it determined Fort Belknap Tribes were not necessary parties to this case under M.R.Civ.P. 19(a). *See* Order, p. 37. As well, it abused its discretion by failing to determine that Fort Belknap Tribes were indispensable under M.R.Civ.P. 19(b). The district court also abused its discretion when it determined under Rule 19(b) that Fort Peck Tribes were not indispensable parties. Order, p. 37.

In analyzing a Rule 19 issue, a court must first determine whether a party is necessary under M.R.Civ.P. 19(a). *See Blaze Constr., Inc. v. Glacier Elec. Coop., Inc.*, 280 Mont. 7, 11, 928 P.2d 224, 227 (1996). M.R.Civ.P. 19(a) provides:

> (1)A person who is subject to service of process must be joined as a party if:
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> (B) that person *claims an interest* relating to the subject of the action

> and is so situated that disposing of the action in the person's absence may:
>
> > (i) as a practical matter *impair or impede* the person's ability to protect the interest; or
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(Emphasis added.)

Because the state rule is modeled after the federal rule, this Court looks to federal interpretations of Rule 19 for guidance. *Mohl v. Johnson*, 275 Mont. 167, 171, 911 P.2d 217, 220 (1996).

The Rule 19(a) test is disjunctive. *City of Syracuse v. Onondaga Cnty*, 464 F.3d 297, 309 n. 7 (2d Cir. 2006). "If the court determines that any of the criteria set forth in Rule 19(a) is met, then it must order that the absent person be joined as a party." *Johnson v. Smithsonian Inst.*, 189 F.3d 180, 188 (2d Cir. 1999).

After determining a party is necessary, the court moves on to consider under Rule 19(b) whether "in equity and good conscience" the matter should proceed without the party or whether the party is indispensable and the matter should be dismissed. *Id.* M.R.Civ.P. 19(b) provides:

> If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
> (2) the extent to which any prejudice could be lessened or avoided by:
> > (A) protective provisions in the judgment;

(B) shaping the relief; or
(C) other measures;
(3) whether a judgment rendered in the person's absence would be adequate; and
(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

A district court abuses its discretion in Rule 19(b) analysis if it fails to consider a relevant factor, relies on an improper factor, or relies on grounds that do not reasonably support its conclusion. *Davis ex rel. Davis*, 343 F.3d 1282, 1289 (10th Cir. 2003).

A. The Fort Belknap Tribes are a Necessary Party.

Without citing supporting authority, the district court held the Fort Belknap Tribes were not necessary parties under 19(a) "as there is no evidence of an agreement between these tribes" and FWP and the "mere potential for such an agreement with a state agency does not implicate a tribes' governing status where the issues involve the authority of the agency to enter into that agreement." Order p. 35. The district court's holding constitutes legal error.

Rule 19(a) provides that a person is a necessary party if the person "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest." M.R.Civ.P. 19(a)(1)(B)(i); *see also Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991) ("Indian tribes are necessary parties to actions affecting their legal

interests"). The rule does not require the "interest" take the form of an existing agreement and rise to the level of a "property right," as suggested by the district court. Rather, by its terms, the rule defines a necessary party as one who "*claims* an interest relating to the subject of the action." (Emphasis added.)

In this case, Fort Belknap Tribes submitted and RFP for the bison, and following an EA process under the Montana Environmental Policy Act, FWP issued a decision to transfer YNP bison to Fort Belknap and Fort Peck Tribes conditioned upon the successful negotiation of an MOU as to details and conditions of the transfer and management. Decision Notice p. 5. The Fort Peck Tribes agreed to hold all the bison intended for translocation until adequate fencing and other arrangements were made at Fort Belknap. *See* MOU Addendum.

If the district court had correctly analyzed the Fort Belknap Tribes' interests under 19(a) it would have concluded they were necessary parties. A party need only claim an interest in the outcome of a case to be necessary under Rule 19(a). The case of *Shermoen v. United States*, 982 F.2d 1312 (9th Cir. 1992) is instructive. There, individual Native Americans challenged a federal act as violating their constitutional rights. The district court dismissed on Rule 19 grounds. The plaintiffs challenged the district court's decision, arguing that the "very existence of absent tribes' interest" depended on the legality of the Act, which, if found to be unconstitutional, would nullify their interest. The Ninth Circuit rejected the

argument, stating:

> The appellants' position is not without some logical appeal. The Act is either constitutional or unconstitutional: if the latter, then the absent tribes have no "legally protected interest in the outcome of the action"; if the former, then the appellants will not prevail and thus the disposition of the action will not impair the absent tribes' interests.
>
> The language of Rule 19, however, forecloses such an analysis. Under that rule, the finding that a party is necessary to the action is predicated only on that party having a *claim* to an interest: "A person . . . shall be joined as a party in the action if . . . the person claims an interest relating to the subject of the action . . . ." Fed. R.Civ.P. 19(a)(2). Just adjudication of claims requires that courts protect a party's right to be heard and to participate in adjudication of a claimed interest, even if the dispute is ultimately resolved to the detriment of that party.

Id. at 1317.

The district court's ruling, below, that Fort Belknap Tribes do not have an interest because they only have "potential" for an agreement with FWP and the issues in the case "involve the authority of the agency to enter into that agreement" are at odds with the Ninth Circuit's holding in *Shermoen.* Just as the absent tribes claimed an interest in the question of the constitutionality of the federal act, so the Fort Belknap Tribes can claim an interest in the district court's construction of SB 212. Indeed, the district court's injunction prohibits FWP from entering an agreement with Fort Belknap Tribes and prohibits Fort Peck Tribes from

transferring bison to Fort Belknap, as required by the MOA Addendum. In so doing, it frustrates both Tribes' interests in sovereign government-to-government relationships. As discussed in more detail later in this brief, the court's Order effectively applies state law regarding management of wildlife to Indian land, a conclusion which at a minimum touches the Tribes' jurisdictional interests.

As well, the court heard testimony at the preliminary injunction hearing on issues going to the essence of the Tribes' sovereign interests, including the status of land on the Ft. Belknap reservation (*see e.g.* Transcript, 33:6-35:1), the Tribes' conduct in managing reservation resources (*see e.g.* Transcript, 53:15-58-24), and the Tribes' government-to-government contractual relationship with the State of Montana (*see e.g.* Transcript, 92:10-97:17). If Fort Belknap Tribes were not necessary parties as the court found, then the relevance of this testimony concerning their reservation and their management of their land was questionable at best.

The district court abused its discretion when it concluded that in the absence of a signed MOU with FWP, Fort Belknap Tribes were not necessary parties as they did not "claim an interest relating to the subject of the action" that would be "impaired or impeded" if the court proceeded in their absence. The Tribes' interests were impaired by the preliminary injunction issued.

Oddly enough, however, the court's reasoning under 19(a) had further flaws.

While the court focused too narrowly on the issue of whether Fort Belknap Tribes had an agreement with FWP, the court acknowledged the Tribes had a legally protected interest in protecting their sovereign immunity under M.R.Civ.P. 19(a)(1)(B). *See* Order, pg. 34. Having made this determination, the court's next step should have been to proceed to determine under Rule 19(a)(1)(B)(i) whether disposition of the case in the Tribes' absence may "as a practical matter impair or impede the person's ability to protect the interest." *See Shermoen*, 982 F.2d at 1318 ("If a legally protected interest exists, the court must further determine whether that interest will be *impaired or impeded* by the suit."). The court, however, inexplicably ignored this next step and instead jumped back to Rule 19(a)(1)(A) to determine whether in the Tribes' absence the court could "accord complete relief among existing parties…." *See* Order, pg. 34-35. This was error for two reasons. First, the district court failed to complete the analysis properly under Rule 19(a)(1)(B) by omitting consideration of subsection (i). Second, the district court effectively failed to recognize that the test under Rule 19(a)(1)(B) is disjunctive. *City of Syracuse*, 464 F.3d at 309 n. 7. "If the court determines that any of the criteria set forth in Rule 19(a) is met, then it must order that the absent person be joined as a party." *Johnson*, 189 F.3d at 188.

For the stated reasons, the district court ruling that Fort Belknap Tribes were not a necessary party under M.R.Civ.P. 19(a) should be reversed as an abuse of

discretion.

B. Both Fort Peck and Fort Belknap Tribes are Indispensable Parties.

The district court held the Fort Peck Tribes were not indispensable parties because it believed it could shape a judgment that would "avoid implicating the [Tribes'] interest." Order p. 36. The court's interpretation of its own decision is contorted and wrong. A study of the Order demonstrates the fallacy of the court's assumption. For example, the court, itself, states that "an order to remove the YNP bison from Ft. Peck" would "implicate the Fort Peck Tribes' interest in the MOU." Order p. 35. Certainly if an order to *remove* the bison from Fort Peck would implicate the Tribes' interests, the court's order directing the bison *remain* with the Tribes implicates the Tribes' interests as well. Likewise, the court suggested it could fashion a judgment that was "applicable only to future involvement of YNP bison until statutory compliance is achieved. . . ." Order p. 36. Certainly, such an order pertaining to "future involvement of YNP bison" implicates the immediate, claimed interests of Fort Belknap Tribes. The court went on to say, "No modification of the MOU is needed." *Id*. Since the Order, itself, modifies the MOU (even if temporarily), by prohibiting the transfer of bison from Fort Peck to Fort Belknap, to put it plainly, the court's statement is not accurate. Both Fort Peck and Fort Belknap Tribes' interests are implicated.

Moreover, through its actions, the district court took it upon itself to apply

state law to Indian reservations – a result which impacts the Tribes' interests *directly*. As discussed later in this brief, by holding the reference in Mont. Code Ann. §87-1-216(5) to "private or public land" applies to Indian reservations, the district court essentially imposed state law on Indian land, which at a minimum implicates the Tribes' jurisdictional interests.

Indeed, many of the issues before the court went straight to the Tribes' most basic interests, including the status of land on the reservation (*see, e.g.*, Transcript, 37:4-40:7), the Tribes' management of reservation resources (*see, e.g.*, Transcript, 64:16-66:14, 85:1-87:10), and the Tribes' contractual relations with other sovereign governments (*see, e.g.*, Transcript, 71:6-77:7). As part of their sovereign status, tribes generally retain the ability to control use of their land and resources. *See, e.g.*, *Mescalero Apache Tribe v. New Mexico*, 462 U.S. 324 (1983).

In conducting its analysis with respect to Fort Peck Tribes, the district court incorrectly focused on the MOA Addendum's term "as soon as practical" for the timing of Fort Peck Tribes' transfer of the bison to Fort Belknap. According to the court's reasoning, since bison need only be transferred "as soon as practical" and not according to a specific timeline, "this action would not prejudice any protected interest of the Fort Peck Tribes." Order p. 37. The court's "as soon as practical" language, however, is taken out of context. The entire provision of the MOA Addendum reads as follows:

> This transfer will take place as soon as is practical, following MFWP's indication that adequate facilities are in place on the Fort Belknap Reservation to receive QFS bison.

Read in context, the court's error becomes clear. The "practicality" of moving the bison is based on when FWP determines Fort Belknap Tribes have "adequate facilities in place." Transfer of bison is to be done "as soon as practical" after that. In no way is it intended to be the vague "whenever" proposition the court interpreted it to be. Indeed, read in context, this provision actually indicates the bison should be moved sooner, rather than later, after FWP approves the facilities – not at the end of the protracted litigation of a case to which the Tribes are not parties.

The district court's conclusion leads to an unacceptable result regardless of how it is interpreted. On the one hand, the court's application of Mont. Code Ann. §87-1-216(5) could be read to obligate the *State* to go onto the reservation and effectively proscribe management actions for bison on the reservation, dictate placement of fences, establish contingency plans for bison relocation, create public safety protocols, mandate a maximum carrying capacity for bison on the reservation, and identify long-term funding sources for the tribe's management of the bison. *See generally* Mont. Code Ann. §87-1-216(5) (specifying FWP's obligations for releasing bison on "private or public land in Montana."). On the other hand, it could be read to obligate a *tribe* to meet these requirements. Either

way, the court's interpretation of Mont. Code Ann. §87-1-216(5) effectively imposes state law on Indian land and Indian resources, thereby directly implicating the interests of these Tribes. The district court's application of state law to an Indian reservation at a minimum implicates the Tribes' ability "to make their own laws and be governed by them." *Nevada v. Hicks*, 533 U.S. 353, 361 (2001).

Returning again to the factors the Court must analyze, the federal courts have ruled that when parties are necessary under Rule 19(a), they would likely be prejudiced by a judgment in their absence under Rule 19(b)(1). *See Enter. Mgmt. Consultants, Inc. v. U.S.*, 883 F.2d, 890, 894 n. 4 (10th Cir. 1989) ("This prejudice test is essentially the same inquiry under Rule 19(a)(2)(i) into whether continuing the action without a person will, as a practical matter, impair that person's ability to protect his interest relating to the subject matter of the lawsuit.); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d, 1030, 1043 n. 15 (9th Cir. 1983); *Quileute Indian Tribes v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994). The prejudice test is met in this case. .

As to the fourth test under Rule 19(b), i.e., "whether the plaintiff would have an adequate remedy," the State recognizes, as the district court noted, that the absence of an adequate forum cannot be taken lightly. However, the district court also correctly recognized that absence of an alternative forum was not dispositive. Order p. 36. In this case, moreover, a proper analysis by the court would have

concluded that Plaintiffs' concerns about an alternate forum for their claims were effectively cancelled out by the countervailing prejudice to the Tribes from a judgment in their absence and, in any event, ultimately were outweighed by the public policy otherwise immunizing the Tribes from suit. *See e.g., Enter. Mgmt. Consultants*, 883 F.2d at 894. This is because a "plaintiff's inability to obtain relief in an alternative forum is not as weighty a factor when the source of that inability is a public policy that immunizes the absent person from suit." *Davis*, 343 F.3d at 1293-94 (upholding Rule 19 dismissal).

In summary, by relying on its erroneous assumption that it could "provide adequate relief to Plaintiffs and avoid implicating [the Tribes'] legally protected interest[s]," Order p. 36, the district court abused its discretion and committed an error of law. An analysis of the Rule 19(b) factors requires a finding that both Fort Belknap and Fort Peck Tribes are not only necessary, they are indispensable. The district court's Rule 19 ruling should be reversed. Given that the Tribes are immune from suit in state court, such a holding would require dismissal of the case in its entirety.

II. SB 212 DOES NOT APPLY TO THE TRANSFER OF BISON TO INDIAN TRIBES IN MONTANA AS LANDS WITHIN THE RESERVATION BOUNDARIES ARE NOT "PUBLIC OR PRIVATE LAND" WITHIN THE MEANING OF THE STATUTE.

The district court's preliminary injunction was based on the erroneous assumption that SB 212 -- which establishes requirements that must be fulfilled

before FWP may transplant wild buffalo or bison to "private or public land in Montana" -- applies to bison that are transferred by FWP to lands within Fort Peck and Fort Belknap Reservations pursuant to MOUs between FWP and the respective tribal governments. In construing SB 212 (Mont. Code Ann. §87-1-216 (4)-(6)) to apply to private and public lands within Indian reservations, the district court committed legal error.

The lands at issue in this case are lands on Fort Belknap and Fort Peck Reservations. Notably, the district court found that the "entire pasture" contemplated for bison on Fort Belknap Reservation consisted of "tribal lands." Order at 17. The bison pasture on Fort Peck Reservation was identified "as including both tribal and 'non-public land.'" The "non-public land" was shown on the Tribes' records as owned by three separate individuals, *id.* at 16, permission from whom the court concluded was not obtained by FWP. *Id.* at 23. Unfortunately, the district court did not reveal how the ownership status of these lands (i.e., tribal, non-public) factored into its determination that the statutory language ("private or public lands in Montana") applied to lands within the boundaries of both Fort Belknap and Fort Peck Reservations. However, as a matter of law, the court's decision was erroneous.

The phrase "private or public land in Montana" as used in Mont. Code Ann. §87-1-216(4)-(6) cannot be construed to apply to lands within the boundaries of an

Indian reservation because: 1) under federal and state law, the term "public land" does not include Indian lands and reservations; and 2) as used in SB 212, the term "private and public land in Montana" cannot reasonably be construed to include state or privately owned lands within Indian reservations. Because the preliminary injunction was based on an erroneous conclusion of law, it should be reversed as a manifest abuse of discretion.

A. Federal and State Law are Clear that the Term "Public Lands" Does Not Include Indian or Tribally Owned Lands.

As a matter of both federal and state law, Indian lands have always been distinct from "public land." Further, under federal precedent, statutes dealing with federal public lands exclude Indian lands unless there is specific language indicating that Indian lands are meant to be included. Under this settled law, SB 212 cannot be construed to apply to Indian lands on grounds that such lands are "public land."

i. Federal public lands are distinct from Indian lands, and, absent explicit language to the contrary, statutes concerning public lands exclude tribal lands.

Since the first assembly of Congress, Indian lands have occupied a legal position that is fundamentally different from other lands that comprise the public domain or public lands. *See* Indian Trade and Intercourse Act, July 22, 1790, 1 Stat. 137, §4 (prohibiting non-Indian purchases of Indian land, except when "made and duly executed at some public treaty . . . held under the authority of the United

States"), now *codified as amended* at 25 U.S.C. §177. Indian lands are reserved and held in trust specifically for the benefit of Indian peoples, whereas the federal government manages public lands and the public domain for the benefit of the general public. Indian lands cannot be construed as equivalent to, or a subset of, public lands.

Congress and the executive branch have long made clear the distinction between Indian lands and public lands. For example, in 1964, Congress passed Public Law 88-606, an Act for the establishment of a Public Land Law Review Commission to study existing laws and procedures relating to the administration of the public lands of the United States. P.L. 88-606, 78 Stat. 982, 43 U.S.C. §§1391-1400 (1964) *as amended*, (Supp. IV, 1969). The Act excludes Indian lands and reservations. Likewise, federal statutes pertaining to public lands exclude Indian lands, Federal Land Policy and Management Act (FLPMA) specifically *excludes* from its definition of public lands, "lands held for the benefit of Indians, Aleuts, and Eskimos." 43 U.S.C. §1702(e). The Commission's Report reflects that, as a matter of federal legislation and executive policy, Indian lands have always been distinct from public lands.

Furthermore, absent explicit language to the contrary, federal statutes concerning the disposition of public lands or the public domain do not include Indian lands or reservations. *See, e.g., United States v. Santa Fe Pac. R. Co.*, 314

U.S. 339, 353 (1941) (in the absence of a "clear and plain indication" to the contrary, a federal grant of public lands does not extinguish Indian title); *Bennett County, S.D. v. United States*, 394 F.2d 8 (8th Cir. 1968) ("As a general rule, Indian lands are not included in the term "public lands" which are subject to sale or disposal under general laws."); *Foust v. Lujan*, 942 F.2d 712, 715 (10th Cir. 1991) ("We agree that lands now held by the United States in trust for Indians are not public lands. *See* 43 U.S.C. §1702(e).").

Legal treatises and scholars also confirm that Indian lands are legally distinct from public lands, and their administration and management is therefore different. For example, the 2005 edition (updated through 2009) of Felix Cohen's seminal work states as follows:

> Indian lands are not . . . public lands or part of the public domain and are thus not administered under the public land laws. Although Indian trust lands are owned in fee by the United States, they are administered for the benefit of the tribes and individuals who are the equitable owners of the land.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §§5.01 [1] (Nell Jessup Newton ed., 2005) (2009) (citations omitted). The district court's decision that general state statutes do not require specific "reference to lands within an Indian reservation to reflect an intent to cover those lands" stands in direct contradiction to these federal rules of statutory construction. Order, at 23-24. Furthermore, as shown below, no state law authority supports a conclusion of law that a general

state law reference to "public land in Montana" can include "Indian land," and in the federal context the legal authority is to the contrary.

ii. State public lands are distinct from Indian lands and reservations.

Articles I and X of the Montana Constitution establish, as a matter of state law, a sharp distinction between Indian lands and state "public lands." Article I declares that "all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States …" By virtue of Article I of the Montana Constitution, as well as federal jurisprudence, the management and control of Indian lands is beyond the authority of state government. Article X, section 11 of the Constitution defines state public lands as "all lands of the state that have been or may be granted by congress, or acquired by gift or grant or devise from any person or corporation." Further, section 11 provides that state public lands shall be held in trust for the people of Montana; that state public lands shall not be disposed of except pursuant to general laws providing for such disposition; and that all public land shall be classified by the board of land commissioners in a manner provided by law. As used in the Montana Constitution, the term "public lands" means state-owned and managed public lands. It is manifest, then, that Indian lands, which remain under the absolute jurisdiction and control of the Congress and the Tribes, cannot be construed as part of the state public lands.

iii. SB 212 does not apply to the agreement intended between FWP and the Fort Belknap Tribes, as the agreement contemplates pasturing bison on tribal lands only.

As stated above, the State's agreement with the Fort Belknap Tribes, though not final, contemplated that bison would be pastured solely on tribal lands. Order at 17. Yet the district court enjoined FWP from entering an MOU with the Fort Belknap Tribes and also enjoined FWP from transferring any YNP bison at Fort Peck to Fort Belknap. Order at 37-38.

Given that, as demonstrated above, "public lands" do not include tribal lands, and the State's agreement with Fort Belknap did not contemplate pasture of bison on "private lands," at a minimum, those aspects of the district court's order enjoining the transfer of bison to Fort Belknap Tribes should be overturned.

B. The Term "Private Land in Montana," as Used in SB 212 Cannot Reasonably be Construed to Include Lands within Indian Reservations.

Having established that Indian lands are not "public lands" under either federal or state law, the question remains whether the term "private land in Montana," as used in §87-1-216(4)-(6), is intended to encompass state owned or privately owned lands within the boundaries of an Indian reservation. Given (1) the sovereign interests of Fort Peck and Fort Belknap Tribes with regard to the management of wild bison within their reservation boundaries, (2) the inaptness of subsections (4)–(6) to a translocation of bison to Indian tribes, (3) the utter silence

of §87-1-216 with regard to the transfer of bison to tribes, (4) the State's existing policy under §81-2-120 allowing the transfer of bison by DOL to Montana tribes, (5) the practice of the Montana legislature to expressly include Indian tribes and lands in statutes when so intended, (6) the legislature's practice of requiring that matters in which both state and tribal interests are at stake be addressed through cooperative agreement, and (7) the potential for state-tribal jurisdictional conflict under the district court's statutory construction, the answer is no. Given the sovereign interests at stake and established state legal practice, it is not reasonable to conclude that the requirements of Mont. Code Ann. §87-1-216(4)-(6) implicitly apply to transfers of wild bison to lands within Indian reservations.

i. The Tribes likely have some jurisdictional authority over wild bison located within reservation boundaries, regardless of the title or ownership status of any lands on which they will be contained.

The Fort Peck and Fort Belknap tribal governments are sovereigns with inherent authority over their members and territory. *See*, *e.g., United States v. Wheeler*, 435 U.S. 313, 323 (1978), *quoting United States v. Mazurie*, 419 U.S. 544, 557 ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory"); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, at 16-17 (1831). The ability to hunt, fish and trap wildlife on tribal trust lands is specifically restricted to tribes and tribal members. 18 U.S.C. §1165. Further, while the general rule is that tribes do not have inherent

authority to regulate the activities of non-Indians on fee lands located within reservation boundaries, an important exception exists that is likely to apply here. Pursuant to *Montana v. United States* and its progeny: "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. 544, 566 (1981). *See also Montana v. United States EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998) (upholding tribal authority to regulate surface waters on the Flathead Indian Reservation, including waters on non-Indian lands, because such regulation was necessary for the health and welfare of the tribe).

The transfer of wild bison to within the boundaries of an Indian reservation implicates the political integrity, economic security, and health and welfare of a tribe and its members. This is so, regardless of whether the bison are placed on non-Indian fee land, state-owned lands, or Indian lands. Tribal governments have an obvious political and cultural interest in the return of wild bison to plains Indian peoples; wild bison are anticipated to have an impact on reservation economies; and wild bison will impact the health and welfare of tribal members. *See*, *e.g.*, FWP Draft Environmental Assessment for Interim Translocation of Bison (EA), September 2011, at 43-44 (discussing historic and cultural importance), 75 (nutritional importance), 76 (economic importance through increased tourism and

employment), 77 (cultural and spiritual importance), and 88 (ecological, cultural, and educational importance). The State recognizes that placement of wild bison within a reservation, regardless of the title status of the land, will have wide ranging impacts such that a tribe's sovereign interests and jurisdiction are likely invoked.

Moreover, this Court has made clear that in matters concerning wildlife within reservation boundaries, state deference to tribal authority is appropriate. In *State v. Shook*, 2002 MT 347, 313 Mont. 347, 67 P.3d 863, this Court upheld state regulations prohibiting non-tribal members from hunting big game on Indian reservations in Montana, thereby reserving hunting on reservations to tribal members only. In upholding the state's regulations, the Court reasoned:

> There are seven Indian reservations in Montana each established by treaty and agreements with the federal government. The majority of the treaties establishing the reservations reserve some type of hunting or fishing rights to the respective tribes. *See, e.g.*, Treaty with the Flatheads, Etc. of July 16, 1855, 12 Stat. 975 (commonly called the Hellgate Treaty). At the same time, we have already held that the state can regulate the hunting activities of non-tribal members on reservations unless precluded by an act of congress or tribal self-governance matters. *State ex rel. Nepstad v. Danielson* (1967), 149 Mont. 438, 443, 427 P.2d 689, 692. *See also Montana v. United States* (1981), 450 U.S. 544, 564, 101 S.Ct. 1245, 1258, 67 L. Ed. 2d 493.
>
> Accordingly, under Article I [of the Montana Constitution], the State, and in this case the Commission, has a duty to regulate hunting by non-tribal members in a

> way that recognizes the Indian hunting privileges protected by federal law. The regulation at issue here deals with the state's obligation by simply prohibiting hunting by non-tribal members on reservations. This is an entirely rational means to preserve wildlife populations for hunting by Indians. Therefore, the regulation is rationally related to the federal, and consequent state, obligation to recognize tribal hunting privileges.

Id. at ¶¶ 16-17.

While the State has jurisdiction over its wildlife, *Shook* confirms that the management of bison on reservations implicates Indian interests and Indian rights, as well. *Shook* also makes clear that state legislation and regulation must recognize and not infringe upon tribal rights protected by federal law. Any state legislation involving non-Indians on fee lands within reservation boundaries must be written with due regard for tribal authority concerning wildlife, including management of wild bison.

This leads to a major flaw in the district court's ruling. Applying §87-1-216(4)-(6) to lands within reservation boundaries, as the plaintiffs construe it, would mean that FWP could, upon its own unilateral authority and with agreement of a private landowner, place wild bison on private land in the middle of a reservation, pursuant to a plan which does not require the consent, or even consultation, with the affected tribal government and adjacent tribal members. As discussed below, this is not a workable interpretation of the statute. Given the

sovereign interests at stake and the obligation of the State under *Shook* to accommodate tribal rights and authority in such matters, this Court should hold that SB 212 did not address, nor did the Legislature intend it to address, transfers of wild bison to lands within Indian reservations.

ii. As a matter of statutory construction, SB 212 does not apply to lands within Indian reservations.

The 2011 Legislature passed SB 212, adding subsections (4)-(6) to §87-1-216, to ensure that transfers of YNP bison to private or public lands in Montana occurred pursuant to a process with specific requirements. However, in clear contrast to numerous other Montana statutes specifically referencing Indian tribes and reservations (*see, e.g.,* §2-15-3112 (DOL to establish guidelines for reimbursement of livestock losses caused by wolves on "state, federal, and private land and on tribal land that is eligible through agreement"); §7-10-102(4) (resources within boundaries of Indian reservation may not be included within boundaries of regional resource authority without tribal consent); §10-3-315(2)(a) (removal of debris after emergency requires authorization from affected "political subdivision, tribal government" and others)), nowhere in §87-1-216, or in its new subsections (4)-(6), is there any mention of Montana Indian tribes, reservations, or Indians.

A review of the specific provisions of SB 212 demonstrates that to apply it to the transplantation of bison to Montana Indian tribes was never intended. First,

subsection (4) of 87-1-216 prohibits FWP from releasing bison "on any private or public land in Montana that has not been authorized for that use by the private or public owner." In the context of this case, the statute is conspicuously silent with respect to tribes, and there is no indication how this requirement is intended to be fulfilled where FWP has reached an agreement with an Indian tribe for the translocation of bison. Had the legislature intended this provision to apply to transfers of bison to Indian tribes, it should have said so and explained what was required. Testimony at the district court hearing was that Fort Peck Tribes would be responsible for obtaining permission from private landowners on the reservation. Tr. 89:24 – 90:9. Turning to subsection (5) of the statute, clearly the management plan referred to is a *state* not a *tribal* management plan. While it can be possible for FWP to negotiate a management plan with a tribe that addresses the matters set forth in subsection (5) (and, indeed FWP intended its MOU to comply with the intent of the statute), a fair read of the statute reveals it was not written with an intent to apply to the transfer of bison to tribal management.

Moreover, to the extent the requirements of the management plan pertain to animal health and tracking protocol required by DOL (subsections (5)(a) and (b)), it is significant that under Mont. Code Ann. §81-2-120(1)(d)(ii), DOL has authority to transfer YNP bison certified by the state veterinarian as brucellosis-free to tribal entities that participate in a disease control program pursuant to a

cooperative agreement with the tribe, without the restrictive language applicable to transfers to "private or public land" under §87-1-216. There is no rational basis for the Legislature to have imposed through statutory law a different list of requirements for FWP to satisfy than DOL prior to translocating bison to tribes. Finally, subsection (6) of 87-1-216 requires that "when developing a management plan" under subsection (5), FWP must provide the opportunity for public comment and hold a public hearing in the affected county or counties. Thus, while referencing the need to engage the public, identified through reference to Montana's political subdivisions, the statute is conspicuously silent with respect to input from tribal authorities. This, too, supports the position that, under the express terms of the statute, the Legislature did not consider SB 212 to apply to transfers of bison to tribal governments, and the terms "private or public land in Montana" do not apply to the translocation of bison to tribes.

Should the Court find the terms "private or public land in Montana" as used in SB 212 to be ambiguous, it may turn to legislative history to construe the statute. *See, e.g.*, *State v. Norquay*, 2010 MT 85 ¶¶ 30-31, 356 Mont. 113, 233 P.3d 768. FWP's construction of the statute is consistent with the legislative history of SB 212.

The district court disregarded the legislative history by holding that the expression "private or public land in Montana" clearly and unambiguously

included lands within the boundaries of Indian Reservations. *See* Order at 26-27. At a minimum, however, the statute is ambiguous, and the Court should have considered this clear evidence of legislative intent to conclude that SB 212 (§87-1-216(4)-(6)) did not apply to FWP's transfer of bison to Fort Belknap or Fort Peck Tribes.

iii. When both state and tribal sovereign interests are at stake, Montana statutes establish a framework for governing through cooperative agreements.

The Montana legislature does not have authority to pass laws which purport to direct or control tribal governments. Tribes possess inherent sovereignty and are not governmental subdivisions of either the federal or state governments. The Montana legislature cannot direct or control a tribal government anymore than it can direct or control the governments of Canada or Wyoming. "The policy of leaving Indians free from State jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945), *citing Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); 1 Stat. 469; 4 Stat. 729. The State may, in certain instances, have authority to pass laws which concern the activities of non-Indians on fee lands within reservation boundaries. *Montana v. United States*, 450 U.S. 544. Federal jurisprudence has thus created a situation in which two sovereign governments may legislate within the same geographic area, within their respective spheres of authority.

Thus, while the State cannot legislate with regard to any matter under the exclusive jurisdiction of a tribal government, some matters may fall under the concurrent authority of both the state and the tribal sovereigns. When the sovereign interests of both the state and a tribe are at stake, the practice and policy under Montana statute is to expressly require cooperative governance.

Although an exhaustive analysis is not possible or necessary, even a cursory look at the Montana code plainly demonstrates the legislature's practice of expressly directing the State to work cooperatively with tribes in matters that impact both state and tribal sovereign interests. *See, e.g.,* Mont. Code Ann. §§2-15-141-143 ("In formulating or implementing policies or administrative rules that have direct tribal implications, a state agency should consider the following principles . . . a commitment to cooperation and collaboration. . ."); §2-15-3113(2) (providing for state reimbursement for tribal livestock losses due to wolf depredation on tribal lands pursuant to state-tribal agreement); §5-5-229 (establishing a state-tribal interim legislative committee to "encourage state-tribal and local government-tribal cooperation"); see also, §7-10-102, §10-3-101(6), §15-70-234 - 236, §16-11-111-155, §18-11-101 - 112, §20-5-108, §39-71-441, §76-10-101, §82-11-180, §85-20-201, §87-1-228. Under these laws, the legislature has established its practice of expressly directing the State to negotiate cooperative agreements with Montana Indian tribes on a government-to-government basis on

matters relevant to tribes. The State cannot unilaterally legislate with regard to any matter over which a tribe has exclusive jurisdictional authority, and would risk jurisdictional conflict if it chose to unilaterally legislate with regard to any matter over which the state and tribes claim concurrent authority. For this reason, too, the law referring to "private or public land in Montana," which is simultaneously silent about its applicability to Indian tribes, should not be held to apply to FWP's transfer of bison to Fort Peck or Fort Belknap Tribes.

This Court should reverse the district court and hold that as a matter of law subsections (4)–(6) of Mont. Code Ann. §87-1-216 do not apply to the transfer of bison by FWP to Montana tribes.

III. THE DISTRICT COURT ERRED WHEN IT FOUND THAT BISON ARE LARGE PREDATORS.

The district court's preliminary injunction also appears to have been based on its erroneous construction of Mont. Code Ann. §87-1-217, addressing FWP's responsibilities in managing large predators. Order p. 18, 21-22. The court stated: "[T]he following persuasive evidence has been presented: . . . YNP bison are a large predator." Order pp. 6-7. The infirmity of the lower court's decision is no more apparent than with this declaration. There is simply no evidence to support this finding and the conclusion is legally wrong.

FWP is required, under Mont. Code Ann. §87-1-217(6), to ensure that county commissioners and tribal governments have "the opportunity for

consultation and coordination with state and federal agencies" in areas that have "identifiable populations of large predators." The district court indicated, though declined to decide the question: "There may be an open question regarding whether allowing a county board to participate in the public comment process constitutes 'the opportunity for consultation and coordination,' under §87-1-217(6), MCA." Order p.22; *see also* p. 22 n.4. The district court erred by even considering FWP's compliance with the large predator statute.

A simple read of the statute reveals that bison are not predators and the statute should not, under any circumstances, apply to the transfer of bison. The statute is clear upon its face: bison are not predators. Mont. Code Ann. §87-1-217(2)(b) expressly defines "large predators" as "bears, mountain lions, and wolves." In addition to the lack of statutory definition, no evidence was presented to the court that would lead to the district court's conclusion. Indeed, a reading of the transcript of the entire hearing reveals not one mention of the word "predator." By making this factual finding and legal conclusion, the district court set into motion the application of a statute that should not have been a part of the discussion at all.

The significance of this finding is immense for FWP in other management ways. The characterization of a species as a predator brings with it a whole set of statutory duties and ramifications for bison management. *See, e.g.*, Mont. Code

Ann. §87-1-217(1) (prioritizing FWP's goals in management of large predators); §87-1-214 (prohibiting disclosure of information to protect a person who has lawfully taken a large predator); and Title 81, chapter 7, part 1 (establishing a system for the destruction and control of predatory animals).

This Court should reverse the district court's finding that Mont. Code Ann. §87-1-217 applied to FWP's transfer of bison to Tribes, as bison are not predators within the meaning of the statute. This basis for the district court's preliminary injunction was improper as a matter of law.

IV. THE DISTRICT COURT ERRED WHEN IT ISSUED AN OVERBROAD INJUNCTION PROHIBITING FWP FROM TRANSFERRING ANY YNP BISON TO ANY PRIVATE OR PUBLIC LANDOWNER.

This case concerns CBU's challenge to FWP's translocation of bison to Fort Peck Tribes and its plan to translocate bison to Fort Belknap Tribes. *See* Amended Complaint for Decl. & Inj. Relief, *passim.* Yet when it granted the preliminary injunction, the district court prohibited FWP from entering into *any* agreement and from translocating YNP bison to *any* private or public landowner in Montana or elsewhere. By any measure, the district court's order is overbroad, not supported by the facts, and outside the parameters of the actions complained.

Specifically, the Order states in pertinent part:

> 2. 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*. . . .

Order at 37-38 (emphasis added).

YNP bison that have been determined by the State veterinarian to be brucellosis-free are located on Fort Peck Reservation, pursuant to the MOU at issue in this case. They are also located on the Green Ranch near Bozeman, Montana. *See* Amended Complaint, ¶ 16.

A discussion of the scope of the relief requested by CBU occurred at the hearing on the preliminary injunction. Tr. at 11-29. There, FWP counsel argued the district court's TRO, which contained similar restraints upon FWP as does the preliminary injunction, extended beyond the scope of the amended complaint and the relief requested in the complaint. *Id*. at 11. Throughout the discussion, even counsel for CBU explained that his clients' concerns involved FWP's transfer of bison to Montana tribes and FWP's position that SB 212 did not apply to such transfers. The district court summarized the discussion by saying: "Okay. Where I think we're at, then, is that we're primarily dealing with the – the decision, which has resulted in the transfer of 61 YNP bison to Fort Peck Reservation." *Id*. at 29. Counsel for CBU concurred. *Id.* Notwithstanding the long discussion, and this

apparent meeting of the minds, the district court issued its written order prohibiting FWP from moving any YNP bison, including those at Green Ranch, anywhere in Montana.

The Order exceeded the court's powers. With one minor exception, there was no issue before the court respecting the movement of YNP bison to non-tribal properties. That minor exception is that the amended complaint challenged FWP's authority to transplant bison under SB 212 until after a statewide bison management plan was prepared. Amended Complaint, ¶53. Since the district court rejected this argument, and held that the management plan required by SB 212 was site-specific and not a statewide plan (Order at 21) (a decision with which FWP concurs), all remaining issues in the case involved the specific Decision Notice issued by FWP authorizing the transfer of the YNP bison to Fort Peck and Fort Belknap Tribes.

The district court's injunction is overbroad. There is no legal basis under Mont. Code Ann. §27-19-201 for the court to have enjoined any future movement of bison by FWP to non-tribal entities. The court did not have jurisdiction to reach so far. At a very minimum, this Court should reject the district court's injunction as to its overbroad aspects and direct the lower court to modify the order accordingly.

CONCLUSION

For the foregoing reasons, FWP requests this Court overturn the lower court's Order as an abuse of discretion and error of law.

Respectfully submitted this 12th 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 10,000 words, excluding the tables, certificates, and appendix, and therefore complies with this Court's word limitation of 10,000 words for principle briefs.

Rebecca Jakes Dockter
Special Assistant Attorney General
Attorney for Defendants/Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on this 12th day of September 2012, I caused a true and accurate copy of the foregoing Appellants Director Joseph Maurier; Montana Department of Fish, Wildlife & Parks; and Montana Fish, Wildlife & Parks Commission Opening Brief. copies of the foregoing brief to be served upon the following by first-class mail:

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