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 REPLY BRIEF

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Despite raising several new arguments on appeal, Citizens for Balanced Use (CBU) fails to provide any better justification for the district court's order than the court itself provided. These arguments fail procedurally and substantively. The district court should be reversed.

I. CBU CANNOT JUSTIFY THE DISTRICT COURT'S ERROR IN APPLYING SB 212 TO BISON TRANSFERS TO TRIBAL LANDS.

CBU continues the fallacy upon which the district court based its decision. Contrary to CBU's suggestions, the matter is not, and never has been, a question of tribal authority over non-members. Indeed, the owners of the non-member fee lands which could be implicated by the Tribes' management of bison on the reservation are not even parties to this suit.

Rather, the issue is one of simple statutory construction: whether the district court correctly interpreted SB 212's reference to "private or public land in Montana" to apply to *tribal* land. By concluding it did, the court erred.

A. Rules of statutory construction confirm the district court erred in applying SB 212 to tribal lands.

The simple reading of SB 212 requires FWP to obtain permission and draft a management plan for movement of bison to "private or public land in Montana." Mont. Code Ann. § 87-1-216. On its face the statute does not apply to placement of bison on tribal lands. *Id*. By ruling otherwise, the district court inserted that which is not there: the term "tribal." This interpretation rendered the statutory distinction

of "private or public" effectively meaningless by interpreting it to include *every* land status. It did this not only despite the long-standing principle that Indian lands occupy a unique legal status distinct from other lands, *see* FWP Brief at 23-26, but also in violation of statute dictating that the court's role is "not to insert what has been omitted or to omit what has been inserted." Mont. Code Ann. § 1-2-101.

While CBU attempts to justify the court's error, it never adequately explains how "private or public land in Montana" includes tribal land within reservation boundaries based on the statute's plain language. For instance, CBU claims that FWP "retains jurisdiction over the wild bison for another five years." CBU Brief, p. 14. This is simply wrong. The Bison Translocation Decision Notice (DN) and the MOU itself indicate otherwise. *See e.g.* DN at 12, 15, 19 (stating that study bison on the reservation are under the jurisdiction of the tribe); MOU at 2 (indicating the tribes would be "solely responsible" for the care and management of bison). FWP's control of the bison exists only once they *leave the reservation*, at which point they become Montana wildlife subject to FWP's authority.

Similarly, CBU claims that FWP's EA, DN and MOU all evince intent to apply SB 212 to the movement of bison to the reservations. CBU Brief at 24. FWP indeed drafted an MOU with the intention to apply the principles of SB 212, primarily out of an abundance of caution. FWP Brief p. 6; *see also* Tr. 162:9-17. However, this *discretionary* decision to apply the statute does not, somehow, turn

it into a legally enforceable statutory *requirement*.[1] Moreover, CBU, while attempting to hold FWP to its words in one place, completely disregards FWP's words elsewhere: "While Fort Peck and Fort Belknap reservations are within Montana's state boundaries, they are sovereign nations not subject to the laws of Montana, and therefore FWP can't enforce SB 212 on the reservation." DN p. 9, Defenders App. Tab B. The district court further confused this issue for on the one hand it questioned how FWP could enforce a voluntary agreement with the Tribe, while on the other hand it anticipated FWP would somehow enforce SB 212 against them.

This Court should focus on the real issue, statutory interpretation, and review the district court's decision to determine whether the statute is clear on its face. If it is, this Court should apply the statute's plain language. *See Mont. Shooting Sports Assn v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003. If the statute is clear, then SB 212 does not apply here.

However, if the statute is not clear, legislative history should be consulted to ascertain its meaning. *Id.* That legislative history evinces an intention *not* to apply the statute to placement of bison on tribal lands. FWP Brief p 5. The statement from Rep. Knudsen, the House sponsor of the bill that became SB 212, is

[1]CBU asserts that FWP is unwilling to "enact a bison management plan for wild bison on a Reservation." CBU Brief at 14. To the contrary, FWP has already agreed in a MOU that largely mirrors the requirements of a management plan for SB 212. FWP Brief at 6. Rather, if SB 212 does apply to tribal lands, it necessarily implicates tribes' sovereign interests.

unequivocal: the legislation "would have no effect on the tribe's ability to receive buffalo from the department." H. Floor Sess. on SB 212, 2011 Legis. Sess. (March 30, 2011), at minute 9:52. CBU attempts to refute this by confusing the words of the speakers. CBU Brief 25. The "department" was not, as CBU claims, the Department of Livestock (DOL), but rather, FWP, the department ultimately charged with application of SB 212.[2] CBU fails to justify the district court's application of SB 212 to tribal lands in the face of Rep. Knudsen's unequivocal language that it does not. Similarly, neither CBU nor the district court explain how SB 212 applies to tribal lands without explicit reference to them, given the Montana Code's numerous statutes otherwise making explicit their application to tribes.

The district court erred in construing SB 212's reference to "private or public" land to include tribal lands. On its face, SB 212 does not apply to tribal lands. However, to the extent SB 212 is unclear, review of the legislative history indicates it was not intended to apply to tribal lands. The district court should be reversed.

B. Even if it hinged on the status of the land, "private or public land in Montana" does not include tribal land as a matter of law.

CBU mistakenly relies upon the presence of some non-member fee land

[2] FWP, in its opening brief, discussed the significance of the DOL statute that allows bison translocation to a tribal entity, Mont. Code Ann. § 81-1-120. CBU attempts to refute that argument based on the mistaken assumption that simply because DOL acts, the bison turn from wildlife into livestock. There is no statutory basis for CBU's claim and this assumption undermines CBU's entire argument on this point.

within the boundaries of the Fort Peck and Fort Belknap reservations to justify application of SB 212 to FWP's actions. In addition to the reasons set forth in FWP's opening brief refuting this argument, p. 30-32, CBU is equally mistaken in its characterization of tribal land as "public or private" based upon its understanding of Indian land allotment.

CBU's contends "[a]t least some" of the Fort Belknap Reservation is "public land" subject to dispossession under the public land laws by virtue of legislation passed in 1921 and 1958. *See* CBU Brief, p. 18. This would come as a shock not just to the Fort Belknap Tribes, but to virtually all American Indian tribes. Not only is this a misunderstanding of a century of federal Indian law, it is also a misreading of the plain language of the1958 Act upon which CBU relies.[3]

Allotment ended as federal policy with enactment of the 1934 Indian Reorganization Act ("IRA"), which made clear, "Hereafter [on and after June 18, 1934] no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian." 25 U.S.C. § 461; *see also* Getches, Wilkinson, Williams, *Federal Indian Law*, pp. 187-193 (6th ed. 2011). Allotment of Indian

[3] Due to space limitations, as well as the complexity of Indian land allotment, the State cannot give this subject the attention it deserves here, especially because CBU has raised it for the first time in its Answer Brief. Suffice to say, review of the legislative history for the 1958 Act (attached as Exhibits A and B), as well as reference to noted Indian law authorities, including Felix S. Cohen's *Handbook of Federal Indian Law*, and David Getches, Charles Wilkinson, and Robert Williams' *Federal Indian Law*, amply demonstrates CBU's misapprehension of the history of Indian allotment, as well as its misapplication of the 1958 Act.

lands is widely regarded as having been "disastrous for the Indians[.]" *Babbitt v. Youpee*, 519 U.S. 234, 237 (1997).

Despite its end, allotment's effects lingered. Congress subsequently passed legislation to address remaining problems. The 1958 Act, which CBU refers to as the "Fort Belknap Allotment Act," was such an attempt. Contrary to CBU's assertions, however, the 1958 Act was not called the "Fort Belknap Allotment Act," nor did it allot any land on the reservation. *See* CBU Ex. D. The Act's opening sentence, which reads, "An Act providing for the allotment of lands within the Fort Belknap Indian Reservation…" is a reference to the *title of the 1921 Act*, which did, in fact, allot Fort Belknap lands, but which the 1958 Act was *amending*. *See* CBU Ex. C (noting 1921 Act's title). CBU simply misreads the 1958 Act.

The 1958 Act removed the "homestead limitation" on allotments granted pursuant to section six of the 1921 Act. *See* House Report (attached at A) and Senate Report (attached at B). Without such an amendment, individual allottees under section six of the 1921 Act were limited in how they could dispose of their property. The 1958 Act removed this limitation and "permit[ted] disposal of these acreages in the manner wished by the allottees." *See* House Report 1676, p. 2 (Ex. A). While acknowledging that "it is probable" the IRA effectively ended the homestead limitation, Congress felt the 1958 Act "will resolve any doubts and will therefore benefit any Fort Belknap Indians who wish to dispose of their homestead

allotments." *See* Senate Report 1906, p. 2 (Ex. B). Contrary to CBU's suggestions, the 1958 Act did not allot new areas of the reservation; it simply allowed those members who previously acquired homestead allotments under the 1921 Act to freely dispose of them. Indeed, if allowing people to sell their land makes those lands "public," as CBU implies, then many of CBU's members also have "public lands" for sale.

Finally, CBU argues the State cannot invoke the exceptions to *Montana v. U.S.*, 450 U.S. 544 (1981), to justify the transfer of bison to tribal lands. [4] In making this argument, however, CBU only attempts to explain why *Montana*'s first exception does not apply. But the State argued it was *Montana*'s second exception – "political integrity, the economic security, or the health or welfare of the tribe" – that likely applied here, not the first. *See* FWP's Brief, p. 29; *see also* Fort Peck Amicus p. 6-7. Thus, CBU refutes an argument the State never made, while ignoring the argument it did.

The simple presence of some non-member fee land inside the external boundaries of the reservation does not preclude tribal actions that may impact those fee lands. *See State v. Shook*, 2002 MT 347, 313 Mont. 347, 67 P.3d 863.

[4] FWP recognizes that it argued in its opening brief that the second exception in *Montana v. U.S.* "likely" applied here. It is worth noting, however, that a threshold question exists as to whether *Montana v. U.S.* applies at all. In Montana, the tribe sought to "exercise civil authority over the conduct of non-Indians on fee lands within [the] reservation…." *Montana*, 450 U.S. at 566. Here, however, the Tribes do not seek to affirmatively "exercise" any authority over non-member conduct. If *Montana* does not apply, it reinforces FWP's original point that this case is one of simple statutory construction, rather than the jurisdictional case CBU attempts to make it.

The district court should be reversed.

II. CBU's RULE 19 ANALYSIS MISCHARACTERIZES THE TRIBES' INTERESTS IN THE CASE AND, THEREFORE, IS FLAWED.

CBU's brief miscasts the Tribes' interests in this matter. Accordingly, the resulting Rule 19 analysis is flawed.

A. The Fort Belknap Tribes were not required to intervene in this case in order to claim an interest.

CBU first claims the Fort Belknap Tribes were not necessary parties because they failed to "claim an interest" in the matter under Rule 19(a)(1)(B)(i). CBU is wrong. It is the Defendant who raises the defense of failure to join a party that bears the burden of establishing the absent party's interest.

Initially, as a procedural matter, CBU's argument should be disregarded for two reasons. First, this is a new argument raised on appeal. "It is well-established that a party may not raise new arguments or change its legal theory on appeal[.]" *Milltown Addition Homeowner's Assn. v. Geery*, 2000 MT 341, ¶ 18, 303 Mont. 195, 15 P.3d 458. Second, because CBU never raised this argument in the district court, it was not a basis for the court's decision. It should be disregarded now because, "it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. *Day v. Payne*, 280 Mont. 273, 276, 929 P.2d 864, 866 (citation omitted).

CBU is also wrong as a substantive matter. An absent party is not required to

appear in order to "claim an interest" under Rule 19. On the contrary, a Defendant who raises the defense of non-joinder bears the burden of establishing the absent party's interest. *Dine Citizens Against Ruining Our Env. v. Klein*, 676 F. Supp. 2d 1198, 1215 (D. Colo. 2009) (citation omitted); *see also Davis v. U.S.*, 192 F.3d 951, 962 (10th Cir. 1999). This is particularly true with respect to American Indian tribes which otherwise enjoy sovereign immunity: "By so intervening, a party 'renders itself 'vulnerable to complete adjudication by the federal court of the issues in litigation between the intervenor and the adverse party.'" *Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 773 (D.C. Cir. 1986) (citations omitted). Thus, "When necessary… a court of appeals should, on its own initiative, take steps to protect the absent party, who of course had no opportunity to plead and prove his interest below." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968) (citations omitted).

Federal courts have specifically rejected CBU's argument that the Tribes "could have" intervened in the case, calling it a "Hobson's choice between waiving [the tribe's] immunity or waiving its right not to have a case proceed without it." *Wichita*, 788 F.2d at 776. This position "dismisses substantially the policy of tribal immunity, which, after all, accords to tribal sovereignty and autonomy a place in the hierarchy of values over society's interest in making tribes amenable to suit." *Id*. The fact that a tribe "could waive immunity and intervene in [a] lawsuit for all

purposes if it so chose is, of course, not a relevant consideration."*Center for Biological Diversity v. Pizarchik*, 858 F. Supp. 2d 1221, n. 2 (D. Colo. 2012).

The Fort Belknap Tribes clearly claim an interest in this case. They submitted a proposal to receive bison from the State. *See* AR 2888, 2942-2958, 3232-3243. They also entered a memorandum of understanding with the Fort Peck Tribes for movement of bison to their reservation. *See* AR 13125-13130. In addition, they undertook planning efforts for management of the bison on the reservation, including erecting fencing and other infrastructure to manage the animals. *See* AR 3232-3243. FWP issued a decision notice pursuant to MEPA sending bison to the Fort Belknap Reservation. *See* AR 12954-12972. FWP's Ken McDonald testified to all these efforts at the hearing on the preliminary injunction. *See* Tr. 62:25-170:7. Clearly the Tribes have claimed an interest.

The district court erred when it concluded the Ft. Belknap Tribes were not necessary parties under Rule 19. This Court should reverse.

B. The Fort Belknap Tribes have a protectable interest in this case.

CBU next claims the Fort Belknap Tribes do not have a "protectable interest" in the case because they never negotiated an agreement with FWP. CBU is wrong. The Tribes' interest goes well beyond the mere existence of a contract and includes their interests as an independent sovereign government.

Indeed, the district court acknowledged both Tribes "have a legally protected

interest in preserving their sovereign immunity." Order, p. 34 (*citing Pit River Home & Agric. Coop. Assn. v. U.S.*, 30 F.3d 1088, 1099 (9th Cir. 1999)). The court's wording on this point is crucial because it comes directly from the case the court cited in support – *Pit River*. In *Pit River*, the Ninth Circuit explained, "Based on Rule 19(a), we evaluate whether… the absent party has a *legally protected interest* in the outcome of the litigation." *Pit River*, 30 F.3d at 1099 (emphasis added). The Ninth Circuit further explained that a "legally protected interest" included the tribe's "interest in preserving its sovereign immunity." *Id*. In support, the Ninth Circuit cited *Shermoen v. U.S.*, 982 F.2d 1312 (9th Cir. 1992), for the principle that "absent tribes have an interest in preserving their own sovereign immunity, with its concomitant right not to have [their] legal duties judicially determined without consent." *Pit River*, 30 F.3d at 1099 (*quoting Shermoen*, 982 F.2d at 1317.). Thus, the district court's reliance on *Pit River* leads inexorably to one of two conclusions regarding the Tribes' interests under Rule 19(a). Either the court: (1) acknowledged that the Tribes had a "legally protected interest" in "preserving their sovereign immunity, with its concomitant right not to have [their] legal duties judicially determined without consent" for the purposes of Rule 19(a)(1)(B); or (2) completely misunderstood the implications of *Pit River*, the case which it relied upon for support, thereby undermining its entire analysis.

Despite the acknowledgment of a "legally protected interest," however, the

district court focused narrowly on whether an agreement existed between the Tribes and FWP. In this way, both CBU and the court miscast the Tribes' "legally protected interest." A tribe need not have a direct property right or contract to be a necessary party. *See e.g. Pizarchik*, 858 F. Supp. 2d 1221, n. 6. Rather, a tribe's "unique role in relation to its members and to the management of its own lands means that it 'would offer [a] necessary element to the proceedings that the present parties [might] neglect.'" *Id*. at 1227 (citations omitted). Here, the Tribes would provide a "necessary element" regarding *their* management of *their* land. Indeed, the centrality of this issue to the case is reflected in the opening subsection of CBU's Statement of Facts which is entitled, "History of Bison Escapes from Fort Belknap." *See* CBU Brief, p. 2.

Likewise, the Tribes' "legally protected interest in preserving their sovereign immunity" along with the "concomitant right not to have [their] legal duties judicially determined without consent" is directly implicated by the scope of the court's order. *See* Order, p. 34; *Pit River*, 30 F.3d at 1099. As explained in FWP's opening brief, the court's order could be read either to require *state* officials to enter Indian reservations and effectively proscribe management actions for bison on the reservation, or to require *tribes* to meet these *state law requirements* on the reservation. *See* Appellants' Brief, pp. 19-20. Either reading, however, effectively

applies state law to Indian land and resources.[5]

The Fort Belknap Tribes have a legally protected interest in this case and are therefore a necessary party under Rule 19. The district court should be reversed.

C. The Tribes are indispensable parties.

CBU raises only a cursory reply to FWP's argument regarding the Tribes' indispensability. First, CBU argues the Fort Peck Tribes are not indispensable because they are currently managing the bison as anticipated. Second, CBU repeats its earlier flawed argument that the Fort Belknap Tribes have no interests implicated in this matter because they do not have an agreement with FWP and therefore are not indispensible under Rule 19(b). Both arguments should be rejected.

The district court's conclusion regarding the indispensability of the Fort Peck Tribes drew a distinction without much of a difference. While correctly recognizing that an order *removing* the bison from the reservation would implicate the Tribes' interests, the court had no problem issuing an order requiring them to *stay there*. *See* Order p. 35. Somehow the court believed such an order could "avoid implicating the Tribes' interests." Order, p. 36. But certainly, if removing the bison would implicate the Tribes' interests, requiring them to stay there does as

[5] Moreover, as noted in FN 1, FWP is not claiming it cannot create a bison management plan for the reservation. Rather, it is claiming that any plan it did create would necessarily require it to enter government-to-government negotiations with the tribe itself, thereby necessarily implicating the tribe's sovereignty.

well.

In considering the indispensability of the Fort Belknap Tribes, CBU makes the same error as before: effectively negating the Tribes' sovereignty to the simple matter of an agreement with the State. This misses the point entirely. As discussed above, the Fort Peck and Fort Belknap tribes have significant interests implicated in this case. The court's order, rendered in their absence, prejudices their ability to protect those interests by applying state law to reservation land, precluding government-to-government relations, and dictating management of reservation resources.

The district court erred when it found that neither the Ft. Peck nor Ft. Belknap tribes were indispensable under Rule 19(b). It should be reversed.

D. The case should be dismissed.

CBU next argues that the case should not be dismissed because CBU is simply seeking judicial review of a state agency decision.

The U.S. Supreme Court recently addressed dismissal under Rule 19(b), specifically in the context of an absent party with sovereign immunity. *Philippines v. Pimentel*, 553 U.S. 851 (2008). In *Pimentel*, although dealing with a foreign nation as opposed to a tribe, the Supreme Court spoke unequivocally:

> A case may not proceed when a required-entity sovereign is not amenable to suit. These cases instruct us that where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, *dismissal of the action must be ordered where there*

is a potential for injury to the interests of the absent sovereign.

Pimentel, 553 U.S. at 867 (emphasis added).

Courts interpreting *Pimentel* in the context of an Indian tribe have dismissed the case for non-joinder under Rule 19(b). For instance, in *Pizarchik*, the court explained that in *Pimentel*, the Supreme Court had "reinforced the primacy of sovereign immunity in this analysis." *Pizarchik*, 858 F. Supp. 2d at 1228. Thus, the court explained, "although the Rule 19(b) factors still must be considered, my 'discretion in balancing the equities . . . is to a great degree circumscribed, and the scale is already heavily tipped in favor of dismissal.'" *Id*. (citations omitted).

While CBU correctly notes that courts should exercise caution before dismissing a case for non-joinder, "it is also important to realize that 'this does not mean that an action should proceed solely because the plaintiff otherwise would not have an adequate remedy, as this would be a misconstruction of the rule and would contravene the established doctrine of indispensability.'" *Wichita*, 788 F.2d at 777 (citation omitted). Accordingly, in *Wichita*, the D.C. Circuit concluded that, "The dismissal of this suit is mandated by the policy of tribal immunity… *the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.*" *Wichita*, 788 F.2d at 777 (emphasis added).

Likewise, the "fact that society has consciously opted to shield Indian tribes

from suit," mandates dismissal of this case. *See Wichita*, 788 F.2d at 777. This Court should dismiss.

E. The public rights doctrine does not apply when a tribe's sovereign immunity is at stake.

CBU next argues that its suit is intended to "vindicate public rights" and therefore no joinder is necessary. Again, this argument is raised for the first time on appeal and should be disregarded.

"The contours of the public right exception have not been clearly defined." *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996). As a general rule, "the litigation must transcend the private interests of the litigants and seek to vindicate a public right." *Id.* at 1311(citation omitted).

Contrary to CBU's claim, the public rights exception is significantly limited when the absent party is an Indian tribe. *See Kescoli*, 101 F.3d at 1311-1312; *see also Pizarchik*, 858 F. Supp. 2d at 1230, n. 11 (court noting that "neither of the cases plaintiffs cite discuss the public rights doctrine in the context of a required party's sovereign immunity" and explaining the court's "own research suggests that the doctrine is unlikely to apply in these circumstances."). In *Kescoli*, an individual tribal member sued the federal government for approving a mining permit on the reservation. Plaintiff claimed joinder of the tribes was unnecessary under the public rights exception. The Ninth Circuit disagreed, noting that plaintiff's "claim 'is a private one focused on the merits of her dispute rather than

on vindicating a larger public interest.'" *Kescoli*, 101 F.3d at 1311. Although the plaintiff "purports to represent others… the essence of her dispute is her disagreement" with tribal leaders. *Id*. To allow the case to proceed without the tribes "threatens the [the tribes'] sovereignty by attempting to disrupt their ability to govern themselves and to determine what is in their best interests[.]" *Id.* at 1312.

Although CBU attempts to cast their claim in broader terms, applicable to the public at large, their claim is likewise essentially "a private one focused on the merits of [their] dispute rather than on vindicating a larger public interest." *See Id.* at 1311. The gravamen of CBU's case is a simple disagreement with FWP over its decision to place bison on the reservations. Their action is private in nature, focusing largely on potential impacts to *their* agricultural and ranching operations if bison were to escape reservation pastures and wander onto *their* land. Indeed, if *CBU's* claim seeks vindication of a "public right," then virtually *every* claim against a state agency would, provided plaintiffs invoke the magic language alleging their suit was to insure the agency "follow the law."

CBU's reliance on *Conner v. Buford*, 848 F.2d 1441 (9th Cir. 1998), is misplaced. First, *Conner* did not evaluate the public rights exception in the context of the absent party's sovereign immunity. Moreover, the court in *Conner* was addressing the issuance of leases by the *federal government* on *federal land*. Because the federal landowner was party to the suit, the court concluded that the

lessees of that land were not necessary. Here, conversely, CBU challenges activities on *Indian land*, yet argues those Tribes – as owners of that land – are not necessary. Similarly, CBU finds no support in *People ex rel. Lungren v. Community Redevelopment Agency*, 56 Cal. App. 4th 868 (Cal. App. 4th Dist. 1997). Unlike here where the land in question is already Indian land, in *Lungren*, the land was public land belonging to a city, which was proposed for transfer *to a tribe*.

Not only is CBU's public rights argument raised for the first time on appeal, its application in the context of an Indian tribe is doubtful, at best. This Court should reject it and hold that the public rights exception to Rule 19 does not apply.

III. CBU'S OTHER ARGUMENTS EITHER MISSTATE FWP'S POSITION OR FAIL TO APPRECIATE THE SIGNIFICANCE OF THE COURT'S ORDER TO A STATE AGENCY ATTEMPTING TO FULFILL STATUTORY DUTIES.

In response to FWP's claim that the scope of the court's preliminary injunction was overbroad, CBU claims FWP has raised new factual issues on appeal. CBU Brief, p. 41. Not only is this untrue, it is irrelevant.

Both the plain language of the hearing transcript, Tr. 11:29 (discussing the potential for overbreadth in the court's order) and even the Amended Complaint, ¶16, suggest that there are bison at Green Ranch that could be implicated by the preliminary injunction, depending on its scope. Indeed, counsel for CBU raised the matter himself at the hearing. *See e.g.* Tr. 17:6. In any event, it is irrelevant

whether these factual issues were raised in the district court. FWP does not allege they are material issues upon which this Court base its decision; only that they indicate the scope of the district court's injunction which went beyond what was requested in CBU's pleadings, reaching actions not even before the court.

Finally, while the district court's pronouncement that bison are "predators," may seem like "harmless error" to CBU, it is a matter of significance for wildlife management when a court engages in the improper characterization of a species. FWP's statutory authorities and corresponding duties largely hinge upon the characterization of a species as a game animal, predator, species in need of management, or furbearer. *See generally* Mont. Code Ann. Title 87. The legal mischaracterization of a species sows confusion, where there should be none, thereby complicating managers' ability to manage wildlife for Montana's citizens.

Oddly enough, CBU seems to blame FWP for the court's error. CBU Brief, p. 42. But a simple reading of the provision CBU references specifies: "big game (which bison are)." EA at 16; CBU Brief, at 42. How the court concluded bison were "predators" is unclear; how CBU blames FWP for it is even more so still.

CONCLUSION

This Court should rule that SB 212's reference to "private or public land in Montana" does not apply to tribal lands and dismiss the case. However, if this Court determines that SB 212 *does* apply to tribal land, then the application of a

state law to a sovereign Indian tribe would necessarily implicate that tribe's interests. In that case, this Court should determine the Fort Peck and Fort Belknap Tribes are necessary and indispensable under Rule 19 and this case should be dismissed for CBU's failure to join them.

For the reasons above, this Court should overturn the decision of the lower court and dismiss the action against the State.

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CERTIFICATE OF COMPLIANCE

Pursuant to M. R. App. P. 11(4)(e), I certify that the foregoing document is is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2007, is not more than 4998 words.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of January 2013, 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 Reply Brief to be served upon the following by first-class mail:

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