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7 MONTANA SEVENTEENTH JUDICIAL DISTRICT COURT
BLAINE COUNTY
8

9 CITIZENS FOR BALANCED USE; SEN.)
RICK RIPLEY; DUSTIN & VICKI) Case No.: DV – 2012 – 1
10 HOFELDT; KEN HANSEN; UNITED)
PROPERTY OWNERS OF MONTANA; and)
11 MISSOURI RIVER STEWARDS,) COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF
12)
13 Plaintiffs,)
14 vs.)
15)
16 JOSEPH MAURIER; MONTANA)
DEPARTMENT OF FISH, WILDLIFE &)
17 PARKS; and MONTANA FISH, WILDLIFE)
& PARKS COMMISSION,)
18 Defendants.)

19
20 COMES NOW the above-named Plaintiffs, by and through their undersigned counsel,
21 and for their Complaint allege as follows:

22 **I. INTRODUCTION**

23 1. Plaintiffs Citizens for Balanced Use, Senator Rick Ripley, Dustin & Vicki Hofeldt, Ken
24 Hansen, United Property Owners of Montana and Missouri River Stewards respectfully request
25 this Court to adjudge and declare the Montana Fish, Wildlife and Parks Director Joseph Maurier,

1 the Montana Fish, Wildlife & Parks Commission and the Montana Department of Fish, Wildlife
2 & Parks have violated Montana law by enacting a bison¹ translocation plan without a state-wide
3 management plan and without adequate analysis of the impacts upon the human environment in
4 accordance with Montana law.

5 2. Plaintiffs seek judicial review of a state agency decision under the Montana
6 Administrative Procedure Act, MCA 2-4-101, et. seq., the Montana Declaratory Judgments Act,
7 MCA 2-4-506, et. seq., and the Montana Environmental Policy Act, MCA 75-1-101, et. seq.

8 3. Venue is proper in Blaine County, Seventeenth Judicial District, because the suit is
9 against state agencies, the dispute in this case arose in Blaine County, and multiple plaintiffs
10 reside in Blaine County. MCA 25-2-126.

11 **II. Parties**

12 4. Plaintiff Citizens for Balanced Use (“CBU”) is a 501(c)(3) non-profit organization
13 dedicated to the responsible shared use of public lands, the protection of private property
14 interests, and enhancing multiple use of Montana’s lands and natural resources. CBU is based in
15 Gallatin Gateway, Montana, and has members and supporting organizations throughout
16 Montana. Its members include blue and white collar workers, farmers and ranchers, land
17 owners, hunters and anglers, recreationists, veterans, and people of all walks of life. CBU’s
18 executive co-chairman Kerry White submitted written testimony to the FWP Department and
19 Commission on behalf of CBU and its members against the FWP bison translocation proposal
20 during the administrative process.

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24 ¹ Some documents promulgated by the Department of Fish, Wildlife & Parks distinguish
25 between bison and buffalo as different types of animals. For the purposes of Plaintiffs, all such
animals, whether in a Tribal commercial herd or in a state quarantine program, are consistently
referred to as bison.

1 5. Plaintiff Rick Ripley is a Montana State Senator representing Senate District 9, including
2 parts of Powell, Teton, Cascade and Lewis & Clark Counties. Sen. Ripley sponsored Senate Bill
3 212 in the Sixty-Second Montana Legislature in 2011.

4 6. Plaintiffs Dustin and Vicki Hofeldt are ranchers in Blaine County, Montana. They are
5 part owners and operators of a ranch bordering the Fort Belknap Indian Reservation. The
6 Hofeldt's have suffered numerous and on-going damages to their fences, crops, livestock and
7 personal property rights due to bison escaping the Fort Belknap Reservation and intruding upon
8 their land. The Hofeldt's testified in person and submitted documents and photos to the Fish,
9 Wildlife and Parks Commission during the administrative process, in opposition to the proposed
10 bison translocation plan.

11 7. Plaintiff Kim "Ken" Hansen is a former State Senator representing Hill and Blaine
12 Counties. He is also a farmer and rancher in Blaine County, Montana. His land is next to the
13 Fort Belknap Indian Reservation. Hansen has suffered numerous and on-going damages to his
14 fences, crops, livestock and personal property rights due to bison escaping the Fort Belknap
15 Reservation and intruding upon his private land. Hansen testified orally and in writing during
16 the FWP Commission public meeting in Glasgow, Montana in opposition to the translocation
17 plan.

18 8. Plaintiff United Property Owners of Montana, Inc. ("UPOM") is a coalition of
19 landowners, allied businesses, and supporters dedicated to the preservation of private property
20 rights. UPOM has members in all parts of the state, and collectively represents over 1 million
21 acres of privately held property in the state. UPOM has members with property near the Fort
22 Belknap and Fort Peck Indian Reservations who will be harmed by the continued or increased
23 problem of bison escaping either of these Reservations due to the FWP bison translocation plan.
24 Rancher and co-founder of UPOM Deanna Robbins submitted written testimony on behalf of
25

1 UPOM and its members to the FWP Department and Commission opposing the bison
2 translocation plan during the administrative process.

3 9. Plaintiff Missouri River Stewards is an organization of landowners, farmers, ranchers and
4 other citizens of small Montana communities in North Central and North Eastern Montana. It is
5 dedicated to educating the public and advocating policies supporting the continued success of
6 family farm and ranch operations in Montana. Missouri River Stewards has members with
7 landowners near and bordering the Ft. Belknap and Ft. Peck tribal bison ranges who will be
8 harmed by the continuation or increase in problems associated with bison escapes from the
9 Tribal bison pastures. Missouri River Stewards participated in the administrative decision-
10 making process through multiple members who attended the public meeting in Glasgow.

11 10. Defendant Joseph Maurier is the Director of the Montana Department of Fish, Wildlife &
12 Parks, MCA 2-15-3401, and has been the Director in charge of the Department's actions during
13 all of the events giving rise to this Complaint. He is the individual charged with carrying out the
14 policies directed by the Fish, Wildlife & Parks Commission and supervising the Fish, Wildlife &
15 Parks Department and employees in order to accomplish the same. MCA 87-1-401 et. seq. He is
16 sued in his official capacity.

17 11. Defendant Montana Department of Fish, Wildlife & Parks (hereinafter "FWP" or
18 "Department") is the state government agency charged with studying, planning and carrying out
19 actions associated with the plan to transport bison from the quarantine areas to other areas within
20 the State of Montana, MCA 87-1-201, -202, -216 et. seq., except for specific disease control
21 measures under the jurisdiction of non-party agency Montana Department of Livestock. FWP
22 was the agency responsible for the preparation of the state-wide conservation plan and
23 Environmental Assessment at issue here. Its principal office is in Helena, Montana.

24 12. Defendant FWP Commission (hereinafter "Commission") is the Governor-appointed
25 citizen commission pursuant to MCA 2-15-3402, that is responsible for setting policies and

1 adopting rules appropriate to managing hunting, state parks and wildlife management under the
2 authority of the State of Montana. MCA 87-1-301 et. seq. The Commission was the responsible
3 public body that directed the promulgation of an Environmental Assessment and plan to
4 translocate bison from various quarantine facilities in Southern Montana to various other cites,
5 and ultimately adopted the decision to transport quarantined bison to the Fort Peck and Fort
6 Belknap Reservations in accordance with the facts alleged herein.

7 **III. FACTUAL ALLEGATIONS**

8 13. The FWP Commission directed its staff in January, 2011 to begin analyzing locations for
9 the Department to transport bison currently contained in a brucellosis testing and quarantine
10 program to alternate locations outside of the greater Yellowstone National Park area. There are
11 currently 68 bison entering the monitoring phase of the quarantine process located at the Slip N'
12 Slide Pastures near Corwin Springs, MT. There are another 143 bison entering the second year
13 of the monitoring phase of the quarantine process at the Green Ranch, a subsidiary of Turner
14 Enterprises Inc., 20 miles west of Bozeman, MT.

15 14. The initial proposal considered four possible translocation sites: (1) the Marias River
16 Wildlife Management Area near Shelby, Montana; (2) the Spotted Dog Wildlife Management
17 Area near Deer Lodge, MT; (3) the Fort Belknap Reservation in Blaine County, MT; and (4) the
18 Fort Peck Reservation in Roosevelt County, MT.

19 15. The Fort Belknap Reservation has an existing herd of over 450 commercial bison that it
20 manages on multiple grazing units in a pasture with total combined acreage of 22,000 acres. The
21 proposal calls for the Tribal authorities to establish a separate 800 acre pasture to receive some of
22 the translocated bison, with the intention of growing the transplanted quarantine herd and
23 liquidating the commercial herd after 3 years. The 800 acre pasture intended for the transplanted
24 bison is on the Western edge of the Fort Belknap Reservation and bison pasture, and borders
25 private land on the West. Environmental Assessment for Interim Translocation of Bison

1 (hereinafter “EA”), MT Dept. Fish, Wildlife & Parks, Map 7 at 35

2 <<http://fwp.mt.gov/hunting/bison.html>> (accessed Jan. 8, 2012).

3 16. The Fort Peck Reservation has an existing herd of approximately 200 bison known as
4 Turtle Mound Bison. These animals are kept approximately 4 miles away from the proposed
5 location for the transplanted quarantined bison. The proposed pasture for the transplanted bison
6 is 4,800 acres in size. The Tribe intends to allow the transplanted bison herd to grow to at least
7 150 head.

8 17. In response to a state-wide outcry over the Commission’s proposed bison transport plan,
9 Plaintiff Sen. Rick Ripley sponsored and the Sixty-Second Montana Legislature passed Senate
10 Bill 212 in its 2011 Regular Session. SB 212 was codified as part of MCA 87-1-216, with an
11 effective date of May 12, 2011, the day Governor Brian Schweitzer signed it.

12 18. SB 212 required the Commission and Department to “develop and adopt a management
13 plan before any wild buffalo or bison under the department’s jurisdiction may be released or
14 transplanted onto private or public land in Montana.” MCA 87-1-216(5). There is no exception
15 for “interim” bison movements or transportation for study or quarantine purposes, such as the
16 Commission’s EA. EA at 5.

17 19. The specific requirements under SB 212 for the bison management plan are:

18
19 (a) measures to comply with any applicable animal health protocol required under Title 81, under
subsubsection (2)(b), or by the state veterinarian;

20 (b) any animal identification and tracking protocol required by the department of livestock to
21 identify the origin and track the movement of wild buffalo or bison for the purposes of subsections
(2)(b) and (5)(c);

22 (c) animal containment measures that ensure that any animal transplanted or released on private
or public land will be contained in designated areas. Containment measures must include but are not
limited to:

23 (i) any fencing required;

24 (ii) contingency plans to expeditiously relocate wild buffalo or bison that enter private or public
property where the presence of the animals is not authorized by the private or public owner;

25 (iii) contingency plans to expeditiously fund and construct more effective containment measures
in the event of an escape; and

(iv) contingency plans to eliminate or decrease the size of designated areas, including the

1 expeditious relocation of wild buffalo or bison if the department is unable to effectively manage or
2 contain the wild buffalo or bison.

3 (d) a reasonable means of protecting public safety and emergency measures to be implemented if
4 public safety may be threatened;

5 (e) a reasonable maximum carrying capacity for any proposed designated area using sound
6 management principles, including but not limited to forage-based carrying capacity, and methods for
7 not exceeding that carrying capacity; and

8 (f) identification of long-term, stable funding sources that would be dedicated to implementing
9 the provisions of the management plan for each designated area.

10 20. During 2011, the Commission and Department held public meetings on its proposed
11 bison transfer plan near all of the projected translocations. These meetings were heavily
12 attended by the public, and the comments to the Commission were overwhelmingly against the
13 bison transfer plan. Members of the public commented on the danger of brucellosis transmission
14 to livestock and wildlife; the danger the bison pose to the public due to their large size and wild
15 nature; the potential damage to fences, crops and livestock; opposition to this plan as a first step
16 toward replacing farms and ranches with a “buffalo common” or other free-ranging bison herd
17 on large portions of the Montana plains; and the uncertainty about the bison status as wildlife or
18 livestock, in addition to many other concerns.

19 21. During public meetings at Glasgow and an additional small meeting in Chinook, area
20 landowners, including Plaintiffs Dustin & Vicki Hofeldt and Ken Hansen, testified and submitted
21 written testimony describing the current inadequacy of the bison fence efforts on the Fort
22 Belknap and Fort Peck Reservations. The Commission and Department staff received numerous
23 personal stories, written testimony, photos and other evidence of wide-spread and continuous
24 problems with bison escapes from the Reservations, particularly the Fort Belknap Reservation.
25 Plaintiffs and other landowners and local officials told the Commission and Department staff that
the Tribal fencing and bison control efforts must be improved dramatically in order to prevent
further damage to private landowners and neighborly relations.

26 22. Plaintiffs Hofeldt’s have suffered numerous bison intrusions upon their ranch, resulting in
damaged fences, damaged and depleted haystacks, and other damages. There were ten reported

1 incidents of bison escapes from the Reservation pasture in the month of January, 2011, alone.
2 Despite repeated phone calls to Tribal authorities and the Blaine County Sheriff, the local
3 authorities have been slow to respond, and have failed to adequately compensate the Hofeldt's
4 for bison damages, or to prevent the recurrence of these intrusions.

5 23. In 2004, Plaintiff Dustin Hofeldt shot two stray Fort Belknap bison that were on his ranch
6 and intermingled with his cattle in the hay feeding grounds, after repeated and unsuccessful
7 attempts to get Tribal and local law enforcement assistance in rounding up and fencing in Tribal
8 bison.

9 24. Plaintiffs Hofeldt's submitted bills for compensation in the spring of 2011 to the Fort
10 Belknap Tribal Council for damage to fences, hay depletion and other costs in excess of \$20,000.
11 The Fort Belknap Tribal Council has failed to pay these bills.

12 25. Plaintiff Ken Hansen suffered extensive fence damage due to bison wandering from the
13 Fort Belknap Reservation onto his property in the winter of 2010-2011. Hansen sent a fence
14 repair bill of \$4,430 to the Fort Belknap Tribal Council on July 23, 2011 for this damage. The
15 Fort Belknap Tribal Council has not yet paid the bill or even responded to Hansen's
16 communication.

17 26. The EA describes the bison containment fences at the Fort Belknap bison pasture as:

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19 The existing bison pastures are currently surrounded by a 6 foot, 6 or 7 strand barb wire fence capable of
20 holding buffalo under normal circumstances. The fence consists of eight foot treated wooden brace posts
21 2.5 foot into the ground at 15 foot intervals with 7.5 foot steel T-posts in between and placed at 15 foot
intervals. The lowest wire is 18 inches off the ground to allow for wildlife passage. The fence boundary is
continually being improved when it is taken down due to snowdrifts or after a bison escapes. EA at 36.

22 27. The Fort Belknap bison fences do not comply with the standard stated in the EA in all
23 areas. They are in need of repair in numerous locations. The wire is often lying on the ground.
24 The fence posts are often loose. In many places, the wire is inadequate strength or gauge for the
25

1 pressure of the contained animals. Tribal fence repair efforts are slow and often inadequate,
2 exacerbating the problem of bison escapes.

3 28. The Commission and Department released the Draft Environmental Assessment for the
4 bison translocation plan in September, 2011, with public comment beginning on September 15.
5 The Draft EA proposed to transfer some or all of the bison at the Slip N' Slide Pasture and Green
6 Ranch to the Spotted Dog WMA, the Marias River WMA, the Fort Belknap Reservation, and the
7 Fort Peck Reservation.

8 29. The Draft EA specifically noted it intended to transfer the bison before completing a
9 state-wide bison management plan, EA at 5, 12, 14, 98. The EA anticipates the state-wide bison
10 management plan will not be complete until 2015. The EA claims that the analysis and the
11 Department's steps to prepare the WMA's to hold bison meet the requirements of SB 212, EA at
12 19, 89. The EA does not acknowledge or analyze SB 212's bison management plan
13 requirements for placement of bison on Tribal grazing lands.

14 30. The EA assigns the Department very little management responsibility over bison
15 transported to the Tribal lands. In fact, the EA places all responsibility and costs upon Tribal
16 officials in managing the containment and recovery of escaped bison, with the caveat: "If study
17 bison escape and exit the Reservation, FWP would work with the Tribes to immediately herd the
18 bison back onto the pasture." EA at 37. The EA does not explain how FWP will "work with" the
19 Tribes or what resources have been provided to the Department to effectuate this task. The EA is
20 silent as to the process or timeline for a FWP-Tribal bison management plan under the statutory
21 requirements of SB 212.

22 31. On October 17, 2011, the Montana Legislative Environmental Quality Council ("EQC"),
23 the interim committee charged with oversight of the Department and Commission, MCA 75-1-
24 324(10)(b), sent a unanimous letter to Director Maurier urging the Commission to post-pone a
25 decision on the bison translocation plan until a supplemental EA, a full EIS and/or a state bison

1 management plan was completed. EQC Letter to FWP Director Joseph Maurier (Oct. 17, 2011),
2 <[http://leg.mt.gov/content/Committees/Interim/2011-2012/EQC/Meeting-Documents/October-](http://leg.mt.gov/content/Committees/Interim/2011-2012/EQC/Meeting-Documents/October-2011/EQC-letter.pdf)
3 [2011/EQC-letter.pdf](http://leg.mt.gov/content/Committees/Interim/2011-2012/EQC/Meeting-Documents/October-2011/EQC-letter.pdf)> (accessed Jan. 8, 2012)(Exhibit 1). The letter noted that the EA fell short
4 of MEPA requirements in many respects, particularly in consideration of long-term impacts.

5 32. The EQC letter also informed Director Maurier that the EA did not comply with the
6 management plan requirements of SB 212. The EQC stated the EA violates the management
7 plan requirements of:

8 87-1-216(5)(c)(iii), requiring “contingency plans to expeditiously fund and construct more effective
9 containment measures in the event of an escape”;

10 87-1-216(5)(c)(iv), requiring “contingency plans to eliminate or decrease the size of designated areas,
11 including the expeditious relocation of wild buffalo or bison if the department is unable to effectively
12 manage or contain the wild buffalo or bison”;

13 87-1-216(5)(e), requiring “a reasonable maximum carrying capacity for any proposed designated
14 area”; and · 87-1-216(5)(f), requiring “identification of long-term, stable funding sources that would
15 be dedicated to implementing the provisions of the [bison] management plan for each designated
16 area.” EQC Letter at 2.

17 33. Despite the continued public outcry against the proposed bison translocation plan and the
18 EQC’s letter informing it the EA violated the law, the Commission adopted a modified proposed
19 alternative at its meeting on December 9, 2011. The Commission approved the proposal to
20 transfer 68 bison from the current Slip N’ Slide pasture quarantine facilities to the Fort Belknap
21 and Fort Peck Tribal grazing lands. FWP Commission Agenda Item: Bison Translocation to Fort
22 Belknap and Fort Peck Reservations (Dec. 9, 2011)

23 <[http://fwp.mt.gov/doingBusiness/insideFwp/commission/meetings/agenda.html?si&coversheet](http://fwp.mt.gov/doingBusiness/insideFwp/commission/meetings/agenda.html?si&coversheet&itemId=21723104)
24 [&itemId=21723104](http://fwp.mt.gov/doingBusiness/insideFwp/commission/meetings/agenda.html?si&coversheet&itemId=21723104)> (accessed Jan. 8, 2012)(Exhibit 2).

25 34. The Commission did not order a supplemental Environmental Assessment or an
Environmental Impact Statement to correct the short-comings of the current EA. It did not order
the initiation of a state-wide or even site-specific bison management plan for the Tribal grazing

1 lands pursuant to the requirements of SB 212 prior to the shipment of bison to the new locations.
2 The Commission did not commit to an additional public comment period in the formation of any
3 possible bison management plan prior to moving the transplanted bison onto Tribal lands.

4 **IV. Violations of 62nd Montana Legislature’s Senate Bill 212, MCA 87-1-216.**

5 35. Count 1: The Defendants acted in concert to prepare and enact a wild bison transportation
6 plan from quarantine areas to the Fort Peck and Fort Belknap Reservations before the completion
7 of a state-wide or site-specific bison management plan, in direct violation of Senate Bill 212,
8 now codified in MCA 87-1-216. The Defendants acted with blatant and arbitrary disregard for
9 the plain meaning of the statute in question, and in contravention to the expressed will of the
10 Legislature and the Governor. The statute does not provide an exception for “interim”
11 relocations of bison, or exceptions for quarantine study and monitoring purposes; it requires a
12 complete bison management plan before a single bison can be transported.

13 36. Count 2: The Defendants violated SB 212 by failing to inform the public or the
14 Legislature how they will implement the Commission’s decision while guaranteeing public
15 participation and protection according to the bison management plan requirements of the statute,
16 prior to movement of any quarantined bison to the Tribal grazing lands.

17 **V. Violations of Montana Environmental Policy Act, MCA 75-1-101, et. seq.**

18 37. Count 3: The Defendants failed in the EA to analyze the impacts on the human
19 environment, particularly the neighboring landowners, resulting from continual bison escapes
20 from the Reservation onto private land. The Defendants demonstrated a complete disregard for
21 unequivocal evidence that current Tribal fencing arrangements do not prevent neighbor conflicts
22 or damage to land, livestock, fences and other resources bordering the Reservations. The
23 Defendants also disregarded evidence from Plaintiffs and the public that the Fort Belknap Tribe
24 does not adequately compensate landowners for damages resulting from bison depredations.
25

- 1 a. The EA currently states that any bison that escape either Reservation and enter
2 neighboring private land will be herded back onto the Reservation. EA at 37, 40,
3 75. The EA states that all damage from stray bison will be fixed, and the Tribe
4 will compensate neighboring landowners according to the current policy. EA at
5 40, 75. The EA states there will be no conflicts resulting from the placement of
6 additional bison onto the Tribal range, EA at 93.
- 7 b. As alleged in more detail previously, the current Fort Belknap Tribal bison
8 containment policy is a failure. Bison are continually escaping from the
9 Reservation lands onto private lands and causing wide spread and uncompensated
10 damage to fences, haystacks, livestock herds and private property rights. The
11 current bison herd is a source of continual neighbor conflict.
- 12 c. By issuing a blanket statement that the Tribe has a zero tolerance policy for
13 escaped bison without analyzing the clear evidence that this policy does not work,
14 Tribal and other officials are uncooperative in response efforts, and these factors
15 have led to ongoing neighbor conflict, the EA has failed to examine this impact
16 upon the human environment from the proposed action. The EA has failed to
17 conduct actual analysis of the expected conflicts from the placement of more
18 bison on the range, and the failure of the Tribe to dedicate adequate personnel and
19 resources to rounding up stray bison and protecting neighboring private property.
20 The EA's failure violates the requirements of MEPA.
- 21 d. The EA has failed to analyze the conflict resulting from the current failure to
22 compensate landowners for damage. Plaintiffs Hofeldt and Hansen currently
23 have outstanding damage claims against the Fort Belknap Tribal Council that
24 have gone unpaid for months. The EA has further failed to analyze ways to
25 improve the Tribal damage compensation system or to mitigate such damage

1 efforts. By relying upon the current Tribal compensation system, the EA has
2 failed to analyze the proposed action's impacts upon the human environment and
3 violates MEPA's standards.

- 4 e. The EA has inadequately analyzed this issue by its failure to examine and
5 document the frequency of fence failures and disrepair; FWP has relied upon
6 empty assurances rather than detailed examination of the fences intended to
7 contain the transported bison. Given the evidence presented to the Commission
8 of the inadequate Fort Belknap fences, this failure to analyze this issue violates
9 MEPA's requirements.
- 10 f. The EA's failure resulted in blatantly incorrect conclusions when comparing
11 alternatives, concluding that placement of additional bison on the Fort Belknap
12 Reservation would improve relations with neighboring landowners. EA at 93.
13 This conclusion demonstrates an uninformed and arbitrary decision in conflict
14 with the evidence before the agency. The EA staff could have reached this
15 decision only by completely ignoring the vast majority of the information
16 provided by the public in response to the proposed action. The EA's failure to at
17 a minimum account for this conflicting evidence and its potential impacts upon
18 the community evidences an arbitrary and capricious decision.

19 38. Count 4: Failure to analyze the impact of a possible brucellosis transmission from the
20 quarantined bison to the existing commercial bison herd at Fort Belknap, or from the existing
21 Fort Belknap commercial herd to the quarantined bison.

- 22 a. The EA states the brucellosis status of the commercial bison herd at Fort Belknap
23 is currently unknown. EA at pp. 93. Because of the high probability that the two
24 bison herds will interact due to the proximity of the two groups and the
25

1 documented inadequacy of the fence conditions, a brucellosis transmission
2 between the two groups is possible.

- 3 b. The EA completely failed to analyze this foreseeable impact of the proposed plan
4 and its greater impacts upon the success of the entire bison quarantine project and
5 the impact such a spread of brucellosis would have upon neighboring landowners
6 and cattle herds. The EA further failed to analyze the impact such a bison to
7 bison transmission would have upon the Montana-wide brucellosis free status
8 designation. For this reason, the EA is inadequate.

9 39. Count 5: Failure to conduct a full EIS, as required by the severity of impacts and the
10 Plan's egregious violation of state law. The EA wrongly concludes that because the impacts of
11 the proposed action are negligible, no EIS is required.

- 12 a. The impacts upon the human environment alone require the promulgation of a full
13 EIS, due to the severity of the Tribe's bison containment system failure in its
14 current form. The reality of broken fences and uncompensated landowners is
15 divorced from the façade of cooperation presented in the EA. Only a serious and
16 thorough examination of the current problems with the Tribal bison containment
17 system will be adequate to properly inform and mandate an effective bison
18 management plan for any future placement at Fort Belknap. The EA's
19 justification for failing to conduct an EIS because of "negligible or neutral" (EA
20 at 95) impacts is completely inaccurate and at odds with the record before the
21 Department.

- 22 b. The EA completely ignores the Defendants' violation of applicable state laws,
23 embodied in SB 212, that require the creation of a bison management plan prior to
24 movement of the quarantined bison. The EA fails to even mention this statute
25

1 when it considers any possible legal violations (EA at 96) and throughout as
2 applied to transporting bison to Tribal grazing lands.

3 **VI. Prayer for Relief**

4 WHEREFORE, Plaintiffs pray for the following relief:

5 40. Enjoin Defendants Maurier, the Department and the Commission from carrying out their
6 December 9, 2011 Decision to translocate bison, or entering Memorandums of Understanding or
7 similar agreements with Tribal entities or any other private or public entity to receive transferred
8 bison from Yellowstone National Park, the Slid N' Slide Pasture, the Green Ranch, or other
9 possible source of quarantined or wild bison until the Defendants complete a state-wide or site-
10 specific bison management plan pursuant to the requirements of the 2011 Legislature's Senate
11 Bill 212, codified in MCA 87-1-216, and other current applicable Montana law.

12 41. Require any such state-wide management plan to protect and assure compensation to
13 private property owners who suffer monetary or other damages due to bison escaping from
14 Tribal, public or private land holding areas under a FWP-sponsored transport program. Further
15 require the plan to provide remedies for private landowner against any Tribal, local or state
16 government agency that fails to so protect and compensate private landowners.

17 42. Adjudge and declare the Defendants' Interim Translocation of Bison Environmental
18 Assessment to be legally inadequate, as an arbitrary and capricious decision, and not in
19 accordance with the Montana Environmental Policy Act.

20 43. Direct Defendants to complete a full Environmental Impact Statement or supplemental
21 Environmental Assessment to fully analyze the impacts on the human environment, including
22 fence and compensation conflicts between the Tribes and neighboring landowners; impacts upon
23 wildlife and livestock, including possible bison-to-bison brucellosis transmission; and any other
24 matters adjudged to be incomplete or inadequate in the current Department EA.

25 44. Award Plaintiffs costs and attorney's fees as allowed by law.

1 45. Award such other relief as the Court may deem just.

2
3 Respectfully submitted and DATED this 11th day of January, 2012.

4
5 //S// Cory J. Swanson

6 CORY J. SWANSON
7 Attorney for Plaintiffs

OPINION

DA 12-0306

IN THE SUPREME COURT OF THE STATE OF MONTANA

2013 MT 166

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

Plaintiffs and Appellees,

v.

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

Defendants and Appellants,

and

DEFENDERS OF WILDLIFE and
NATIONAL WILDLIFE FEDERATION,

Defendant Intervenors and Appellants.

APPEAL FROM: District Court of the Seventeenth Judicial District,
In and For the County of Blaine, Cause No. DV-2012-1
Honorable John C. McKeon, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Zachary C. Zipfel (argued), Rebecca Jakes Dockter (argued), Special
Assistant Attorneys General, Helena, Montana
(For Joseph Maurier, MT Dept. of FWP, and MT FWP Commission)

Timothy J. Preso (argued), Earthjustice, Bozeman, Montana
(For Defenders of Wildlife and National Wildlife Federation)

For Appellees:

Chad E. Adams (argued), J. Daniel Hoven, Steven T. Wade, Christy S. McCann; Browning, Kaleczyc, Berry & Hoven, PC, Helena, Montana

For Amicus:

Ryan C. Rusche, Attorney at Law, Poplar, Montana

Argued: April 12, 2013
Submitted: April 16, 2013
Decided: June 19, 2013

Filed:

Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Joseph Maurier; Montana Department of Fish, Wildlife & Parks; Montana Fish, Wildlife & Parks Commission (hereafter referred to collectively as DFWP); Defenders of Wildlife; and National Wildlife Federation, intervenors, appeal from the District Court’s Order Granting Preliminary Injunction. We reverse.

PROCEDURAL AND FACTUAL BACKGROUND

¶2 This case arises from the challenges presented to the State of Montana from bison which seasonally migrate out of Yellowstone National Park. Since 2000 the State, through the Department of Fish, Wildlife & Parks, along with the Montana Department of Livestock, has been a member of the Interagency Bison Management Plan, and it issued the Bison Management Environmental Impact Study that same year. The United States participates in the Interagency Bison Management Plan through the National Park Service, the Forest Service, and the Department of Agriculture’s Animal and Plant Health Inspection Service.

¶3 Starting in 2004 the DFWP, the National Park Service, and the USDA Animal and Plant Health Inspection Service began a quarantine program to isolate and study bison that migrated out of Yellowstone Park and into Montana. These animals were born into the genetically-pure Yellowstone herd (not influenced by genes from domestic cattle), and were tested negative for the disease brucellosis.¹ The goal was to create a

¹ Brucellosis is a serious disease for animals and humans, causing sterility and fetal abortions in livestock and undulant fever in humans. Brucellosis infects some of the Yellowstone Park bison, having been passed to them from

brucellosis-free herd that could be relocated out of the Yellowstone area, as an alternative to commercial slaughter and other bison-control measures. In 2005 DFWP established a quarantine facility just north of Yellowstone Park, starting with 100 calves that were ear-tagged, implanted with microchips, and repeatedly tested for brucellosis over a period of years. Some of these animals have matured and bred with others in the study, and their offspring have also tested negative for brucellosis.

¶4 In 2011 the DFWP considered relocation of a first group of about 60 bison for the final stage of the quarantine program, a five-year period of continued quarantine and testing. The DFWP considered several sites that could potentially pasture the animals and in September, 2011, released its draft environmental assessment evaluating the options for transferring the quarantine program bison. In December, 2011, DFWP decided to transfer the animals to an existing 4800-acre bison pasture on the Ft. Peck Reservation in northeastern Montana, and to eventually transfer half of those animals to the Ft. Belknap Reservation when a suitable pasture is established there. While there were herds of domestic bison on both reservations, the plan was to separate those animals from the Yellowstone animals and then remove the domestic animals within three years.

¶5 The final DFWP decision required it to enter agreements (referred to as a Memorandum of Understanding, or MOU) with the tribes of both reservations. The DFWP entered an MOU with the Ft. Peck Tribes on March 16, 2012, and most of the bison were transported to the Reservation on March 19, 2012. The DFWP planned that

domestic cattle. The disease can be spread back to cattle. Montana achieved designation as a brucellosis-free state in 1985 after decades of effort and expense. This designation allows cattle producers to ship animals without testing.

the agreement with the Ft. Belknap Tribes would include provisions requiring adequate new fencing prior to transferring any bison to the Ft. Belknap pasture.

¶6 On March 19, the CBU applied for a temporary restraining order against shipment of bison to Ft. Peck, but the District Court denied that application “due to procedural defects involving lack of notice and a sworn complaint or affidavit.” The CBU filed a new application and the District Court granted a TRO on March 22, 2012, but only after the final shipment of bison to Ft. Peck had taken place.

¶7 The MOU with the Ft. Peck Tribes provided for the relocation and containment of the quarantine program bison. The Tribes agreed to continue the quarantine program disease testing and to be responsible for the care and management of the animals. The Tribes agreed to surround the pasture with adequate fencing, “at least a seven foot, woven wire fence.” The Tribes further agreed to act within 72 hours to return any escaped bison and to maintain insurance to cover damages caused by escapes. If escaped animals are not contained they can be killed by DFWP. The agreement provided that half the animals would be transferred to Ft. Belknap as soon as practical after establishing adequate facilities there. Shipment of the bison to Ft. Peck took place primarily on March 19, 2012, with a few more animals shipped a few days later.

¶8 The present lawsuit was filed in January, 2012, challenging the DFWP action and seeking to enjoin the bison transport. The plaintiffs, collectively referred to here as the CBU, asked for an injunction to prohibit movement of any Yellowstone bison until the DFWP complied with §§ 87-1-216 and -217, MCA. While the bison transport was still in

process on March 22, 2012, the District Court entered a temporary restraining order enjoining any bison movement from Ft. Peck to Ft. Belknap. The District Court subsequently held a hearing and on May 8, 2012, issued a preliminary injunction prohibiting DFWP from entering any agreement with any Tribal entity or public or private landowner concerning transplanting Yellowstone bison; prohibiting DFWP from transferring any bison from the brucellosis quarantine facilities; and prohibiting DFWP from transferring any bison from Ft. Peck to Ft. Belknap. The State of Montana and intervenor defendants appeal the District Court's order granting the preliminary injunction.

STANDARD OF REVIEW

¶9 This Court generally reviews a district court's decision to grant a preliminary injunction for a manifest abuse of discretion, one that is "obvious, evident, or unmistakable." *State v. BNSF Ry. Co.*, 2011 MT 108, ¶ 16, 360 Mont. 361, 254 P.3d 561. To the extent that a preliminary injunction is based upon an interpretation of law, the district court's conclusions of law are reviewed to determine whether they are correct. *Reier Broad. Co. v. Kramer*, 2003 MT 165, ¶ 9, 316 Mont. 301, 72 P.3d 944.

DISCUSSION

¶10 While the Appellants state a number of issues, they all are contained within the issue of whether the District Court properly entered the preliminary injunction.

¶11 A preliminary injunction is an extraordinary remedy and should be granted with caution based in sound judicial discretion. *Trogia v. Bartoletti*, 152 Mont. 365, 370, 451

P.2d 106, 109 (1969). The purpose of a preliminary injunction is to preserve the status quo and to minimize the harm to the parties pending trial. *City of Whitefish v. Board of County Comm'rs.*, 2008 MT 436, ¶ 18, 347 Mont. 490, 199 P.3d 201; *Yockey v. Kearns Properties*, 2005 MT 27, ¶ 18, 326 Mont. 28, 106 P.3d 1185. The district court considering a preliminary injunction sits in equity and should not anticipate the ultimate determination of the issues in the case, *Sweet Grass Farms v. Board of County Comm'rs.*, 2000 MT 147, ¶ 38, 300 Mont. 66, 2 P.3d 825, applying § 27-19-201, MCA. The applicant for a preliminary injunction must show a prima facie case that he will suffer irreparable injury before the case can be fully litigated. *Sweet Grass Farms*, ¶ 28.

¶12 Much of the discussion in the District Court's Order Granting Preliminary Injunction, and in the arguments on appeal, arises from the application of § 87-1-216, MCA. The plaintiffs argue and the District Court concluded that § 87-1-216, MCA, governs DFWP's transfer of the quarantined bison to Ft. Peck and then to Ft. Belknap. During the injunction proceedings in District Court the plaintiffs withdrew the request that the initial group of bison be removed from Ft. Peck. A preliminary injunction is not available to restrain an act already committed. *State v. BNSF Ry.*, ¶ 19. The remaining issue in this case is whether § 87-1-216, MCA, governs transfer of some of the Ft. Peck bison to Ft. Belknap so as to support a preliminary injunction against that transfer.

¶13 Section 87-1-216, MCA, begins with a legislative finding that "significant potential exists for the spread of contagious disease to persons or livestock in Montana and for damages to person and property by wild buffalo or bison." The statute designates

Yellowstone National Park bison as a species requiring disease control, and designates “other wild buffalo” as a “species in need of management.” Subsection (4) provides that DFWP “may not release, transplant, or allow wild buffalo or bison on any private or public land in Montana that has not been authorized for that use by the private or public landowner.” Subsection (5) requires DFWP to develop and adopt a management plan before any wild buffalo “under the department’s jurisdiction” may be released or transplanted onto “private or public land in Montana.” The statute requires that the management plan contain a number of provisions including identification and tracking protocols, and containment measures. Subsection (6) requires DFWP to provide the opportunity for public comment and to provide a public hearing in the “affected county or counties.” Subsection (7) makes the DFWP liable for the costs of any damage to private property that occurs as a result of its failure to meet any of the requirements of subsection (5).

¶14 The District Court applied § 87-1-216, MCA, and concluded that DFWP had violated the statute by transferring the bison to Ft. Peck without obtaining consent of affected landowners, and without adopting a management plan. The bison transfer to Ft. Peck had already taken place, and CBU did not seek any injunctive relief that would require removal of the Ft. Peck bison. Nonetheless, the District Court relied upon events involved in that transfer to enjoin any other transfers, including the anticipated transfer to Ft. Belknap. The District Court noted that the evidence at the hearing showed that three individuals owned some land within the designated 4800-acre pasture at Ft. Peck. There

was no evidence, however, that those individuals had not consented to having bison on their property, or that they objected to having bison on their property. It is uncontested that the initial 800-acre bison pasture at Ft. Belknap is exclusively tribal land.

¶15 Under the express terms of § 87-1-216, MCA, it applies only when “wild buffalo or bison” are relocated to “public or private land in Montana.” A “wild buffalo or bison” is defined as a bison “that has not been reduced to captivity and is not owned by a person.” Sections 81-1-101(6) and 87-2-101(1), MCA. The brucellosis quarantine bison involved in this case have been reduced to captivity for a number of years and therefore arguably are not “wild buffalo or bison” as defined in Montana law, rendering § 87-1-216, MCA, inapplicable to this case. The parties did not raise or brief this issue and it was not addressed by the District Court. Because the District Court based its ruling on an interpretation of the statute’s “public or private land” language and because the parties focused upon that language in their arguments, we will consider it on appeal. *State v. Andersen-Conway*, 2007 MT 281, ¶ 14, 339 Mont. 439, 171 P.3d 678 (this Court generally does not resolve a case on grounds not raised or supported by the parties); *Pinnow v. Mont. State Fund*, 2007 MT 332, ¶ 15, 340 Mont. 217, 172 P.3d 1273 (same).

¶16 The District Court concluded that § 87-1-216, MCA, was not ambiguous and that the plain meaning of the phrase “public or private land” included transfers to tribal lands. We conclude otherwise. First, as previously noted, it is clear that the phrase “public or private land in Montana” does not expressly mention tribal lands. By contrast, in a number of other statutes the Legislature has specifically referred to tribes or tribal land

when it intended to do so. Most significantly, there is a statute that expressly provides authority to the Department of Livestock to transfer bison “to qualified tribal entities” that participate in a disease control program. Section 81-2-120(1)(d)(ii), MCA. That statute, specifically referencing bison transfers to tribes, contains neither the landowner consent nor management plan requirements of § 87-1-216, MCA, and it requires no public hearings.

¶17 Similarly, § 87-1-217, MCA, sets out State policy on “large predators,” defined to mean “bears, mountain lions and wolves.” As part of that policy, the DFWP is required to ensure that “county commissioners and tribal governments” have the opportunity for consultation on policies.² Many other examples of express statutory references to tribes exist, including but not limited to: §§ 2-15-141 to 143, MCA (directing state agencies in implementing policies that “have direct tribal implications”); § 2-15-3112, MCA (livestock loss mitigation programs apply on “state, federal, and private land and on tribal land”); § 5-5-229, MCA (establishing a “state-tribal relations committee” of the Legislature); § 7-6-2230, MCA (disbursements for projects shared “with any other county, city, state, federal, or Indian tribal agency”); § 7-10-102, MCA (resources “within the exterior boundaries of an Indian reservation”); § 10-3-315, MCA (requiring authorization from any “affected political subdivision, tribal government, corporation, organization, or individual” prior to debris removal); § 60-4-202, MCA (providing for sales of property to a “federal, state, tribal, or local government”); and § 90-1-404, MCA

² The District Court in the Order Granting Preliminary Injunction determined, for reasons that are not at all clear, that bison are “large predators” under § 87-1-217, MCA. This is clearly an error of law because the statute limits large predators to bears, mountain lions and wolves. The parties agree that this was error.

(providing for cooperation of “state, local, private and tribal entities to develop and maintain land information”).

¶18 Principles of land ownership support the conclusion that tribes and tribal lands should not be impliedly included in statutory schemes without the clearest of reasons to do so. Public lands of the State of Montana are described in Article X, § 11 of the Montana Constitution, to include lands granted by Congress, or lands acquired by gift, grant or devise, or by exchange, that are owned and managed by the State. See also § 77-1-101(8), MCA, defining “state land.” Private property is property owned by an individual and therefore private. Section 70-1-102, MCA.

¶19 Reservations and tribal lands are neither public property nor private property, but are in a special class. Article I of the Montana Constitution affirms the special status of tribal lands, declaring that “all land owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States.” The United States and the tribes retain jurisdiction over “Indian Country.” *Big Spring v. Conway*, 2011 MT 109, ¶ 30, 360 Mont. 370, 255 P.3d 121. Nothing in these provisions on land ownership suggests that the phrase “private or public land in Montana” should be construed to include tribal lands on the reservation.

¶20 The Legislature has specifically provided for the transfer of bison to tribes in § 81-2-120, MCA, and has required DFWP to consult with tribes about large predators, § 87-1-217, MCA. We therefore conclude that the Legislature did not intend that the phrase “private or public land in Montana” include tribal lands and did not intend that § 87-1-

216 apply to the transfer of the quarantined Yellowstone bison to tribal lands of the Ft. Peck and Ft. Belknap Tribes.

¶21 Since § 87-1-216, MCA, does not apply to the bison transfer to Ft. Peck and Ft. Belknap, the District Court erred as a matter of law in issuing the preliminary injunction based upon the conclusion that DFWP had violated that statute.

¶22 After determining that § 87-1-216, MCA, applied to this case, the District Court applied § 27-19-201(1), MCA, and determined that the CBU had established a “prima facie case” entitling it to a preliminary injunction, to prevent the DFWP from violating § 87-1-216(4)-(6), MCA. The District Court considered whether CBU had established a likelihood of success on the merits; the likelihood of irreparable injury; whether the balance of the equities favored CBU; and whether the injunction would be adverse to the public interest. *Shammel v. Canyon Resources*, 2003 MT 372, ¶ 17, 319 Mont. 132, 82 P.3d 912 (the district court should consider those four factors where monetary damages will not afford an adequate remedy).

¶23 The District Court determined that even though the CBU failed to demonstrate the likelihood of irreparable injury in the absence of an injunction, a balancing of the equities in the case favored the CBU and therefore tipped the scales in favor of issuing an injunction. That decision was predicated upon the involvement of “disease prone” bison; the absence of a management plan required by § 87-1-216, MCA; the absence of landowner consent to the bison transfer; the DFWP’s delegation of its statutory

responsibilities under § 87-1-216, MCA, to the Ft. Peck Tribes; and the evidence of inadequate pasture fencing at Ft. Belknap.

¶24 The CBU presented landowner testimony about the condition of some of the current fence at Ft. Belknap and about past problems of property damage caused by escaped bison from the Tribes' existing domestic herd. Property owners adjacent to the proposed Ft. Belknap bison pasture have a right, as the District Court found, to protect their property. It is at least arguable, however, that the adjacent property owners would be in a better position to do so if the DFWP bison quarantine program were completed rather than halted.

¶25 The Ft. Belknap commercial bison herd presently numbers over 400 animals. Under the plan proposed by the DFWP, the commercial herd would be separated from the quarantine bison and would be eliminated in favor of the Yellowstone animals. The projected MOU with the Ft. Belknap Tribes would be similar to the one entered with the Ft. Peck Tribes, and would require a bison enclosure fence upgraded to meet the specifications of the DFWP prior to any bison transfer. The Tribes would have specific responsibilities under the MOU to contain escaped animals, and would have to provide insurance coverage that could be claimed by adversely-affected landowners. Moreover, while the District Court referred to the quarantine bison as "disease prone," the evidence was that the animals have been tested for years and are brucellosis free, and that they will be subject to continued brucellosis testing. In fact the District Court acknowledged that there is "no evidence of a reason to believe these bison have a latent infection."

¶26 The District Court also failed to weigh the equities of the interest of the State of Montana in finding a way to constructively meet the challenges presented by Yellowstone Park bison which migrate into the State. The quarantine and relocation program adopted by DFWP presents a reasoned and viable alternative or addition to the hazing, confinement, commercial slaughter, and other steps that have been taken. Significantly, the clear policy of the State of Montana, enacted by the Legislature in § 81-2-120, MCA, is to permit the transfer of disease-free Yellowstone bison to Indian Tribes who will agree to have them. While the bison transfer in this case was by the DFWP and not the Department of Livestock, the animals are tested disease free and the transfer was consistent with established State policy.

¶27 Also, while the Ft. Belknap and Ft. Peck Tribes are not parties to this action, the District Court did acknowledge their interest in participating in the bison transfers. This interest is long-held and deeply rooted in the history, beliefs and traditions of the Tribes. Recovery of and reconnection to the wild genetic strain of Yellowstone bison represent important goals for the Tribes.

¶28 In summary, we cannot conclude, as the District Court did, that the balance of equities in this case favors the CBU. It was an abuse of discretion for the District Court to reach a determination on the balance of equities without fully considering the equities of all interests involved. Therefore, the District Court relied upon erroneous grounds for issuing a preliminary injunction under § 27-19-201(2), MCA.

¶29 Finally, the District Court determined that the CBU was entitled to an injunction under § 27-19-201(3), MCA, based primarily upon the absence of a “choice of law” provision in the MOU entered with the Ft. Peck Tribes. The District Court was concerned that the DFWP had discrete duties under § 87-1-216, MCA, that were being delegated to the Tribes. If the Tribes fell short of those duties, then neither the CBU nor the DFWP would have a forum to seek redress. This could tend “to render the judgment [of the District Court] ineffectual” as provided in § 27-19-201(3), MCA.

¶30 This discussion is relevant only to the extent that the DFWP has statutory duties under § 87-1-216, MCA, that govern transfer of the Yellowstone quarantine bison to tribal lands. As we have determined, that statute does not apply. To the extent that any statute applies, it is § 81-2-120, MCA, which lacks the requirements of § 87-1-216, MCA, and allows transfer of bison to tribes as long as disease control measures are in place.

¶31 The District Court relied upon erroneous grounds for issuing a preliminary injunction under § 27-19-201(3), MCA, and is reversed. Having determined that the preliminary injunction was wrongfully issued, we decline to address the other issues raised by the parties.

¶32 The District Court is reversed, the preliminary injunction is vacated, and this case is remanded for further proceedings consistent with this Opinion.

/S/ MIKE McGRATH

We concur:

/S/ MICHAEL E WHEAT
/S/ PATRICIA COTTER
/S/ BETH BAKER
/S/ LAURIE McKINNON
/S/ BRIAN MORRIS

Justice Jim Rice, concurring.

¶33 I concur in the decision of the Court. With regard to the proper construction of § 87-1-216, MCA, any ambiguity in the statutory language was resolved during floor debate, wherein the House sponsor of SB 212 explained in response to a question that he had conferred with the Senate sponsor concerning the measure’s potential impact upon transfers of bison by the Department of Fish, Wildlife and Parks to the tribes, and indicated unequivocally that the measure “would have no effect on the tribe’s ability to receive buffalo from the department.” *See Montanans for Justice v. State*, 2006 MT 277, ¶ 60, 334 Mont. 237, 146 P.3d 759 (“When the legislative intent cannot be readily derived from the plain language, we review the legislative history. . . .”).

¶34 The Appellants’ briefing and their comments during oral argument display a remarkable befuddlement regarding the issue of jurisdiction over the MOU. As the District Court noted, “FWP is uncertain which forum it can use to enforce the MOU.” For a department of state government to deploy state resources pursuant to a contract it has entered, while having no idea to what judicial forum it can turn to ensure that the contractual obligations made to the state will be enforced, and the state’s interest

protected, is no less than maladministration. The obligations to the state under the MOU are substantial. As the Court notes, the Department is now working on a second MOU to be entered with the Fort Belknap Tribes. Opinion, ¶ 25. This time, perhaps some thought can be given to where the state is entitled to seek judicial enforcement of the MOU in order to protect its investment of state resources in this project.

/S/ JIM RICE