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8 MONTANA, SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY
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10 DIANA'S GREAT IDEA, LLC, a Montana
11 limited liability company; ENGWIS
12 INVESTMENT COMPANY, LTD., a Montana
13 limited partnership; R.F. BUILDING
14 COMPANY, LP., a Montana limited partnership;
15 ROCK CREEK RANCH I LTD., a Texas limited
16 partnership; and ENTITY DOES I-XXX; JOHN
17 DOES I-XXX; JANE DOES I-XXX,

18 *Plaintiffs,*

19 vs.

20 CRAZY MOUNTAIN WIND, LLC; CRAZY
21 MOUNTAIN LAND AND LIVESTOCK, LLC;
22 CRAZY MOUNTAIN CATTLE CO.; RICHARD
23 "RICK" JARRETT, general partner of CRAZY
24 MOUNTAIN CATTLE CO.; PATTERN
25 ENERGY GROUP, INC.; PATTERN ENERGY
26 GROUP LP, a/k/a PATTERN DEVELOPMENT
27 a/k/a PATTERN DEVELOPMENT 2.0 a/k/a
PATTERN RENEWABLES, LP; ALFRED
ANDERSON; ENTITY DOES I-XXX; JOHN
DOES I-XXX; JANE DOES I-XXX,

Defendants.

CAUSE NO. DV-2018-161

Hon. Jon A. Oldenburg

FINDINGS OF FACT, CONCLUSIONS
OF LAW, ORDER ON
PRELIMINARY INJUNCTION

//

BACKGROUND

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2 Plaintiffs filed a *Complaint for Damages and Injunctive Relief, and Jury Demand* on
3 September 28, 2018. (Dkt. # 1). On October 18, 2018 Plaintiffs filed their *Combined Motion and*
4 *Brief in Support of a Preliminary Injunction*. (Dkt. # 8). Defendants Crazy Mountain Wind, LLC,
5 Pattern Energy Group, Inc. and Pattern Energy Group LP filed their *Answer to Complaint and*
6 *Demand for Jury Trial* (Dkt. # 22) and *Brief in Opposition to Plaintiffs' Motion for Preliminary*
7 *Injunction* (Dkt. # 21) on November 9, 2018. Defendants Richard Jarrett, Crazy Mountain Cattle
8 Co., and Alfred Anderson filed their *Opposition to Request for Preliminary Injunction* on November
9 14, 2018. (Dkt. # 32). The Plaintiff's filed their *Reply Brief in Support of Motion for Preliminary*
10 *Injunction* (Dkt. # 52) as to Pattern Energy Opposition on December 7, 2018.
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12
13 On November 27, 2018 a scheduling conference was held and this Court issued an *Order*
14 *Setting Hearing on Motion for Preliminary Injunction* to be held February 19th – February 21st 2019.
15 (Dkt. # 47). On December 5, 2018 Wild Eagle Ranch filed their Motion to Intervene and *Proposed*
16 *Complaint in Intervention*. (Dkts. 48, 49, 50). The Order Granting Wild Eagle Mountain, LLC's
17 Motion to Intervene (Dkt. # 67) was signed February 5, 2019 upon assent of all Parties. Prior to the
18 hearing, Wild Eagle filed a *Motion for Site Visit* (Dkt. # 77) to be taken during the Preliminary
19 Injunction hearing.
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21 On February 19, 20 and 21, 2019 this Court held a hearing on Plaintiffs'
22
23 *Motion for Preliminary Injunction* at the Park County Courthouse in Livingston, Montana.
24 Elizabeth Greenwood, Inga L. Parsons, and Stephen E. Woodruff represented Plaintiffs. W. Scott
25 Mitchell, and Shane P. Coleman represented the Pattern Defendants; and Monica J. Tranel
26 represented Defendants Jarrett and Anderson. Nicholas J. Lofing and J. Andrew Person represented
27 the Intervenor.

1 On February 20, 2019, the Court conducted a site visit. The Court had the opportunity to
2 view the entire area of the projected windfarm and the properties of the parties. A summary of the
3 site visit was placed on the record on February 21, 2019. At the conclusion of the hearing, this
4 Court ordered the parties to file written submissions including Proposed Findings of Fact and
5 Conclusions of Law within ten days. All parties have done so. No transcript was available to the
6 parties or the Court. Ordinarily the Court would grant time for the production of a transcript prior to
7 the submission of the Findings and Conclusions, however, the Court was made aware of the limited
8 time-frame that Defendants felt was necessary for a decision.
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10 The Court has examined the entirety of the record herein, examined the exhibits admitted at
11 the hearing, examined the briefs and submissions of the parties, taken into consideration the site
12 visit, and good cause appearing therefore enters the following:
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16 FINDINGS OF FACT

17 Based upon the evidence and testimony presented the Court finds the
18 following facts have been established by a preponderance of the evidence. To the extent any of the
19 Court's ensuing Conclusions of Law are more properly construed as Findings of Fact, they are
20 incorporated herein as Findings to give effect to the Court's decision.
21

- 22 1. Plaintiff Diana's Great Idea, LLC, is a Montana limited liability company that owns
23 real property in Sweet Grass County, Montana. David Z. Chesnoff is a principal of
24 Diana's Great Idea, LLC.
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2. Plaintiff Engwis Investment Company Ltd., LP is a Colorado limited partnership that owns real property in Sweet Grass County, Montana. Jan and Karen Engwis are principals of Engwis Investment Company Ltd., LP.
3. Plaintiff R.F. Building Company, LP, is a Montana limited partnership that owns real property in Sweet Grass County, Montana. Jan and Karen Engwis are principals of R.F. Building Company, LP.
4. Rock Creek Ranch I Ltd. is a Texas limited partnership that owns real property in Park and Sweet Grass Counties, Montana. Russell Gordy is a principal of Rock Creek Ranch I Ltd.
5. Intervenor Wild Eagle Mountain Ranch, LLC is a Montana limited liability company that owns real property in Park and Sweet Grass Counties, Montana. Jim Holgemark is a ranch manager for Wild Eagle Mountain Ranch, LLC.¹
6. Crazy Mountain Wind, LLC, (CMW) is a Delaware limited liability company that is the owner and developer of CMW. The proposed wind farm is located on private property owned by Richard Jarrett and Alfred Anderson in Park and Sweet Grass Counties. Crazy Mountain Wind, LLC is an indirect, wholly-owned subsidiary of Pattern Energy Group 2 LP. Pattern Energy Group Inc. has acquisition rights over projects being developed by Pattern Energy Group 2 LP, including CMW.
7. Richard Jarrett owns real property that he has leased to Pattern for the development of CMW. Exhibit P-201
8. Alfred Anderson owns real property in Sweet Grass County, Montana that he has leased to Pattern for the development of CMW. Exhibit P-201

¹ Intervenor Wild Eagle Mountain Ranch, LLC, has asserted the same positions and arguments of Plaintiffs in regards to the preliminary injunction matters.

9. Jarrett and Anderson, by leasing their property to CMW for the construction of the wind farm at issue, hope to create a source of income to sustain their family ranches, to help pay for necessary ranch and medical bills, and as a source for retirement funds. Exh. 112, Testimony of Jarrett and Anderson.
10. The proposed location of CMW is outside Springdale, Montana, in Park and Sweet Grass Counties. Aff. Ward Marshall. (Dkt. 25 p. 8-9 Nov. 8, 2018). The land owned by Plaintiffs and Intervenor completely surround and abut the land owned by Jarrett and Anderson, with the exception of one State school section. Exhibit P-211.
11. Pattern purchased the CMW project in 2016 from Martin Wilde of WINData LLC. Ward Marshall Testimony (Feb. 21, 2019). Among the assets Pattern purchased were resource assessment data that had been collected by meteorological towers that were installed on Jarrett's property in 2004, real estate contracts with Jarrett and Anderson, environmental study reports, and interconnection study reports. *Id.*
11. Pattern's interest in acquiring CMW arose out of its collection of wind resource assessment data and its proximity to a substation on site to which the energy collected by CMW's turbines could be transferred and sold to Northwestern Energy. Marshall Testimony.
12. CMW will be comprised of 22 turbines manufactured by General Electric, each of which has a nameplate capacity of 3.63 megawatts. Aff. Marshall p. 10. The total nameplate capacity of the CMW facility will be 79.9 megawatts. Aff. Allen Wynn. (Dkt. # 26) (Nov. 7, 2018). These turbines were ordered in December 2018, after this action was filed and the preliminary injunction hearing was set. Marshall hearing testimony.

13. The 22 turbines will be located on private property owned by Jarrett and Anderson and leased to Pattern for the construction and operation of CMW. Marshall Testimony; Alfred Anderson Testimony (Feb. 20, 2019); Richard Jarrett Testimony (Feb. 20, 2019). These will be located about a mile north of Interstate 90, near the Crazy Mountains, near the Yellowstone River, and near the Lewis and Clark Trail. Exhibits P-211 and P-212.
14. Plaintiffs' witnesses asserted, and no witness really disagreed, that this area contains natural beauty, beautiful vistas, dark skies, and abundant wildlife and avian life. The Court observed the same on its visit.
15. CMW's turbines will be configured into four rows. Marshall Testimony. Each turbine has a maximum height of approximately 492 feet and the blades are approximately 300 feet in diameter. *Id.* There was no dispute that when constructed, the turbines will be the tallest structures in the State of Montana, and will be visible for miles.
16. The distance between a wind turbine and potentially occupied structures nearby is known as "setback." Aff. Marshall P13. The industry standard for wind turbine setbacks is approximately three times the tip height of the turbines, which for CMW would be approximately 1,500 feet. *Id.*; Marshall Testimony. The setback for all of CMW's turbines will be well in excess of 2,000 feet. Marshall Testimony.
17. The distance between a wind turbine and adjacent property lines, public roads, and transmission lines is known as the "fall down distance." Marshall Testimony. The industry standard for wind turbine fall down distances is 1.1 times the tip height of the turbines, which for CMW is approximately 550 feet. *Id.* CMW's turbines will all

1 have a fall down distance in excess of 550 feet. *Id.* All proposed CMW turbines are
2 located in excess of the fall down distance.

3 18. Within a one-mile buffer of CMW's project boundary, there are six potentially
4 occupied structures owned by the Plaintiffs in this case. Marshall Testimony; Pattern
5 Ex. 211.

6 19. Measured from the nearest turbine, the closest of the potentially occupied structures
7 owned by Plaintiffs is 3,927.20 feet. Aff. Marshall paragraph 18; Ollson Rpt. Table
8 2.

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10 20. Pattern retained NewFields, Inc. to create visual renderings of CMW, the results of
11 which were shared with Mr. Gordy and Mr. Chesnoff. Marshall Testimony; Allen
12 Wynn Testimony (Feb. 21, 2019).

13 21. The renderings demonstrated that CMW's turbines will not be visible from Mr.
14 Gordy's residence. However, they will be visible from areas on his property,
15 including his ranch manager's home. Russell Gordy Testimony (Feb. 20, 2019).

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17 22. The renderings show that Mr. Chesnoff will be able to see portions of nine turbines
18 from his residence. David Chesnoff Testimony. (Feb. 19, 2019). Demonstrative
19 Exhibit P-205.

20 23. The wind turbines will be visible from the Engwis property. The prime building site
21 on the Engwis property is located on a ridge that abuts the project area to the east.
22 This ridge also is the prime area for eagles and raptors. Engwis testimony. Exhibit P-
23 211. Exhibit P-9.

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25 24. Hunter Hot Springs was, at the turn of the century, a beautiful medicinal springs and
26 resort. It is located on Russell Gordy's property and he and his wife, planned to
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1 develop it to a beautiful historical reconstruction. Testimony of Russell Gordy.
2 Exhibit JA-111. Structure 22 on Exhibit P-212.

3
4 25. Mr. Gordy testified to the \$100,000 they spent in initial development and the efforts
5 they made in preparation to restore the historical hotel and hot springs when they
6 thought the wind project was dead, as a result of prior litigation.² They obtained
7 plans, hired an architect, hired a water expert, and worked through the conservation
8 easement that was in place.³

9
10 26. Once it became certain that this wind project was actually going forward, according
11 to Mr. Gordy's testimony, the Gordys halted the plans, given the location of the
12 Hunter Hot Springs to the turbines and their impact on the viewshed, serenity, the
13 environment, and the wildlife that would have drawn people to the location.⁴ Gordy
14 testified that he believed the negative impacts of the wind farm, should it be built,
15 would render the project not viable.

16
17 27. On August 18, 2017, Pattern entered into a Qualified Facility Power Purchase
18 Agreement ("PPA") with Northwestern Energy under the Public Utility Regulatory
19 Policies Act. Pattern Ex. 208. The PPA runs for a term of 25 years. *Id.*

20 28. Pattern claims that the PPA obligates CMW to be operating by December 31, 2019,
21 or the PPA will be terminated, ending the project. Exh. 208, Marshall testimony.
22 Plaintiffs dispute this assertion. Pattern further claims that in order to meet this
23 deadline, construction must start prior to April 1, 2019. This tight time-frame is the
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27 ² Gordy Hmg. Testimony.

³ Gordy Hmg. Testimony.

⁴ Gordy Hmg. Testimony and Aff.

1 reason that the Court did not wait for the production of a transcript prior to the filing
2 of the Findings and Conclusions.

3 29. The arguments of Plaintiffs and Intervenor against the CMW project, in their
4 pleadings and at the hearing, can be categorized as noise nuisance; lighting nuisance;
5 flicker nuisance; dust and noxious weed nuisance, primarily during construction;
6 unsightliness and aesthetic nuisance; risk to health; and harmful effects on wildlife,
7 birds, raptors, bats, and wildlife viewing nuisance. Plaintiffs have also claimed in
8 their Complaint an anticipatory constructive trespass, that CMW was developed
9 negligently, and that Pattern has committed an intentional tort. These were not the
10 focus of the Plaintiffs claims at the hearing. Complaint and Intervenor Complaint.

11
12 30. Defendants defend their position and rely on the following legal and factual
13 arguments: Plaintiffs' unsightliness and aesthetically-based allegations do not
14 constitute a nuisance because wind-generation facilities are statutorily authorized in
15 Montana; in Montana there is no recognized property right for an unimpeded
16 viewshed; the lights on the towers cannot constitute a nuisance as they are mandated
17 by federal law; Plaintiffs lack standing to pursue a nuisance claim based on the
18 public's interrupted view of the Crazy Mountains; and the Plaintiffs have no private
19 nuisance claim in the wildlife, birds, raptors, or bats as they are regulated by the State
20 of Montana or the federal government and Plaintiffs cannot prevail on a private
21 nuisance claim because they lack "special injury". See CRW and Pattern's Proposed
22 Findings of Fact and Conclusions of Law.
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- 1 31. There was significant testimony given at the preliminary injunction hearing regarding
2 whether the nuisances claimed by Plaintiffs were realistic, based in law, or could be
3 proven.
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5 32. There was significant testimony on the potential of damage to the viewshed of the
6 Plaintiffs; the noise generated by the turbines and any potential adverse effects on
7 Plaintiffs; the potential risk to the health of the Plaintiffs, potential harmful effects to
8 wildlife, birds, raptors, and bats; and to how Plaintiffs claim the construction of
9 CMW would adversely affect their use and enjoyment of their land. This testimony
10 was rebutted by the Defendants.
11
12 33. At this stage of the litigation, it is not required, nor is it proper for this Court to decide
13 these factual claims.

14
15 From the foregoing Findings of Fact, the Court enters the following:

16
17 CONCLUSIONS OF LAW

- 18 1. The Court has jurisdiction of this case.
19 2. Venue is proper in and has not been disputed.
20 3. Mont. Code Ann. § 27-19-201 authorizes the issuance of a preliminary injunction
21 under the following circumstances:
22 1) when it appears that the applicant is entitled to the relief demanded and the relief
23 or any part of the relief consists in restraining the commission or continuance of
24 the act complained of, either for a limited period or perpetually;
25 2) when it appears that the commission or continuance of some act during the
26 litigation would produce a great or irreparable injury to the applicant;
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1 3) when it appears during the litigation that the adverse party is doing or threatens or
2 is about to do or is procuring or suffering to be done some act in violation of the
3 applicant's rights, respecting the subject of the action, and tending to render the
4 judgment ineffectual;

5 4. The requirements of § 27-19-201 are disjunctive "meaning that findings that satisfy
6 one are sufficient" *Sweet Grass Farms, Ltd. V. Bd. of County Comm'rs* 2000 MT 147,
7 ¶ 27, 300 Mont. 66 P. 3d 825.

8 5. In *Yockey v. Kearns Props., LLC* 2005 MT 27, ¶ 18, 326 Mont. 28, 106 P. 3d 1185
9 the Montana Supreme Court explained:

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11 In determining the merits of a preliminary injunction it is not the province of
12 either the District Court or this Court on appeal to determine finally matters that
13 may arise upon a trial on the merits. *Sweet Grass*, ¶ 38. The limited function of a
14 preliminary injunction is to preserve the *status quo* and to minimize the harm to
15 all parties pending full trial; findings and conclusions directed toward the
16 resolution of the ultimate issues are properly reserved for a trial on the merits.
17 *Porter v. K & S Partnership* (1981), 192 Mont. 175, 183, 627 P. 2d 836, 840.

18 6. A preliminary injunction may issue under 27-19-201 (2) when it appears that the
19 commission or continuance of some act during the litigation would produce a great or
20 irreparable injury to the applicant *Caldwell v. Sabo*, 2013 MT 240, ¶ 29, 371 Mont.
21 328, 308 P. 3d 81.

22 7. An applicant for a preliminary injunction must establish a prima facie case, or show
23 that it is at least doubtful whether or not he will suffer irreparable injury before his
24 rights can be fully litigated. If either showing is made, then courts are inclined to
25 issue the preliminary injunction to preserve the status quo pending trial. *Benefis*
26 *Healthcare v. Great Falls Clinic, LLP*, 2006 MT 254, 334 Mont. 86, 146 P.3d 714,
27

1 quoting from *Porter v. K&S Partnership*, 192 Mont. 175, 181, 627 P.2d 836, 839
2 (1981).

- 3 8. Upon the requisite showing, a preliminary injunction is issued to maintain the status
4 quo pending trial, which is defined as the last actual, peaceable non-contested
5 condition which preceded the pending controversy. It is a court's duty to minimize
6 the injury or damage to all parties to the controversy. *Sandrock v. DeTienne*, 2010
7 MT 237, ¶ 16, 358 Mont. 175, 243 P. 3d 1123..
- 8 9. Defendants contend that "wind generation facilities like CMW are authorized and
9 promoted by Montana Statute, which means they cannot be a nuisance at law or
10 grounds for an injunction in anticipation of operation." Under Mont. Code Ann. §
11 27-30-101 "[n]othing that is done or maintained under the express authority of a
12 statute may be deemed a public or private nuisance." "As a threshold matter under
13 Mont. Code Ann. § 27-30-101(2) [this] court must inquire pursuant to the
14 particularized *Hassell v. City and Cnty. Of San Francisco*, 11 Cal.2d 168, 78 P.2d
15 1021, 1022-23 (1938) standard, whether the activity or facility is authorized either by
16 the express terms of the authorizing statute or by necessary implication therefrom."
17 Once it is determined that the activity or facility falls within the immunizing effects
18 of § 27-30-101(2) a plaintiff's only recourse is to then proceed to on a qualified
19 nuisance theory and prove negligence to warrant recovery. The *Hassell* test "requires
20 a particularized assessment of each authorizing statute in relation to the act which
21 constitutes the nuisance." By requiring that the authorizing statute contain an express
22 or necessarily implied authorization to do the very act which occasions injury, it is
23 ensured that "an unequivocal legislative intent to sanction a nuisance will be
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1 effectuated, while avoiding the uncertainty that would result were every generally
2 worded statute a source of undetermined immunity from nuisance liability.” *Barnes*
3 *v. City of Thompson Falls*, 1999 MT 77, 294 Mont. 76, 979 P.2d 1275 at P23. (Dkt. #
4 21 at p. 4).

5 10. Defendants concede that while “there is no statutory provision specifically exempting
6 wind generation facilities from all nuisance suits”. . . “the comprehensive statutory
7 scheme governing renewable energy clearly demonstrates the Montana legislature’s
8 explicit authorization, or at minimum, its necessarily implied authorization, to
9 promote the production of renewable energy.” *Brief in Opposition to Plaintiffs’*
10 *Motion for Preliminary Injunction* (Dkt. # 21 at p.4)

11 11. This Court’s review of the statutes concerning wind energy currently in place
12 certainly indicates that the Montana Legislature has done much to lay the foundation
13 for developing and operating renewable energy sources in Montana. However, this
14 Court could find no statutory provision specifically exempting wind generation
15 facilities from nuisance suits, or any civil nuisance liability. As far as express
16 statutory authorization goes, this case is similar to *Tally Bissell Neighbors, Inc. v.*
17 *Eyrie Shotgun Ranch, LLC*, 2010 MT 63, 355 Mont. 387, 228 P.3d 1134.

18 12. In *Tally Bissel Neighbors, supra*, the question of whether a shooting range was
19 statutorily authorized was disputed by the parties. The Montana Supreme Court
20 undertook the *Hassell* analysis to determine if an “unequivocal legislative intent” to
21 immunize shooting ranges from civil nuisance liability could be found. The Court
22 found that although the statutes in question “evinced the requisite unequivocal
23 legislative intent to protect shooting ranges from...planning zoning, community
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1 decay, litter, disorderly conduct, and criminal nuisance” no mention was made of
2 civil nuisance liability. *Tally Bissell Neighbors* at ¶ 28.

3 13. In 2011, after *Tally Bissell Neighbors*, the Legislature amended MCA Section 27-30-
4 101 to include Section (4) exempting “noise resulting from shooting activities at a
5 shooting range” from public nuisance liability.

6 14. This Court concludes that Mont. Code Ann. 27-30-101(4) (2011) demonstrates
7 “unequivocal legislative intent” to immunize shooting range noise from public
8 nuisance liability.

9 15. In the construction of a statute, the office of the judge is simply to ascertain and
10 declare what is in terms or in substance contained therein, not to insert what has been
11 omitted or to omit what has been inserted. Where there are several provisions or
12 particulars, such a construction is, if possible, to be adopted as will give effect to all.
13 Mont Code Ann. § 1-2-101

14 16. Here, the defendants contend that MCA §§ 15-6-225, 15-32-401, 15-24-1401, 15-24-
15 1402, 69-3-2002, 69-3-601, 602, 70-14-402, or 75-26-301 (“ the Wind statutes”)
16 “anticipate the whole life cycle of wind energy production, starting with the creation
17 of a new real property right needed to facilitate the siting of wind farms, to the
18 associated production of electricity through wind generation facilities and its ability
19 to sell to public utilities , and ending with the decommissioning of turbines at the end
20 of their useful lives.” *Brief in Opposition to Plaintiffs’ Motion for Preliminary*
21 *Injunction* (Dkt. # 21 at p.6).

22 17. This Court’s particularized assessment of the Wind Statutes
23 (MCA §§ 15-6-225, 15-32-401, 15-24-1401, 15-24-1402, 69-3-2002, 69-3-601, 602,
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1 70-14-402, or 75-26-301) reveals no "unequivocal legislative intent" to expressly or
2 impliedly authorize any act, in developing or operating a wind farm, which would
3 otherwise constitute a nuisance, or immunizes the development and/ or operation of a
4 windfarm from civil nuisance liability.

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6 18. In *Tarlton v. Kaufman*, 2008 MT 462 a dispute arose between two neighboring
7 property owners who disagreed on the presence of a 26 foot high fence measuring
8 270 feet in length, which was constructed by Kaufman's to block the glare from
9 Tarlton's exterior flood lights. The Tarltons alleged that the fence constituted a
10 nuisance under § 27-30-101. Specifically, Tarltons alleged that the fence destroyed
11 the aesthetic value of their property, that it destroyed their view, and that it was an
12 eyesore. Kaufmans counterclaimed that the Tarltons' yard lights constituted a
13 nuisance, stating that the lights "unreasonably interfere[d] with the Kaufmans' pursuit
14 of their hobbies, disturb[ed] wildlife in the area and interfere[d] with the Kaufmans'
15 general use and enjoyment of their property." The Montana Supreme Court concluded
16 that an instruction given to the jury improperly defined nuisance under Montana law,
17 where the instruction read "[g]enerally, a structure or condition cannot constitute a
18 nuisance merely because it is considered unsightly or because it obstructs a party's
19 view." *Tarlton*, ¶ 24. The Court held that this instruction could have precluded the
20 jury from finding the fence's impairment of the plaintiff's viewshed could constitute a
21 nuisance, due to the liberal construction of Montana's nuisance statute .
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24 19. "Montana's definition of nuisance which applies to both public and private nuisance
25 claims, states clearly that "[a]nything which is injurious to health, indecent or
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1 offensive to the senses, or an obstruction to the free use of property, so as to interfere
2 with the comfortable enjoyment of life or property... is a nuisance." *Id.*

3 20. The Montana Supreme Court "did not hold in *Tarlton* that a nuisance claim would lie
4 for any obstruction of view whatsoever." *Martin v. Artis*, 2012 MT 249, ¶ 15, 366
5 Mont. 513, 517, 290 P.3d 687, 690.

6 21. However, The Supreme Court in *Martin v. Artis* did hold that "while it is possible
7 under § 27-30-101(1), MCA, for "anything" to constitute a nuisance, a nuisance claim
8 must nonetheless plead a factual foundation that satisfies governing legal standards."

9 22. The ownership of a thing is the right of one or more persons to possess and use it to
10 the exclusion of others. In Montana, the thing of which there may be ownership is
11 called property. 70-1-101, MCA

12 23. The commission of a single act which is destructive to the affected property, either
13 physically or in the character in which it has been held or enjoyed, can result in an
14 irreparable injury. *Madison Fork Ranch v. L & B Lodge Pole Timber* (1980), 189
15 Mont. 292, 302, 615 P.2d 900, 906.

16 24. Continuing invasion of property rights also constitutes an irreparable injury; absent
17 injunctive relief, an injured party would be forced to bring a multiplicity of actions at
18 law in order to be compensated for the ongoing injury. See *Floyd v. City of Butte*
19 (1966), 147 Mont. 305, 313, 412 P.2d 823, 827.

20 25. In *Madison Fork Ranch v. L&B Lodge Pole Timber Prods.*, 189 Mont. 292, 615 P.2d
21 900 (1980), the Montana Supreme Court concluded that the District Court had not
22 abused its discretion in issuing a permanent injunction to stop the destruction of
23 standing timber. They similarly concluded that the injunction was not overbroad. In
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1 issuing its injunction the District Court had considered "the character and use of the
2 property" and that the principal use of the property was "recreational aesthetic and
3 environmental." *Madison Fork Ranch*, 189 Mont. at 302.

4 26. Based upon the testimony of the various plaintiffs who own land at or near the
5 boundary line of the proposed wind farm site, this Court finds that the plaintiffs'
6 principal use of their property is also "recreational aesthetic and environmental."
7 *Madison Fork Ranch*, 189 Mont. at 302.
8

9 27. This Court finds that plaintiffs have shown that, pursuant to Mont. Code Ann. 27-19-
10 201(2) the commission of an act i.e. the construction and operation of the wind farm
11 "is at least doubtful" to cause irreparable injury to the plaintiffs due their diminished
12 viewshed, the potential for shadow flicker, the alleged noise associated with wind
13 farms, golden eagle taking, or the loss of bats.
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15 28. The testimony of the Plaintiffs shows they clearly use and enjoy the entirety of their
16 properties, and not just their residences. Under Montana property law, this Court
17 concludes that it is "at least doubtful" shadow flicker or noise, especially at the
18 boundary of the windfarm development and not necessarily at the residences of the
19 Plaintiffs, could negatively impact Plaintiffs' ability to build a residence on the
20 property, and/or change the nature of the property, resulting in destruction of "the
21 character in which it has been held or enjoyed" thereby inflicting "irreparable harm".
22 *Benefis, supra*, at P14.
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24 29. The Court found particularly relevant to its conclusion that during the hearing on
25 Plaintiffs' Motion for Preliminary Injunction, Defendants' own expert on the noise
26 and shadow flicker associated with windfarms, Dr. Ollson, when asked what he
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1 would tell one of the Plaintiffs if they told him they were contemplating building a
2 house closer to the Wind Farm, placing it near the border of the same in the proximity
3 in which the effects of shadow flicker and noise begin to worsen, his reply in effect
4 was, "don't build your house there".

5 30. This Court in considering how to produce the "minimal harm to all parties", *Yockey*,
6 *supra*, concludes that a preliminary injunction is necessary, at least until the factual
7 issues and contentions of the parties may be heard at trial. Pattern claims it has
8 invested nearly \$10 million in the development of CMW, and that it anticipates
9 realizing approximately \$120 million in value over the project. They claim that it
10 will produce millions of dollars in revenue to Park and Sweet Grass counties and to
11 Anderson and Jarrett. Marshall, Jarrett, and Anderson testimony.

12 31. These claims rest entirely on Pattern's assertion that the PPA will be terminated and
13 the project will be dead, if construction has not started by April 1, 2019, or if the
14 project is not on line by December 31, 2019. The Court has read the PPA, and as
15 pointed out by the Plaintiffs, Pattern has not met any of the benchmark dates in
16 paragraph 5.2 and has not been required to produce any "remedial action plan".
17 Marshall testified that Pattern has not completed its financing of the project nor does
18 it even know whom the financiers will be; has not determined where, how, or from
19 whom it will get the thousands of gallons of water necessary for the construction of
20 the facility; has not received the construction permits necessary; and has not received
21 or applied for any federal "take" permit for the loss of eagles. Yet Pattern claims it
22 must start construction by April 1, 2019.
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32. More importantly, there has been no testimony or argument presented by the Defendants that would show that an extension of the PPA, or a new PPA, could or would not be able to be negotiated based upon the fact of this litigation. Should Pattern continue their millions of dollars in investments in building the wind farm and a trier of fact eventually find against their position, they would stand a substantial loss.
33. The Plaintiffs also have potential harm. They have testified as to their large investments in their property, how special the use and enjoyment of their properties are to them, how they have worked and planned to accumulate their properties for the specific uses they make of it, and how their claimed damages from the wind farm would affect them individually. The Court's site visit clearly shows the millions of dollars the Plaintiffs have invested in their properties. Gordy has testified regarding the Hunter's Hot Springs project and the loss of investment already made, as well as future investment.
34. Until the ultimate issues are decided by a trier of fact, the balance of equities does not fall in favor of one side or the other.
35. The last actual peaceable, non-contested condition here consisted of the area in question without the construction or operation of a wind farm
36. This Court finds that to preserve the "status quo" it is necessary to issue a preliminary injunction.
37. A question has arisen regarding the appropriate bond to be posted by Plaintiffs should a preliminary injunction issue. Plaintiffs have offered to deposit \$50,000.00 in cash in lieu of a bond. (Dkt. # 9). Pattern has asserted that the bond must cover "all of the

1 damages that may be suffered by a party who is wrongfully enjoined". Pattern asserts
2 a bond of \$181 million is appropriate. (Dkt. # 23). Anderson and Jarrett desire a bond
3 of \$5,000,000.00.

4 38. MCA Section 27-19-306(2)(a) limits the amount of the bond at \$50,000.00 for an
5 industrial operation or activity, unless the interests of justice require more. In
6 addition, it is to be "conditioned to indemnify the employees of the party enjoined or
7 restrained against lost wages, salaries, and benefits sustained by reason of the
8 injunction."

9
10 39. Subsection 27-19-306(2)(b) states an "industrial operation or activity includes but is
11 not limited to construction, mining, timber, and grazing operations". There can be
12 little doubt that the wind farm is a construction operation. There has been no
13 evidence of any loss of wages, salaries, and benefits sustained by the workers on this
14 project.

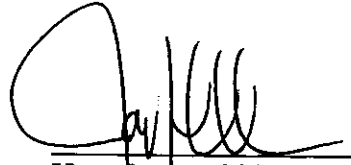
15
16 40. This Court finds that the \$50,000.00 cash bond offered by Plaintiffs is appropriate
17 and they shall deposit this with the Clerk of this Court within ten (10) days of the date
18 of this Order. The Clerk shall hold the same in an interest-bearing account. None of
19 this bond shall be released without Court Order.
20

21
22 Based upon the foregoing Findings of Fact and Conclusions of Law, the Court enters the
23 following:

- 24
- 25 1. The preliminary injunction is GRANTED.
 - 26 2. This preliminary injunction is limited to prevent any on-the-ground construction, road
27 modifications, or physical on-site modification.

1 The Clerk of Court is directed to file this *Findings of Fact, Conclusions of Law, Order on*
2 *Preliminary Injunction* and provide copies to counsel of record.

3 DATED this 19th day of March, 2019.

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6 
7 Hon. Jon A. Oldenburg
8 District Court Judge
9

10 xc: Stephen Woodruff
11 Inga Parsons
12 Elizabeth Greenwood
13 Scott Mitchell
14 Shane Coleman
15 John Sullivan
16 Monica Tranel
17 Nick Lofing
18 Andrew Person
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