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MONTANA FIFTH JUDICIAL DISTRICT COURT

MADISON COUNTY

SITZ ANGUS RANCH; BILL MYERS; and )  
MONTANA STOCKGROWERS )  
ASSOCIATION, INC., on behalf of its )  
members, )

Cause No. DV 29-2008-34

Petitioners, )

vs. )

MONTANA BOARD OF LIVESTOCK; )  
MONTANA DEPARTMENT OF )  
LIVESTOCK, an agency of the State of )  
Montana; STATE OF MONTANA; and DR. )  
MARTIN ZALUSKI, in his capacity as )  
Montana State Veterinarian, )

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR JUDGMENT  
ON THE PLEADINGS**

Respondents, )

and )

EDITH FORD, JOANNE MAYO, ED )  
MILLSPAUGH, TOM SHEPERD, ANN )  
STOVALL, JOANN STOVALL, KARRIE )  
TAGGART, JEANNETTE THERIEN, )  
GREATER YELLOWSTONE COALITION, )  
and NATURAL RESOURCES DEFENSE )  
COUNCIL, )

Respondent-Intervenors. )

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## INTRODUCTION

This case involves a controversy over management of bison that migrate into Montana, crossing the west boundary of Yellowstone National Park. Petitioners Sitz Angus Ranch, Bill Myers, and Montana Stockgrowers Association, Inc. (“Petitioners”) seek a court order requiring the Montana Department of Livestock (“DOL”) to remove wild bison, through hazing or slaughter, from private and public lands in the area known as “Zone 2,” adjacent to the western boundary of Yellowstone National Park, by May 15 of each year. See First Amend. Compl. ¶¶ 39, 44, 45 (May 30, 2008). Plaintiffs cannot obtain the relief they seek Respondents are not bound by a mandatory legal duty. Such a legal duty is a necessary requirement for both of Petitioners’ claims. Accordingly, Respondent-Intervenors request that this Court issue a judgment in favor of Respondents and Respondent-Intervenors on the pleadings. See Mont. Rule Civ. P. 12(c).

## STANDARD OF REVIEW

Montana Rule of Civil Procedure 12(c) provides that, “[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.” Such motions are “designed to provide a means of disposing of cases when the material facts are not in dispute between the parties and a judgment on the merits can be achieved by focusing on the content of the competing pleadings, exhibits thereto, matters incorporated by reference in the pleadings, whatever is central or integral to the claim for relief or defense, and any facts of which the district court will take judicial notice.” Firelight Meadows, LLC v. 3 Rivers Telephone Co-op., Inc., 2008 MT 202, ¶ 10, 344 Mont. 117, 120, 186 P.3d 869, 872 (quoting 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil § 1367 at 206-07 (3d ed.,

Thomson-West 2004)).<sup>1</sup> “The motion is properly granted when, taking all of the well-pleaded factual allegations in the nonmovant’s pleadings as true, the material facts are not in dispute and the moving party is entitled to judgment as a matter of law.” Id. ¶ 11; see also Lohmeier v. Gallatin County, 2006 MT 88, ¶ 8, 332 Mont. 39, 41, 135 P.3d 775, 776. Under this standard, judgment should be entered for Respondents and Respondent-Intervenors.

## **ARGUMENT**

Judgment should be entered against Petitioners because, even assuming the truth of all factual allegations in their complaint, Petitioners’ claims fail as a matter of law. See Mont. Rule Civ. P. 12(b)(6), 12(c). Petitioners allege that DOL has a “clear legal duty” under the Interagency Bison Management Plan (“IBMP”) and Montana regulations to remove all bison from Zone 2 of Yellowstone National Park’s western boundary area by May 15 each year. See First Am. Compl. ¶ 38; see also id. ¶¶ 42, 44. To the contrary, neither the IBMP nor state law creates an enforceable obligation that requires DOL to take the action Petitioners’ urge by May 15. Petitioners cannot obtain a court order compelling DOL to take an action that is within the discretion of the agency.

### **I. THE REQUESTED RELIEF DEPENDS ON THE EXISTENCE OF A LEGAL DUTY TO REMOVE BISON BY MAY 15**

Petitioners’ action for mandamus and declaratory and injunctive relief seeks to enforce an alleged duty on the part of the Montana DOL to haze or kill bison in the western boundary area by May 15 each year. See First Amend. Compl. An action for declaratory relief asks the Court

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<sup>1</sup> “Materials referred to in a pleading” are considered a part of the pleading for the purpose of Rule 12(c) motions. Firelight Meadows, LLC, 2008 MT 202, ¶ 15. In this motion, Respondent-Intervenors rely upon the First Amended Complaint and the Interagency Bison Management Plan (“IBMP”). The IBMP is properly considered in this motion because it is referenced and cited in the First Amended Complaint at ¶¶ 4, 10-15, 18, 37, and is attached to Petitioners’ brief in support of application for alternative writ of mandate, which the First Amended Complaint expressly incorporates at ¶ 38.

“to declare rights, status, and other legal relations.” Mont. Code Ann. § 27-8-201; see also Miller v. State Farm Mut. Auto. Ins. Co., 2007 MT 85, ¶ 7, 337 Mont. 67, 69, 155 P.3d 1278, 1280. To succeed on their declaratory relief claim, Petitioners must establish that they have a legal right under the IBMP and state law to the requested action. See Mont. Code Ann. § 27-8-202 (“Any person ... whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.”).

Petitioners’ mandamus claim likewise requires the Court to find that Petitioners have a legal right to the removal of bison from outside Yellowstone National Park by May 15. Indeed, to maintain a mandamus action, Petitioners must establish that there is a “clear legal duty” which requires DOL to take the requested action. Smith v. County of Missoula, 1999 MT 330, ¶ 28, 297 Mont. 368, 376, 992 P.2d 834, 839 (emphasis added); see also State v. Toole (1905), 32 Mont. 4, 79 P. 403, 405 (Petitioner in mandamus action must establish “a clear, legal right in himself to have a particular act or a duty performed by the defendant.”); see also Mont. Code Ann. § 27-26-102. “For a court to grant a writ of mandate, the clear legal duty must involve a ministerial act, not a discretionary act.” Smith, 1999 MT 330, ¶ 28 (citing Withers v. County of Beaverhead (1985), 218 Mont. 447, 450, 710 P.2d 1339, 1341). Thus, mandamus will lie only when “the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.” Id. (quoting State v. Cooney (1936), 102 Mont. 521, 529, 59 P.2d 48, 53).

As described below, neither the IBMP nor state law imposes on DOL a legal duty to haze or kill bison in Yellowstone National Park’s western boundary area by May 15. Because

Petitioners' claims depend on the existence of a legal duty that does not exist, judgment should be entered against Petitioners.

## **II. THE IBMP DOES NOT CREATE AN ENFORCEABLE LEGAL DUTY TO HAZE OR KILL BISON BY MAY 15**

First, Petitioners wrongly rely on the IBMP as a source of legal obligations to be enforced in this case. See First Amended Complaint at ¶¶ 10-12, 14-15, 18-20, 22-25, 29-33, 37-39, 42-44. The IBMP does not create rights in Petitioners or legal obligations in DOL that are subject to enforcement through this action. The IBMP is a plan developed by the National Park Service, the U.S. Forest Service, Animal and Plant Health Inspection Service, DOL, and Montana Fish, Wildlife and Parks (“the agencies”) to guide management of bison in Yellowstone National Park and Montana. See First Am. Compl. ¶¶ 10-12; IBMP, ROD at 2. Petitioners inaccurately describe the IBMP as a set of permanent management prescriptions, including the requirement to haze bison from Zone 2 into Yellowstone National Park each year. See, e.g., id. ¶¶ 22-24. The IBMP instead adopts an “adaptive management” approach that contemplates adjustments in bison management in response to changed circumstances and new information. See IBMP at 2, 16-17, ¶ 29. However, even if the direction of the IBMP were static, as Petitioners urge, it nonetheless cannot be enforced through this action because it does not carry the force of law.

The IBMP is not set forth in the constitution or a statute duly adopted by the State legislature. See Mont. Code Ann. § 1-1-102 (laws are expressed by statute or the constitution). Nor has the IBMP been promulgated by DOL or any other agency as a “legislative rule” in accordance with the Montana Administrative Procedure Act. See id. § 2-4-102(13)(a); see also, cf., United States v. Fifty-Three (53) Eclectus Parrots, 685 F.2d 1131, 1136 (9th Cir. 1982) (federal agency policy manual that is “not promulgated in accordance with the procedural requirements of the [federal] Administrative Procedure Act,” i.e., notice and comment

rulemaking, does not have the independent force of law). Nor does Montana law otherwise mandate compliance with the IBMP; instead, it provides that DOL “may, under a plan approved by the governor” take any of several listed bison management actions. See Mont. Code Ann. § 81-2-120(1) (emphasis added). The use of the term “may” denotes agency discretion—not a mandatory agency obligation. See Laudert v. Richland County Sheriff's Dept., 2000 MT 218, ¶ 38, 301 Mont. 114, 124, 7 P.3d 386, 393. Therefore, even assuming the IBMP directs DOL to take the management actions that Petitioners allege—which Respondent-Intervenors dispute—the IBMP does not have the force of law and cannot be enforced by the Court as requested by Petitioners.

Contrary to Petitioners’ suggestion, the IBMP is not made enforceable through the adoption of a Record of Decision (“ROD”) pursuant to the environmental review process of the Montana Environmental Policy Act (“MEPA”), Mont. Code Ann. § 75-1-101, et seq. See First Am. Compl., ¶¶ 11, 37. The purpose of MEPA is not to establish legally enforceable directives, but rather to “provide for the adequate review of state actions in order to ensure that environmental attributes are fully considered.” Id. § 75-1-102. The statute is expressly “procedural” in nature. See id. Under MEPA, a ROD “is a public notice of what the decision is, the reasons for the decision, and any special conditions surrounding the decision or its implementation,” Admin. R. Mont. 32.2.238(1)—not an enforceable legal mandate. Indeed, in addressing the analogous requirements of the federal National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 et seq., the U.S. Supreme Court has emphasized that “NEPA itself does not mandate particular results, but simply prescribes the necessary process,” and has specifically rejected a lower court holding that “NEPA requires that action be taken” to mitigate environmental impacts. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350, 353

(quotations and citation omitted). Such federal case law interpreting NEPA is persuasive when interpreting MEPA because MEPA is modeled on NEPA. See Ravalli County Fish and Game Ass'n, Inc. v. Mont. Dept. of State Lands (1995), 273 Mont. 371, 903 P.2d 1362.

Because the adoption of a ROD does not create any substantive legal rights or responsibilities, it cannot form the basis for Petitioners' action. See Sierra Club v. Van Antwerp, 526 F.3d 1353, 1362 (11th Cir. 2008) ("The [National Environmental Policy Act ("NEPA")] process can never provide grounds for a court to direct an agency's substantive decision.") (emphasis in original); see also Homeowners Ass'n, Inc. v. Adams, 492 F. Supp 521, 529 (W.D.N.C. 1979) (holding there is no cause of action to enforce the provisions of an Environmental Impact Statement under NEPA); Daniel R. Mandelker, NEPA Law and Litigation § 4.64, at 4-218 (2d ed. 2006) ("Mandamus is not likely to be available to compel the performance" of duties under NEPA other than duty "to prepare an impact statement"). Accordingly, Petitioners' attempt to enforce an alleged bison-hazing deadline in the IBMP, which is not legally enforceable, should be rejected.

### **III. MONTANA LAW DOES NOT IMPOSE A DUTY ON DOL TO HAZE OR KILL BISON BY MAY 15**

Petitioners also erroneously claim that Montana law provides "a clear legal duty" to remove bison from outside the western boundary of Yellowstone National Park by May 15 of each year. See First Am. Compl., ¶¶ 35, 42. Montana law never mentions a May 15 deadline for hazing bison. Further, like the IBMP, Montana law vests DOL with discretion in managing bison. Montana law thus does not provide a basis for the declaratory or mandamus relief that Petitioners seek.

Contrary to Petitioners' claim, see id., section 81-2-120 of the Montana Code Annotated, addressing the management of wild buffalo or bison for disease control in the state of Montana,

does not mandate the removal of all wild bison from outside of Yellowstone National Park by May 15. Mont. Code Ann. § 81-2-120. The statute states: “Whenever a publicly owned wild buffalo or bison from a herd that is infected with a dangerous disease enters the state of Montana on public or private land ... the department may, under a plan approved by the governor, use any feasible method in taking one or more of the following actions... .” Id. The statute lists the available management techniques for controlling wild bison in the state of Montana, including: physical removal via hazing and aversion tactics or capture, transportation, quarantine, slaughter, destruction by firearms, public hunts, and vaccination. See id. The statute does not include any direction that DOL must remove bison by May 15. Instead, it provides that DOL “may” take action when infected bison enter Montana, provides a list of acceptable actions DOL “may” take, and nowhere states a deadline for taking such action. See id.; see also Admin. R. Mont. 32.3.224A (listing management actions, but not stating deadline). As a result, DOL retains discretion under state law regarding what actions may be taken, and when, to manage wild bison in Montana. See Laudert, 2000 MT 218, ¶ 38 (“The use of the word ‘may’ indicates that the [agency] has the discretion ...”).

Without the existence of a specific mandatory duty required by law, Petitioners do not have a legal right to bison removal by May 15 that can be enforced through this action. See Miller, 2007 MT 85, ¶ 8; Toole 32 Mont. 4, 79 P. 403. Accordingly, there is no legal basis for Petitioners’ claims and judgment should be entered in favor of Respondents and Respondent-Intervenors.

## **CONCLUSION**

For all of the foregoing reasons, Respondent-Intervenors respectfully request that this Court grant their motion for judgment on the pleadings be granted.



Respectfully submitted this 29th day of October, 2008.

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