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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, 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, 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.	Cause No. DV 29-2008-34 **RESPONDENT-INTERVENORS' MOTION TO TRANSFER VENUE AND TO DISMISS and BRIEF IN SUPPORT OF MOTION**

Respondent-Intervenors Edith Ford, et al., hereby move to transfer venue of this action to Gallatin County pursuant to Mont. Code Ann. § 25-2-201(1) and Montana Rule of Civil Procedure 12(b)(ii) because Madison County is not the proper county for Petitioners' claim under the Montana Environmental Policy Act ("MEPA"), Mont. Code Ann. § 75-1-101, et seq. See Mont. Code Ann. § 75-1-108. Petitioners' MEPA claim is set forth as Count 3 in Petitioners' Second Amended Complaint for Declaratory and Injunctive Relief and Application for Alternative Writ of Mandate ("Second Amended Complaint").

This motion also presents Respondent-Intervenors' arguments for dismissal of two of Petitioners' amended claims. Montana Rule of Civil Procedure 12(b)(ii) provides that

> [e]very defense in law or fact, to a claim for relief in any pleading which defendant desires to present by way of motion as hereinabove provided must be joined with, or inserted in, the motion requesting a change in the place of trial.

Accordingly, by this motion, Respondent-Intervenors move to dismiss Counts 1 and 2 of Petitioners' Second Amended Complaint on the ground that these counts fail to state a claim upon which relief can be granted. See Mont. R. Civ. P. 12(b)(6).

Rule 12(b)(ii) requires that a defendant must present a transfer request under Mont. Code Ann. § 25-2-201(1) by motion "at the time of defendant's first appearance," and Rule 12(b) provides that a dismissal motion "shall be made before pleading if a further pleading is permitted." Therefore, Respondent-Intervenors submit this motion in advance of filing their answer to Petitioners' Second Amended Complaint. The rule also provides that where, as here, a defense is raised in conjunction with a motion to transfer venue,

> [i]f the court in which the action is commenced grants the request for change of venue, that court shall not consider nor pass upon other defenses in law, or fact, presented by the motion, but such shall be considered and decided by the court sitting in the proper county after the transfer has been completed.

Mont. R. Civ. P. 12(b)(ii). Consistent with this provision, Respondent-Intervenors present their dismissal arguments for resolution by this Court or the Gallatin County court, depending on this Court's resolution of Respondent-Intervenors' transfer motion.

BACKGROUND

This case involves management of bison that migrate into Montana, crossing the west boundary of Yellowstone National Park into the Horse Butte area north of West Yellowstone. Petitioners Sitz Angus Ranch, Bill Myers, and Montana Stockgrowers Association, Inc., ("Petitioners") filed this action on May 27, 2008, and filed their First Amended Complaint for Declaratory and Injunctive Relief and Application for Alternative Writ of Mandate ("First Amended Complaint") on June 2, 2008.

In their First Amended Complaint, Petitioners' raised two claims seeking mandamus, declaratory and injunctive relief and requested an 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, which consists of Horse Butte and surrounding lands adjacent to the western boundary of Yellowstone National Park. See First Amend. Compl. ¶¶ 39, 44, 45. In requesting such relief, Petitioners relied on management provisions set forth in the Interagency Bison Management Plan ("IBMP") adopted in December 2000 by DOL and other agencies. See, e.g., id. ¶¶ 39, 45. The IBMP provisions that Petitioners asked this Court to enforce designated the Zone 2 area and generally called for hazing and capture of bison leaving Yellowstone Park, testing of captured bison for exposure to the disease brucellosis, slaughter of those testing positive, slaughter of even untested bison when the Yellowstone population reaches certain levels, and hazing or slaughter of all bison from Zone 2 by May 15 each year. See id. ¶¶ 18, 23.

However, even as Petitioners' First Amended Complaint was pending in this Court, the IBMP provisions upon which Petitioners relied were subject to potentially major changes due to an ongoing adaptive management process of the IBMP partner agencies. See Second Amend. Compl. Exs. 3, 4. On December 17, 2008, that process culminated in a decision by DOL and other state and federal agencies to adopt new Adaptive Adjustments to the IBMP ("IBMP Adaptive Adjustments"). See Second Amend. Compl. Exs. 1, 2. The IBMP Adaptive Adjustments modified bison management prescriptions for the Horse Butte area in response to land management changes that substantially reduced cattle presence in Zone 2. See id. These modifications included: (1) allowing an unlimited number of untested bull bison to occupy the area of Zone 2 south of Duck Creek on the western boundary of Yellowstone National Park year-round, Second Amend. Compl. Ex. 2 at 3, Mgmt. Action 1.2.a; (2) allowing unlimited untested female bison on Horse Butte, as many as 30 untested female bison south of Horse Butte on the Madison Arm, and as many as 40 untested female bison north of Horse Butte in the area north of Duck Creek and east of Corey Springs (all within Zone 2) until a spring return date to be determined each year, id. at 1, Mgmt. Action 1.1.a; (3) "[u]s[ing] slaughter only when necessary; attempt to use other risk management tools first," id. at 5, Mgmt. Action 2.2.a; and (4) directing DOL and the National Park Service to "assess the prevailing environmental conditions and reach consensus by May 13 on a step-wise, integrated plan for the end-of-winter return of bison into" Yellowstone Park, "with a target date of May 15," id. at 7, Mgmt. Action 3.2.c (emphasis added).

In adopting these changes, the IBMP partner agencies emphasized that "[t]hese changes do not increase the risk of transmission of brucellosis to cattle or diminish the conservation of wild, free-ranging bison." Second Amend. Compl. Ex. 1, at 1. Indeed, the IBMP Adaptive Adjustments included a commitment to, "[a]s necessary, institute bison hazing, capture, or lethal

removal to prevent bison from entering cattle-occupied properties" and to remove bison from any "areas that will be occupied by cattle within 20 days." Second Amend. Compl. Ex. 2, at 7, Mgmt. Action 3.2.a.

As a result of these IBMP Adaptive Adjustments, the IBMP management guidelines that Petitioners asked this Court to enforce in their First Amended Complaint are no longer in effect. As Petitioners recognize, these IBMP Adaptive Adjustments "render moot the Petitioner's underlying claims in this case." Second Amend. Compl. at 34, ¶ 4.

Petitioners responded to the IBMP Adaptive Adjustments on December 23, 2008, by seeking leave to file their Second Amended Complaint. The Second Amended Complaint repeats the same two claims originally pled in the Petitioners' First Amended Complaint, but supplements those claims with two new claims attacking the IBMP Adaptive Adjustments. See id. ¶¶ 49-87. The first of the new claims, styled as Count 3, alleges a MEPA violation, claiming that DOL erred in failing to prepare adequate environmental analysis before approving the IBMP Adaptive Adjustments. See id. ¶¶ 61-81. The second new claim, styled as Count 4, alleges that the IBMP Adaptive Adjustments violate Article II, Section 3, of the Montana Constitution guaranteeing a clean and healthful environment. See id. ¶¶ 82-87. This Court granted Petitioners' motion to file the Second Amended Complaint on December 24, 2008. See Omnibus Order (Dec. 24, 2008).

ARGUMENT

I. THIS COURT SHOULD TRANSFER THIS ACTION TO GALLATIN COUNTY

This Court should transfer this action to Gallatin County because Madison County is not a proper venue for Petitioners' new MEPA claim. Pursuant to Mont. Code Ann. § 25-2-201(1), this Court "must, on motion, change the place of trial … when the county designated in the

complaint is not the proper county." See Liang v. Lai, 2004 MT 188, ¶ 13, 322 Mont. 199, ¶ 13, 94 P.3d 759, ¶ 13 ("A district court must grant [a motion for change of venue] if the county in which the action is filed is not a proper place for trial."). Moreover, where, as here,

> the complaint contains more than one cause of action, on one of which defendant is entitled to a change of venue, the motion must be granted, though the other cause or causes of action may be properly triable where the action was commenced.

Beavers v. Rankin (1963), 142 Mont. 570, 572, 385 P.2d 640, 641; see also Mont. Code Ann. § 25-2-116 (setting forth same rule). Accordingly, this Court should transfer this entire action to Gallatin County.

Gallatin County is the only proper forum for Petitioners' MEPA claim. MEPA's venue provision states:

> A proceeding to challenge an action taken pursuant to parts 1 through 3 must be brought in the county in which the activity that is the subject of the action is proposed to occur or will occur. If an activity is proposed to occur or will occur in more than one county, the proceeding may be brought in any of the counties in which the activity is proposed to occur or will occur.

Mont. Code Ann. § 75-1-108 (emphases added); see also Mont. Code Ann. § 25-2-131 (providing that specific statutes control over general statutes in venue determination); Whalen v. Montana Right to Life Ass'n, 2002 MT 328, ¶ 9, 313 Mont. 204, ¶ 9, 60 P.3d 972, ¶ 9 (stating same rule).[1]

Here, Gallatin County is "the county in which the activity that is the subject of the action is proposed to occur or will occur." Mont. Code Ann. § 75-1-108. The subject of Petitioners' action is the state Respondents' adoption of "a plan to allow uncontrolled introduction of bison into Zone 2." Second Amend. Compl. ¶ 38; see also id. ¶¶ 15 (alleging threat of harm from

[1] Petitioners seek to enforce duties imposed by Parts 1 and 2 of the MEPA statute, so their MEPA claim falls within the scope of the MEPA venue provision. See Second Amend. Compl. ¶¶ 15 (invoking MEPA venue provision), 62, 66, 67, 70, 78 (alleging MEPA statutory duties).

Respondents' "allowing a significant number of untested bison to migrate into and to occupy portions of Zone 2"), 39 (enumerating "significant modifications" to IBMP, all relating to "Zone 2"); 71 (MEPA claim alleging that "Petitioners are concerned about provisions to allow untested bison, particularly pregnant bison, to remain in the Horse Butte Peninsula and the Flats area … in direct contravention to the existing IBMP's requirement that only seronegative bison be allowed into the Western Boundary Area of Zone 2").

Indeed, the IBMP Adaptive Adjustments challenged by Petitioners call for management changes exclusively within the western boundary's Zone 2 area. The IBMP Adaptive Adjustments set out a goal of "[i]ncreased tolerance for bison in Zone 2." Second Amend. Compl. Ex. 2, at 1. They call for "allow[ing] untested female bison … to migrate onto and occupy the Horse Butte peninsula … and the Flats … each winter and spring in Zone 2"; "[a]llow[ing] bachelor groups of bull bison to occupy suitable habitat areas outside the west boundary of YNP in the portion of Zone 2 south of Duck Creek each year"; and even mandate prevention of bison movement beyond Zone 2. Id. at 1, 3, Mgmt. Actions 1.1.a, 1.2.a. In short, "the activity that is the subject" of Petitioners' action, Mont. Code Ann. § 75-1-108, will occur exclusively within Zone 2 of the western boundary area.

The west boundary's Zone 2, in turn, lies exclusively within Gallatin County. Zone 2 is clearly mapped on pages 4 and 6 of the IBMP, which is attached as Exhibit 6 to Petitioners' May 27, 2008 mandamus application to this Court. For the Court's convenience, these maps are reproduced as Exhibit 1 to this motion. As these maps demonstrate, the western boundary of Zone 2 does not extend past the western terminus of the Horse Butte peninsula. The Madison County line is located much further westward, west of Hebgen Dam. In the west boundary area, Gallatin County is the only county containing Zone 2 and therefore the only "county in which the

activity that is the subject of [Petitioners' MEPA] action is proposed to occur or will occur." Mont. Code Ann. § 75-1-108.

In their Second Amended Complaint, Petitioners seek to avoid this conclusion by alleging that venue in Madison County is proper under Mont. Code Ann. § 75-1-108 because "the modifications to the IBMP adopted by Respondents under the IBMP Adaptive Management Plan impact Madison County, and any negative consequences … from those modified IBMP activities will transpire, in part, in Madison County." Second Amend. Compl. ¶ 15. Petitioners thus treat the MEPA venue test as if it focused on the location of the "impact[s]" and "consequences" of a challenged agency activity. Id. However, that is not what Mont. Code Ann. § 75-1-108 says. The statute does not broadly provide for venue of MEPA actions in any county in which the impacts or consequences of agency activity will be felt. Instead, it provides that such actions "must be brought" in the county in which the "activity" itself will occur. Mont. Code Ann. § 75-1-108 (emphases added); see State v. Kroll, 2004 MT 203, ¶ 17, 322 Mont. 294, ¶ 17, 95 P.3d 717, ¶ 17 ("Where the plain language of the statute is clear and unambiguous, no further interpretation is required."); see also Memorandum and Order on Def. Golden Sunlight Mines' Motion for Change of Venue, Montana Envtl. Info. Ctr. v. Montana Dep't of Envtl. Quality, No. CDV 2007-899 (Mont. First Jud. Dist. Ct. Mar. 28, 2008) (transferring lawsuit challenging mining project to county where mine is located based on statute mandating venue in county where "activity is proposed to occur") (attached as Exhibit 2).[2]

In sum, Gallatin County is the exclusive venue for Petitioners' MEPA claim under Mont. Code Ann. § 75-1-108. Accordingly, this Court should transfer Petitioners' entire action to the

[2] The venue provision at issue in Montana Environmental Information Center, like the MEPA venue provision at issue here, was enacted by the 2003 Montana Legislature in ch. 361, "An Act Generally Revising Laws Governing the Environment," and employs similar language to the MEPA provision.

Montana Eighteenth Judicial District Court in Gallatin County. See Beavers, 142 Mont. at 572, 385 P.2d at 641; Mont. Code Ann. § 25-2-116.[3]

II. COUNTS 1 AND 2 OF THE SECOND AMENDED COMPLAINT SHOULD BE DISMISSED

The first two counts of Petitioners' Second Amended Complaint, alleging mandamus and declaratory judgment actions, should be dismissed pursuant to Montana Rule of Civil Procedure 12(b)(6). These claims seek an order from this Court mandating that Respondents take certain bison hazing and slaughter actions pursuant to the IBMP (as it stood prior to the IBMP Adaptive Adjustments) in the Zone 2 area. Petitioners cannot obtain the relief they seek because Respondents are not bound by a mandatory legal duty to take the actions demanded by Petitioners. Such a mandatory duty is a necessary requirement for Counts 1 and 2 of Petitioners' claims. These claims therefore should be dismissed.

This Court should dismiss a claim under Rule 12(b)(6) when it concludes "that the plaintiff would not be entitled to relief based on any set of facts that could be proven to support the claim." Good Schools Missoula, Inc. v. Missoula County Pub. Sch. Dist. No. 1, 2008 MT 231, ¶ 15, 344 Mont. 374, ¶ 15, 188 P.3d 1013, ¶ 15 (quotations and citation omitted). While "[f]acts must be viewed in a light most favorable to the plaintiff" in reviewing a Rule 12(b)(6) motion, "the court is under no duty to take as true legal conclusions or allegations that have no factual basis." Cowan v. Cowan, 2004 MT 97, ¶ 14, 321 Mont. 13, ¶ 14, 89 P.3d 6, ¶ 14. "Whether a complaint states a claim for which relief can be granted is a question of law … ." Good Schools Missoula, ¶ 15. "The only relevant document when considering a motion to

[3] Gallatin County is also an appropriate venue for the non-MEPA counts of Petitioners' Second Amended Complaint—i.e., Counts 1, 2, 4 and 5. See Mont. Code Ann. §§ 25-2-125, 25-2-126 (providing that proper place of trial for actions against public officers or the state includes county in which claim arose).

dismiss is the complaint and any documents it incorporates by reference." Cowan, ¶ 11. Further, because "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes," Mont. R. Civ. P. 10(c), "[t]he mere fact that documents are attached to a complaint does not automatically require that the motion to dismiss be converted into a Rule 56 motion for summary judgment." Cowan, ¶ 11 (affirming dismissal).

A. The Requested Relief Depends On The Existence Of A Legal Duty To Remove Bison By May 15

The touchstone of Petitioners' claims for both mandamus and declaratory and injunctive relief (Counts 1 and 2) is the existence of a duty on the part of Respondents to haze or kill bison in Zone 2 of Yellowstone National Park's western boundary area by May 15 each year. See Second Amend. Compl. ¶¶ 53-54, 58-60. Absent such a duty, Petitioners cannot maintain these claims.

Count 1, Petitioners' mandamus claim, asks this Court to find that Petitioners have a legal right to the removal of bison from outside Yellowstone National Park by May 15. To maintain their 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, ¶ 28, 992 P.2d 834, ¶ 28 (emphasis added); see also State ex rel. Breen 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, ¶ 28. 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).

Count 2, Petitioners' action for declaratory and injunctive relief, likewise asks this Court "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, ¶ 7, 155 P.3d 1278, ¶ 7. To succeed on their declaratory relief claim, Petitioners also must establish that they have a legal right under the IBMP and/or 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.").

As described below, neither the IBMP (even as it existed prior to the IBMP Adaptive Adjustments) 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 in conformance with Petitioners' wishes.

B. 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 Second Amend. Compl. ¶¶ 52-54, 57-60. 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 to guide management of bison in Yellowstone National Park and Montana. See id. ¶¶ 17-18; IBMP Record of Decision ("IBMP ROD") at 2 (Ex. 6 to Petitioners' May 27, 2008 Mandamus

Application).[4] Petitioners inaccurately describe the IBMP as a rigid set of permanent management prescriptions, including the requirement to haze bison from Zone 2 into Yellowstone National Park by May 15 each year. See, e.g., Second Amend. Compl. ¶¶ 20-21, 24, 27-30. In fact, the IBMP adopts an "adaptive management" approach that allows the implementing agencies to make adjustments to bison management, such as those made in the IBMP Adaptive Adjustments concerning the Horse Butte area. See IBMP at 2 and 16-17, ¶ 29 (Ex. 6 to Petitioners' May 27, 2008 Mandamus Application).

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); United States v. Fifty-Three (53) Eclectus Parrots, 685 F.2d 1131, 1136 (9th Cir. 1982) (federal agency policy manual that was not promulgated in accordance with procedural requirements for legislative rulemaking did not have 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

[4] As set forth supra, documents incorporated by reference in a pleading may properly be considered in ruling on a Rule 12(b)(6) motion without converting the motion into a Rule 56 motion for summary judgment. See Cowan, ¶ 11. Here, Respondent-Intervenors rely upon the Second 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 Second Amended Complaint in the "Background" discussion and at ¶¶ 16-18, 20-21, 24-26, 28-31, 43-45, 52-54, and 58-60, among others, and is attached to Petitioners' brief in support of application for alternative writ of mandate, which the Second Amended Complaint references and incorporates in the "Background" section and at ¶ 8.

the term "may" indicates agency discretion—not a mandatory agency obligation. See Laudert v. Richland County Sheriff's Dep't, 2000 MT 218, ¶ 38, 301 Mont. 114, ¶ 38, 7 P.3d 386, ¶ 38. Therefore, even assuming, for the sake of argument, that the IBMP directs DOL to take the management actions that Petitioners allege, 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 its adoption by DOL in a Record of Decision ("ROD") issued pursuant to MEPA's environmental review process. 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." Mont. Code Ann. § 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, the MEPA regulation setting forth the requirements for a record of decision explicitly states that "[t]his rule does not define or affect the statutory decision making authority of the agency." Id. 32.2.238(4) (emphasis added).

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 (1989) (quotations and citation omitted). As the Supreme Court stated, "[o]ther statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits

uninformed—rather than unwise—agency action." Id. at 351 (footnote 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, 377, 903 P.2d 1362, 1366.

Because the MEPA environmental review process does not create any substantive legal rights or responsibilities, it cannot form the basis for Petitioners' mandamus and declaratory judgment claims. See Sierra Club v. Van Antwerp, 526 F.3d 1353, 1362 (11th Cir. 2008) ("NEPA can never provide grounds for a court to direct a federal agency's substantive decision.") (emphasis in original); Mountainbrook 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), aff'd mem., 620 F.2d 294 (4th Cir. 1980); Daniel R. Mandelker, NEPA Law and Litigation § 4.64, at 4-222 (2d ed. 2008) ("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 alleged bison-hazing requirements and deadlines in the IBMP, which is not legally enforceable, should be rejected.

C. Montana Law Does Not Impose A Duty On Respondents 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. Second Amend. Compl. ¶¶ 50, 53. 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 in Counts 1 and 2 of their Second Amended Complaint.

Contrary to Petitioners' claim, see id. ¶ 50, Mont. Code Ann. § 81-2-120, 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. That 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… ." Mont. Code Ann. § 81-2-120(1). The statute then 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, or slaughter; destruction by firearms; public hunts; and vaccination. See id. § 81-2-120(1)(a)-(d). 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 or temporal constraint 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, ¶ 38 ("The use of the word 'may' indicates that the [agency] has the discretion … .") ; In re Investigative Records of City of Columbus Police Dep't (1995), 272 Mont. 486, 488, 901 P.2d 565, 567 (holding that "the word 'may' is permissive").

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. Accordingly, Counts 1 and 2 of Petitioners' Second Amended Complaint fail to state a claim upon which relief can be granted and should be dismissed.

CONCLUSION

For the foregoing reasons, Respondent-Intervenors Edith Ford, et al., respectfully request that this action be transferred to Gallatin County and that Counts 1 and 2 of Petitioners' Second Amended Complaint be dismissed for failure to state a claim upon which relief can be granted.

Respectfully submitted this 20th day of January, 2009.

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