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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 **REPLY BRIEF OF RESPONDENT-INTERVENORS EDITH FORD, ET AL., IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS**

Petitioners Sitz Angus Ranch, et al., fail to offer any legitimate reason why this Court should not grant a judgment on the pleadings in favor of Respondent-Intervenors and Respondents. Petitioners' response brief ultimately admits that the specific bison management provisions they ask this Court to enforce are embodied exclusively in the December 2000 Record of Decision for the Interagency Bison Management Plan ("IBMP"). See, e.g., Petitioners' Response in Opposition to Respondent-Intervenors' Motion for Judgment on the Pleadings and Notice of Conversion of Motion to Rule 56 Motion for Partial Summary Judgment ("Petitioners' Resp.") at 12 ("[T]he IBMP defines the specific management actions DOL is to take as necessary to control bison … . It is that duty, and it is those management actions identified in the IBMP, which give rise to Petitioners claims made in this case."). Petitioners' new request for partial summary judgment on Count II of their amended complaint, seeking declaratory relief, underscores the fact that Petitioners ask this Court to treat the IBMP as a source of legal obligations that can be enforced against the State of Montana by third parties such as the Petitioners here. See id. at 19 (requesting declaration that "IBMP results in affirmative duties and obligations on DOL to control YNP bison in the Western Boundary Area").

However, Respondent-Intervenors' research has not identified even a single case holding that a decision document issued as the culmination of an environmental analysis process undertaken pursuant to the Montana Environmental Policy Act ("MEPA"), Mont. Code Ann. § 75-1-101 et seq., or its federal model and analogue, the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., is, by itself, judicially enforceable against the issuing agency. Nor, despite their response brief arguments, have Petitioners cited any such authority. This Court should reject Petitioners' unsupported arguments and enter a judgment on the pleadings in favor of Respondent-Intervenors and Respondents on Petitioners' claims.

I. PETITIONERS WRONGLY SEEK TO ENFORCE THE IBMP AGAINST THE STATE RESPONDENTS

Petitioners erroneously argue that a "decision associated with a MEPA/NEPA process" constitutes "an enforceable decision by the agency" and creates "enforceable substantive legal rights or responsibilities." Petitioners' Resp. at 14-15. As the U.S. Supreme Court has made clear, the NEPA process relies "on procedural mechanisms—as opposed to substantive, result-based standards." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 353 (1989) (emphases added); see also Winter v. Natural Res. Def. Council, --- U.S. ---, 2008 WL 4862464, at *11 (U.S. Nov. 12, 2008) ("When the Government conducts an activity, NEPA itself does not mandate particular results.") (quotations and citation omitted).

MEPA, which is modeled on NEPA, is likewise exclusively "procedural." Mont. Code Ann. § 75-1-102(1); see also Ravalli County Fish and Game Ass'n, Inc. v. Mont. Dep't of State Lands (1995), 273 Mont. 371, 377, 903 P.2d 1362, 1366, 1367 (holding that cases construing NEPA are persuasive in interpreting MEPA, and stating: "NEPA is essentially procedural; it does not demand that an agency make particular substantive decisions."). Consistent with this procedural focus, a record of decision issued at the conclusion of the MEPA process "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 a substantive mandate on the agency. 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 seeking to justify a contrary conclusion, Petitioners fail to identify any countervailing authority. Indeed, although they criticize Respondent-Intervenors' argument as "novel," "clearly wrong," and "spurious at best," Petitioners' Resp. at 15, 16, Petitioners fail to cite a single statute

or regulation providing that a NEPA or MEPA record of decision in general, or the IBMP in particular, creates any mandatory obligation on the issuing agency, or a single case in which a court has enforced such a record of decision against the issuing agency as Petitioners would have this Court do here. Instead, Petitioners apparently seek to cite the case of Laub v. Department of Interior, 342 F.3d 1080 (9th Cir. 2003), for the proposition that a NEPA record of decision "'pre-determines' the future" and is therefore "ripe for judicial review."[1] Petitioners' Resp. at 15. However, the issue here is not whether a NEPA or MEPA challenge to the IBMP would be ripe for judicial review, but rather whether the IBMP itself constitutes an enforceable legal mandate. Laub sheds no light on that issue, as the case addressed whether a NEPA challenge to a plan to manage California water resources was ripe for judicial review before site-specific implementation actions were taken. See 342 F.3d at 1087-91. While the Ninth Circuit in Laub held that the NEPA challenge in that case was ripe because the plan at issue foreclosed other options, see id. at 1091, the plan foreclosed such options as a matter of administrative discretion rather than any legal requirement. See id. at 1088-89 (quoting agencies' statement that "new information or substantially changed circumstances" could prompt agencies to revisit rejected options). Nothing in the opinion suggests that a third party could have enforced the plan against the agencies in that case.

Equally irrelevant is the Montana federal district court's opinion in Wilderness Society v. Rey, 180 F. Supp. 2d 1141 (D. Mont. 2002), which Petitioners cite for the proposition that a NEPA record of decision "is the decision of the agency making it subject to appeal." Petitioners' Resp. at 15. The Rey court addressed a federal agency effort to bypass a statutorily required administrative appeals process by the stratagem of having a U.S. Agriculture Department official

[1] Petitioners misidentify the case as Lamb v. Department of Interior and erroneously cite to volume 343 of the Federal Reporter, Third Series.

sign a U.S. Forest Service record of decision. See 180 F. Supp. 2d at 1146. The Montana federal district court held this stratagem to be illegal, reasoning that it "defies common sense" to treat the agency decision as anything other than a decision of the Forest Service that, by statute, is subject to administrative appeal. Id. at 1148. Again, nothing in the decision offers any support to Petitioners' argument that a NEPA or MEPA record of decision by itself creates legal duties that are enforceable against the issuing agency.

Lacking any pertinent authority, Petitioners attempt to argue by logical inference, asserting that a record of decision must be legally enforceable because otherwise "there would be no need to analyze environmental impacts in the first place," or any "need for judicial review, or for any appeals process." Petitioners' Resp. at 15, 16. This argument misunderstands the environmental analysis process set forth in NEPA and MEPA. This process has "twin aims": "First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983) (quotations and citations omitted). Appeals and judicial review of agency environmental analyses are necessary "to insure that the agency has taken a 'hard look' at environmental consequences," Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)—not to enforce the record of decision against the agency.

Indeed, although Petitioners argue that "there would be no need to analyze environmental impacts in the first place" if "there is nothing to bind the agency to a particular course of conduct," Petitioners' Resp. at 15, the law is to the contrary. Where an agency is legally bound to a particular course of conduct, no environmental analysis is required because the agency lacks

discretion to modify its action based on environmental information disclosed in the analysis. See Dept. of Transp. v. Public Citizen, 541 U.S. 752, 769 (2004) (holding that NEPA does not "require an agency to prepare a full EIS due to the environmental impact of an action it could not refuse to perform"). Thus, Petitioners' argument has it exactly wrong; it is precisely in the circumstance where "there is nothing to bind the agency to a particular course of conduct," Petitioners' Resp. at 15, that environmental analysis is most needed to ensure that the agency's exercise of discretion is fully informed by an assessment of the likely environmental consequences of its action. See Mont. Code Ann. § 75-1-102(1) (stating purpose of MEPA "to ensure that environmental attributes are fully considered" in state actions); Ravalli County Fish & Game Ass'n, 273 Mont. at 378, 903 P.2d at 1367 (describing purpose of MEPA "to make informed decisions").

In sum, Petitioners' argument confuses two distinct concepts: (1) the need for environmental analysis, appeals, and judicial review to ensure that a discretionary agency decision is fully informed regarding environmental consequences as required by governing law, and (2) conversion of such a discretionary agency decision itself into governing law. While MEPA seeks to ensure the former, its purely procedural requirements do not accomplish the latter. See Robertson, 490 U.S. at 351, 353 (reversing lower court holding that NEPA required implementation of environmental mitigation plan; "Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.") (footnote omitted). Petitioners' attempt to convert the IBMP into a mandatory legal requirement should be rejected by this Court.

II. PETITIONERS' REMAINING ARGUMENTS ARE MERITLESS

Petitioners' remaining arguments fail to salvage their flawed claims. Petitioners repeatedly point out that "the IBMP is derived from specific statutory duties." Petitioners' Resp. at 13. In this regard, a Montana statute provides that, when a wild bison enters Montana, the Department of Livestock ("DOL") "may, under a plan approved by the governor, use any feasible method in taking" specified response actions. Mont. Code Ann. § 81-2-120(1) (discussed in Petitioners' Resp. at 13-14). However, the mere fact that Montana law provides for creation of a governor-approved bison management plan does not indicate that such a plan is legally enforceable against the state. To the contrary, the statute's statement that DOL "may" take certain actions pursuant to such a plan, Mont. Code Ann. § 81-2-120(1) (emphasis added), demonstrates that the agency has discretion rather than an obligation. See Laudert v. Richland County Sheriff's Dept., 2000 MT 218, ¶ 38, 301 Mont. 114, ¶ 38, 7 P.3d 386, ¶ 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").

Petitioners also contend that, "[b]y rule, DOL is required to take action when YNP bison enter Montana." Petitioners' Resp. at 14; accord id. at 16-17. The rule in question, Admin. R. Mont. 32.3.224A, provides that, when "estrayed or migratory bison exposed to or affected with brucellosis" entire Montana, "one of the following actions will be taken": the bison "may be physically removed" or, if removal cannot safely be accomplished, the bison "shall be summarily destroyed." Admin. R. Mont. 32.3.224A(1)(a), (b). However, the rule does not state any timeframe for the contemplated actions or set forth the far more detailed, time-specific, and site-specific actions that Petitioners ask this Court to mandate in this case. Thus, Petitioners ask this

Court to order, inter alia, that DOL haze bison back into Yellowstone National Park after cattle are removed from Zone 2 of the Park's Western Boundary Area in the fall, capture and test those bison that cannot be hazed and slaughter those testing positive for exposure to brucellosis, and remove all bison from the Western Boundary Area by May 15 of each year. See Petitioners' Resp. at 17, 19. Those specific management requirements do not appear in any rule or statute. Petitioners themselves admit that "the rule and the statute do not mention these specific actions, or state with particularity the May 15 date." Id. at 17 (emphasis added); see also id. at 14 (admitting that "[t]he statute did not codify the precise terms of the legislatively authorized plan"). Although Petitioners seek to compensate for this omission by arguing that "the IBMP specifically identifies these actions will be taken," id. at 17 (emphasis in original), the IBMP does not create legal duties that are enforceable against the state Respondents for the reasons stated in Respondent-Intervenors' opening brief and in Point I, supra.

Accordingly, Petitioners' arguments concerning Montana's statutory and regulatory bison management provisions ultimately collapse into nothing more than a reiteration of their reliance on the IBMP as the source of the legal duties that they ask this Court to enforce in this case. See Petitioners' Resp. at 17-18 ("Because the IBMP is enforceable as a ROD it creates legal duties and obligations upon which DOL must abide, and upon which Petitioners' claims may be judged by this Court."). In so arguing, Petitioners ask this Court to transform a mere record of the agency's decision at the conclusion of an environmental analysis process into a legal mandate that can be enforced against the agency by third parties such as Petitioners. As discussed, Petitioners' attempt to enforce such a record of decision finds no support in governing law. It should be rejected by this Court and judgment should be entered for the Respondent-Intervenors and Respondents.

III. PETITIONERS' REQUEST FOR PARTIAL SUMMARY JUDGMENT SHOULD BE DENIED

Petitioners' invocation of summary judgment procedures in response to Respondent-Intervenors' motion for judgment on the pleadings is misguided.

First, Petitioners purport to provide notice of conversion of the instant motion for judgment on the pleadings into a Rule 56 motion for partial summary judgment due to Petitioners' submission of new exhibits with their response brief. See Petitioners' Resp. at 1-2, 5-6. However, "conversion takes place at the discretion of the district court, and only when it affirmatively decides to consider the additional material." Swedberg v. Marotzke, 339 F.3d 1139, 1144 (9th Cir. 2003); see also Bretz v. Ayers (1988), 232 Mont. 132, 136, 756 P.2d 1115, 1118 (relying on Ninth Circuit case law interpreting Federal Rules of Civil Procedure in construing Rule 12 conversion procedure under Montana rules). Here, the new exhibits submitted by Petitioners—consisting of excerpts from agency environmental reviews, documents concerning a bison hunt, and a page from a deposition transcript—are irrelevant to the purely legal question whether the state Respondents have a legal duty to Petitioners that is sufficient to support Petitioners' claims. Resolution of that question depends on this Court's construction of MEPA and the statutory and regulatory provisions governing state bison management, not on the documents submitted by Petitioners.

Second, even if this Court were to convert this motion into one for summary judgment as Petitioners request, then judgment still should be granted to Respondent-Intervenors and Respondents because "there is no genuine issue as to any material fact and … the moving party is entitled to a judgment as a matter of law." Mont. R. Civ. P. 56(c). Summary judgment in favor of Respondent-Intervenors and Respondents is warranted for all the same reasons that a judgment on the pleadings should be entered for Respondent-Intervenors and Respondents.

Third, and finally, even if this Court were to reach the unprecedented holding that the IBMP, as a MEPA record of decision under Admin. R. Mont. 32.2.238, is an enforceable substantive legal mandate on the state Respondents—which, for all the reasons discussed supra, it should not do—Petitioners' request for partial summary judgment in their favor still should be denied. Petitioners ask for partial summary judgment on Count II of their amended complaint, which seeks a declaration that the IBMP provisions "are management actions required to be taken by DOL." Petitioners' Resp. at 19. In so arguing, Petitioners treat the management actions that were promulgated in December 2000 for "the Western Boundary Area in Step 1 of the IBMP" as set in stone for all time. Id. Petitioners ignore the fact that the federal and state agencies that promulgated the IBMP are now in the midst of an adaptive management process under the IBMP that is designed to modify bison management activities for Yellowstone National Park's western boundary area in light of changed circumstances and new information.[2] See Second Affidavit of Amy McNamara (attached). The IBMP bison management provisions for the coming winter and spring season of 2008-09 in the Western Boundary Area will not be set until that adaptive management process is concluded, which is currently scheduled for December 17-18, 2008. See id. Moreover, the bison management provisions that ultimately emerge from that ongoing process may vary significantly from the management actions that Petitioners ask this Court to enforce. See id. Until the ongoing adaptive management process concludes, the bison management provisions for the Western Boundary Area remain in flux and Respondent-Intervenors are unable to adduce the facts needed to oppose Petitioners' partial

[2] Petitioners wrongly argue that the IBMP's adaptive management provisions are limited to the "three 'adaptive management steps'" discussed in the plan's prescriptions for the Western Boundary Area. Petitioners' Resp. at 18. Petitioners ignore the separate provision number 29 listed at page 16 of the IBMP under the heading "Other Management Provisions," which states that "[t]he agencies may agree to modify elements of this plan based on research and/or adaptive management findings."

summary judgment request. Accordingly, even if this Court were to accept Petitioners' view of the duty imposed by the IBMP, which it should not do, Petitioners' summary judgment request should be denied. See Mont. R. Civ. P. 56(f) ("Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment … .").

CONCLUSION

For the foregoing reasons, as well as the reasons previously stated in Respondent-Intervenors' opening motion papers, Respondent-Intervenors respectfully request that this Court grant their motion for judgment on the pleadings.

Respectfully submitted this 25th day of November, 2008.

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