

Douglas L. Honnold (MT Bar # 8481)  
Timothy J. Preso (MT Bar # 5255)  
Jenny K. Harbine (MT Bar # 3606)  
Earthjustice  
209 South Willson Avenue  
Bozeman, MT 59715  
(406) 586-9699  
Fax: (406) 586-9695  
dhonnold@earthjustice.org  
tpreso@earthjustice.org  
jharbine@earthjustice.org

*Attorneys for Proposed Intervenors*

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, )

Defendant-Intervenor- )  
Applicants. )

Cause No. DV 29-2008-34

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO INTERVENE**

## INTRODUCTION

This case involves a controversy over management of bison, also known as buffalo, that migrate from 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 Horse Butte, on the western boundary of Yellowstone National Park, by May 15 of each year. See Petr.’s First Amend. Compl. ¶¶ 39, 44, 45 (May 30, 2008).

Numerous Horse Butte property owners and residents, along with two conservation groups, the Greater Yellowstone Coalition (“GYC”) and Natural Resources Defense Council (“NRDC”) (collectively, “Applicants” or “Proposed Intervenors”), now seek to intervene to protect their interests in this action. The Horse Butte property owners and residents have an interest in the activities occurring on and near their private property, including bison hazing operations on Horse Butte. These applicants for intervention also have an interest in preserving their efforts to maintain the presence of bison on and near their property for a variety of aesthetic and conservation reasons. GYC and NRDC similarly have a longstanding conservation interest in securing safe habitat and greater tolerance for bison outside of Yellowstone National Park. If Petitioners prevail in their efforts to bind the DOL to bison hazing, capture, and slaughter practices, Proposed Intervenors’ private property interests and interests in the conservation of a wild, free-ranging Yellowstone bison herd and the preservation of bison habitat outside of Yellowstone National Park will be severely impaired. For these reasons, the Horse Butte property owners, GYC, and NRDC are entitled to intervene as of right pursuant to Montana Rule of Civil Procedure 24(a)(2) in Petitioners’ action challenging DOL’s management of wild bison

in the State of Montana. In the alternative, Proposed Intervenors should be granted permissive intervention pursuant to Montana Rule of Civil Procedure 24(b)(2).

## **BACKGROUND**

### **A. The Horse Butte Peninsula**

Horse Butte occupies a peninsula of land that extends westward into Hebgen Lake from just beyond the western boundary of Yellowstone National Park only about five miles north of West Yellowstone, Montana. Nat'l Park Serv. & U.S. Forest Serv., Final Environmental Impact Statement, Bison Management for the State of Montana and Yellowstone National Park (Aug. 2000) (“FEIS”), at 181 (attached as Ex. 1). The peninsula’s southern boundary is formed by the Madison Arm of the lake, where the Madison River flows from Yellowstone into Montana. Id. at 181 (Ex.1). The northern boundary of the peninsula is formed by the lake’s Grayling Arm and two of its tributaries, Duck and Cougar Creeks. Id. at 181 (Ex. 1). Each winter and early spring, this peninsula constitutes a traditional migration path, and provides crucial habitat, for many bison forced to migrate from Yellowstone National Park’s harsh, higher elevations in search of forage necessary for their survival. Id. at 181, 30-36, vii, xii (Ex. 1). After the ice melts in Hebgen Lake in the spring, the waters of the lake substantially impede further bison movement into lands on the west shore of the lake.

Historically, cattle have grazed on the private and public lands on Horse Butte during the milder months of summer and early fall. Id. at xxxiii (Ex. 1). However, cattle grazing on Horse Butte’s public lands ceased following a 2002 federal court order prohibiting grazing on the Gallatin National Forest’s Horse Butte livestock allotment. See Greater Yellowstone Coalition v. Bosworth, 209 F. Supp. 2d 156 (D.D.C. 2002). Cattle grazing on private lands on the Horse Butte peninsula also recently ceased following the sale of the so-called “Munns Ranch” to

Robert and Janae Galanis, who have expressed to state and federal agencies their desire to maintain bison presence on their property. See Letter from Robert and Janae Galanis to Christian Mackey (Aug. 16, 2007) (Ex. 2); Letter from Timothy J. Preso to Suzanne Lewis, et al. (Mar. 3, 2008) (Ex. 3). Thus, as a result of the 2002 federal court order and the Galanises' purchase of the Munns Ranch, no cattle remain on the Horse Butte peninsula, nor will cattle graze on Horse Butte in the foreseeable future.<sup>1</sup>

### **B. Yellowstone's Bison**

The roughly 3,000 bison constituting the current Yellowstone National Park bison herd are all that remain of the great bison herds that once roamed the western United States. See Yellowstone National Park, IBMP Briefing Statement: Bison Population Status (Aug. 7, 2008) ("IBMP Briefing Statement") (Ex. 5). An estimated 30 million to 65 million wild bison roamed the Great Plains and high plateaus of the American West well into the nineteenth century. FEIS, at xlv (Ex. 1). However, by 1897 slaughter had reduced this iconic species to a population of roughly 25 individuals confined to Yellowstone National Park. Id. at vii (Ex. 1). In 1902, in an effort to restore bison numbers in Yellowstone, Yellowstone National Park's managers imported 21 bison from captive herds to supplement the herd of roughly 25 wild bison remaining in the United States. Id. at vii (Ex. 1). The Yellowstone herd increased to approximately 1,000 animals by the 1930s, id. at viii (Ex. 1), and approximately 3,000 bison exist in the Yellowstone area today. See IBMP Briefing Statement, at 1 (Ex. 5).

Despite efforts to restore this symbol of the American West to the landscape, the slaughter of bison has persisted. See FEIS, at vii-viii (Ex. 1); see also IBMP Briefing Statement

---

<sup>1</sup> The Galanises notified DOL that cattle no longer graze on their property with the expectation that aggressive control measures aimed at maintaining "temporal" and "spatial" separation between domestic cattle and bison would cease. See Letter from Robert and Janae Galanis (Ex. 2). Nevertheless, the DOL hazed bison off the Galanises' property in May 2008.

(Ex. 5). The slaughter of bison continues in order to facilitate cattle grazing on the public and private lands surrounding Yellowstone National Park. FEIS, at 14 (Ex. 1). Domestic cattle infected Yellowstone's bison with a bacterium known as Brucella abortus sometime prior to 1917. Id. at ix. The bacterium causes a disease known as brucellosis. Id. at 16 (Ex. 1). Brucellosis has the potential to cause cattle to abort their first calf after the fifth month of gestation and is spread through the ingestion of fetuses or afterbirth materials by non-infected cows. Id. at 19 (Ex. 1). Brucellosis can affect ranchers' ability to sell or transport their cattle. Id. at 36-37 (Ex. 1).

While cattle are responsible for infecting the Yellowstone bison herd with brucellosis, there has never been a documented case of bison transmitting brucellosis to cattle in free-ranging conditions. Id. at ix (Ex. 1). Further, other species in the Greater Yellowstone Ecosystem, such as elk, are also infected with brucellosis. Id. at 21 (Ex. 1). Brucellosis infects approximately one to two percent of Yellowstone's approximately 20,000-head northern elk herd, and potentially infects up to 65 percent of the elk herds that congregate on winter feedgrounds near Jackson, Wyoming. Id. (Ex. 1). The Animal and Plant Health Inspection Service ("APHIS"), the federal agency that manages livestock health, id. at 50 (Ex. 1), and the State of Montana have tolerated the intermingling of brucellosis infected-elk with cattle for three to four decades, despite demonstrated transmission of brucellosis from elk to cattle. See DOL, [GYA Bison Brucellosis – History of Bison and Brucellosis Management in Yellowstone National Park and Montana](#), <http://liv.mt.gov/liv/ah/diseases/brucellosis/bison/history.asp>, at 2 (last accessed Aug. 12, 2008) (attached as Ex. 6); FEIS, 21-22 (Ex. 1). Yet bison have been targeted for different treatment by the National Park Service, the Forest Service, and the State of Montana. FEIS, at 21-22 (Ex. 1). In order to guard against a theoretical, as yet unrealized, threat of brucellosis transmission from

bison to privately-owned, domestic cattle, id. at 27-29 (Ex. 1), these agencies aggressively haze, capture, and kill bison that migrate outside of Yellowstone National Park. See id. at xxii-xxiv (Ex. 1); See DOL & Fish, Wildlife and Parks, Interagency Bison Management Plan for The State of Montana and Yellowstone National Park Record of Decision (Dec. 22, 2000) (“ROD”), at 7-9 (Attached as Ex. 7). In the last year alone, 1,435 Yellowstone bison were killed by state and federal agents in the name of controlling brucellosis. DOL, IBMP Briefing Statement: IBMP Partner Update – 2007/2008 (August 6, 2008) (attached as Ex 8).

### **C. The Interagency Bison Management Plan**

This bison killing program is conducted by officials from the National Park Service, the U.S. Forest Service, APHIS, DOL, and the Montana Department of Fish, Wildlife, and Parks (“the agencies”) pursuant to the Interagency Bison Management Plan (“IBMP”) for the Yellowstone region, which Montana adopted in 2000. FEIS, at 3 (Ex. 1); ROD, at cover letter (Ex. 7). The agencies identified the purpose of this long-term management plan as being “to maintain a wild, free-ranging population of bison and address the risk of brucellosis transmission to protect the economic interest and viability of the livestock industry in the state of Montana.” FEIS, at 14 (Ex. 1); see also Nat’l Park Serv. & U.S. Forest Serv., Record of Decision for Final Environmental Impact Statement and Bison Management Plan for the State of Montana and Yellowstone National Park (Dec. 2000) (“Plan”), at 22 (attached as Ex. 9); ROD, at IBMP 1 (Ex. 7). This purpose is to be attained through measures designed to both “[p]revent ... cattle and bison from commingling or from utilizing the same area or adjacent areas at the same time” (“spatial separation”), and “[m]aintain a specified period between the time bison depart or are hazed from certain lands outside the Park and the time cattle move onto those lands” (“temporal separation”). Plan, at 22 (Ex. 9); see also FEIS, at 177 (Ex. 1).

In drawing the lines governing the movement and distribution of bison migrating out of Yellowstone National Park, the agencies sought to protect Montana’s cattle industry as it existed at the time of the IBMP’s drafting—nearly a decade ago—when cattle still grazed on Horse Butte’s public and private lands. FEIS, at xxxiii (noting active cattle grazing operations on Horse Butte at the time) (Ex. 1). The IBMP designated lands to the north of West Yellowstone west to the Hebgen Lake Dam and north to the area near Highway 287—in effect, all of Horse Butte—as “Zone 2”. *Id.* at 181, 184 (Ex. 1). During the first management phase for Zone 2, which is still in effect, the agencies attempt to haze back into the park bison exiting into the West Yellowstone area. *Id.* at 184 (Ex. 1). If the hazing is ineffective, bison are captured and tested for brucellosis. Under the plan, bison that test negative for the disease, up to a specified tolerance level, are released while those that test positive are sent to slaughter. *Id.* (Ex. 1). The plan provides that bison that cannot be captured and can be “tolerated” will be permitted outside the park until approximately 45 days before cattle return to the area; those bison not captured, hazed or tolerated will be shot. *Id.* (Ex. 1). The plan also provides that the management agencies may depart from these protocols when the Yellowstone bison population exceeds 3,000 animals; the agencies relied upon this provision to accomplish the extensive slaughter that occurred during winter and spring 2008. *See id.* at xxiii (Ex. 1); Plan, at 20, 32 (Ex. 9).

However, the IBMP does not contemplate a static management prescription in the face of changed circumstances. Instead, it adopts a forward-looking “adaptive management approach,” under which “future management actions [may] be adjusted, based on feedback from implementation of the proposed risk management actions.” Plan, at 22 (Ex. 9). The IBMP provides that “[t]he agencies may agree to modify elements of th[e] plan based on research and/or adaptive management findings.” *Id.* at 32 (Ex. 9). In furtherance of an “adaptive

management” strategy, the agencies are required to convene at least once annually to review any new information and adopt an updated set of “operating procedures” setting forth additional or alternate management mechanisms determined necessary to maintain a wild, free-ranging bison population and to protect Montana’s livestock industry. See id. at 42 (Ex. 9); Mont. Dept. of Livestock, *et al.*, Interagency Bison Management Plan Operating Procedures, at 10 (updated Nov. 16, 2007) (“Operating Procedures”) (attached as Ex. 10). Changed circumstances along Yellowstone’s western boundary have previously resulted in revision of management practices. Following the initiation of a bison hunt in 2005, the agencies agreed to suspend hazing activities otherwise required under the IBMP’s management prescriptions for the western park boundary area in order to “ensure a fair chase hunt.” Id. at 9 (Ex. 10).

Now, circumstances again have changed on Horse Butte. With the purchase of the Munns Ranch by Robert and Janae Galanis last year, the peninsula’s last grazing operation ceased. See Letter from Robert and Janae Galanis (Ex. 2). Today, Horse Butte is a stretch of land, surrounded by water on the north, west, and south, that is ideally situated to provide crucial refuge for Yellowstone’s “wild, free-ranging” bison population.

#### **D. The Present Lawsuit**

Notwithstanding the absence of cattle grazing on Horse Butte, Petitioners filed this action for writ of mandate on May 27, 2008, seeking a Court order compelling the hazing or killing of all bison remaining outside of Yellowstone National Park in the Horse Butte area pursuant to the IBMP, including removal of all bison from the area by May 15 of this and subsequent years. See First Amend. Compl. ¶¶ 39, 44, 45. The requested relief would handcuff the DOL to decade-old management prescriptions that were never intended to be static, but were designed to adapt to changed circumstances – such as those that have occurred on Horse Butte. See Plan, at 22



(description of the adaptive management process) (Ex. 9). The respondent state agencies answered the complaint on July 28, 2008, but no other proceedings have been scheduled.

## **ARGUMENT**

The applicant Horse Butte property owners and residents, GYC and NRDC are entitled to intervene as a matter of right in this action. In the alternative, permissive intervention is appropriate. Intervention is necessary to ensure that Proposed Intervenors have an opportunity to address their distinct interests in private property, wildlife conservation, and preservation of habitat outside Yellowstone National Park for bison. Because the Petitioners' claims threaten Proposed Intervenors' cognizable private property, conservation, and aesthetic interests, this motion to intervene should be granted.

### **I. APPLICANTS ARE ENTITLED TO INTERVENE AS OF RIGHT.**

Proposed Intervenors satisfy all of the requirements for intervention as of right. A successful application for intervention as of right "must: (1) be timely; (2) show an interest in the subject matter of the action; (3) show that the protection of the interest may be impaired by the disposition of the action; and (4) show that the interest is not adequately represented by an existing party." Estate of Schwenke v. Bechtold (1992), 252 Mont. 127, 131, 827 P.2d 808, 811; see also M. R. Civ. P. 24(a).

Proposed Intervenors each have a substantial interest in the subject matter of this action that would be impaired if Petitioners prevail. The applicant Horse Butte property owners and residents seeking intervention purchased their properties and/or reside on Horse Butte specifically to enjoy the solitude of rural Montana and view wildlife, including bison. Taggart Dec. ¶¶ 2; Mayo Dec. ¶ 2; Sheperd Dec. ¶2; Therien Dec. ¶¶ 2, 5; see A. Stovall Dec. ¶ 3; J. Stovall Dec. ¶ 3; Millspaugh Dec. ¶ 3; Ford Dec. ¶ 2. GYC, NRDC, and their members have a

longstanding record of efforts to ensure safe habitat and increased tolerance for bison outside of Yellowstone National Park. McNamara Dec. ¶¶ 3-8; Welsch Dec. ¶¶ 1, 8; Willcox Dec. ¶¶ 2-4. The interests of Proposed Intervenors are directly and significantly impaired by bison hazing, capturing, and slaughtering on Horse Butte, as sought by Petitioners. Because these interests are not represented by either Petitioners or the existing Respondents in this case, Proposed Intervenors should be granted intervention as of right pursuant to Rule 24(a) of the Montana Rules of Civil Procedure.

**A. The Intervention Motion is Timely**

Intervention at this early stage of litigation is timely. Montana courts consider “the particular circumstances surrounding the action” to determine whether a motion to intervene is timely. Estate of Schwenke, 252 Mont. at 131, 827 P.2d at 811. Here, intervention is sought just eleven weeks after the lawsuit commenced and only shortly after the State has filed an answer to the complaint. In such circumstances, the lawsuit is not delayed nor is any party prejudiced by the timing of intervention. Cf. id. at 132, 827 P.2d at 811 (motion to intervene one week prior to trial is untimely); Connell v. State of Montana, 2003 MT 361, ¶ 23, 319 Mont. 69, ¶ 23, 81 P.3d 1279, ¶ 23 (motion to intervene three years after final judgment issued is untimely). Accordingly, the motion to intervene is timely.

**B. Proposed Intervenors Have a Substantial Interest in This Lawsuit**

Proposed Intervenors have significant interests in this action that warrant intervention as of right. Montana courts require a showing of a “direct, substantial, legally protectable interest in the proceedings” to find that intervention applicants have a substantial interest in the subject matter of the action. Sportsmen for I-143 v. Montana Fifteenth Judicial District Court, Sheridan County, 2002 MT 18, ¶ 9, 308 Mont. 189, ¶ 9, 40 P.3d 400, ¶ 9 (citation omitted). An interest in

the property at issue is sufficient. See M. R. Civ. P. 24(a) (requiring claim of “interest relating to the property or transaction which is the subject of the action”); see also DeVoe v. State of Montana (1997), 281 Mont. 356, 364, 935 P.2d 256, 261 (City’s claim of public interest in use of subject property sufficient); Gammon v. Gammon (1984), 210 Mont. 463, 469, 684 P.2d 1081, 1084 (finding a sufficient interest when intervenor possessed interest in subject property by way of quitclaim deed). Further, the courts retain an “expansive notion” of what constitutes a sufficient interest to invoke intervention as of right when public interest groups are seeking intervention. Sportsmen, 2002 MT 18, ¶12. A sufficient interest exists when public interest groups have been actively involved in either supporting or opposing a given action or process and then seek to intervene in a challenge involving that action or process. Id.; see also Idaho Farm Bureau Federation v. Babbitt, 58 F.3d 1392, 1397 (9th Cir. 1995) (finding that a public interest group has a sufficient interest to intervene in an action challenging a measure it had supported) (reasoning adopted in Sportsmen, 2002 MT 18, ¶ 12); Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1246-47 (6th Cir. 1996) (finding that prior participation on an issue constituted a sufficient interest) (referenced in Sportsmen, 2002 MT 18, ¶ 12); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527-28 (9th Cir. 1983) (finding that an intervening public interest group that had actively opposed plaintiff in administrative process had a sufficient interest to intervene by right) (reasoning adopted in Sportsman, 2002 MT 18, ¶ 7).

Here, Proposed Intervenors Taggart, Mayo, A. Stovall, J. Stovall, Millspaugh, Ford, Therien, and Sheperd are property owners and/or residents on Horse Butte. Taggart Dec. ¶ 5; Mayo Dec. ¶ 4; A. Stovall Dec. ¶ 5; J. Stovall Dec. ¶ 5; Millspaugh Dec. ¶ 5; Ford Dec. ¶ 4; Therien Dec. ¶ 5; Sheperd Dec. ¶ 3. These individuals derive great personal enjoyment from the presence of bison on and near their property, and desire that their properties be open to wildlife,

especially bison. See Taggart Dec. ¶¶ 4,6; Mayo Dec. ¶¶ 2, 4; A. Stovall Dec. ¶¶ 4-5, 7; J. Stovall Dec. ¶¶ 4-5, 7; Millspaugh Dec. ¶¶ 3, 10; Ford Dec. ¶¶ 2, 5, 7; Therien Dec. ¶¶ 3, 5, 8; Sheperd Dec. ¶¶ 2, 5, 7. They further benefit from bison grazing that reduces fire danger and other ecological disruptions from tall grasses and weeds on Horse Butte. See A. Stovall Dec. ¶ 4; J. Stovall Dec. ¶ 3; Millspaugh Dec. ¶ 3.

DOL conducts hazing operations on and around Proposed Intervenor's Horse Butte properties that reduce bison presence on the peninsula and interfere with the property owners' and residents' quiet enjoyment of their homes and land. See Taggart Dec. ¶¶ 5-6; Mayo Dec. ¶ 4; A. Stovall Dec. ¶¶ 5, 7; J. Stovall Dec. ¶¶ 5, 7; Millspaugh Dec. ¶ 10; Ford Dec. ¶¶ 5, 7; Therien Dec. ¶¶ 5, 8; Sheperd Dec. ¶¶ 5, 7. Taggart, Millspaugh, and Ford live in a subdivision on Horse Butte, through which DOL agents have hazed bison on ATVs, snowmobiles, horseback, trucks, and even in low-flying airplanes or helicopters. Taggart Dec. ¶ 5; Millspaugh Dec. ¶¶ 2, 5; Ford Dec. ¶¶ 1, 3. These activities of agency personnel are highly disruptive, noisy, and negatively impacts the ability of these property owners and residents to maintain a safe and quiet neighborhood. See Taggart Dec. ¶ 6; Millspaugh Dec. ¶ 6; Ford Dec. ¶ 4.

In addition to her status as a Horse Butte property owner, Proposed Intervenor Taggart is the organizer of a group called Horse Butte Neighbors of Buffalo ("HOBNOB") and an active participant in the issue of bison management on Horse Butte. Taggart Dec. ¶¶ 8, 10. HOBNOB was organized to advocate for increased tolerance of a wild, free-ranging bison herd and a more flexible management strategy for bison. Taggart Dec. ¶ 8. Through HOBNOB, Taggart has organized and facilitated meetings with agency representatives and circulated petitions calling for an end to bison hazing on Horse Butte; additionally, Taggart has participated as a panelist for discussions of Horse Butte bison management, lobbied Montana Senate committees, given

interviews to raise awareness, and attended numerous agency meetings. Taggart Dec. ¶ 11. Proposed Intervenor Ed Millspaugh, Jeannette Therien, Edith Ford, and Tom Sheperd are also members of HOBNOB. Millspaugh Dec. ¶ 2; Therien ¶ 4; Ford Dec. ¶ 2; Sheperd Dec. ¶ 4. The bison advocacy interests of HOBNOB relate directly to the subject matter of this action.

The Horse Butte property owners' and residents' property and conservation interests constitute "direct, substantial, [and] legally protectable interest[s]" in the area of land and activities that are the subject of this lawsuit, thereby qualifying them for intervention as of right. See Sportsmen, 2002 MT 18, ¶ 9; see also id. ¶ 12 (group's prior advocacy on issue constitutes sufficient interest to warrant intervention as of right in action implicating the issue); Gammon, 210 Mont. at 469 (ownership of property affected by action sufficient for intervention as of right); DeVoe, 281 Mont. at 364 (same).

GYC and NRDC also have a sufficient interest for intervention as of right. Both conservation groups have demonstrated a longstanding interest in securing habitat outside of Yellowstone National Park for bison. McNamara Dec. ¶¶ 3-8; Welsch Dec. ¶ 8; Willcox Dec. ¶¶ 3, 8. These organizations have actively participated in discussions with the agencies regarding management of bison outside of Yellowstone National Park, and have long advocated for tolerance of bison outside of the park. McNamara Dec. ¶¶ 3-8; Willcox Dec. ¶ 8. GYC's and NRDC's "environmental, conservation and wildlife interests" in the bison outside of Yellowstone National Park are sufficient to warrant intervention as of right. See Sagebrush Rebellion, 713 F.2d at 526-28.

### **C. This Lawsuit Threatens Harm to the Applicants' Interests**

If Petitioners are successful, Proposed Intervenor's property, conservation, and aesthetic interests will be substantially impaired. Montana courts take a broad view of activities

threatening harm to a public interest group's interests for intervention purposes. See Sportsmen, 2002 MT 18, ¶ 13; see also Sagebrush Rebellion, 713 F.2d at 527-28 (noting that the courts have not typically struggled to find impairment of a demonstrated interest because disposition of the suit "might, as a practical matter, impair the ability of the organization to protect its interest"). The impairment requirement is satisfied when an adverse decision in the suit would negatively impact the intervenors' interests. See Sportsmen, 2002 MT 18, ¶ 13 (hunting organization entitled to intervene where an adverse decision regarding game farm regulation would harm intervenors' interests in preservation of Montana's wild game).

Here, the hazing of bison sought by Petitioners in this lawsuit satisfies this standard. Proposed Intervenors desire to maintain bison presence on Horse Butte because of their interest in conservation and wildlife and/or enjoy viewing wildlife, including bison, on and near their properties. Taggart Dec. ¶ 6; Mayo Dec. ¶¶ 2-3; A. Stovall Dec. ¶¶ 4-5, 7; J. Stovall Dec. ¶¶ 4-5, 7; Millspaugh Dec. ¶¶ 3, 10; Ford Dec. ¶¶ 2-7; Therien Dec. ¶¶ 3, 5, 8; Sheperd Dec. ¶¶ 2, 6-7. Bison hazing results in damage to the landscape and vegetation of Horse Butte, directly interferes with the Horse Butte property owners' and residents' abilities to enjoy their privately owned property in the manner desired, and threatens the public safety of Horse Butte neighborhoods. See Taggart Dec. ¶¶ 4, 6; Mayo Dec. ¶¶ 2-4; A. Stovall Dec. ¶ 4; J. Stovall Dec. ¶ 4; Millspaugh Dec. ¶ 3; Ford Dec. ¶ 2; Therien Dec. ¶¶ 3, 5; Sheperd Dec. ¶ 2. Petitioners seek to require DOL to capture, haze, and harass bison on Horse Butte, and specifically to remove all bison from Horse Butte by May 15 of each year. First. Amend. Compl. ¶¶ 39, 44, 45. If Petitioners are successful, the ability of the Horse Butte property owners and residents to enjoy their private property in the manner desired, and their opportunities to view bison on Horse Butte, will be significantly impaired. See Taggart Dec. ¶ 6; Mayo Dec. ¶ 6; A. Stovall Dec. ¶ 7;

J. Stovall Dec. ¶ 7; Millspaugh Dec. ¶ 10; Ford Dec. ¶ 7; Therien Dec. ¶ 8; Sheperd Dec. ¶ 7.

Additionally, the safety of the Hebgen Lake Estates neighborhood will continue to be threatened by fleeing wildlife and agency personnel. Taggart Dec. ¶ 6; Millspaugh Dec. ¶ 6. Furthermore, both private properties and the general Horse Butte landscape will continue to suffer and be threatened with future physical damage by fleeing wildlife if Petitioners are successful. Taggart Dec. ¶ 6; Mayo Dec. ¶ 4.

The conservation interests of GYC and NRDC would likewise be impaired by the relief Petitioners seek. These conservation organizations have worked for decades to preserve habitat for bison outside of Yellowstone National Park. McNamara Dec. ¶¶ 2-6; Willcox Dec. ¶¶ 3, 8-9. The groups' interests in the preservation of a wild, free-ranging bison herd and in providing winter range for bison forced from the Park during extreme winters are harmed by the hazing and killing of bison outside of Yellowstone National Park. McNamara Dec. ¶¶ 9-10; Welsch Dec. ¶ 9; Willcox Dec. ¶¶ 7-8. GYC and NRDC members and staff also suffer harm to their aesthetic interest in observing wild, free-ranging bison in the Horse Butte area when these animals are subjected to government hazing and slaughter programs. Welsch Dec. ¶¶ 7-9; Willcox Dec. ¶ 7. The ability of these Proposed Intervenors to advocate for a more tolerant bison policy will be impaired if the Petitioners are successful in obtaining an order from this Court binding the DOL to bison management requirements that were never intended to be static. Accordingly, Proposed Intervenors' interests are threatened by this lawsuit. See Sportsmen, 2002 MT 18, ¶ 13.

**D. The Existing Parties Do Not Adequately Represent the Proposed Intervenors' Interests**

No current party to the action adequately represents Proposed Intervenors' interests in the presence and preservation of bison, the avoidance of bison hazing and capture on Horse Butte, and the provision of bison habitat outside Yellowstone National Park.

In Montana, the inadequacy of representation required for intervention as of right is satisfied if an intervenor demonstrates that representation of its interests by existing parties “may be” inadequate. Sportsmen, 2002 MT 18, ¶ 14. The burden of making this showing is minimal. Id.; see also Trbovich v. United Mine Workers, 404 U.S. 528, 538-39 (1972) (finding inadequate representation when proposed intervenor shows that representation of its interests “may be” inadequate and making clear that the burden of making this showing is minimal). When the party best suited to represent the intervenors’ interests is a political appointee and the issue in dispute is highly controversial, intervention is necessary to protect the intervenors’ interests. See Sportsmen, 2002 MT 18, ¶¶ 16-17 (finding existing representation inadequate to protect intervenors where the Montana Department of Fish, Wildlife and Parks was the existing party most able to represent intervenors’ interest, the director is a political appointee, and the issue was very contentious). Furthermore, when the interests of the existing parties and the intervenors are substantially different, representation by existing parties is inadequate. See DeVoe, 281 Mont. at 365, 935 P.2d at 262 (the interests of the named holder of an easement and the party currently responsible for maintenance and repair of the easement were substantially different and therefore the currently responsible party could not adequately be represented by the named easement holder, the existing party). In determining the adequacy of representation by existing parties, proper considerations include “whether the [existing party] will undoubtedly make all of the intervenor’s arguments, whether the [existing party] is capable of and willing to make such arguments, and whether the intervenor offers a necessary element to the proceedings that would be neglected.” Sagebrush Rebellion, 713 F.2d at 528.<sup>2</sup>

---

<sup>2</sup> The Montana Supreme Court relied heavily on the Ninth Circuit’s decision in Sagebrush Rebellion in analyzing this factor in Sportsmen. See Sportsmen, 2002 MT 18, ¶ 14.



DOL does not represent Proposed Intervenors' interests. First, because DOL's director is a political appointee and bison management outside of Yellowstone National Park is a highly controversial issue, the agency cannot adequately represent the interests of Proposed Intervenors. See Sportsmen, 2002 MT 18, ¶¶ 16-17 (intervention required under similar circumstances to ensure intervenors' interests were adequately represented at all times). Further, DOL is not in a position to adequately represent Proposed Intervenors' private property interests because DOL does not have an interest in the preservation of their private property or in protecting their interests in making management decisions regarding their own property. See, e.g., Taggart Dec. ¶ 6; Mayo Dec. ¶¶ 2-3; A. Stovall Dec. ¶ 4; J. Stovall ¶ 4; Millspaugh Dec. ¶ 3; Ford Dec. ¶ 2; Mont. Code Ann. § 81-1-102 (purpose and duties of the DOL to promote and protect Montana's livestock industry). Indeed, the DOL to date has failed to take action requested by Horse Butte property owners to shield their property from the State's bison hazing and slaughter activities in the west boundary area. See Letter from Marty Zaluski to Timothy J. Preso, at 1 (Ex. 4). Additionally, the DOL is ill-equipped to adequately represent Proposed Intervenors' conservation and aesthetic interests because the DOL's primary interest is in the management of bison for the benefit of livestock and disease control—not in bison conservation. See Mont. Code Ann. § 81-1-102. Consequently, DOL will not “undoubtedly” make all of Proposed Intervenors' arguments, nor is DOL capable or willing to make those arguments. See Sagebrush Rebellion, 713 F.2d at 528. As a result, “a necessary element to the proceedings” will be neglected if Proposed Intervenors are denied intervention. Id. Therefore, the existing parties to the lawsuit do not adequately represent Proposed Intervenors' property, conservation, and aesthetic interests in maintaining bison presence on Horse Butte.

In sum, Proposed Intervenors satisfy all requirements for intervention under Rule 24(a) of the Montana Rules of Civil Procedure, and intervention as of right should be granted.

**II. IN THE ALTERNATIVE, APPLICANTS SHOULD BE GRANTED PERMISSIVE INTERVENTION.**

Proposed Intervenors equally satisfy all requirements to intervene permissively pursuant to Rule 24(b) of the Montana Rules of Civil Procedure. A court may, in its discretion, allow applicants to intervene pursuant to Rule 24(b) of the Montana Rules of Civil Procedure if the intervention application is timely, the applicant's claim or defense has a question of law or fact in common with the main action, and intervention will not result in prejudice or undue delay to the existing parties. M. R. Civ. P. 24(b). Here, the intervention application is timely, as set forth above, and the remaining requirements are equally satisfied.

**A. Proposed Intervenors' Defenses Have Questions of Law or Fact in Common with the Main Action**

Proposed Intervenors satisfy the "common question" requirement for permissive intervention. Permissive intervention is appropriate where intervenors have as little as one question of law or fact in common with the main action. See Shilhanek v. D-2 Trucking, 2000 MT 16, ¶¶ 47-48, 298 Mont. 101, ¶¶ 47-48, 994 P.2d 1105, ¶¶ 47-48. The literal requirements of Rule 24(b) are satisfied when proposed intervenors assert interests in the subject matter of the action and raise defenses directly responsive to a plaintiff's claim for injunction. See Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1110-11 (9th Cir. 2002) (permitting environmental groups to intervene to defend rule because they asserted defenses to plaintiffs' claims, their members had a stake in the rule, and their members enjoyed affected lands for recreational pursuits). Permissive intervention is also appropriate where an organization's "longstanding interest in and familiarity with" an issue underlying the litigation provides intervenors with

special expertise that may be helpful in clarifying the facts and issues in the case. Natural Res. Defense Council, Inc. v. Tennessee Valley Auth., 340 F. Supp. 400, 408-09 (S.D.N.Y. 1971) (granting permissive intervention to the National Audubon Society in a National Environmental Policy Act case regarding strip mining in part because of their expertise and familiarity with issues underlying the suit).<sup>3</sup>

Here, Proposed Intervenors raise defenses that present questions of law or fact in common with the main action. See Proposed Answer, filed herewith. Proposed Intervenors will contribute to the full development of the issues in the lawsuit because they have interests separate from the existing defendants, including the protection of private property rights and interests related to conservation and wildlife protection that this Court should consider in ruling on this case. See Taggart Dec. ¶¶ 4, 6; Mayo Dec. ¶ 2-3; A. Stovall Dec. ¶¶ 3, 5; J. Stovall Dec. ¶¶ 3, 5; Millspaugh Dec. ¶ 3; Ford Dec. ¶¶ 2, 4; Therien Dec. ¶¶ 3-4; Sheperd Dec. ¶ 2; Welsch Dec. ¶ 6; McNamara Dec. ¶¶ 3-5; Willcox Dec. ¶¶ 3-4. Giving voice to these interests by granting the requested intervention will contribute to a full development of the issues in this lawsuit, and will assist the Court in resolving this case. Additionally, GYC's and NRDC's long history of involvement with this issue would enable them to clarify facts and issues for the Court, and give the Court access to their "special expertise" in this area. See McNamara Dec. ¶¶ 3-8; Willcox Dec. ¶¶ 2-4.

---

<sup>3</sup> Rule 24(b) of the Montana Rules of Civil Procedure mirrors its federal counterpart. Compare Fed. R. Civ. P. 24(b)(1) with Mont. R. Civ. P. 24(b). Accordingly, federal interpretation of Rule 24(b) is instructive regarding the Montana Rule. Cf. Anniballi v. Anniballi (1992), 255 Mont. 384, 387, 842 P.2d 342, 344 (federal interpretation of Rule 24(a) is instructive because Montana's rule was modeled on the federal rule).

**B. Intervention Will Not Result in Prejudice or Undue Delay to the Original Parties**

Finally, granting permissive intervention here will not prejudice the rights of the existing parties, or cause undue delay. See Shilhanek, 2000 MT 16, ¶ 46 (in exercising its discretion on a permissive intervention motion, the court should consider the resultant delay and prejudice to the original parties). Here, intervention is proposed just eleven weeks after the complaint was filed and three weeks after the defendants filed their answer. Proposed Intervenors intend to comply with any scheduling orders the Court issues. Because intervention is proposed at such an early stage in the litigation, it will not result in any prejudice or undue delay to the existing parties. Accordingly, Proposed Intervenors satisfy the requirements for permissive intervention as well.

**CONCLUSION**

Based on the foregoing reasons, Proposed Intervenors respectfully request that their motion to intervene be granted.

Respectfully submitted this 13th day of August, 2008.

---

Douglas L. Honnold (MT Bar # 8481)  
Timothy J. Preso (MT Bar # 5255)  
Jenny K. Harbine (MT Bar # 3606)  
Earthjustice  
209 South Willson Avenue  
Bozeman, MT 59715  
(406) 586-9699  
Fax: (406) 586-9695

*Attorneys for Proposed Intervenors*