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MONTANA BOARD OF LIVESTOCK, ET AL.  
7

8 **MONTANA FIFTH JUDICIAL DISTRICT COURT**  
**MADISON COUNTY**  
9

10 SITZ ANGUS RANCH, BILL MYERS, and  
the MONTANA STOCKGROWERS  
11 ASSOCIATION, INC., on behalf of it's  
members,  
12

Petitioners,  
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vs.  
14

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

18 Respondents,  
19

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

24 Respondent-Intervenors.  
25

Cause No. DV 29-2008-34

**MOTION TO DISMISS  
AND FOR CHANGE OF  
VENUE**

26 Pursuant to Montana Rule of Civil Procedure 12(b), State Respondents move  
27 this Court to dismiss Counts 1 and 2 of the Second Amended Complaint for lack of

1 standing of Petitioners to bring Counts 1 and 2, and for failure of Petitioners; in  
2 their Second Amended Complaint, to state a claim upon which relief can be granted.

3 State Respondents also move this Court for a transfer of venue to Gallatin  
4 County of any claim under MEPA, and the attached Montana Constitutional claim.  
5 Under the provisions of MEPA, the sole and proper county in Petitioners may bring  
6 their MEPA claim is Gallatin County.

7 In support, Respondents have submitted a brief addressing the question of  
8 lack of standing of Petitioners to bring their Second Amended Complaint.  
9 Respondents have also adopted therein Respondent-Intervenors' Brief submitted in  
10 support of their Motion to Dismiss and for Transfer of Venue.

11 DATED this 21st day of January, 2009.

12 AGENCY LEGAL SERVICES BUREAU  
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15 COUNSEL FOR RESPONDENTS  
16 MONTANA BOARD OF  
LIVESTOCK, ET AL

17 By:   
18 NORMAN C. PETERSON  
Assistant Attorney General

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**CERTIFICATE OF SERVICE**

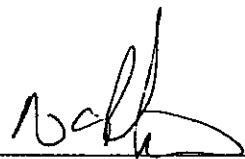
I hereby certify that I caused a true and accurate copy of the foregoing  
Motion to Dismiss and for Change of Venue to be mailed to:

Mr. John E. Bloomquist  
Mr. James L. Shuler  
Mr. James E. Brown  
Doney, Crowley, Bloomquist,  
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DATED: \_\_\_\_\_

1/21/09



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**MONTANA FIFTH JUDICIAL DISTRICT COURT  
MADISON COUNTY**

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27 TAGGART, JEANNETTE THERIEN,  
GREATER YELLOWSTONE COALITION,  
and NATURAL RESOURCES DEFENSE  
COUNCIL,

                  Respondent-Intervenors.

Cause No. DV 29-2008-34

**RESPONDENTS' BRIEF  
IN SUPPORT OF MOTION  
TO DISMISS AND  
MOTION TO TRANSFER  
VENUE**

1 State Respondents, above-named; join in the Motion for Transfer of Venue  
2 and Motion to Dismiss as filed by the Respondent-Intervenors, and adopt as their  
3 own the brief filed by the Respondent-Intervenors in support of the Motion for  
4 Transfer of Venue and Motion to Dismiss.

5 State Respondents, in compliance with Montana Rule of Civil Procedure  
6 12(b) (ii), which requires a respondent to include all other defenses, by way of law  
7 or fact, with any motion for a change of venue, hereby also move to dismiss the  
8 applicable portions of the Second Amended Complaint as Petitioners lack standing  
9 to bring Counts One and Two of their present action.

10 **SUMMARY OF ARGUMENT**

11 Petitioners are owners or leaseholders of Montana based cattle ranches or are  
12 members of an organization composed mainly of Montana landholders or livestock  
13 producers.

14 Counts One and Two of the Second Amended Complaint allege (1) a failure  
15 of the State Respondent to follow the “dictates, directives, and obligations imposed”  
16 on them under the Interagency Bison Management Plan (IBMP) and also (2) a  
17 failure of the State Respondents to comply with the alleged “clear legal duties”  
18 imposed on them under Mont. Code Ann. §81-2-120.

19 Standing is a question of law, and is a jurisdictional threshold question in  
20 cases of claims of statutory violation.

21 Petitioners are not signatories or parties to the IBMP and therefore lack  
22 standing to bring any action against State Respondents for failure to comply with the  
23 terms of the IBMP, or for breach of its provisions, or to compel specific  
24 performance of the IBMP.

25 As to the State Statute in question; it does not impose a clear legal duty on  
26 Respondents. While this addressed by Respondent-Intervenors’ Motion to Dismiss,  
27 it is equally true that if a Statute does not impose a clear legal duty, Petitioners lack

1 standing to insist that an action authorized, but not mandated by the Statute must be  
2 taken by State Respondents.

3 **ARGUMENT**

4 **I. Petitioner's lack Standing to Compel Performance of any**  
5 **Provision of the IBMP.**

6 Individually named Petitioners Sitz Angus Ranch and Bill Myers are owners  
7 or leaseholders of land located in the State of Montana, and ranch or graze livestock  
8 on that land. [Second Amended Complaint, paragraphs 1 and 2]. Petitioner  
9 Montana Stockgrowers Association, Inc. is an organization representing landowners  
10 and livestock producers located throughout Montana. Some members are livestock  
11 owners who operate ranches or graze livestock in the State of Montana [Second  
12 Amended Complaint, paragraph 3].

13 Petitioners have attached to their Second Amended Complaint a copy of the  
14 IBMP and its recent amendments. [Petitioner's Exhibits 1 and 6].

15 As concerns the IBMP, Petitioner's Counts One and Two ask this Court to  
16 compel the State Respondents to perform alleged mandatory or clear obligations  
17 required of them under the IBMP. [Second Amended Complaint, paragraphs 50,  
18 52-54, 57-60].

19 Essentially, Petitioners seek to compel specific performance of the provisions  
20 of the IBMP.

21 The question of standing is a conclusion of law based on the pleadings made  
22 by Petitioner or Plaintiff. Somont Oil Co., Inc. v. A&G Drilling, Inc., 49 P3d 598,  
23 310 Mont. 221, 2002 MT 141 (2002). It can be raised at any time. In Re Estate of  
24 Goick, 909 P.2d 1165, 275 Mont. 13 (1996).

25 In cases that claim a statutory or constitutional violation, it is a threshold  
26 jurisdictional question that must be addressed by the Court. Fleenor v. Darby  
27 School District, 1 P.3d 1048, 1049 (2006).

1 In cases of a claim of statutory violation, the Plaintiff or Petitioner must  
2 sufficiently prove that s/he has a true stake in the governmental action or inaction  
3 that is alleged, and that s/he has a personal concrete adverseness to the action that is  
4 alleged to be taken or not taken in violation of the statute. Fleenor, 1 P.3d at 1050.

5 Therefore, if the present Petitioners had a claim of improper action or  
6 inaction as regards a **mandatory duty under a statute**, and alleged a potential  
7 personal or property injury as a result of the Respondents' action or inaction, they  
8 may in fact have sufficient grounds for standing.

9 However, Petitioners claim is that the State Respondents have failed to  
10 perform "directives, duties, or obligations" under the IBMP, and that is a  
11 considerably different claim.

12 A simple glance at the contents and signature pages of the IBMP and its  
13 newly adopted amendments conclusively prove that it is an agreement entered into  
14 between two agencies of the State of Montana – the Department of Livestock  
15 (DOL) and the Department of Fish, Wildlife and Parks (DFWP) – and the National  
16 Park Service (Yellowstone National Park), USDA Forest Service (Gallatin National  
17 Forest) and the USDA Animal Plant Health Inspection Service. The State portion  
18 submitted by the Petitioners is signed only by representatives of the DOL and  
19 DFWP.

20 Noticeably absent from any document submitted by Petitioners is any  
21 signature of any Petitioner. Likewise absent from the Second Amended Complaint  
22 is any allegation that Petitioners are or were a party to the document.

23 Nonetheless, Petitioners ask this Court to compel specific performance of  
24 what they allege are IBMP mandatory duties to be performed by the State  
25 Respondents. In effect, Petitioners claim the IBMP is a contract. A contract in  
26 which there are mandatory, non-discretionary, unquestionable duties to be performed  
27

1 solely by the State Respondents. And Petitioners seek to compel specific  
2 performance of that alleged contract.

3 The problem for Petitioners, of course, is that they are not a party to any  
4 alleged contract. And not being a party, they have no standing to seek specific  
5 performance of the terms of the alleged IBMP.

6 For the sake of argument, let's assume the IBMP is a contract, and assume it  
7 contains clear unambiguous and mandatory duties that must be performed by the  
8 State Respondents. Who then can seek to compel specific performance of the  
9 contract terms?

10 By law, only the parties or specific third party beneficiaries can compel  
11 specific performance. In Palmer v. Bahm, 128 P.3d 1031, 331 Mont. 105, 2006 MT  
12 29 (2006), a Plaintiff had entered into a buy agreement for a piece of property. But  
13 the property was subject to a previously negotiated option contract between two  
14 parties, one of whom had entered into the later agreement with the Plaintiff. The  
15 Plaintiff's agreement could only be exercised if the remaining party to the original  
16 option contract failed to properly exercise her right of purchase under the option  
17 contract.

18 That remaining party did in fact attempt to exercise that purchase option, and  
19 the exercise was approved by the property owner. However, the Plaintiff believed  
20 the exercise of the purchase option was not in strict compliance with the terms of  
21 her contract. The Plaintiff brought suit for specific performance after he concluded  
22 that she had failed to properly exercise her right of purchase under the terms of the  
23 option contract. He claimed he was therefore entitled to buy the property under his  
24 separate agreement. He essentially asked the Court to order specific performance of  
25 the strict terms of the original buy contract to which he was not a party, or to find  
26 the contract was breached by imperfect performance.



1 The Court, however, held against the Plaintiff. It ruled that unless he was a  
2 party to a contract he had no standing to seek a Court order that the contractual right  
3 had been improperly exercised. He was not entitled to ask the Court to compel  
4 either specific performance of the original buy contract, or for that matter, that the  
5 terms were breached. Palmer, 128 P.3d at 1034.

6 The Court reasoned that: (1) the contract provisions the Plaintiff sought to  
7 have enforced existed only under the original contract and between parties other  
8 than him; (2) that contract principles recognize concepts such as substantial  
9 performance; and (3) that the parties to a contract may discretionally accept  
10 imperfect performance even if such acceptance effectively alters the terms of the  
11 contract. Palmer, 128 P.3d at 1034.

12 Further, the Court reasoned that there are flexibility principles that adhere to  
13 contract law, and it is the mutual satisfaction of the parties to the contract that  
14 matter, not necessarily the strict terms of the contract. It is up to the parties to the  
15 contract to decide what constitutes suitable performance under the terms of the  
16 contract.

17 To allow strangers to the contract to compel specific performance and strict  
18 compliance with the terms despite the parties' mutual satisfaction with imperfect  
19 performance would eliminate those recognized flexibility principles, and remove the  
20 discretion of the parties to determine what may be suitable performance. Palmer,  
21 128 P.3d 1034-1035.

22 The same is true for the present matter. While a claim for alleged personal  
23 injury or potential property injury may be sufficient to establish standing in a  
24 challenge to a failure of a State agency to properly perform a mandatory Statutory  
25 duty owed directly to the Plaintiff or a class in which the Plaintiff was a member;  
26 that is not the same as establishing standing when the basis for the claim is a  
27

1 demand for strict performance of the terms of a contract to which you are not a  
2 party.

3 Only a party to the IBMP may seek to compel specific performance of its  
4 terms. And no party to that IBMP is banging at this Court house door crying either  
5 doom or damage. If the parties appear to be happy with the performance of the  
6 other parties, it should not be the business of this Court to demand that someone else  
7 who is not a party be made happier.

8 Petitioners' recourse is not through this Court. Petitioners, if they do not care  
9 for the IBMP or its terms, or the performance of its terms, may approach the  
10 Montana Board of Livestock with their Complaints. If they are not satisfied with  
11 any response from the Board, they may approach the Governor. And finally, if they  
12 are not satisfied with his response, they may go to the Montana Legislature.

13 They cannot, however, ask this Court to compel specific performance of the  
14 terms of the IBMP, as they are not a signing party to the IBMP and they have no  
15 standing to make such a request.

16 **II. The Statute, of which the Petitioners Complain, Authorizes the**  
17 **State Respondents to Exercise their Discretion; it does not contain**  
18 **any Mandatory Duty. Petitioners Lack Standing to Compel a**  
**Discretionary Duty.**

19 Much of what could be argued under this heading has already by addressed in  
20 the brief of the Respondent-Intervenors, and will not be repeated.

21 It is sufficient to say that the Petitioner's demand for specific performance of  
22 the duties expressed in Mont. Code Ann. §81-2-120 has no basis in law. As argued  
23 by Respondent-Intervenors, a Court lacks the authority to compel the performance  
24 of a discretionary duty. In effect, Petitioners also lack standing to bring such a  
25 claim.

26 The entire statute is permissive in nature, using often the word "may". It  
27 does not contain the word "shall" in reference to what the Department of Livestock

1 is authorized to do by the Legislature. Any use of the word “must” is in reference to  
2 either working with tribal authority or in reference to what the Department needs to  
3 do with bison if either captured or killed.

4 In statutory construction the word “may” is permissive; if a statute is  
5 permissive there is no clear mandatory duty to perform the function enumerated by  
6 the Statute. King v. State, 856 P.2d 954, 259 Mont. 393 (1993). And the statute is  
7 clear and requires no tortured interpretation required to build a mandatory duty as  
8 alleged by the Petitioners. If the plain meaning of a statute is clear and  
9 unambiguous, there is no interpretation required. Lowell v. St. Comp. Mut. Ins.  
10 Fund, 260 M 279, 860 P.2d 95 (1993).

11 Plaintiffs have no right to ask this Court to compel the performance of a  
12 discretionary duty, and there is no mandatory duty in Mont. Code Ann. §81-2-120  
13 which Petitioners allege is not being performed.

14 **CONCLUSION**

15 This matter, for the reasons expressed in the brief submitted by Respondent-  
16 Intervenors, is improperly brought in Madison County. Venue must be transferred  
17 to Gallatin County.

18 In the event the Motion for Transfer of Venue is not granted, Counts One and  
19 Two of Petitioner’s Second Amended Complaint must be dismissed for the reasons

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1 expressed above, and in the brief in support of the Motion to Dismiss submitted by  
2 Respondent-Intervenors.

3 Dated this 21st day of January, 2009.

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8 COUNSEL FOR RESPONDENTS  
9 MONTANA BOARD OF  
10 LIVESTOCK, ET AL.

11 By:   
12 NORMAN C. PETERSON  
13 Assistant Attorney General

14 **CERTIFICATE OF SERVICE**

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16 Respondents' Brief in Support of Motion to Dismiss and Motion to Transfer Venue  
17 to be mailed to:

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DATED: 9/21/09 