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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

**MOTION FOR LEAVE TO FILE SECOND
AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF & APPLICATION FOR
ALTERNATIVE WRIT OF MANDATE; &
BRIEF IN SUPPORT**

COME NOW the Petitioners, Sitz Angus Ranch, Bill Myers, and the Montana Stockgrowers Association, Inc., on behalf of its members, by and through their undersigned counsel, and pursuant to Mont. R. Civ. P. 15(a), Mont. Code Ann. §§ 27-26-101 *et. seq.* (mandamus); Mont. Code Ann. §§27-8-101 *et. seq.* (declaratory relief); Mont Code Ann. §§ 27-19-101 *et. seq.* (injunctive relief); Mont. Code Ann.§§ 2-4-101 *et. seq.*(Montana Administrative Procedures Act); Mont. Code. Ann. §§ 75-1-101 *et. seq.* (Montana Environmental Policy Act); and Article II, Section 3 of the Montana Constitution, moves this Court for an order granting Petitioners leave to file a second amended complaint for declaratory and injunctive relief and application for alternative writ of mandate against the State of Montana, the Montana Department of Livestock (hereinafter referred to as “MDOL”), the Montana Board of Livestock (hereinafter referred to as “MBOL”), and Montana State Veterinarian Dr. Martin Zaluski (hereinafter referred to as “Zaluski”) (hereinafter referred to collectively as “Respondents”). A Brief in Support of this Motion and a proposed order are submitted herewith.

BRIEF IN SUPPORT

Petitioners, Sitz Angus Ranch, Bill Myers, and the Montana Stockgrowers Association, Inc., on behalf of its members submit this Brief in Support of the Motion for Leave to file a Second Amended Complaint for Declaratory and Injunctive Relief and Application for Alternative Writ of Mandate. Mont. R. Civ. P. 15(a) provides that, once a responsive pleading has been served, a party may amend a party’s pleading by leave of court and that leave shall be freely given when justice so requires. On July 28th, 2008, Respondents served their response to the Petitioners First Amended Complaint for Declaratory and Injunctive Relief and Application for Alternative Writ of Mandate. Because a response has been filed, Petitioners respectfully request that this Court exercise its discretion under Mont. R. Civ. P. 15(a) to allow them to file a

Second Amended Complaint.

At present, the hearing date and time to hear presently pending motions, which now consist of the Petitioners' partial summary judgment motion on Count II of their Amended Complaint and Respondent-Interveners' motion for judgment on the pleadings, is set for December 29, 2008 at 11:00 a.m. in Virginia City, Montana. After the filing of the pending motions, and after the date set for the amendment of pleadings by this Court as November 14, 2008 in the Amended Pretrial Schedule Order, the Respondents on December 17, 2008 purportedly modified the existing IBMP, which is the subject of Petitioners' underlying action. As provided for in the Petitioners' Second Amended Complaint, the modifications to the existing IBMP violate rights preserved to Petitioners under the Montana Constitution and are also in violation of state law as to Respondents' obligations under the Montana Environmental Policy Act (MEPA). As a result of Respondents' illegal activities in modifying the existing IBMP, Petitioners have had to amend their existing complaint.

In Montana, requests for motions to amend complaints are to be freely granted unless the request is the product of undue delay, bad faith and amendment futility. *See, Hughes v. Pullman*, (2001) MT 216, ¶ 42, 306 Mont 420, ¶ 42, 36 P.3d 339 ¶ 42. In this instance, Petitioners seek to amend their complaint to allow for consideration of a new claim arising from actions made by the respondents since the filing in May of 2008 of the First Amended Complaint. Specifically, Petitioners seek to add two counts: for declaratory and injunctive relief requesting an order that declares that Respondents must comply with MEPA, (Mont. Code. Ann. 72-1-102 *et. seq.*) prior to implementing the recently executed IBMP Adaptive Management Plan, and for relief that enjoins Respondents from implementing and carrying out provisions of the IBMP Adaptive Management Plan that modify and/or change the existing IBMP until the MEPA process is concluded. Second, Petitioners' request from this Court an order that Respondents actions in

allowing for an increase risk of brucellosis/brucella in the environment in areas outside of Yellowstone National Park violates Petitioners' constitutional rights under Article II, Section 3 of the Montana Constitution, which provides to all Montanans a right to a clean and healthful environment, and consequently, such actions should be enjoined until the Respondents analyze the environmental impacts of their actions as called for under Montana law.

The claims made in Petitioners' Second Amended Complaint are timely, relevant to the ongoing case, and consideration of the same will not result in a trial delay. Pre-trial conference on this matter is scheduled for June, 29, 2009. Therefore, the Motion will not result in prejudicial delay either to the Court or to any party to this matter. As previously noted, the actions sought to be enjoined have only recently been concluded by the Respondents (December 17, 2008) and relate to the subject of and parties named in the original and amended complaints. Consequently, the Motion to Amend is timely, relevant, and not the product of bad faith or dilatory motive. *See, Aldrich & Co. v. Ellis*, 2002 MT 177 ¶ 26, 311 Mont. 1 ¶ 26, 52 P.3d 388 ¶26 ([W]e have repeatedly held that leave to amend should be freely given when justice so requires pursuant to Rule 15(a) unless the moving party is guilty of undue delay, bad faith, or dilatory motive).

Allowing Petitioners to amend their complaint to add the allegations precipitated by Respondents' actions in modifying the existing IBMP since the filing of this action in May of 2008 should be allowed in the interests of justice. Given the efforts of Respondents and Respondent-Intervenors to have the Petitioners' underlying claim related to the enforcement of the existing IBMP dismissed by this Court, consideration of Petitioners' additional claims as set forth in the Second Amended Complaint should also be allowed so that all of Petitioners' relevant and timely claims may be asserted in one action. For the foregoing reasons and in light

of the express mandate of Rule 15(a) that leave to amend is to be "freely given," Petitioners respectfully request that this Court exercise its discretion to grant the Petitioner's Motion.

Petitioners' counsel has contacted Respondents' counsel who has indicated Respondent takes no position until Respondents' review Petitioners' pleadings. Counsel for Respondent-Intervenors was contacted and informed counsel for Petitioners of their objection. A proposed order is included for this Court's consideration.

Dated this 23rd day of December, 2008.

DONEY CROWLEY BLOOMQUIST PAYNE UDA P.C.

By:


James E. Brown

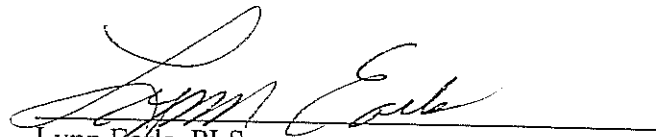
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Motion for Leave to Amend Complaint and Brief in Support* was served, postage prepaid via first class U.S. mail on this 23rd day of December, 2008, upon the following:

Norman C. Peterson
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
Helena, Montana 59620-1440

Douglas Honnold
Earthjustice Legal Defense Fund
209 South Wilson Avenue
Bozeman, MT 59715


Lynn Earls, PLS
Legal Assistant

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
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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-Intervenors.

Cause No. DV 29-2008-34

**PROPOSED ORDER GRANTING
PETITIONERS' MOTION FOR LEAVE
TO FILE TO FILE SECOND AMENDED
COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

and

**APPLICATION FOR ALTERNATIVE
WRIT OF MANDATE**

Movant, Petitioners Sitz Angus Ranch, Bill Myers, and the Montana Stockgrowers Association, Inc., on behalf of its members, by and through their attorneys of record, having filed with this Court a Motion for Leave for Petitioners to file a Second Amended Complaint for

Declaratory and Injunctive Relief and Application for Alternative Writ of Mandate and having filed a Brief in Support, and good cause being shown:

PURSUANT TO MONT R. CIV. P. 15(A), IT IS HEREBY ORDERED THAT justice requires that the Petitioner's Motion for Leave to file a Second Amended Complaint be **GRANTED.**

DATED this ____ day of _____, 2008.

HONORABLE LOREN TUCKER
DISTRICT COURT JUDGE

cc: Norman C. Peterson
Douglas Honnold
John E. Bloomquist

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James L. Shuler
Marc G. Buyske
James E. Brown
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MONTANA FIFTH JUDICIAL DISTRICT COURT, MADISON COUNTY

SITZ ANGUS RANCH; BILL MYERS; and
MONTANA STOCKGROWERS
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Respondent-Intervenors

Cause No. DV 29-2008-34

**SECOND AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

and

**APPLICATION FOR ALTERNATIVE
WRIT OF MANDATE**

COME NOW the Petitioners, Sitz Angus Ranch, Bill Myers, and the Montana Stockgrowers Association, Inc., on behalf of its members, by and through their undersigned counsel, and pursuant to Mont. Code Ann. §§27-26-101 *et. seq.* (mandamus); Mont. Code Ann. §§27-8-101 *et. seq.* (declaratory relief); Mont. Code Ann. §§27-19-101 *et. seq.* (injunctive relief); Mont. Code Ann. §§2-4-101 *et. seq.* (Montana Administrative Procedures Act), Mont. Code. Ann. §§75-1-101 *et. seq.* (Montana Environmental Policy Act); Article II, Section 3 of the Montana Constitution, and Mont. R. Civ. P. 15(a) and for its causes of action against the State of Montana, the Montana Department of Livestock (hereinafter referred to as “MDOL”), the Montana Board of Livestock (hereinafter referred to as “MBOL”), and Montana State Veterinarian Dr. Martin Zaluski (hereinafter referred to as “Zaluski”) (hereinafter referred to collectively as “Respondents”) hereby incorporate fully the facts and allegations made in its First Amended Complaint and now file the following Second Amended Complaint that further alleges as follows:

I. BACKGROUND

Petitioners filed this action for alternative writ of mandate and supporting brief and attachments on May 27, 2008, to require Respondents to immediately perform their clear legal duty to remove all Yellowstone National Park bison currently located on public and private lands within the State of Montana and, specifically to remove said bison from Zones 2 and/or 3 of the Western Boundary Area of the Interagency Bison Management Plan for State of Montana and Yellowstone National Park (hereinafter referred to as “IBMP”) or to show cause why this Court should not order Respondents to take such action (hereinafter “Application”). On May 29, 2008, this Court issued an Alternative Writ of Mandate ordering Respondents to remove all bison from

the West Boundary Area or appear before this Court on June 9, 2008 to show cause why Respondents should not be ordered to do so.

On May 30, 2008, Petitioners filed and served their First Amended Complaint, in which the Petitioners further brought an action for declaratory and injunctive relief regarding Respondents failure to implement the various bison management prescriptions called for in the IBMP in the Western Boundary Area, and sought an order requiring the Respondents to follow and implement the dictates of the IBMP, specifically in the Western Boundary Area, immediately and into the future. On June 6, 2008, upon stipulation of the Petitioners and Respondents, this Court entered an order vacating the Show Cause Hearing the Court had scheduled on June 9, 2008 as Respondent had taken action to remove Yellowstone National Park bison from Montana.

By this Second Amended Complaint, Petitioners further bring this action for declaratory and injunctive relief based on Respondents failure to implement the various bison management prescriptions called for in the IBMP in the Western Boundary Area, and to order Respondents to follow and implement the existing IBMP until they comply with their legal duties to analyze the environmental impacts of modifying the IBMP. Based on knowledge, information, and belief, Petitioners allege that on Wednesday, December 17, 2008, Respondents purportedly adopted significant amendments to the existing IBMP by signing an agreement entitled "IBMP Adaptive Management Plan," and did so without first complying with Montana law, including specifically the obligation to conduct an environmental review as is required by the Montana Environmental Policy Act (MEPA); Mont. Code. Ann. §75-5-101 *et seq.* and regulations implementing Respondents' MEPA duties, Admin. R. Mont. §§32.2.221 *et seq.*

The action taken by Respondents Montana Department of Livestock (DOL) is an action

that constitutes a challengeable state agency action because it is an attempt to significantly modify the existing IBMP, which such modifications substantially change the IBMP by extensively changing the IBMP's existing brucellosis transmission prevention management actions without the benefit of a legally required environmental review of the action. The Respondent DOL's decision to modify the IBMP without following proper procedure is affected by error of law that renders the decision arbitrary and capricious, and that violates the legal rights of Petitioners. Specifically, the Respondents failed to comply with their legal duties under the Montana Environmental Policy Act (MEPA), Mont. Code. Ann. §75-1-102 *et seq.*, and Article II, Section 3 of the Montana Constitution to analyze the environmental impacts of their actions prior to purportedly adopting the IBMP Adaptive Management Plan.

Based on the Respondents decision to sign the IBMP Adaptive Management Plan, Petitioners now seek a declaration that Respondents must, pursuant to the MEPA, sufficiently evaluate the significant impacts of the modified "IBMP Management Plan for the West Boundary of Yellowstone National Park" on the human environment prior to implementing the modified management provisions by preparing an Environmental Impact Statement (EIS) or, at a minimum, the required Environmental Assessment (EA) for the proposed modifications, and further seek an order of this Court enjoining the Respondents presently, and into the future, from putting into place the IBMP Adaptive Management Plan for the West Boundary of Yellowstone National Park until the necessary MEPA review is completed by Respondents.

II. PARTIES

1. Petitioner Sitz Angus Ranch (hereinafter referred to as "Sitz") is a Montana partnership headquartered in Harrison, Montana. Sitz grazes cattle in Madison, Gallatin, and Beaverhead Counties affected by the action or inaction of the Respondents as alleged herein.

Sitz leases lands known as the Deep Well Ranch from the Povah Family for livestock grazing purposes, which lands are situated on the boundary line between what are described in the IBMP dated December 22, 2000 as Zones 2 and 3 in the Western Boundary Area. *See*, map of Western Boundary Bison Management Zones depicting private property within the area (attached to Application as Exhibit “1”);¹ Application, Ex. 2, Aff. Bob Sitz ¶3 (May 27, 2008).

2. Petitioner Bill Myers (hereinafter referred to as “Myers”) of Reedpoint, Montana is a rancher who grazes cattle adjacent to Yellowstone National Park within Zone 2 of the Western Boundary Area on private lands known as the Stinnett Ranch and Red Creek Ranch. *See* Application, Ex. 1; *see also*, Application, Ex. 3, Aff. Bill Myers ¶3 (May 27, 2008).

3. Petitioner Montana Stockgrowers Association, Inc. (hereinafter referred to as “MSGA”) is a Montana not-for-profit organization representing more than 2,500 landowners and livestock producers located throughout Montana. Certain MSGA members are livestock owners who own and/or operate ranches on private property or on federal grazing allotments where livestock are situated and grazed, in Madison, Beaverhead, and Gallatin Counties, either within or adjacent to Zones 2 and 3 and who depend upon proper management of Yellowstone National Park bison by Respondents when such animals are found within the borders of the State of Montana. *See*, Application Ex. 4, Aff. Errol Rice ¶2 (May 27, 2008).

4. Collectively, Petitioners or their members have a direct interest in the management of bison which emigrate into Montana from Yellowstone National Park due to the known prevalence of the disease brucellosis in these Yellowstone bison. In addition, Petitioners and their members have a direct interest in the protection of Montana’s environment, which interests are potentially impacted significantly by the failure of the Respondents to fully

¹ Citation to attachments of previous pleadings will not include an attachment of those exhibits previously provided to the Court and contained already in the record herein.

implement the terms of the IBMP, and which interests are potentially impacted significantly by Respondents' action in failing to analyze the environmental impacts of their actions prior to purportedly adopting the IBMP Adaptive Management Plan as required by MEPA. In particular, the health of Petitioners' livestock, the human health ramifications associated with brucellosis, and the impacts on area wildlife associated with the increased presence of diseased bison outside Yellowstone National Park are injuries, or potential injuries, to Petitioners which are a result of Respondents' actions. These interests of Petitioners' are directly affected by Respondents' actions and inactions. Petitioners' and Petitioners' members use and enjoy land, the environment, and natural resources within areas directly adjacent to areas where bison migrate from Yellowstone National Park into Montana in the Western Boundary Area. These lands, environments, and associated natural resources are used by Petitioners or their members for the grazing of livestock whose health is directly affected by the management of Yellowstone bison, many of which are infected with, or exposed to, the disease brucellosis that may be shed into the environment if Respondents' fail to manage the bison. The potential negative impacts of brucellosis on the health of Petitioners' livestock, the human health ramifications of brucellosis, and the associated impacts of brucellosis on area wildlife populations are all directly affected by Respondents' actions or inactions associated with bison management.

5. The above-described interests of the Plaintiffs have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely and irreparably injured by the Respondents failure to comply with the IBMP and failure to follow the procedural mandates of MEPA, and implementing regulations thereto, prior to adopting the IBMP Adaptive Management Plan dated December 17, 2008.

6. The Petitioners have a strong interest in protecting the quality and ecological

integrity of the human environment in Montana. *Brucella abortus* is known to be present in Yellowstone National Park Bison that enter Montana. Petitioners' and their members' interests include specifically the harmful impacts of brucella from Yellowstone National Park Bison being shed into the environment when bison are present in the Western Boundary Area. Accordingly, the Plaintiffs have an interest in the procedural and substantive requirements of Montana's environmental protection laws, including MEPA, to ensure Respondents' actions adequately analyze and consider the impacts associated with increasing the presence of brucella abortus in the environment outside of Yellowstone National Park in Montana as a result of Respondents' action in adopting the IBMP Adaptive Management Plan. Petitioners, the Montana Stockgrowers Association, have commented previously to Respondents regarding the illegality of Respondents' actions in purportedly adopting the IBMP Adaptive Management Plan by failing to comply with MEPA's requirements. In spite of these comments, and in spite of these clear violations of Montana law, the Respondent DOL has purportedly adopted the Adaptive Management Plan without complying with MEPA or MEPA's implementing regulations.

7. Collectively, the Petitioners have no administrative remedies available to them to enforce the IBMP or to prohibit the modification of that Plan as Respondent DOL has done on December 17, 2008. Consequently, the only form of relief available to Petitioners to enforce Montana's Constitution and environmental laws is by the filing of this Second Amended Complaint.

8. Respondent MDOL is an executive branch agency of the State of Montana headquartered in Helena, Montana and is charged with the statutory authority to control and eradicate animal diseases, prevent the transmission of animal diseases to humans, and to protect the livestock industry from diseased animals. MDOL has the specific statutory and regulatory

responsibility to control bison entering Montana from Yellowstone National Park that may be exposed to or infected with brucellosis, specifically those bison within Montana and the Western Boundary Area. Mont. Code. Ann. §§81-1-102; 81-2-120. *see also*, IBMP (attached to Application as Exhibit "6"). Respondent DOL is a signatory to the IBMP Adaptive Adjustments to the Interagency Bison Management Plan dated December 17, 2008. Respondent DOL as an executive branch agency has rules and regulations promulgated directing it to comply with MEPA. A copy of the signed Adaptive Adjustments to the Interagency Bison Management Plan is attached hereto and incorporated herein as Exhibit "1"

9. Respondent MBOL is the director of and is responsible for the activities of MDOL. Mont. Code Ann. §2-15-3102. By law, MBOL must appoint a state veterinarian who is directly responsible to MBOL as administrator of the laws relating to animal health in Montana. Mont. Code Ann. §81-1-301.

10. Respondent Zaluski is the Montana State Veterinarian responsible for the administration of the animal health laws of the State of Montana. Mont. Code Ann. §81-1-302.

11. Respondent State of Montana is one of the several states of the United States and entered into the IBMP.

12. Respondents are collectively members of the Interagency Bison Management Plan (IBMP) partner agencies, which conducted seven working meetings after the filing of this action with the stated purpose of those meetings being to adopt and implement bison management modifications to the IBMP for winter 2008-2009 and beyond and which planned modifications substantially change the existing IBMP. A copy of the December 17, 2008 modifications are attached hereto and incorporated herein as Exhibit "2".

13. Respondent-Intervenors are comprised of Horse Butte property owners and

residents, along with two conservation groups, the Greater Yellowstone Coalition (“GYC”) and Natural Resources Defense Council (“NRDC”). By order of this Court, Respondent-Intervenors became parties to the above-captioned case on September 24, 2008.

III. JURISDICTION AND VENUE

14. Jurisdiction is proper in this Court pursuant to Mont. Code Ann. §§27-26-102; 27-8-201; 27-19-101; 2-4-701; the general original jurisdiction of this Court under Mont. Code Ann. §3-5-302; the Montana Constitution Article II, Section 3; and the inherent power of this Court to review state agency decisions and actions

15. Venue is proper in Madison County in this matter because the proper place of trial for an action against a public officer for an act done or not done by him in virtue of his office is the county where the cause or some part thereof arose. Venue is further proper in Madison County because when an action is brought by a resident of Montana against the State of Montana, the county of the petitioner’s residence is a proper place of trial. *See*, Mont. Code Ann. §§25-2-125 through 126. Venue is also 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 resulting to Petitioners and Petitioners’ members and to the human environment from those modified IBMP activities will transpire, in part, in Madison County. In this matter, Sitz’s principal place of business is in Madison County, and this action arises in part out of Respondents’ failure to carry out their clear legal duties to manage bison found within the State of Montana to protect Sitz’s livestock situated within Madison County, Montana. After pasturing cattle in the Western Boundary Area, Sitz returns those cattle to Madison County where they remain for various periods of the year. Venue is also proper in Madison County as the interests of MSGA, on behalf of its members,

include MSGA members situated in Madison County whose property, livestock health, constitutional, and environmental interests are placed at risk by Respondents' failure to follow the law, by Respondents' failure to implement the provisions of the IBMP, and by Respondent's apparent action to sign a modification of the IBMP that may significantly enhance the risk of brucellosis transmission to cattle herds in Madison County by both allowing for an increase in the number of bison allowed outside of the Park and by *allowing* a significant number of untested bison to migrate into and to occupy portions of Zone 2 each winter and spring, namely the Horse Butte Peninsula and The Flats area, with the stated goal of allowing untested bison to remain in this area until late spring or early summer, thereby both increasing the risk to Petitioners' livestock and significantly increasing the risk of environmental contamination by shedding brucella abortus on the Horse Butte Peninsula and the Flats areas. The series of modifications agreed to by Respondent DOL have been adopted without any environmental review being conducted on this state action that has the potential for causing significant impacts on the human environment and violate the Petitioners' constitutional right to a clean and healthful environment under Article II, Section 3 of the Montana Constitution.

IV. FACTUAL BACKGROUND

16. Collectively, Respondents are charged under Montana state law, promulgated Administrative Rules of Montana, and the IBMP with protecting Montana livestock and the owners of Montana livestock from disease threats posed by Yellowstone National Park bison that are infected with or exposed to brucellosis and that enter Montana. As part of those applicable statutory and regulatory obligations, Respondents are obligated to manage and control bison outside Yellowstone National Park within the Western Boundary Area. *See*, Mont. Code Ann §81-2-120; Admin. R. Mont. 32.3.224A (attached to Application as Exhibit "5"); IBMP at 3-9

(attached to Application as Exhibit “6”). This action arises out of the Respondents’ failure to properly carry out their duties, namely their failure to remove bison from Montana by May 15 of 2008 and previous years, and the failure of Respondents to conduct the described management actions set forth in the IBMP in the Western Boundary Area, thereby jeopardizing both Petitioners’ property (livestock), and the animal health of the livestock industry in the State of Montana.

17. On or about December 22, 2000, the State of Montana issued a Record of Decision on the IBMP, which is the State of Montana’s approved management plan governing management activities for bison situated in the State of Montana that enter the state from Yellowstone National Park. *See*, Application, Ex. 6. The IBMP implements Respondents’ statutory responsibilities to manage bison under Mont. Code Ann. §81-2-120. *See*, IBMP at 3-4.

18. The IBMP is also the governing plan for the management of Yellowstone bison that enter Montana in the Western Boundary Area to ensure that domestic cattle in portions of Montana adjacent to Yellowstone National Park are protected from the threats associated with the disease brucellosis, which bison are exposed to or infected with and which poses a threat to animal and human health in the State of Montana. *See*, IBMP at 1.

19. Brucellosis is a contagious bacterial disease caused by various species of the genus *Brucella* that infects domestic animals, wildlife, and humans. The species of concern in the Yellowstone National Park region is *Brucella abortus*, whose hosts are bison and elk. There is no known cure for brucellosis. Cattle infected with brucellosis characteristically abort after the fifth month of gestation. *See*, Draft Environmental Impact Statement (hereinafter referred to as “EIS”) for IBMP at 8 (excerpts of which are attached to the Application as Exhibit “7”). The presence of brucellosis in Yellowstone National Park bison that enter Montana also subjects the

Montana livestock industry to animal health-related sanctions from other animal health authorities. The presence of brucellosis in Yellowstone bison that enter Montana further subjects the human environment, human health, and other forms of wildlife to harm or potential harm due to the potential risk of transmission if bison are not properly managed or controlled.

20. The IBMP was approved by both the State of Montana and the Governor of Montana in 2000. Respondents are charged with implementing the IBMP's mandate to reduce the risk of transmission between bison and Montana cattle located in areas neighboring Yellowstone National Park. *See*, Mont. Code Ann. §81-2-120; IBMP at 1-2.

21. The IBMP dictates management of bison into various steps and zones. One of those management areas is the Western Boundary Area where bison migrate out of Yellowstone National Park into Montana. *See*, Application, Ex. 1. At present, no cattle are grazed in this area during winter. *See*, Application, Ex. 7. However, beginning in late spring and throughout the summer into early fall, cattle graze on private lands within Zone 2 and on public and private lands in Zone 3 adjacent to Zone 2. As the IBMP directs, by May 15, bison in the Western Boundary Area are to be moved back into Yellowstone National Park or otherwise removed from Zone 2 so that cattle are allowed onto grazing allotments or private lands for grazing and to ensure temporal and spatial separation between bison and cattle as provided for in the IBMP. *See*, IBMP at 7, ¶7.

22. Beginning in early June of each year, Sitz grazes cattle on private property leased from the Povah Family, and public lands adjacent to Zone 2 of the Western Boundary Area. *See*, Application, Aff. Sitz at ¶4. After grazing on these lands during the summer, Sitz's cattle are returned to Madison County where they remain for periods throughout the year.. Beginning in early June of each year, Petitioner Myers also grazes cattle on private land located within Zone 2

of the Western Boundary Area on ranches known as the Stinnett Ranch and Red Creek Ranch and has a federal and state-approved herd plan for this activity. *See*, Application, Aff. Myers at ¶8. Under Myers' herd plan, bison are to be out of the West Boundary Area grazed by Myers by May 15th of each year. *Id.*

23. Beginning in the spring and early summer of each year, MSGA members also graze cattle on private and public lands in the vicinity of Zone 2 and within Zone 3 in Madison County, Montana. MSGA members otherwise graze cattle on private lands in Zones 3 and other areas in Madison County throughout the year. *See*, Application, Aff. Rice at ¶¶2, 4.

24. As provided for in the IBMP and Montana law, Respondents are required to keep all bison outside Yellowstone National Park in the Western Boundary Area away from private lands after April 1 of each year and to haze or otherwise remove bison located in this area back into the park no later than May 15 of each year. *See*, IBMP at 7, ¶7; 8 ¶¶10(a) & (b).

25. As of the date of the Application, and in contravention of the IBMP's mandate to remove bison by May 15, Respondents allowed bison to remain within Zone 2 on private property outside of Yellowstone National Park. Specifically, in 2008, Respondents allowed approximately 200 head of untested bison to reside on private property in the Western Boundary Area formerly known as the "Munns Ranch," which bison were allowed to remain outside of Yellowstone National Park in the Western Boundary Area in contradiction of specific management directives provided for in the IBMP and in contradiction of Montana law. These bison were untested in contradiction of the IBMP, meaning the seroprevalence for brucellosis was unknown and included pregnant female bison that have calved or are calving within Montana, also in contradiction of the IBMP.

26. Respondents' failure to remove bison or otherwise comply with the requirements

of the IBMP and Montana law threaten the economic, property and animal and human health interests of Petitioners herein. See, Application, Aff. Sitz, at ¶10; Aff. Myers at ¶8; Aff. Rice at ¶6.

27. Respondents' failure to remove bison in the Western Boundary Area after May 15 significantly increases the risk of disease transmission, namely brucellosis, between livestock and bison, as *brucella* organisms that may be shed by bison can persist in the environment, for extended periods of time, thereby exposing Montana cattle to additional risk of brucellosis transmission from bison to cattle in direct contradiction of Respondents' clear legal duties.

28. Respondents have also failed to implement the other management activities specifically directed in the IBMP in the Western Boundary Area in the years, 2006, 2007, and 2008. Under the terms of the IBMP, the Plan is presently in Step 1 in the Western Boundary Area. In Step 1, under the IBMP, bison are to be managed as provided in the Plan. In the past three (3) years the Respondents have failed to manage bison in the Western Boundary Area in accordance with the IBMP despite repeated requests from Petitioners for the Respondents to comply.

29. Respondents failure to properly manage bison under the terms of the IBMP include, but is not limited to, Respondents failure to: 1) capture and test bison; 2) only allow seronegative bison to remain within Zone 2 of the Western Boundary Area; 3) limit the number of seronegative bison up to the specific tolerance level of a maximum of 100 head; 4) manage pregnant bison as directed under the IBMP; 5) remove bison when the YNP population level exceed 3,000 animals; 6) remove bison from the West Boundary Area by May 15; 7) vaccinate certain classes of bison captured as called for in the IBMP; and 8) keep bison away from private lands after April 1, as directed by the IBMP.

30. Respondents' failure to manage bison located outside Yellowstone National Park in the Western Boundary Area in conformance with the terms of the IBMP and to completely remove bison from Zone 2 in the Western Boundary Area by May 15 of each year is an ongoing violation of the law. Respondents have also failed to adhere to the May 15 mandate and other specific management directives called for in the IBMP in the years of 2006, 2007 and 2008. *See*, Application, Aff. Rice at ¶8; Aff. Myers at ¶9.

31. The IBMP is specifically intended to lower the risk of brucellosis-exposed bison from Yellowstone National Park, thereby preventing transmission of the disease to Montana livestock and to protect human health interests. Without implementing the terms of the IBMP the Respondents place Petitioners, the public, and the entire Montana cattle industry at risk. Respondents' failure to comply with Montana law, and the terms of the IBMP is ongoing and capable of repetition given Respondents conduct or inaction and requires relief from this Court.

32. Until recently, the State of Montana had been officially brucellosis class-free since 1985. *See*, Application, Aff. Rice at ¶6. However, after the discovery in May 2008 of a second infected cattle herd in the Paradise Valley, Montana, the United States Department of Agriculture Animal and Plant Health Inspection Service ("USDAAPHIS") downgraded Montana's brucellosis status from Class Free to Class A in September 2008. This downgrade will result in Montana's livestock producers having to, at a minimum, test all sexually intact cattle over 18 months of age within 30 days of export. This downgrade was required by UDAAPHIS rule due to the discovery of a second case of brucellosis within 24 months of the first discovery.

33. In May 2007, a brucellosis-exposed cattle herd was discovered near Bridger, Montana. According to current regulations, when a brucellosis-exposed herd is disclosed in a

class-free state such as Montana, the state can retain its class-free status only if the entire herd is sold to slaughter, an epidemiologic investigation is completed within 60 days, and there has been no evidence of spread. Since a second brucellosis-exposed herd was discovered within two years of the first exposed herd, Montana has now, as noted above, regressed to brucellosis Class A status, which reduction in status has adversely affected Petitioners and all Montana cattle producers statewide. *See*, *Aff. Rice* at ¶¶6-7.

34. In 2007, Montana was able to maintain its brucellosis class-free status after the disclosure of the brucellosis-exposed herd in May only after the Montana ranchers whose herd was exposed suffered a total loss of their stock and significant out-of-pocket losses. *Id.* at ¶7. Pursuant to APHIS regulation, the Paradise Valley herd where the second instance of brucellosis was identified was also depopulated resulting in financial loss to the owners.

35. Montana will be able to reapply for Class Free Status on May 27, 2009. In addition, under the IBMP, should the Class Free Status be restored, USDAAPHIS will not threaten Montana's brucellosis class-free status due to the presence of Yellowstone National Park bison being within Montana, provided that the State of Montana is complying with the provisions of the IBMP. However, until the Class Free Status is restored, the Petitioners will continue to be harmed by the State's reduction to Class A status and, regardless of which classification is in place, are placed at risk for the foreseeable future by the presence of brucellosis-infected bison located in and around Yellowstone National Park, including those areas within and adjacent to Zone 2 of the IBMP.

36. Petitioners' livestock graze on lands located either within Zone 2 or adjacent to Zone 2. The presence of bison in the Western Boundary Area in contravention of the IBMP places Petitioners' cattle at a higher risk for brucellosis exposure as a result of Respondents'

failure to implement their clear legal duties. *See*, Application, Aff. Myers at ¶18; Aff. Sitz at ¶18.

37. In addition, the presence of bison from Yellowstone National Park within the boundaries of the State of Montana at a time when the bison are calving, which is a period in which the risk of transmission of brucellosis from bison to Montana domestic cattle is high due to the transportation of shed fetuses by predators and scavengers, further places Petitioners at risk. Consequently, there is an increased risk that Montana could experience another domestic herd with a brucellosis reactor prior to the time Montana is able to reapply for Class Free status in May of 2009, or subsequent to that date, unless Respondents are ordered to implement their clear legal duties under Montana law and specifically the IBMP. Should another reactor be discovered, Montana will likely not be able to regain its brucellosis class-free status, and Petitioners and the entire Montana cattle industry will suffer further injury.

38. After the original complaint was filed in this matter in May of 2008, Respondents participated, as members of the Interagency Bison Management Plan partner agencies, in a series of meetings with the goal of developing and incorporating short- and long-term adjustments to the IBMP for winter 2008-2009 and beyond. *See*, Meeting Agenda of Interagency Bison Management Plan #7 of 7 at 1 and Second Affidavit of Amy McNamara attached to Reply Brief of Respondent-Intervenors Edith Ford, et al., In support of Motion for Judgment On The Pleadings (Nov. 25, 2008) (which documents are attached hereto and incorporated herein as Exhibits "3" and "4" respectively). Employing the term "adaptive management" to define their actions, Respondents used these meetings to modify the IBMP contrary to their statutory and regulatory duties to prevent the spread of brucellosis and contrary to compliance with Montana's most basic environmental law, MEPA. Respondents have purportedly adopted a plan to allow uncontrolled introduction of bison into Zone 2. *See*, Exhibits "1" and "2" attached hereto.

Respondents' interpretation of the term "adaptive management" is in contradiction of the express provision of the IBMP, and even if consistent with the provisions of the IBMP have been done contrary to MEPA.

39. The final meeting of the partner agencies took place on December 17 and 18, 2008 at the Montana Fish Wildlife and Parks (MFWP) Offices in Bozeman, Montana. *See, Ex. "3" at 1.* At that meeting, the Partner Agencies, including Respondent DOL, adopted an "IBMP Management Plan for the West Boundary of Yellowstone National Park; *See, Ex. 1. 40.* The IBMP Adaptive Management Plan for the West Boundary of Yellowstone National Park substantially modifies bison management activities for the western boundary. *See, Ex. 2.* Among the significant modifications enacted are (1) allowing untested bison to migrate onto and to occupy the Horse Butte peninsula between the Madison Arm of Hebgen Lake and Grayling Creek and on the Flats (the area east of South Fork Madison River, south of the Madison Arm, and west of Highway 191) in Zone 2; (2) substantially increasing the number of untested and pregnant bison allowed in these areas; (3) making May 15 of each year a target, not a set date, for hazing bison back into the Park; (4) classifying bison located in Zone 2 as "wildlife" as opposed to a "species in need of disease management" as required by Montana law; and (5) allowing untested bull bison to occupy the area of Zone 2 south of Duck Creek on the Western Boundary of Yellowstone National Park year-round. *See, Ex. 2, Sections 1.1-1.3 and 3.1-3.2.* Under the modified Management Plan, Respondents the State of Montana and the MDOL are designated as being the "lead" parties for implementing and executing these substantial IBMP modifications in the West Boundary area. *See, Ex. 2.*

41. The changes proposed by the partner agencies in the so-called IBMP adaptive plan were purportedly adopted by the partner agencies on December 17, 2008. *See, Ex. 1.* If put

into place without first being subject to proper environmental review, the modifications set forth in the IBMP Adaptive Management Plan subject Petitioners' cattle herds to a significant increase in risk of brucellosis exposure and subject wildlife and the environment in the Western Boundary Area to a significant risk of brucella exposure without the benefit of any assessment by the Respondents of the impact of these modifications on the environment and without any environmental review being conducted. Specifically, by allowing untested bison (and in greater numbers than presently allowed and for significantly greater periods of time) to be situated in the West Boundary, namely pregnant bison, the proposed Adaptive Management Plan increases greatly the risk of brucellosis exposure and potential transmission to livestock and to other wildlife due to the shedding of brucella in areas at a time of the year proximate to the turning out of petitioners' livestock to graze, and at times of the year when other wildlife will frequent the area.

42. The stated purpose of the existing IBMP is to minimize the risk of transmission from Bison to domestic cattle and to humans by calling for 100% seronegative bison to be in Zone 2 under Step 1 of the IBMP and by ensuring proper temporal and spatial separation between bison that have left Yellowstone Park and cattle grazing in Zones 2 and 3. By agreeing to and by implementing the IBMP revisions contained in the Adaptive Management Plan without first conducting a sufficient MEPA review of such modifications, the Respondents are subjecting the Petitioners and the entire Montana cattle industry to additional injury associated with the disease brucellosis. The Respondents' failure to conduct an EIS or, at a minimum, an EA pursuant to MEPA prior to revising their management activities under the IBMP is a breach of Montana law, violates the Petitioners' environmental rights under the Montana Constitution, and results in actual procedural injury to Petitioners as well as potential significant environmental

injury protected under Montana law and the Constitution; and such conduct is capable of being remedied by this Court. Consequently, Petitioners are entitled to relief from this Court that directs Respondents to follow proper procedure and to conduct a sufficient environmental review under MEPA.

43. In light of the importance of compliance with the IBMP and Montana law, Petitioners have repeatedly requested that Respondents comply with their statutory and regulatory directives to implement the management measures of the existing IBMP and specifically to remove bison remaining within the boundaries of the State of Montana as per the time limits set forth in the existing IBMP. However, Respondents have failed to haze, capture, manage, transport, or otherwise remove bison from the Western Boundary Area in the manner directed under the IBMP. *See*, Application, Aff. Rice at ¶8.

44. Without immediate action by either Respondents or by an order of this Court to direct Respondents to comply with the existing IBMP and Montana law, Petitioners individually, and/or their members, will suffer significant and irreparable harm.

45. The harm that could occur to Petitioners Sitz and Myers, and these Petitioners' cattle, as a result of the Respondents' failure to implement the terms of the existing IBMP and as a result of Respondents' decision to modify the existing IBMP without first going through the MEPA process includes an increased potential for brucella to be present in the human environment, increased potential transmission of brucellosis to cattle and to other forms of wildlife, including elk, loss of grazing opportunities, increased testing requirements, associated damages to Petitioners' livestock operations, and the denial of the Petitioner's right to a clean and healthful environment. Harm which could occur to members of the Petitioner Montana Stockgrowers Association include these same injuries, plus the potential statewide harm which

could occur to the livestock industry in Montana should the state be unable to regain its brucellosis class-free status or should the state once again lose that class-free status should it be restored.

46. Brucella is a contagious disease that is highly regulated due to its harmful impact on humans, on wildlife, and to the human environment. *See*, Deposition of Dr. Martin Zaluski pp. 45-56 & Deposition Exhibit “6” pp. 15-17 (Oct. 12, 2008) the relevant pages of which are attached hereto and incorporated herein as Exhibit “5”. Once shed into the environment, Brucella can survive freezing and thawing. Under proper environmental conditions, brucella can survive for months in urine, water, and damp soil. Colder weather can extend survival time. Although cattle are the preferential host, other forms of wildlife are known to be carries, such as bison and elk. Aborted tissue and fluids are a common source of the spread of brucella.

47. The presence of untested bison, namely untested pregnant bison, in areas outside of Yellowstone Park increases the risk that brucella will be shed into the human environment, thereby degrading the land and putting other forms of wildlife at risk for transmission. The presence of brucella in the environment and any increase in its presence in lands enjoyed by the Petitioners interferes with the use and enjoyment of those lands and jeopardizes Petitioners’ enjoyment of those lands and natural resources adjacent to Yellowstone National Park in the Western Boundary Area. Given that Petitioners live, work, and recreate in areas where bison migrate, Petitioners have a strong interest in protecting the quality and ecological integrity of the human environment in the Western Boundary Area.

48. Respondents are statutorily required to protect against increased health and environmental degradation risks associated with brucellosis and to evaluate the impact of its decisions and actions on the human environment. *See*, Mont. Code Ann. §§75-1-101; 81-1-102

and 81-2-120. Respondents' failure to analyze the environmental impacts of its decision to modify the existing IBMP is a direct violation of their statutory obligations and that failure both jeopardizes the human environment and the environmental interests of the Petitioners. Such failure is both arbitrary and capricious conduct, and violates Montana law and the Montana Constitution.

V. CLAIMS FOR RELIEF

COUNT ONE—ALTERNATIVE WRIT OF MANDAMUS

49. Petitioners incorporate the allegations set forth in Paragraphs 1 through 48 as set forth above as though fully stated herein.

50. Under Mont. Code Ann. §81-2-120, Admin. R. Mont. 32.3.224A, and the IBMP, Respondents have a clear legal duty to remove Yellowstone National Park bison from both private and public land located within Zone 2 of the Western Boundary Area no later than May 15 of each year.

51. Under Mont. Code Ann. §81-2-120(1), whenever a publicly-owned bison from a herd that is infected with a dangerous disease, such as brucellosis, enters the State of Montana on public or private land and when that disease may spread to persons or livestock or whenever the presence of such bison may "jeopardize Montana's compliance with other state-administered or federally administered livestock disease control programs," Respondents may, under a plan approved by the Governor of Montana, take management actions to protect the Montana livestock industry and human health in Montana.

52. The IBMP is the statutorily authorized plan for bison management containing specific directives in the management and removal of bison from the Western Boundary Area. *See*, Application, Ex. 6 State Record of Decision (hereinafter referred to as "ROD"), p. 3. In

addition, specific administrative rules provide that brucellosis-exposed bison be either physically removed from the State of Montana or be destroyed by firearms if removal is not possible.

Admin. R. Mont. 32.3.224A.

53. Under either the IBMP or applicable administrative rules, the Respondents have the clear legal duty to remove all bison from Montana by May 15 of any year. Respondents have failed to comply with that duty. Petitioners expressly incorporate herein the argument for an alternative writ of mandamus as the same is set forth at pages 10 through 16 of their May 27, 2008 Brief in Support of Application for Alternative Writ of Mandate.

54. Because of Respondents failure to perform their clear legal duties, Petitioners are required to seek from this Court mandamus relief directing Respondents to manage or remove bison as mandated in the IBMP. Respondents' failure to perform their clear legal duties has been ongoing and is capable of repetition. Given the significance of the potential harm and because of the repeated violations of law by Respondents, Petitioners have no speedy or adequate remedy available at law.

COUNT TWO—DECLARATORY AND INJUNCTIVE RELIEF –

FAILURE TO COMPLY WITH IBMP

55. Petitioners incorporate the allegations set forth in Paragraphs 1 through 54 as set forth above as though fully stated herein.

56. Petitioners are persons whose rights are affected by Respondents' compliance, or lack of compliance, with Mont. Code Ann. §81-1-102 and §81-2-120, as implemented through the IBMP.

57. Petitioners' ability, and right, to maintain brucellosis free cattle herds is directly affected by Respondents' failure to comply with Respondents' mandatory obligations under

Mont. Code Ann. §81-1-102 and §81-2-120, as implemented through the IBMP, and to ensure no bison remain outside Yellowstone National Park within the Western Boundary Area after May 15 of each year.

58. The failure of Respondents to ensure no bison remain outside Yellowstone National Park within the Western Boundary Area after May 15 of each year, or to control and manage bison as otherwise directed by statute regulation and the IBMP, subjects Petitioners and Petitioners' livestock to irreparable injury. Respondents' failure in their regulatory and statutory duties exposes Petitioners cattle to the risk of brucellosis transmission from bison threatening Petitioners' livestock and livestock operations, and the brucellosis class-free status of the State of Montana. Any such injury would adversely affect Petitioners and Petitioners' members for a significant period of time, and in a manner that cannot be fully addressed by monetary damages.

59. Respondents' violations of their legal obligations under statute, regulation, and the IBMP are ongoing, and capable of repetition without relief from this Court declaring and directing Respondents to comply with the law. This Court has the authority pursuant to Mont. Code Ann. §27-8-201 to affirmatively declare the obligations of Respondents to Petitioners under Mont. Code Ann. §81-1-102 and §81-2-120, the applicable regulations, and under the IBMP, and pursuant to Mont. Code Ann. §27-8-313 to grant necessary supplemental relief to enforce that declaration.

60. This Court has the authority pursuant to Mont. Code Ann. §27-19-102 and §27-19-201(2) and (3), and pursuant to *Grosfield v. Johnson* (1935), 98 Mont. 412, 39 P.2d 660, 664, to mandatorily enjoin Respondents to comply with their obligations under Mont. Code Ann. §81-1-102, §81-2-120, the applicable regulations, and the IBMP.

COUNT THREE-- DECLARATORY AND INJUNCTIVE RELIEF – FAILURE TO
CONDUCT MEPA ANALYSIS

A. Violation of MEPA and the Respondent DOL's regulatory duties to follow the law:

61. Petitioners incorporate the allegations set forth in Paragraphs 1 through 60 as set forth above as though fully stated herein.

62. The Montana Environmental Policy Act (MEPA) is designed to provide for adequate environmental review of state actions in order to ensure that environmental attributes of those state actions are fully considered. *See*, Mont. Code Ann. §75-1-102. The policy behind MEPA is to attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences. *See*, Mont. Code Ann. §75-1-103(c).

63. Respondent DOL's MEPA regulations require that the agency carefully scrutinize the potential environmental consequences of their actions prior to reaching a final decision on proposed actions covered by MEPA. Admin. R. Mont. §32.2.221(1). If DOL undertakes an action significantly affecting the environment, it must prepare an environmental impact statement (EIS) in order to evaluate the environmental impacts. Admin. R. Mont. §32.2.224. If it is not clear whether an action may significantly effect the environment, the DOL must prepare an environmental assessment (EA) to determine whether the potential environmental effects of the proposed action constitute the type of significant impacts which trigger the need for an EIS. Admin. R. Mont. §32.2.225. If the DOL's analysis of potential environmental effects in an EA reveals that an action significantly affects the environment, MEPA and its implementing regulations require the DOL to prepare an EIS. In addition, the DOL is required to prepare

supplements to a final EIS whenever the DOL makes a substantial change in a proposed actions. Admin. R. Mont. §32.2.233(1)(a). A supplement to a final EIS must include a description of impacts, alternatives, or other items required for a final EIS that were either not covered in the original statement or that must be revised based on new information or circumstances concerned the proposed action. Admin. R. Mont. §32.2.233(2)(c).

64. Under MEPA, State agencies are required to provide the public with notice and opportunity to review and comment on any EAs that the agency prepares. Admin. R. Mont. §17.4.610.

65. The Respondents are a “state agency” subject to MEPA. Admin. R. Mont. § 32.2.222(19). The adoption and implementation of the modified IBMP is a state action subject to MEPA review. *See*, Admin. R. Mont. §32.2.222(1).

66. MEPA requires that a Montana state agency, such as the DOL, and its employees take procedural steps to review “projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment” in order to make informed decisions. *See*, Mont. Code Ann. §75-1-201(1)(b)(iii); Admin. R. Mont. §§32.2.222(12), 32.2.223, and 32.2.224 . MEPA requires that a state agency take the requisite “hard look” at the environmental impacts of a given project or proposal. *See, Ravalli County Fish & Game Assn. v. Mont. Dept. of State Lands* (1995), 273 Mont. 371, 377-78 903 P.2d 1362, 1366-67.

67. The Respondents’ participation in meetings to revise the IBMP and the Respondent’s adoption of modifications to the existing IBMP are state actions significantly affecting the quality of the human environment that requires MEPA analysis because such actions constitute an expansion and/or revision of an ongoing state-administered program and

such program is designed to protect the human environment by preventing transmission of brucellosis from bison to cattle and to protect human health . *See*, IBMP; Mont. Code Ann. §75-1201(1)(b)(iii); Admin. R. Mont. §32.2.222(1); Admin. R. Mont. §32.2.233(1).

68. Collectively, Respondents are charged under Montana state law, promulgated Administrative Rules of Montana, and the IBMP with protecting Montana livestock and the owners of Montana livestock from disease threats posed by Yellowstone National Park bison that are infected with or exposed to brucellosis and that enter Montana. As part of those applicable statutory and regulatory obligations, Respondents are obligated to manage and control bison outside Yellowstone National Park within the Western Boundary Area. *See*, Mont. Code Ann §81-2-120 and §81-1-102; Admin. R. Mont. §32.3.224; Admin R. Mont. §32.3.224A. These obligations necessarily require that the Respondents to take a hard look at the consequences to wildlife, the environment, to public health, and to private property prior to adopting and implementing changes to the IBMP.

69. As noted above, on December 17, 2008, Respondents signed the IBMP Adaptive Management Plan, which modifies programs and activities already undertaken by Respondents. *See*, Ex. 1. Because these modifications to the existing IBMP likely significantly affect the quality of the human environment on a program upon which an EIS was already prepared by significantly increasing the likelihood of brucella abortus being shed into the environment in Montana, the Respondents have a duty under MEPA to prepare an adequate EIS and/or, at a minimum, an EA on its IBMP modifications prior to adopting them. *See*, Admin. R. Mont. §§ 32.2.223(1), 32.2.233 & 32.2.224(1).

70. Petitioners are persons whose rights are affected by Respondents' compliance, or lack of compliance, with MEPA, including, Mont. Code Ann. §75-1-201 & Admin. R. Mont.

§32.2.221 *et. seq.*

71. Petitioners' environmental interests and right to maintain brucellosis-free cattle herds is directly affected by Respondents' adoption of the IBMP Adaptive Management Plan, which contains modifications to the existing IBMP that impacts both short-term and long-term management of bison in the Western Boundary Area. In particular, Petitioners are concerned about provisions to allow untested bison, particularly pregnant bison, to remain in the Horse Butte Peninsula and the Flats area in times, possibly year-round, and spaces proximate to where Petitioners ranch and recreate. *See, Ex. 10.* This is in direct contravention to the existing IBMP's requirement that only seronegative bison be allowed into the Western Boundary Area of Zone 2.

72. An EIS was conducted prior to the implementation of the current IBMP. *See, Application, Ex. 7.* The substantial nature of the modifications contained in the IBMP Adaptive Management Plan triggers the Respondents duties under MEPA to conduct, at a minimum, a supplemental environmental review prior to adopting those modifications to the existing IBMP. *See, Admin. R. Mont. §32.2.233.* Respondents' failure to comply with the procedural requirements of MEPA by conducting an EIS or an EA as to all provisions in the IBMP Adaptive Management Plan prior to their implementation is a violation of Montana State law and regulation and runs afoul of prior IBMP precedent, thereby subjecting Petitioners and their families health, Petitioners' livestock, other forms of wildlife beyond bison, and the human environment to potential irreparable injury.

73. Respondents' failure to faithfully carry out their regulatory and statutory duties exposes Petitioners cattle to the risk of brucellosis transmission from bison threatening Petitioners' livestock and livestock operations, further threatens Montana's attempts to regain its

brucellosis class-free status of the State of Montana, exposes other forms of wildlife to a greater risk of brucellosis transmission, interferes with Petitioners and results in greater risk of bison shedding brucella, an infectious bacterial disease . Any such injury would adversely affect Petitioners and Petitioners' members for a significant period of time, and in a manner that cannot be fully addressed by monetary damages.

74. Respondents performed no environmental analysis of any kind prior to signing the IBMP Adaptive Management Plan. By pursuing this course of action, Respondents are avoiding their obligations under MEPA to fully evaluate the potential impacts of its actions and decision prior to adopting the IBMP Adaptive Management Plan. Consequently, this conduct on the part of the Respondents is arbitrary and directly contrary to Montana law.

B. Respondent DOL's decision to adopt the IBMP Adaptive Management Plan without first conducting an adequate EA and/or EIS is arbitrary and capricious conduct, and not otherwise in accordance with law.

75. Petitioners incorporate the allegations set forth in Paragraphs 1 through 74 as set forth above as though fully stated herein.

76. Additionally, Respondents decision to adopt and sign the IBMP Adaptive Management Plan without conducting the MEPA required environmental analysis of its actions² and decision is arbitrary and capricious and not otherwise not in accordance with law that is immediately reviewable by this Court pursuant to the standard of review for informal agency decisions as set forth in *Langen v. Badlands Co-op. State Grazing District* (1951), 125 Mont.

² An "action" of the Department and its employees is defined as "a project, program, or activity directly undertaken by the agency; . . . either singly or in combination with other state agencies." See, Admin. R. Mont. §32.2.222(1). The decision to sign the IBMP Adaptive Management Plan is an action of the agency because it commits the Respondents to undertake activities called for in the Plan, including being designated as the "lead" on implementing and carrying out bison management provisions contained in that Plan.

302, 234 P.2d 467 and *Johansen v. State Department of Natural Resources & Conservation* (1998), 288 Mont. 39, 955 P.2d 653.

77. Respondents decision to sign the IBMP Adaptive Management Plan is an administrative decision subject to challenge and review as to whether the Respondents acted arbitrarily, capriciously, or unlawfully. *See, Johansen* 288 Mont. 39 at 47-48. Such review is particularly warranted when, as is the situation here, there is no remedy available to challenge the Respondents' actions administratively.

78. As outlined above, the Respondents are charged by the legislature with controlling diseases, such as protecting against increased health and environmental degradation risks associated with brucellosis, and evaluating the impact of its decisions and actions on the human environment. *See, Mont. Code Ann. §§75-1-101; 81-1-102; & 81-2-120.* Furthermore, Respondents are also required by regulation to analyze the environmental impacts of its decision that affect the quality of the human environment and to remove from Montana bison that have been exposed to or affected with brucellosis, such as the Yellowstone bison. *See, e.g., Admin. R. Mont. §§32.3224A and 32.2.221.* In sum, Respondents have a duty under MEPA to prepare an adequate EA and/or an EIS in order to assess the potential environmental impacts associated with its decision to adopt the IBMP Adaptive Management plan, which significantly amends the existing IBMP.

79. Contrary to the dictates of Montana law and regulation the Respondent DOL conducted no adequate (or any) EA or EIS prior to signing the IBMP Adaptive Management Plan and committing themselves to carrying out the revised management activities contained therein.

80. The Respondent DOL's failure to assess the potential environmental impacts of its decision to sign a modified IBMP without first conducting the proper environmental review is not justified under any adequate programmatic review or supported by any categorical exception. See, e.g., Admin. R. Mont. §32.2.223(1)(e).

81. Respondent DOL's conduct described herein is arbitrary, capricious, and otherwise not in accordance with the law and is subject to review and remediable by this Court under *Langen v. Badlands Co-op. State Grazing District*, *Supra*, *North Fork Pres. v. DSL* (1989), 238 Mont. 451, 778 P.2d 862, and *Clark Fork Coalition v. Montana Dept. of Environmental Quality* 2008 MT 407 ¶¶ 47-48, ___ P.3d ¶¶ 47-48, 2008 WL 5096002 (An agency must take a "hard look" at the environmental impacts of a given project or proposal; the reviewing court looks closely at whether the agency has taken that hard look at the question challenged and, if not, the agency made an arbitrary and capricious decision).

COUNT FOUR—ADOPTION OF IBMP ADAPTIVE MANAGEMENT PLAN VIOLATES
PETITIONERS' RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT

82. Petitioners incorporate the allegations set forth in Paragraphs 1 through 81 as set forth above as though fully stated herein.

83. Article II, Section 3 of the Montana Constitution gives all Montanans, including the Petitioners, certain "inalienable rights," including the right to a clean and healthful environment

84 Article II, Section 3 of the Montana Constitution provides that the state and each person "shall maintain and improve a clean and healthful environment." This Section further requires the legislature to provide adequate remedies for the "protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable

depletion and degradation of natural resources.” The health of Montana’s domestic animals, wildlife, land and recreation are critical components of the environmental life support system.

85. The Respondents have a constitutional duty, distinct from its duties under MEPA, to conduct adequate environmental reviews, and to ensure that their actions maintain and improve the health of the human environment and to prevent unreasonable depletion of Montana’s resources, such as wildlife and domestic cattle, due to the presence of and transmission of an infections, communicable disease, such as brucellosis.

86. The Respondents actions in failing to take a hard look at the environmental impacts of its actions as to the signing of the IBMP Adaptive Management Plan and committing to be the “lead” on implementing some modifications to the existing IBMP without first analyzing whether such actions will result in a depletion and degradation of Montana’s clean and healthful environment violate Article II, Section 3 of the Montana Constitution. In addition, by agreeing to allow unlimited numbers of diseased bison into Montana, a significant number of which may shed brucella into the environment outside of Yellowstone National Park, the Respondents have implicated and violated Petitioners’ constitutional rights as preserved under Article II, Section 3.

87. Based on the proceeding allegations, Petitioners seek (1) a declaration that the Respondents violated its duties under MEPA and/or under the Montana Constitution to analyze the environmental impacts of its actions; (2) an order enjoining Respondents from implementing and carrying out those provisions in the IBMP Adaptive Management Plan which modify or change the existing IBMP until such time as the Respondents conduct the proper environmental review; and (3) for an order compelling the Respondents to conduct an EIS or adequate environmental review to assess the environment impacts associated with its decision to modify

the IBMP and allow additional environmental contamination from brucellosis in the State of Montana.

COUNT FIVE —ATTORNEY’S FEES

88. Petitioners incorporate the allegations set forth in Paragraphs 1 through 87 as set forth above as though fully stated herein.

89. Pursuant to Mont. Code Ann. §27-8-313 and §27-26-402, Petitioners are entitled to an award of their reasonable attorney’s fees and costs as successful applicants for a declaration of their rights and status and the obligations of Respondents and for an alternative writ of mandamus.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray for judgment as follows:

1. For a writ of mandamus ordering Respondents to comply with the management terms of the IBMP including the May 15 deadline to remove all Yellowstone National Park bison from Zones 2 and 3 of the Western Boundary Area in 2008 and all subsequent years;
2. For a declaration affirmatively stating the obligation of Respondents to comply with Mont. Code Ann. §81-1-102, §81-2-120, the applicable regulations, and the IBMP; and for mandatory injunctive relief directing Respondents compliance with such statutes, rules and the IBMP;
3. For a declaration affirmatively stating the obligation of Respondent DOL to comply with Mont. Code Ann. §75-1-101 et. seq. (MEPA) and DOL’s MEPA regulations, Admin. R. Mont. §§32.2.221 et. seq., and to comply with the Montana Constitution by conducting an environmental review process on the IBMP Adaptive Management Plan, namely to comply by preparing an EIS on the IBMP Adaptive Management Plan which adequately

analyzes the impacts of any modification to the existing IBMP on the quality of the human environment ;

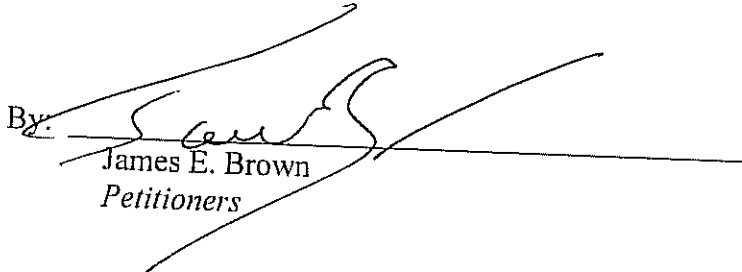
4. For mandatory injunctive relief prohibiting Respondents from adopting and carrying out the management actions modified by the IBMP Adaptive Management Plan until Respondents fully comply with MEPA and Montana law implementing MEPA and directing Respondents to follow the existing IBMP until such time as the proper environmental review on the IBMP Adaptive Management Plan is concluded. A preliminary injunction is particularly warranted in the present circumstances given that: (1) Respondents actions in adopting and implementing revisions to the existing IBMP will, if not enjoined, render moot the Petitioner's underlying claims in this case, thereby rendering any judgment handed down by this court ineffectual; and (2) Petitioners will likely suffer a great and/or irreparable injury should the Respondents be allowed to continue and carry out the modifications of the existing IBMP to which they have committed. Either of these reasons constitutes a basis for this Court to grant a preliminary injunction for the time period and on the conditions requested. *See*, Mont. Code. Ann. §27-19-201;

5. For an award to Petitioners of their attorney fees and costs as provided by law and equity; and

6. For such other relief as this Court may deem proper.

Dated this 23rd day of December, 2008.

DONEY CROWLEY BLOOMQUIST PAYNE UDA P.C.

By: 
James E. Brown
Petitioners

**INTERAGENCY
BISON
MANAGEMENT
PLAN**

NATIONAL PARK SERVICE



USDA
ANIMAL AND PLANT
HEALTH INSPECTION
SERVICE

APHIS



USDA
FOREST SERVICE



MONTANA DEPARTMENT
OF LIVESTOCK



MONTANA FISH, WILDLIFE
& PARKS



Memorandum

December 17, 2008

To: Administrative Record

From: Partner Agencies, Interagency Bison Management Plan

Re: Adaptive Adjustments to the Interagency Bison Management Plan

The Interagency Bison Management Plan (IBMP) was signed in 2000 to coordinate bison management between the State of Montana and Yellowstone National Park. Five agencies are responsible for implementing the bison management plan – the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) and Forest Service; the Department of the Interior's National Park Service; and the State of Montana's Department of Fish, Wildlife, and Parks and Department of Livestock.

Under the IBMP, these agencies harness their respective skills and operational resources to work cooperatively within an adaptive management framework to conserve a wild, free-ranging bison population, while concurrently reducing the risk of brucellosis transmission from bison to cattle. Partner agencies anticipated future adjustments to the IBMP based on research, monitoring, and feedback from the implementation of a suite of conservation and risk management actions and are committed to the adaptive management framework of the IBMP. After eight years of experience in implementing the IBMP, it is timely to formally incorporate adaptive changes to the IBMP and its joint Operating Procedures. These changes do not increase the risk of transmission of brucellosis to cattle or diminish the conservation of wild, free-ranging bison.

In keeping with this adaptive management framework, the IBMP partner agencies have met several times in public venues since August 2008 to deliberate on recent recommendations by the U.S. Government Accountability Office (GAO), assess the effectiveness and outcomes of IBMP management activities (highlighting winter 2007-08), and develop and incorporate short and long-term adaptive management adjustments to the IBMP based on prevailing conditions. These adaptive management strategies will guide the Operating Procedures for the IBMP during winter 2008-09 and beyond.

The following premises are crucial to the adaptive management strategies now and into the future:

- Proposed changes to the IBMP will be based largely on new information, changing land ownership and use, and newly gained operational experience. However, these changes will be applied within the framework of the existing IBMP and will not alter the basic management direction or goals of the original plan.
- Monitoring, application of management thresholds, and adaptation will continue, with additional adaptive management strategies in the future.

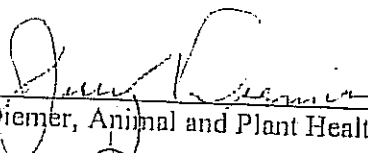

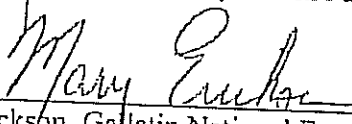
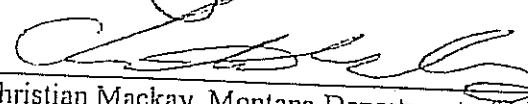
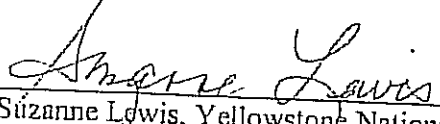
EXHIBIT

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In future adaptive changes, the partners will continue to adjust bison abundance and distribution on lands adjacent to Yellowstone National Park, as appropriate, based on evaluations of new conservation easements or land management strategies, reduced brucellosis prevalence in bison, new information or technology that reduces the risk of disease transmission, different funding available for maintaining separation of bison and cattle, or other changes in circumstances on the ground, experience on the ground, or new research. Future adaptations to the IBMP will require continued surveillance of bison and cattle, monitoring the effects and effectiveness of management actions, and new knowledge regarding vaccine efficacy, vaccine delivery methods, and disease diagnostics. Some of the targeted information to be gathered is as follows:

- Updated information on the relationships between bison management activities at the boundary of the park and the interaction between bison density and snow pack for the central and northern herds.
- Updated data on bison migration routes and timeframes for bison return to the park.
- Updated data on bison and cattle distributions to evaluate the effectiveness of management actions at maintaining spatial and temporal separation of cattle and bison.
- Updated data on the ability to keep bison within Zone 2.

The attached document incorporates adaptive adjustments to the IBMP that were agreed-upon by the partner agencies during August-December 2008 meetings. In addition to providing sound progress in implementing the IBMP, the adaptive changes were established to respond to recommendations from the GAO by creating measurable objectives for the plan and developing a specific monitoring program to assess important scientific and management questions. These adjustments were based on the adaptive management framework and principles outlined in the U.S. Department of Interior's technical guide on adaptive management (2007).

 Jerry Diemer, Animal and Plant Health Inspection Service	12-17-08 Date
 Joe Maurier, Montana Fish, Wildlife and Parks	12/17/08 Date
 Mary Erickson, Gallatin National Forest	12/17/08 Date
 Christian Mackay, Montana Department of Livestock	12-17-08 Date
 Suzanne Lewis, Yellowstone National Park	12.17.08 Date

Goal #1: Increase tolerance for bison in Zone 2 outside the north and west boundaries of Yellowstone National Park (YNP) with no unacceptable consequences (e.g., transmission of brucellosis from bison to cattle, unacceptable impacts on public safety and private property).

Objective 1.1: Within timing and geographical considerations, allow bison within Zone 2 of the Hebgen and Gardiner basins to manage the risk of brucellosis transmission from bison to livestock and enhance wild bison conservation and hunting.

Specific guidance regarding the management of bachelor groups of bull bison is provided in Objective 1.2.

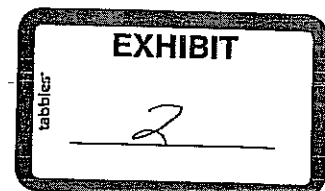
Management action 1.1.a—Consistent with the management responses outlined below, allow untested female bison (or mixed groups of males and females) to migrate onto and occupy the Horse Butte peninsula (between the Madison Arm of Hebgen Lake and Grayling Creek) and the Flats (the area east of South Fork Madison River, south of the Madison Arm, and west of Highway 191) each winter and spring in Zone 2 (subject to end-of-winter hazing described in Objective 3.2.c).

Monitoring metrics:

- Weekly surveys of the number and distribution of bison on Horse Butte, the Flats, crossing the Narrows, and going beyond the Madison Resort (Lead = Montana Department of Livestock (MDOL)).
- Annually document the number of bison using Zone 2 and the number and type of management activities needed to manage bison distribution (Lead = MDOL).
- Create a density curve of the threshold number of bison on Horse Butte that results in movements of bison to the South Fork Madison area. Use this information to modify or verify the limits set for bison counts at Madison Arm Resort that trigger management responses (Lead = MDOL).
- Determine natural routes and timeframes (in the absence of hazing) for bison migration back into the park (Lead = National Park Service (NPS)). Use this information to evaluate the effectiveness of management responses for bison tolerance in Zone 2 (Lead = MDOL).

Management responses:

- Groups (≥ 1 animal) of female/mixed bison will not be allowed in the following areas at any time of year: north of the Narrows; west of Corey Springs; or south and west of the Zone 2 boundary. Bison attempting to enter these areas will be hazed to the Horse Butte peninsula, other available habitat, captured, or if necessary, lethally removed.
- During the period from November 15 through April 15, up to 30 female bison (or a mixed group of 30 males and females) will be allowed in Zone 2 on the Madison Arm. After April 15, up to 30 female/mixed group bison will be allowed east of the Madison Arm Resort. After May 15, no female/mixed group bison will be allowed on the Madison Arm.
 - If female/mixed group bison exceed 30 animals or breach the Zone 2 perimeter on the South Fork two or more times before April 15, then this will trigger management actions to reduce risk that may include hazing, capture, testing, or lethal removal at the discretion of the State Veterinarian.
 - If female/mixed group bison exceed 30 animals or breach the Madison Arm Resort two or more times between April 15 and May 15, then this will trigger management actions to reduce risk that may include hazing, capture, testing, or lethal removal at the discretion of the State Veterinarian.
- Allow up to 40 female bison (or a mixed group of 40 males and females) north of Duck Creek and east of Corey Springs during November 15 through May 15 before management actions are instituted. The number of bison tolerated in this area may be adjusted at the discretion of the State Veterinarian based on bison behavior, environmental conditions, and other considerations.
 - If female/mixed group bison breach the perimeter described above two or more times before May 15, then this will trigger management actions to reduce risk that may include hazing, testing, or lethal removal at the discretion of the State Veterinarian.



- If female/mixed group bison cross the Narrows two or more times before May 1, then this will trigger management actions to reduce risk that may include hazing, testing, or lethal removal at the discretion of the State Veterinarian. After May 1, any crossing may trigger management action.

Management action 1.1.b—Consistent with the management responses outlined below, use adaptive management to gain management experience regarding how bison use Zone 2 in the Gardiner basin, and provide space/habitat for bison in cattle-free areas.

Monitoring metrics:

- Weekly survey of the number and distribution of bison in the Eagle Creek/Bear Creek area and the Gardiner basin (Lead inside YNP = NPS; Lead outside YNP = MDOL with Montana Fish, Wildlife, and Parks (MFWP)).
- Annually document the numbers and dates that bison attempt to exit Zone 2 by passing through Yankee Jim Canyon, west up Mol Heron Creek canyon, or to the east side of the Yellowstone River and north of Little Trail Creek (Lead = MDOL/MFWP).
- Annually document the number of bison using Zone 2 and the number of management activities needed to manage bison distribution (Lead = MDOL/MFWP).
- Annually collect data to update the relationships between bison management at the Stephens Creek facility and the interaction between bison density and snow pack in the central and northern herds (Lead = NPS).
- Annually collect data to determine natural migration routes and timeframes (in the absence of hazing) for bison migration out of and back into the park (Lead inside YNP = NPS; Lead outside YNP = MDOL/MFWP).

Management responses

- Use the Stephens Creek facility to provide 25 bison for adaptive management use of Zone 2, including adult females testing negative for brucellosis exposure and fitted with telemetry devices, per the IBMP ROD, as well as associated calves and young bulls. The number of bison tolerated in this zone may be adjusted, per the IBMP ROD, at the discretion of the State Veterinarian based on bison behavior and group composition, environmental conditions, and other considerations.
- Other female/mixed groups of bison that migrate outside YNP and west of the Yellowstone River will trigger management actions to reduce risk that may include hazing to available habitat inside the park or in the Eagle Creek/Bear Creek area, capture, testing, or lethal removal at the discretion of the State Veterinarian.
- Bison will not be allowed in Zone 3 any time of year. Bison entering Zone 3 will trigger management actions to reduce risk that may include hazing to available habitat within Zone 2, the Eagle Creek/Bear Creek area, or the park, increased monitoring, capture, or lethal removal at the discretion of the State Veterinarian.
- Regardless of testing status, bison will be allowed year-round in the Eagle Creek/Bear Creek area.
- Adaptive adjustments to monitoring metrics and management responses will be made prior to subsequent winters based on new information obtained through surveillance, the effects of management actions on the conservation of bison, and the effectiveness of management actions at maintaining spatial and temporal separation of cattle and bison and retaining bison within Zone 2.

Management Action 1.1.c—Use research findings on bison birth synchrony and fetal and shed *Brucella abortus* field viability and persistence to inform adaptive management.

Monitoring metric:

- Complete research reports and attempt to publish findings in a peer-reviewed, scientific journal (Lead = MFWP/NPS).

Management response:

- Adapt temporal and spatial separation guidelines during spring and summer based on research findings.

Objective 1.2: Manage bull bison to reflect their lower risk of transmission of brucellosis to cattle.

Management Action 1.2.a--Allow 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 within the parameters of conflict management.

Monitoring metrics:

- Weekly counts and locations of bull bison in Zone 2 (Lead = MDOL/MFWP).
- Document threats to human safety and property damage (Lead = MFWP/MDOL).

Management responses:

- Avoid hazing or removing bull bison unless they are breaching the agreed-upon perimeter or pose an imminent threat to livestock co-mingling, human safety, or property damage.
- If there is a threat of livestock co-mingling, human safety, or property damage, or a group (≥ 1 animal) of bull bison attempt to travel beyond the perimeter of Zone 2, then the bull bison will initially be hazed from area of conflict.
- If bull bison actually co-mingle with cattle, then they may be lethally removed and additional management actions may be taken by the State Veterinarian to reduce the risk of further commingling by other bull bison, including capture, hazing, or lethal removal.

Management Action 1.2.b--Allow bachelor groups of bull bison to occupy suitable habitat areas in Zone 2 outside the north boundary of YNP within the following parameters of conflict management.

Monitoring metrics:

- Weekly counts and locations of bull bison in Zone 2 (Lead = MDOL/MFWP).
- Document threats to human safety and property damage (Lead = MFWP/MDOL).
- Annually document the numbers and dates that bull bison attempt to exit Zone 2 by passing through Yankee Jim Canyon, west up Mol Heron Creek canyon, or to the east side of the Yellowstone River and north of Little Trail Creek (Lead = MDOL/MFWP).

Management responses:

- Avoid hazing or removing bull bison from Zone 2 during November through April each year unless they are breaching the agreed-upon perimeter or pose an imminent threat to livestock co-mingling, human safety, or property damage.
- Regardless of testing status, bull bison will be allowed year-round in the Eagle Creek/Bear Creek area.
- Bull bison will not be allowed in Zone 3 any time of year. Bull bison entering Zone 3 will trigger management actions to reduce risk that may include hazing to available habitat within Zone 2, the Eagle Creek/Bear Creek area, or the park, increased monitoring, or removal at the discretion of the State Veterinarian.
 - If a group of bull bison progresses beyond Yankee Jim Canyon, then they may be lethally removed at the discretion of the State Veterinarian.
 - If groups of bull bison progress beyond Yankee Jim Canyon two or more times, then additional management actions may be taken by the State Veterinarian to reduce the risk of future incidents by other bull bison, including capture, hazing, or lethal removal.
 - If a group of bull bison crosses the Yellowstone River to the east side into Zone 3, then they may be lethally removed at the discretion of the State Veterinarian.
 - If groups of bull bison cross the Yellowstone River to the east side into Zone 3 two or more times, then additional management actions may be taken by the State Veterinarian to reduce the risk of future incidents by other bull bison, including capture, hazing, or lethal removal.
- If bull bison actually co-mingle with cattle, then they may be lethally removed and additional management actions may be taken by the State Veterinarian to reduce the risk of further commingling by other bull bison, including capture, hazing, or lethal removal.
- Adaptive adjustments to monitoring metrics and management responses will be made prior to subsequent winters based on new information obtained through surveillance, the effects of management actions on the conservation of bison, and the effectiveness of management actions at maintaining spatial and temporal separation of cattle and bison and retaining bull bison within the agreed-upon perimeter of Zone 2.

Objective 1.3: Reduce conflict between landowners, livestock operators, and bison outside YNP via permit management, improved relations, education, and incentives.

Management Action 1.3.a—Work with private land owners and livestock producers and operators to provide conflict-free habitat in the Hebgen and Gardiner basins.

Monitoring metric:

- Create an annual record of the: 1) number of acres made available to bison from conservation easements (Lead = MFWP); 2) locations, numbers, types, and turn-out/off dates for cattle grazed on private land in the Hebgen and Gardiner basins (Lead = MDOL); and 3) extent of fencing erected to separate bison from livestock (Lead = MDOL).

Management response:

- Implement site-specific brucellosis risk management plans for livestock that may include stocking less-brucellosis susceptible cattle (e.g., steers), brucellosis testing and vaccination, fencing for livestock, and adjustments of turnout dates, when necessary, to ensure temporal separation. As available, financial incentives (working with government and non-government partners) may be provided for altering the timing of cattle operations to ensure temporal separation.
- Evaluate where additional habitat is available for bison commensurate with land management and ownership changes.

Management Action 1.3.b—Work with landowners who have human safety and property damage concerns, as well as those who favor increased tolerance for bison, to provide conflict-free habitat in the Hebgen and Gardiner basins.

Monitoring metrics:

- Annually document the numbers, timing, and types of reported incidents for human safety and property damage related to bison (Lead = MFWP with support from MDOL).
- Annually document the numbers and types of actions taken to provide conflict-free habitat bison (Lead = MFWP with support from MDOL).

Management responses:

- If there is a human injury by bison, then this will trigger management actions to reduce the risk of future incidents that may include hazing, capture, or lethal removal.
- If annual property damage is excessive or unacceptable in frequency, impact, and/or cost, then this will trigger management actions to reduce the risk of future damage that may include hazing, capture, or lethal removal at the discretion of the Region 3 Supervisor of Montana Fish, Wildlife, and Parks.

Management Action 1.3.c—Annually, the Gallatin National Forest will ensure conflict-free habitat is available for bison and livestock grazing on public lands, as per management objectives of the Interagency Bison Management Plan (IBMP).

Monitoring metric:

- Annually track the status (e.g., number of acres, location, etc.) of active and inactive grazing allotments on public lands (Lead = U.S. Forest Service (USFS)).

Management response:

- Evaluate where additional habitat is available for bison commensurate with land management and ownership changes.

Goal #2: Conserve a wild, free-ranging bison population.

Objective 2.1: Manage the Yellowstone bison population to ensure the ecological function and role of bison in the Yellowstone area and to maintain genetic diversity for future adaptation.

Management action 2.1.a—Increase the understanding of bison population dynamics to inform adaptive management and reduce sharp increases and decreases in bison abundance.

Monitoring metrics:

- Conduct aerial and ground surveys to estimate the annual abundance of Yellowstone bison each summer (Lead = NPS).
- Document and evaluate relationships between bison migration to the boundary of YNP and bison abundance, population (or subpopulation) growth rates, and snow pack in the central and northern herds (Lead = NPS).
- Continue to obtain estimates of population abundance through the remainder of the year based on surveys, knowledge of management removals, and survival probabilities (Lead = NPS).
- Conduct an assessment of population range for Yellowstone bison that successfully addresses the goals of the IBMP by retaining genetic diversity and the ecological function and role of bison, while lessening the likelihood of large-scale migrations to the park boundary and remaining below the estimated carrying capacity of the park's forage base (Lead = NPS).

Management responses:

- If abundance estimates decrease to $\leq 2,300$ bison, then the agencies will increase the implementation of non-lethal management measures.
- If abundance estimates decrease to $\leq 2,100$ bison, then the agencies will cease lethal brucellosis risk management and hunting of bison and shift to non-lethal management measures.

Management action 2.1.b—Increase the understanding of genetics of Yellowstone bison to inform adaptive management.

Monitoring metric:

- Complete an assessment of the existing genetic diversity in Yellowstone bison and how the genetic integrity of Yellowstone bison may be affected by management removals (all sources combined) by October 2010 to estimate existing genetic diversity and substructure in the population (Lead = NPS).
- Conduct an assessment of the genetic diversity necessary to maintain a robust, wild, free-ranging population that is able to adapt to future conditions (Lead = NPS).

Management response:

- Define genetic diversity and integrity, and establish long-term objectives for conserving genetic integrity, including assessing hunting and risk management removal strategies that are compatible with conservation of genetic diversity.

Management action 2.1.c—Increase understanding of the ecological role of bison to inform adaptive management by commissioning a comprehensive review and assessment.

Monitoring metric:

- Develop and implement by October 2011 a joint research strategy agreed to by the interagency partners that focuses on understanding the role and function of bison for providing nutrient redistribution, prey and carrion, and microhabitats for other species (Lead = NPS).

Management response:

- Adapt the management responses in 2.1.a based on new monitoring, research, and management findings.

Objective 2.2: Minimize bison slaughter by employing alternative management techniques.

Management action 2.2.a—Use slaughter only when necessary; attempt to use other risk management tools first.

Monitoring metric:

- Annually document the number, age, sex, and sero-status of bison sent to slaughter (Lead = Animal and Plant Health Inspection Service (APHIS) with the MDOL).

Management response:

- Consistent with the management responses in 2.1.a, increase the use of, and allocation of resources to, management actions (e.g., hazing to habitat, hunting, quarantine, and shipping eligible bison to alternate, isolated destinations) that reduce the number of bison sent to slaughter.

Management action 2.2.b—In Zone 2 lands adjacent to YNP, emphasize management of bison as wildlife and increase the use of state and treaty hunts to manage bison numbers and demographic rates, limit the risk of brucellosis transmission to cattle, and protect human safety and property.

Monitoring metric:

- Weekly and annual summaries of bison harvested by state and treaty hunters (Lead = MFWP).

Management response:

- Consistent with the management responses in 2.1.a, develop a hunting strategy annually by May that includes combined harvest thresholds with state and tribal hunters that manage bison abundance, especially in areas of high brucellosis transmission risk to cattle, while ensuring the conservation of population demographics and genetic integrity. That strategy might include, for example, a goal of increasing the hunt as a percent of overall yearly bison mortality.

Management action 2.2.c—Complete the quarantine feasibility study and consider an operational quarantine facility to provide a source of live, disease-free bison for tribal governments and other requesting organizations.

Monitoring metrics:

- Annual summary of bison sent to quarantine and bison transported from quarantine to suitable restoration sites (Lead = MFWP/APHIS).
- Annual summaries from bison populations restored using quarantined Yellowstone bison, including numbers, demographic rates, and implemented risk management actions (Lead = MFWP/APHIS).
- Evaluate regulatory requirements and constraints for moving live bison, including adults, to suitable restoration sites (Lead = APHIS/MDOL).
- Conduct an assessment of the quarantine feasibility study and offer recommendations regarding whether the quarantine of bison should become operational (Lead = MFWP/APHIS).
- Identify suitable release sites for brucellosis-free bison in quarantine, and solicit proposals from groups interested in restoring bison, through the Interagency/Tribal Bison Restoration Panel (Lead = MFWP/APHIS).

Management response:

- Based on the National Environmental Policy Act (NEPA) and Montana Environmental Policy Act (MEPA) processes, determine if operational quarantine of bison will be implemented to restore bison outside of YNP.
- Release brucellosis-free bison from quarantine to suitable sites recommended by the Interagency/Tribal Bison Restoration Panel.

Goal #3: Prevent the transmission of brucellosis from bison to cattle.

Objective 3.1: Reduce the risk of disease transmission through vaccination.

Management Action 3.1.a—Continue bison vaccination under prevailing authority.

Monitoring metric:

- Document the number of eligible bison captured and vaccinated outside of the park (Lead = MDOL/APHIS).
- Implement the YNP Bison and Brucellosis Monitoring and Surveillance Plan (Lead = NPS).

Management response:

- Consistent with the management responses in 2.1.a, vaccinate and release eligible bison (i.e., calves, yearlings, non-pregnant females) captured near the boundary of YNP after state and treaty hunting seasons end each winter and spring.

Management Action 3.1.b—Complete EIS processes (MEPA/NEPA) for remote delivery vaccination of bison and use the outcomes to inform adaptive management.

Monitoring metric:

- Complete the NEPA process and reach a decision on whether remote delivery vaccination of bison can/will be employed inside YNP (Lead = NPS).

Management response:

- Based on the MEPA process, determine if remote delivery vaccination of bison can/will be employed outside of YNP (Lead = MDOL).

Management Action 3.1.e—Test and vaccinate cattle.

Monitoring metric:

- By May 1, determine and document the vaccination status of all cattle in or coming into the Hebgen and Gardiner basins (Lead = MDOL/APHIS).

Management responses:

- Vaccinate all calves, with booster vaccination of adults as deemed appropriate by the Montana State Veterinarian.
- Use existing regulations and provide incentives to ensure 100% of adult cattle in the Hebgen and Gardiner basins are calf hood and booster vaccinated.
- For Zone 2, vaccination is mandatory. If the vaccination status of adult cattle is not 100%, then undertake vaccination or other to-be-determined actions to achieve 100% status as determined by the Montana State Veterinarian.

Objective 3.2: Prevent cattle/bison interactions, with an emphasis on the likely bison birthing and abortion period each year.

Management action 3.2.a—Use spatial and temporal separation and hazing to prevent cattle/bison interactions.

Monitoring metrics:

- Document the minimum temporal separation and space between bison and cattle during February through June (Lead = MDOL).
- Document the number of times bison are successfully or unsuccessfully moved to create separation in time and space from cattle (Lead = MDOL).

Management responses:

- As necessary, institute bison hazing, capture, or lethal removal to prevent bison from entering cattle-occupied properties.
- Adapt temporal separation guidelines for bison and cattle during spring and summer based on research findings from *Brucella abortus* persistence and viability research.
- Consistent with the management responses in 1.1.a, 1.1.b, and 2.1.a, any bison found within areas that will be occupied by cattle within 20 days will be hazed, captured, or lethally removed.

Management action 3.2.b—Evaluate the use of limited, strategically placed fencing when and where it could effectively create separation between domestic livestock and bison, and not create a major movement barrier to other wildlife.

Monitoring metric:

- Document the number of additional acres of habitat made available for bison as a result of strategic fencing (Lead = MFWP/USFS/MDOL).
- Document fence damage or the number of times fencing fails to inhibit bison trespass on private property occupied by cattle (Lead = MDOL).

Management responses:

- Fencing to provide additional bison habitat will not create a movement barrier to other wildlife or detract from or preclude other land management priorities.
- Any incidence of fence failure requires that action be taken to repair and/or enhance the effectiveness of the fence.

Management Action 3.2.c—Haze bison from the Hebgen basin into YNP with a target date of May 15.

Monitoring metrics:

- Consistent with management action 1.1.a, 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 YNP from Zone 2 (Lead = MDOL/NPS).
- Annually document the timing of the end-of-winter return of bison into YNP, the number of bison returned, prevailing environmental conditions, and success or lack thereof of hazing bison and getting them to remain in the park (Lead = MDOL/NPS)

- Annually review and apply *Brucella abortus* persistence information, private land cattle turn-on dates, and applicable research results to determine the effects of haze-to-habitat actions on bison and their effectiveness at preventing the commingling of bison and cattle (Lead = MDOL).

Management responses:

- The actual beginning date for hazing bison will be consistent with the management responses in 1.1.a and based on weather (e.g., green-up, snow pack), cattle turn-out dates, and consideration of the natural migration by bison back into the park.
- Step-wise, coordinated, interagency hazing will be used, as needed, to minimize repeated hazing into situations where snow or other variables will prevent bison occupancy.

Management Action 3.2.d—Haze bison from the Gardiner basin into YNP with a target date of May 1.

Monitoring metrics:

- Consistent with management action 1.1.b, assess the prevailing environmental conditions and reach consensus by April 15 on a step-wise, integrated plan for the end-of-winter return of bison into YNP from Zone 2 (Lead = MDOL/NPS).
- Annually document the timing of the end-of-winter return of bison into YNP, the number of bison returned, prevailing environmental conditions, and success or lack thereof of hazing bison and getting them to remain in the park (Lead = MDOL/NPS)
- Annually review and apply *Brucella abortus* persistence information, private land cattle turn-on dates, and applicable research results to determine the effects of haze-to-habitat actions on bison and their effectiveness at preventing the commingling of bison and cattle (Lead = MDOL).

Management responses:

- The actual beginning date for hazing bison will be consistent with the management responses in 1.1.b and based on weather (e.g., green-up, snow pack), cattle turn-out dates, and consideration of the natural migration by bison back into the park.
- Step-wise, coordinated, interagency hazing will be used, as needed, to minimize repeated hazing into situations where snow or other variables will prevent bison occupancy.

Meeting #7 of 7 Agenda Interagency Bison Management Plan

*Held at: MFWP Offices
Bozeman, MT*

*Host: MFWP
Contact: Mel Frost (406) 581-3692*

Date: December 17/18, 2008

IBMP Principal Representatives

Jerry Diemer, Associate Regional Director, Animal and Plant Health Inspection Service
Mary Erickson, Forest Supervisor, Gallatin National Forest
Pat Flowers, Region 3 Supervisor, Montana Fish, Wildlife, & Parks
Suzanne Lewis, Superintendent, Yellowstone National Park
Christian Mackay, Executive Officer, Montana Board of Livestock
Marty Zaluski, State Veterinarian, Montana Department of Livestock

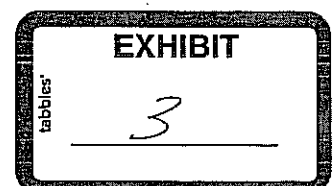
Purpose/Needs Statement for Series of Seven Meetings

The Federal and State Records of Decision in December 2000 for the Long-Term Interagency Bison Management Plan for Montana and Yellowstone National Park (IBMP) were the result of extensive deliberation and legal proceedings that yielded an unprecedented agreement amongst federal-state agencies (National Park Service, USDA Forest Service, USDA Animal and Plant Health Inspection Service, Montana Department of Livestock, and Montana Fish, Wildlife and Parks). Under the IBMP, these agencies harness their respective skills and operational resources to work cooperatively within an adaptive management framework to conserve a wild, free-ranging bison population while concurrently protecting against transmission of brucellosis from bison to cattle.

Partner agencies are committed to the adaptive management framework of the IBMP. In keeping with this commitment, the partners have scheduled multiple working meetings between August and December 2008. These meetings will be open to the public with agendas designed so that partner agencies can effectively deliberate on recent recommendations by the US Government Accountability Office; assess the effectiveness and outcomes of IBMP management activities (highlighting winter 2007-2008); and considering prevailing conditions, develop and incorporate short- and long-term adaptive management adjustments to the IBMP for winter 2008-2009 and beyond.

Goals of the Seven Meetings: for the IBMP Partners...

1. ... to effectively deliberate on recent recommendations by the US Government Accountability Office;
2. ... to assess the effectiveness and outcomes of IBMP management activities (highlighting winter 2007-2008);
3. ... considering prevailing conditions, to develop and incorporate short- and long-term adaptive management adjustments to the IBMP for winter 2008-2009 and beyond.



Wednesday, December 17th

Morning / Afternoon sessions

		<p>Welcome, meeting overview</p> <ul style="list-style-type: none"> • Timeline—where we've been, where we are going • Desired outcomes from Dec 17/18 meetings • Introductions of all present • Meeting logistics, format, process, expectations, agenda modifications as needed
12 noon	<i>Scott Bischke (facilitator); all present</i>	
		<p><u>Information Sharing.</u> Please 1) use agreed upon briefing page format, 2) bring copies for partners, staff, public, and 3) bring electronic copies for posting to www.ibmp.info (electronic copies should be given to Scott).</p>
12:15	<i>DoL/APHIS</i>	(5 min) Updated status of adult cattle vaccinations, appended to the briefing paper already provided at Oct 2,3 meeting
	<i>Tech Comm</i>	(10 min) Map showing reset the North side boundaries to match reasonable on-the-ground conditions
	<i>Partners</i>	(5 min) Update on RMEF meeting, if applicable
12:40	<i>All Partners</i>	Discussion of ver3.0, near complete IBMP AM Plan—Partner deliberations on areas remaining of concern following Dec 10 phone conference
2:30	<i>Break (here, or as called for by partners)</i>	
2:45	<i>All partners</i>	Continue discussions from before break
4:30	<i>Observers</i>	Public comment period (2-4 min per person, depending on level of sign-up sheet)
5:00	<i>Adjourn</i>	<i>(partners please huddle to debrief before departure)</i>

Thursday, December 18th

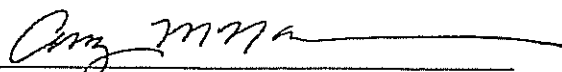
Morning session

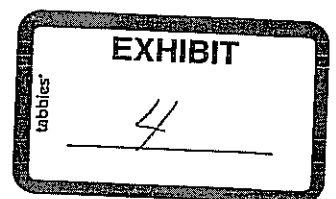
		<p>Abbreviated welcome, overview</p> <ul style="list-style-type: none"> • Introductions of anyone new from yesterday • Recap yesterday's meeting and set today's goals
8:30 AM	<i>Scott Bischke</i>	
8:40	<i>All partners</i>	Continued discussion/clean up of items from yesterday regarding closing open issues prior to signing IBMP Adaptive Management Plan
10:00	<i>All Partners</i>	Signing of the IBMP Adaptive Management Plan
10:15	<i>Break (here, or as called for by partners)</i>	
10:30	<i>Ops team</i>	Discussions and planning for 2008/09 operations based on IBMP AM Plan
11:00	<i>PIOs</i>	Discussions and planning for communications plan associated with announcement of IBMP AM Plan completion
11:30	<i>Observers</i>	Public comment period (2-4 min per person, depending on level of sign-up sheet)
12 noon	<i>Adjourn</i>	<i>(partners please huddle to debrief before departure)</i>

I, Amy McNamara, declare as follows,

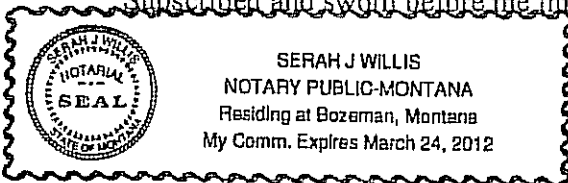
1. I am National Parks Program Director for, and a member of, the Greater Yellowstone Coalition ("GYC") based in Bozeman, Montana.
2. In my capacity as National Parks Program Director for GYC, I have been monitoring the recent meetings of the Interagency Bison Management Plan ("IBMP") partner agencies. As stated in the meeting agenda attached as Exhibit 1, the IBMP partners are in the midst of seven planning meetings, which are designed to "assess the effectiveness and outcomes of IBMP management activities (highlighting winter 2007-2008); and considering prevailing conditions, [to] develop and incorporate short- and long-term adaptive management adjustments to the IBMP for winter 2008-2009 and beyond." In furtherance of this goal, the IBMP partner agencies are considering the adoption of an "IBMP Management Plan for the West Boundary of Yellowstone National Park," a working draft of which is attached as Exhibit 2. The provisions of this working draft vary from the bison management provisions set forth under "step 1" in the December 2000 IBMP's "Adaptive Management Steps in the Western Boundary Area."
3. The final IBMP planning meeting is scheduled for December 17-18, 2008. See Exhibit 1. As reflected in the meeting agenda, the IBMP partners intend to finalize the IBMP Adaptive Management Plan at the December 17-18 meeting. See id. at 2. Thus, bison management activities under the IBMP for the upcoming winter season are subject to change and will not be established before the December 17-18 meeting, at the earliest.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 24, 2008, in Bozeman, Montana.


AMY MCNAMARA



Subscribed and sworn before me this 02th day of November, 2008.



Serah J Willis

Notary Public for the State of Montana

Residing at: Bozeman MT

My Commission Expires: March 24, 2012

MONTANA FIFTH JUDICIAL DISTRICT COURT
MADISON COUNTY

RECEIVED
DEC 03 2008

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

Petitioners

Cause No. DV-29-2008-34

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 MILLS PAUGH,
TOM SHEPHERD, ANN STOVALL, JOANN
STOVALL, KARRIE LAGGART, JEANNETTE
THERIEN, GREATER YELLOWSTONE
COALITION, and NATURAL RESOURCES
DEFENSE COUNCIL,

Defendant-Intervenor

ORIGINAL

DEPOSITION OF MARTIN ZALUSKI, DVM

Heard at the Montana Department of Livestock
301 Roberts
Helena, Montana
October 17, 2008
4:30 p.m.

CHERYL ROMSA
Lesdski Court Reporting, Inc.
7 West 6th Avenue, Suite 519
Helena, Montana 59601
(406) 442-2010

tabbics
EXHIBIT
5

1 Q. Okay. Doctor, as part of the IBMP, it's my
2 understanding that there were some studies conducted on
3 the viability of the organism in the environment. Is that
4 right?

5 A. Yes.

6 Q. Have you reviewed those studies?

7 A. Yes.

8 (Deposition Exhibit 6 was marked for identification.)

9 Q. (By Mr. Bloomquist) Doctor, I'm handing you what
10 has been marked as Deposition Exhibit 6.

11 A. And I need to correct myself. I have reviewed
12 the conclusions for those studies, as opposed to reviewed
13 those studies.

14 Q. Okay, that's fine.

15 And Deposition Exhibit 6 is a document that I think I
16 also got from Fish, Wildlife & Parks --

17 MR. PETERSON: You can tell because it has that
18 dreaded title on it.

19 Q. (By Mr. Bloomquist) -- in an information request
20 I made. It's called a Status Review of Adaptive
21 Management Elements, 2000 to 2005. Have you reviewed that
22 document?

23 A. I have reviewed portions of it.

24 Q. Okay. You mentioned that you have reviewed the
25 conclusions of the, I'll call them the viability studies;

1 is that right?

2 A. Yes.

3 Q. When I look at Deposition Exhibit 6, there was
4 some discussion on fetal disappearance and Brucella
5 persistence in the local environment where the authors
6 talked about the viability studies. And it appears to me,
7 and tell me if you agree with me or not, that -- Go to
8 page 6 and see if this is consistent with your
9 understanding of the results.

10 On the bottom of page 6, do you see that paragraph
11 that says, "Brucella organisms on vegetation and soil have
12 been reported to persist from a few days to over
13 100 days"?

14 A. Yes.

15 Q. It says, "This study found that bacteria remained
16 viable on fetuses until about 80-90 days for those placed
17 in the GYA environment in February."

18 Do you see that?

19 A. Yes.

20 Q. Is that your understanding of some of the results
21 of the study that we were talking about, that they found
22 Brucella could persist 80 to 90 days on fetuses which were
23 placed out in February?

24 A. Yes.

25 Q. Okay. Then it also goes on to say, "In contrast,

1 the bacteria remained viable on fetal tissues 20-30 days
2 for those placed out in mid-May."

3 Is that your understanding of the results?

4 A. Yes.

5 Q. Okay. Now, that information, in terms of your
6 role as state vet, do you assign any, I'm going to call it
7 margin of error or safety factor in terms of viability of
8 the organism in terms of risk of exposure in, say, the
9 west boundary area?

10 That's a horrible question. I don't even understand
11 the question.

12 MR. PETERSON: There's a foundational error
13 there, John, as to whether he uses it.

14 Q. (By Mr. Bloomquist) The viability study, do you
15 use that, and these results we talked about, in how you
16 assess risk associated with bison?

17 A. Yes.

18 Q. Do you use that information in particular in
19 terms of risk associated with bison in the west boundary
20 area?

21 A. Yes.

22 Q. Okay. How do you use that?

23 A. It guides the recommended or required separation
24 in time between bison and cattle occupying the same
25 geography.

1 Q. When you say "the same geography," are you
2 talking about the same general area?

3 MR. PETERSON: As opposed to?

4 Q. (By Mr. Bloomquist) Well, you used the term
5 "geography," and I'm trying to understand what you mean by
6 that.

7 MR. PETERSON: Just answer that question.

8 THE WITNESS: General geography -- Yes.

9 Q. (By Mr. Bloomquist) In the west boundary area,
10 we have -- I'm going to hand you Exhibit 4, which is a map
11 that we used with Mr. Tierney, and I want you to look at
12 this for a moment. On the map, there are various private
13 lands identified. Do you see those?

14 A. Yes.

15 Q. Some in Zone 3 in purple, some within Zone 2,
16 Red Creek Ranch, Stinnett Ranch, Munns Place, which at the
17 time they made this map had cattle on it. It does not
18 now, correct?

19 A. Correct.

20 Q. But Red Creek Ranch and Stinnett Ranch, that's
21 where one of my clients runs cattle, Bill Myers. Are you
22 familiar with those?

23 A. Yes.

24 Q. Okay. And then down here (indicating), Deep Well
25 Ranch, which is Povah, do you understand that the Sitzes

1 run cattle there?

2 A. Yes.

3 Q. And there are also some other cattle operations
4 within that purple area, are there not?

5 A. Yes.

6 Q. So, back to my question on geography, are these
7 lands, Red Creek Ranch, Stinnett, Povah, the area in
8 purple, are those the areas of geography that you're
9 concerned with in terms of the bison management?

10 A. Yes.

11 Q. Now, going back to the viability, I believe you
12 testified that you used the results of the study to assess
13 risk associated with bison being out in terms of time,
14 correct?

15 MR. PETERSON: I don't know that he used the word
16 "assess." I think that's a mistake.

17 Q. (By Mr. Bloomquist) How do you use the viability
18 information in your analysis of temporal separation?

19 A. The temporal separation would need to be -- could
20 be shorter as the calendar year progresses.

21 Q. Let's go to May 1. How do you use that viability
22 analysis if we're at May 1?

23 MR. PETERSON: Assuming he makes that analysis on
24 May 1.

25 MR. BLOOMQUIST: Yeah.

1 Q. (By Mr. Bloomquist) Let's say we have bison out
2 in the west boundary area, let's say they're in Zone 2,
3 and it's May 1 of the year. How do you use that viability
4 analysis?

5 A. I would want to prevent cattle and bison from
6 occupying the same landscape, the same pasture during the
7 time -- or during the interval that the bacteria is
8 thought to be viable for that time of the year.

9 Q. What about the same geographic area that we
10 talked about earlier? These cattle operations are within
11 the geographic area we discussed. How do you use temporal
12 separation recognizing those areas?

13 MR. PETERSON: I think you just asked that
14 question and he answered it. He said on land that they
15 would both be occupying.

16 MR. BLOOMQUIST: Well, he talked about --

17 Q. (By Mr. Bloomquist) As I understood your answer,
18 you would use that in terms of you don't want cattle to
19 come on the same land bison are on, correct?

20 A. Correct.

21 Q. What about these areas where bison are not
22 located but they're within the geographic scope that
23 you're concerned with?

24 MR. PETERSON: Are you asking if they are in the
25 same geographic scope?

1 MR. BLOOMQUIST: Yeah.

2 THE WITNESS: Please ask the question again.

3 Q. (By Mr. Bloomquist) Stinnett, Red Canyon Ranch,
4 and the purple area are within the geographic area that
5 you're concerned with in terms of bison being out of
6 Yellowstone Park, correct?

7 A. Yes.

8 Q. Okay. Use of the temporal -- or use of the
9 viability study and the information from the viability
10 study in terms of temporal separation, you know, cattle,
11 let's say, are going to come on these areas June 1st,
12 June 15th, either the purple or the green or the yellow.
13 When do you want bison out of there?

14 A. Define "out of there," please.

15 Q. Off of Zone 2 or out of Zone 2.

16 MR. PETERSON: Are you asking him if he does want
17 them out of Zone 2 at any one time?

18 MR. BLOOMQUIST: Yeah.

19 Q. (By Mr. Bloomquist) I mean, just because -- Let
20 me ask the question this way: We don't have cattle within
21 Zone 2 on national forest lands, Horse Butte area,
22 correct?

23 A. Correct.

24 Q. No cattle there.

25 A. Correct.

1 Q. Okay. The fact that there's no cattle on those
2 lands, how does that affect, in your mind, the management
3 of bison; should they be allowed to stay out as long as
4 they want, or is there a time period you don't even want
5 them in the general proximity as these areas where cattle
6 are located?

7 A. There is a time -- During the times when there is
8 the potential for cattle and bison to occupy the same
9 space or closely linked, based on those persistence
10 studies, you would not want to have bison in this close
11 proximity to those cattle.

12 Q. Okay. And knowing what we know from the
13 viability information, what date do you want to have bison
14 removed from Zone 2 to protect the cattle that are going
15 to come in and graze?

16 MR. PETERSON: I'm going to object again on
17 foundation. You haven't established that there is a date
18 that he would want to have bison out of Zone 2.

19 Q. (By Mr. Bloomquist) Can you answer the question?

20 A. Could you repeat the question?

21 Q. Okay. The IBMP talks about May 15th, correct?

22 A. Correct.

23 Q. And May 15th is described within the IBMP.
24 Mr. Peterson and I may argue about this to the Court, but
25 May 15th, it indicates that bison are to be returned to

1 the park, correct?

2 MR. PETERSON: Can he look at the IBMP?

3 THE WITNESS: No.

4 Q. (By Mr. Bloomquist) No, is that your answer?

5 A. That's correct.

6 Q. What does the May 15th date mean to you?

7 A. It is the date for bison -- it is a target date
8 for bison to be returned back to the park. However, that
9 date may be changed based on the decisions or
10 conversations between the IBMP partners as well as by the
11 state veterinarian.

12 Q. Okay. Let me ask you this: If cattle are going
13 to come onto the area in purple or green or yellow
14 June 1st, when do you want bison out of the area?

15 MR. PETERSON: Which area? Be specific.

16 Q. (By Mr. Bloomquist) Zone 2. When do you want
17 bison out of Zone 2? When do you want them back in the
18 park?

19 A. The May 15th date is a reasonable time to have
20 them off.

21 Q. Based upon what?

22 A. Based upon the viability studies that have been
23 conducted.

24 Q. Okay. Do you assign any margin of error or do
25 you know if anyone has assigned any margin of error to the

1 viability study information -- or safety period? Rather
2 than margin of error, how about a safety period associated
3 with that?

4 A. I'm not aware of it.

5 Q. Okay. Are you aware of any other assessments or
6 studies which did assign a margin of safety that should
7 also be considered?

8 A. I'm not aware of it.

9 (A brief recess was taken.)

10 MR. BLOOMQUIST: Back on the record.

11 Q. (By Mr. Bloomquist) Doctor, have you ever
12 discussed with any of your predecessor state veterinarians
13 the issue of temporal separation and what they viewed as
14 an adequate time between when bison should be removed from
15 Zone 2 back to the park and when cattle would come onto
16 some of these lands around Zone 2 or within Zone 2?

17 A. No.

18 Q. In terms of viability, my understanding is they
19 also have conducted some studies regarding fetal
20 disappearance. Have you reviewed those studies?

21 MR. PETERSON: They?

22 Q. (By Mr. Bloomquist) As part of the IBMP, is it
23 your understanding that some studies were conducted
24 regarding fetal disappearance?

25 A. Yes.

1 Q. Okay. And what's your understanding of what
2 those studies demonstrated?

3 A. They demonstrated the rate of fetal disappearance
4 typically due to predation inside and outside of the park.

5 Q. Do you recall what they found was the period of
6 time involved until a fetus would be scavenged or removed?

7 A. Yes, I remember the boundaries of that range.

8 Q. Do you recall what those were?

9 A. I believe the short -- From the best of my
10 recollection, the short end is about a week and the long
11 end is never.

12 Q. And did they find, associated with that study,
13 that some of these sites that they were studying,
14 scavengers would come in and move the materials distances
15 from where they placed the fetus?

16 A. Yes.

17 Q. And your understanding, then, that if a -- if a
18 bison would abort a calf, that it's been shown, at least
19 with the studies anyway, that scavengers and predators can
20 move those materials around?

21 A. Yes.

22 Q. Do you recall the distances that were associated
23 with those movements?

24 A. Not to the -- Not well enough to cite here.

25 Q. Okay. Do you factor that information into your

1 analysis of temporal separation between bison and when
2 cattle come into this geographic area on the west
3 boundary?

4 A. Not significantly.

5 Q. Okay. My understanding is that Bill Myers has a
6 herd plan. Is that right?

7 A. Yes.

8 Q. Do you work with him on that particular herd
9 plan?

10 A. No.

11 Q. Is that with APHIS?

12 A. Yes.

13 Q. Your office doesn't have a role in that?

14 A. That's correct. That's correct.

15 MR. PETERSON: When you say "your office," are
16 you speaking --

17 Q. (By Mr. Bloomquist) The state veterinarian's
18 office doesn't have a role in that?

19 A. Describe "role," please.

20 Q. Well, in terms of the aspects of the herd
21 management plan, do you, as state vet, have a role in
22 designing the plan?

23 A. No.

24 Q. That's strictly APHIS and Mr. Myers?

25 A. I do not know that for certain.

A STATUS REVIEW OF ADAPTIVE MANAGEMENT ELEMENTS, 2000 to 2005

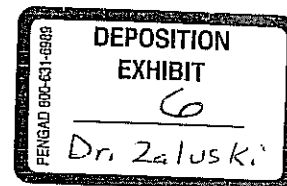
Compiled and Submitted by Status Review Team

Dr. Ryan Clarke, Animal and Plant Health Inspection Service
Craig Jourdonnais, Montana Department of Fish, Wildlife and Parks
John Munding, Montana Department of Livestock
Lisa Stoeffler, Gallatin National Forest
Rick Wallen, Yellowstone National Park

To be Reviewed by and Recommendations Considered by

Dr. Ryan Clarke, Animal and Plant Health Inspection Service
Pat Flowers, Montana Department of Fish, Wildlife and Parks
Becki Heath, Gallatin National Forest
Suzanne Lewis, Yellowstone National Park
Dr. Tom Linfield, Montana Department of Livestock

September 2005



Can we keep bison and cattle separated?

Five winters of interagency-conducted boundary operations have resulted in no known commingling of bison and cattle on shared range nor any documented disease transmission to livestock in Montana.

Monitor bison abundance and distribution

Abundance estimates are currently being conducted by the NPS in mid-summer and late-winter. The late-winter estimate is problematic because of characteristically poor counting conditions. Refinement of the models for transforming count data into a population estimate with relatively tight confidence intervals is ongoing.

Study *Brucella* persistence in the local environment

APHIS and MTFWP began this study as a pilot project from February to June of 2001 in order to evaluate study design, equipment, and methods. The full study was implemented in the years 2002 and 2003. Bison fetuses obtained from slaughtering facilities were 'dipped' and abdominally injected with a *Brucella abortus* strain RB-51 inoculum. These fetuses were then placed in cages (shaded and unshaded) at a Corwin Springs site (north) and a West Yellowstone site (west). Both areas had unique environmental conditions that could play a role in bacteria survivability.

Beginning in February of each year, tissue/swab samples were taken at regular intervals from the top, bottom, and the abdomen of each fetus. This sampling extended through the end of May. The samples were sent to the National Veterinary Services Laboratory (NVSL), where any *Brucella* colonies grown were confirmed with a PCR test.

Data analyses are incomplete at this time. Expected completion of these data analyses is unknown.

Preliminary Findings have been consistent between years.

- There was no difference in persistence curves between the north and west study sites.
- Persistence was much greater during February versus May.
- Bacteria disappeared from the top and abdomen of the carcasses rapidly but persisted longer on the bottom side.
- RB51 remained viable on the bottom of the carcasses for up to 78 days on those fetuses placed out in February. The February curve for the number of positive bottom samples begins to decline steeply around 45 days post-set out. This may be linked to light conditions associated with the spring equinox (March 21) and/or a large jump in UV light values seen in April. The May curve shows rapid decline with no positive carcasses detected by 18 days post-set out.
- Shade takes out all the highs and lows in temperature. Since in theory it is the temperature variance that increases cell lysis, a shaded carcass remains positive longer than a carcass exposed to direct sunlight.

Study Fetal Material Persistence in the Local Environment

APHIS and MTFWP ran this study from March to April during the years of 2001, 2002, and 2003. In 2001 bison fetuses were placed on a one km grid pattern both outside and inside YNP, in both the Western and Northern IBMP Management Areas. In the years 2002 and 2003, the carcasses were set out using a stratified random process and were only deployed outside YNP, again in both the Western and Northern IBMP Management Areas. The carcasses were deployed in groups (4-16 carcasses/week) over the three month period.

Each fetus was placed with its associated membranes and fluid. A transmitter was placed on each carcass to track movement upon scavenging. Half the 2001 sites were monitored with a motion-sensing camera.