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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,

Defendant-Intervenors.

Cause No.: DV-29-2008-34

**PETITIONERS' RESPONSE IN
OPPOSITION TO RESPONDENT-
INTERVENORS' MOTION FOR
JUDGMENT ON THE PLEADINGS AND
NOTICE OF CONVERSION OF MOTION
TO RULE 56 MOTION FOR PARTIAL
SUMMARY JUDGMENT**

COME NOW, Sitz Angus Ranch, Bill Myers, and the Montana Stockgrowers Association, Inc., on behalf of its members (hereinafter collectively referred to as "Petitioners"), by and through their undersigned counsel of record, and hereby responds in opposition to Respondent-Intervenors' Motion for Judgment on the Pleadings in the above-captioned matter. For the reasons set forth herein, Respondent-Intervenors' motion should be denied. Also, as provided for herein, and under the applicable provisions of Rule 12(c), Mont. R. Civ. P., because matters outside the pleadings are presented to the Court, the motion should be treated as a motion for partial summary judgment, and disposed of in accordance with Rule 56, Mont. R. Civ. P. After consideration of these matters, partial summary judgment should issue in favor of Petitioners on Count II (declaratory and injunctive relief) of Petitioners' First Amended Complaint by this Court affirmatively declaring that:

1. the Interagency Bison Management Plan for the State of Montana and Yellowstone National Park (hereinafter referred to as "IBMP") implements the legal responsibilities and duties of the Respondent Department of Livestock (hereinafter referred to as "DOL") to manage Yellowstone National Park (hereinafter referred to as "YNP") bison which enter Montana in the Western Boundary Area;
2. the management actions identified in the Western Boundary Area for Step 1 of the IBMP are the specific management actions required to be taken by DOL to ensure that the risk of brucellosis transmission from bison to cattle is minimized; and,
3. under the IBMP all bison are to be removed from the State of Montana DOL in the Western Boundary Area by May 15 of each year.

I. FACTUAL BACKGROUND

This matter concerns the management actions of the Respondents in managing bison

which migrate from YNP into the State of Montana in the Western Boundary Area. The area concerned in this matter involves certain bison management zones designated as Zones 1, 2, and 3 in the IBMP promulgated by the Respondent DOL on December 22, 2000. *See*, Petr. Br. in Support of Application for Alt. Writ of Mandate (May 27, 2008), Exs. 1 and 6.

Petitioner Sitz Angus Ranch is a third generation family owned and operated registered angus cattle ranch headquartered in Harrison, Montana. Petr. Br. in Support for Application of Alt. Writ of Mandate, Ex. 2, ¶ 2. Sitz Angus Ranch leases private property known as the “Deep Well Ranch” owned by the Povah family within or adjacent to Zones 2 and 3 where Sitz grazes about 300 cow/calf pairs. *Id.*, ¶ 3.

Petitioner Bill Myers is a fourth generation rancher who leases private property located within Zone 2 of the Western Boundary Area known as the “Stinnett Ranch” and “Red Creek Ranch,” where he grazes approximately 200 cow/calf pairs. Petr. Br. in Support of Application for Alt. Writ of Mandate, Ex. 3, ¶ 3. Myers typically grazes his cattle on these lands from about June 1 of each year until about October 15 to November 1. *Id.*, ¶ 4.

Petitioner Montana Stockgrowers Association, Inc. (hereinafter referred to as “MSGA”) is a non-profit corporation whose members are ranchers and livestock owners who operate ranch operations that are directly impacted by the management of publically owned, brucellosis exposed bison which enter Montana from YNP. Petr. Br. in Support of Application for Alt. Writ of Mandate, Ex. 4, ¶ 2. Petitioners Sitz and Myers are members of MSGA. *Id.*, ¶ 4. Members of MSGA are threatened by the presence of brucellosis exposed or infected bison being within Montana due to the risks such animals pose on the Montana livestock industry. *Id.*, ¶¶ 4, 6-9. In 2006 and 2007, MSGA notified the Respondent Montana Board of Livestock (hereinafter

referred to as “BOL”) of MSGA’s members concerns regarding the failure of the DOL to implement the management measures contained within the IBMP. *Id.*, ¶ 5.

Given the status of Petitioners as ranchers directly affected by the bison management actions or inactions of Respondents, Petitioners are interested parties whose rights and interests are directly affected by the validity and enforceability of the IBMP. It is this status, and the fact that terms of the IBMP are contained within the Plan as promulgated by the Respondents, which gives rise to Petitioners’ declaratory judgment claim to afford relief in regard to the respective rights, and legal relations arising under the Plan.

II. PROCEDURAL BACKGROUND

On or about May 27, 2008, Petitioners filed with this Court an action for alternative writ of mandate, supporting brief, and attachments, seeking an order from this Court to require the Respondents to remove all YNP bison, then 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 IBMP or to show cause why this Court should not order Respondents to take such action. On May 29, 2008, this Court issued an Alternative Writ of Mandate ordering Respondents to remove all bison from the Western Boundary Area or appear before the Court on June 9, 2008 to show cause why Respondents should not be so ordered.

On June 2, 2008, Petitioners filed their First Amended Complaint for Declaratory and Injunctive Relief and Application for Alternative Writ of Mandate. By their First Amended Complaint, Petitioners further brought claims for declaratory and injunctive relief regarding Respondents’ alleged failure to implement the various bison management actions called for in the IBMP in the Western Boundary Area, and Petitioners seek from this Court relief in that regard. *See*, 1st Amend. Compl., Count II.

On June 5, 2008, Petitioners and Respondents filed with this Court a Stipulation and Proposed Order on Writ of Mandate. Within the Stipulation and Proposed Order, the Petitioners and Respondents agreed the show cause hearing scheduled for June 9, 2008 was no longer necessary as Respondents had conducted hazing operations in the Western Boundary Area and removed all bison from Zones 2 and 3 in Montana, and returned all bison to YNP. Stip. ¶¶ 2 – 3 (June 5, 2008). The Stipulation further contained the agreement of the Respondents to act pursuant to state law and the management directives set forth in the IBMP in the Western Boundary Area for the remainder of the summer and fall of 2008. *Id.* ¶ 4. On June 6, 2008, the Court adopted the Stipulation by Order of this Court and vacated the June 9, 2008 show cause hearing.

On July 28, 2008, Respondents filed their Answer to the First Amended Complaint for Declaratory and Injunctive Relief and Application for Alternative Writ of Mandate. On or about August 13, 2008, the Respondent-Intervenors moved to intervene in this action. Along with Respondent-Intervenors motion and brief was a proposed Answer to First Amended Complaint. On September 24, 2008, this Court granted intervention. On October 24, 2008, this Court issued an Amended Pretrial Schedule Order. On or about October 30, 2008, Respondent-Intervenors filed the instant motion and memorandum of points and authorities in support.

III. STANDARD OF REVIEW

Respondent-Intervenors' Motion for Judgment on the Pleadings is filed pursuant to Rule 12 (c), Mont. R. Civ. P. Under the rule, after the pleadings are closed, but within such time as not to delay trial, any party may move for judgment on the pleadings.¹ As the rule states, if on a

¹ Pursuant to the Amended Schedule Order issued by this Court on October 24, 2008, the last date to amend pleadings without leave of court is November 14, 2008. As such, the pleadings have not yet closed. However, because Respondent-Intervenors' motion is properly converted into a Rule 56 summary judgment motion, the motion may be properly considered under Rule 56, Mont. R. Civ. P. at this time.

motion for judgment on the pleadings, matters outside the pleadings are presented to, and not excluded by this Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, Mont. R. Civ. P.

The standard of review under Rule 56, Mont. R. Civ. P., on summary judgment is well-established. Summary judgment is proper when the moving party shows that there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c); *see also*, Butler v. Domin, 2000 MT 312, ¶ 19, 302 Mont. 452, ¶19, 15 P.3d 1189, ¶19. The purpose of summary judgment is to encourage judicial economy through the prompt elimination of questions not deserving of resolution by trial. *See*, Rumph v. Dale Edwards, Inc. (1979), 183 Mont. 359, 365, 600 P.2d 163, 167; Reaves v. Reinbold (1980), 189 Mont. 284, 288, 615 P.2d 896, 898. To comply with the requirements of Mont. R. Civ. P. 56(c), the moving party must show that “there is no genuine issue as to any fact deemed material in light of the substantive legal principles entitling the movant to judgment as a matter of law.” Thelen v. City of Billings (1989), 238 Mont. 82, 85, 776 P.2d 520, 522. When reviewing a motion for summary judgment, a court may enter summary judgment for the non-moving party. *See*, Payne Realty & Hous., Inc. v. First Sec. Bank of Livingston (1991), 247 Mont. 374, 378, 807 P.2d 177, 179 (*citing* Hereford v. Hereford, 183 Mont. 104, 107-08, 598 P.2d 600, 602) (The invocation of the power of the court to render summary judgment in favor of the moving party gives the court the power to render summary judgment for his adversary provided the case warrants that result). As demonstrated herein, this action is just such an instance where this Court should enter judgment for the non-moving party, in this case the Petitioners.

Petitioners claims for declaratory relief are governed by Mont. Code Ann. §§ 27-8-101 *et seq.* Declaratory relief is designed “to settle and to afford relief from uncertainty and

insecurity with respect to rights, status, and other legal relations . . .” Mont. Code Ann. § 27-8-102. Declaratory judgments are intended to be remedial and the provisions of the statute are to be liberally construed and administered. Mont. Code Ann. § 27-8-102.

Declaratory judgment is proper when a justiciable controversy exists; genuine and existing rights are affected by a statute; a judgment of the court can effectively operate on the controversy; and a judicial determination will have the effect of a final judgment upon the rights, status, or legal relations of the real parties in interest. *See, McGillivray v. St.*, 1999 MT 3, ¶ 8, 293 Mont. 19, ¶ 8, 972 P.2d 804, ¶ 8. It is not a basis for denying declaratory relief that all of the rights, status, or other legal relations of the parties cannot be decided in the same proceeding. *See, Ridley v. Guar. Natl. Ins. Co.* (1997), 286 Mont. 325, 330, 951 P.2d 987, 990.

IV. DISCUSSION AND ARGUMENT

A. Based Upon the Pleadings, Exhibits, Documents Incorporated, and Material Facts not in Dispute, Respondent-Intervenors’ Motion Should be Denied. In Fact, Based Upon the Record Before this Court, Declaratory Judgment Should be Entered Affirmatively Stating Respondents have the Obligation to Comply with the Management Terms of the IBMP in the Western Boundary Area.

1. The terms of the IBMP speak for itself and is the best evidence of its content.

To date, the operative pleadings in this case consist of Petitioners’ Application for Alternative Writ of Mandate, Brief in Support, and Exhibits 1-7, thereto, Petitioners’ First Amended Complaint and Application for Alternative Writ of Mandate, Respondents’ Answer, and Respondent-Intervenors’ Answer. Based upon these pleadings, it is apparent that Petitioners, Respondents and Respondent-Intervenors can agree that the IBMP and its terms “speak for itself,” and that the IBMP itself is the “best evidence of its contents.” *See, e.g.*, 1st Amend. Compl. ¶¶ 11, 12, 14, 18, 22, 25 and 26; Respt. Ans. ¶¶ 11, 12, 14, 15, 18, 25 and 26; Respt.-Intervenors Ans. ¶¶ 11, 12, 15, 22, 25, 26, and 37. Accordingly, the pleadings in this case

demonstrate the contents of the IBMP speak for itself, and are the best evidence of the bison management actions identified.

2. Statutory/regulatory authorities, Montana Environmental Policy Act/National Environmental Policy Act documents associated with the IMBP, and the terms of the IBMP.

Under Montana law, bison which enter the state from YNP are designated as a “species requiring disease control.” Mont. Code Ann. § 87-1-216(1)(a). By statute, the Department of Livestock (hereinafter referred to as “DOL”) is authorized under the provisions of Mont. Code Ann. § 81-2-120 to regulate YNP bison that pose a threat to persons or livestock in Montana through transmission of a contagious disease (*i.e.*, brucellosis). *See*, Mont. Code Ann. § 87-1-216(2)(c).

Under Mont. Code Ann. § 81-2-120, the DOL, under a plan approved by the governor, is authorized by the legislature to take actions to protect persons and livestock from the threat of disease. As the statute authorizes, DOL may haze, capture, transport, quarantine, slaughter, shoot, euthanize, vaccinate, or allow hunting of YNP bison in exercising its functions delegated from the Montana legislature. *See*, Mont. Code Ann. § 81-2-120(1)(a) through (d). As the statute further authorizes, DOL may promulgate rules in regard to the management of YNP bison that enter Montana on public or private lands. Mont. Code Ann. § 81-2-120(4).

Attached to Petitioners’ Brief in Support of Application for Alternative Writ of Mandate, Exhibit 6, is a copy of the December 22, 2000 IBMP Record of Decision (hereinafter referred to as “ROD”).² As the ROD itself states, the IBMP implements DOL’s statutory responsibilities to

² In Respondent-Intervenors’ Memorandum of Points and Authorities in support of their motion, Respondent-Intervenors contend the ROD does not create any legal rights or responsibilities. This argument is addressed in Section IV.A.3., *infra*.

manage bison under Mont. Code Ann. §§ 81-2-120 and 87-1-216. See, IBMP 3-4 (emphasis supplied).

As part of DOL's preparation for issuance of the IBMP as a decision on the management of YNP bison which enter Montana, the State of Montana issued a Draft Environmental Impact Statement (hereinafter referred to as "DEIS") in conjunction with various federal agencies (Yellowstone National Park, Gallatin National Forest, and APHIS Veterinary Services). After issuance of the DEIS, DOL and Montana Fish, Wildlife, and Parks (hereinafter referred to as "MFWP") developed a modified preferred alternative which was analyzed in the state prepared Final Environmental Impact Statement (hereinafter referred to as "FEIS") issued by DOL and MFWP on November 15, 2000. *See*, Ex. A, Mont. FEIS for the IBMP (Nov. 15, 2000), attached hereto. The FEIS (Ex. A) satisfied DOL's responsibilities to comply with the requirements of the Montana Environmental Policy Act (hereinafter referred to as "MEPA"). Mont. Code Ann. §§ 75-1-101, *et. seq.* The federally prepared DEIS and FEIS recognized the federal agencies responsibilities to comply with MEPA's counterpart, the National Environmental Policy Act (hereinafter referred to as "NEPA"), in assessing impacts of the IBMP on the affected human environment. 42 U.S.C. §§ 4321 *et. seq.*

The FEIS for the IBMP recognizes DOL is authorized by statute to regulate animal health, including specific responsibilities related to the management of bison that move from YNP into Montana. *See*, Ex. A, 4. As the FEIS further notes, the statutory and regulatory authorities of the Respondents, BOL and DOL, were described in the DEIS in Appendix E of the document. Ex. A, 4. Attached hereto as Exhibit B is Appendix E from the DEIS.

As the FEIS recognizes, the ROD for bison management was required to be consistent with these underlying statutory and regulatory authorities, duties, and responsibilities. Ex. A, 28.

As the FEIS further states, the Montana legislature has, through statute, assigned specific responsibilities to DOL for management of bison that move into Montana for the purposes of disease control. Ex. A 30, 31.

The FEIS also specifically states that neither the DEIS or the IBMP require DOL to relinquish its authority to manage and regulate YNP bison. Under Montana law, DOL is “required” to take action when bison move into Montana. Ex. A, 30 (citing, Admin. R. Mont. 32.2.224). Under the IBMP, brucellosis infected and exposed bison are not to be allowed unrestricted access within the state. As the FEIS states, the IBMP defines specific circumstances in which bison may occupy lands in Montana and the specific management actions necessary to control bison to ensure the risk of brucellosis transmission from bison to cattle is minimized. *Id.* (emphasis added.) It is with this backdrop that the role of the Respondents in implementing the IBMP is properly framed in addressing Petitioners’ declaratory relief claims made in this case.

In taking management action in the Western Boundary Area, DOL has been assigned by the legislature to have the primary responsibility to control and regulate YNP bison. Ex. A, 31. Under the express terms of the IBMP, bison in the Western Boundary Area are to be managed in various steps and within certain zones described in the Plan. *See*, IBMP, 3-8. The management actions at issue in this case involves those actions specified within Zones 2 and 3, within Step 1 of the IBMP. IBMP, 3-5. At the time of the filing of the First Amended Complaint, and to this date, the IBMP management actions remain in Step 1 of the Plan. Depo. Rob Tierney, DOL Bison Operations Program Manager, 40:3-13 (Oct. 17, 2008), attached hereto as Exhibit C.

Under the terms of the IBMP in Step 1, in the Western Boundary Area, bison are to be managed as follows:

1. after cattle are removed from Zone 2 in the fall, the agencies will haze bison exiting the Park into the West Yellowstone area back into the Park;
2. when hazing becomes ineffective, the agencies will capture bison;
3. the agencies will test all captured bison and send seropositives to slaughter or for use in jointly approved research;
4. all seronegative bison, up to a specified tolerance level (up to 100 bison), will be released; and
5. Seronegative pregnant bison will be allowed to enter Montana under certain conditions specified in the plan. *See*, IBMP, § III(2)(a) through (h).

See, IBMP § III (1) through (2), p. 3. (emphasis supplied.)

As the IBMP further states, during Step 1 every attempt will be made to capture and test bison that leave the Park. Seronegative calves and yearlings that are captured will be vaccinated with a safe vaccine. Bison that could not be captured but are tolerated will be permitted outside the Park until May 15. After May 15, those bison that could not be captured and cannot be hazed will be subject to lethal removal. *See*, IBMP § III(4), p. 5 (emphasis supplied.)

The IBMP in several other provisions specifically states bison will be returned to YNP by May 15. In addition to the preceding, the May 15 date is recognized as the date when all bison are to be removed from Montana. *See*, IBMP § III(7), (13), and (14), pp. 7, 8-9.

In subsequent decisions by DOL and Montana Fish, Wildlife, and Parks (hereinafter referred to as “MFWP”) issued in 2004 and 2005, pursuant to Mont. Code Ann. §§ 87-2-730 and 81-2-120, public hunting of YNP bison was authorized as an additional action in managing bison leaving YNP and entering Montana. Under these decision notices, hazing, trapping, and other activities mandated in the IBMP will continue. *See*, Ex. D, 21, and Ex. E, 3 attached hereto. As

the public hunting decisions noted, the public hunt will not replace the IBMP as the primary regulatory mechanism for bison numbers and distribution of YNP bison. *Id.*

As the foregoing discussion demonstrates, the IBMP and its terms are grounded upon specific statutory and regulatory authority directing DOL to manage YNP bison. As Petitioners, Respondents, and Respondent-Intervenors have set forth in the pleadings to date, the terms of the IBMP speak for itself, and its terms are contained within the RODs issued by the DOL and other agencies.³ As to the legal effect of IBMP, and whether the IBMP creates legal, enforceable obligations on Respondents, the record is clear that DOL is by statute and regulation, required to take action when bison move from YNP into Montana. *See*, Admin. R. Mont. 32.3.224(A). As the record demonstrates, the IBMP defines the specific management actions DOL is to take as necessary to control bison to ensure that the risk of brucellosis transmission from bison to cattle is minimized. Ex. A, 30. It is that duty, and it is those management actions identified in the IBMP, which give rise to Petitioners claims made in this case.

3. Contrary to Respondent-Intervenors' arguments, the statutory and regulatory authorities which underlie the IBMP create enforceable legal obligations requiring DOL to comply with the terms of the IBMP.

a. Respondent-Intervenors' argument that the IBMP does not create any substantive legal responsibilities is erroneous.

Respondent-Intervenors argue that the IBMP itself is not set forth in any constitution or state statute duly adopted by the state legislature. Respt.-Intervenors Memo. in Support 4. Respondent-Intervenors also argue that the IBMP has also not been promulgated as a "legislative rule" in accordance with the Montana Administrative Procedures Act (hereinafter referred to as "MAPA"). *Id.* Finally, Respondent-Intervenors argue that the IBMP ROD does not create any

³ The other ROD issued in conjunction with the IBMP was the Record of Decision for the Final Environmental Impact Statement and Bison Management Plan for the State of Montana and Yellowstone National Park issued on December 20, 2000 by the U. S. Department of Interior, National Park Service, U. S. Department of Agriculture, U. S. Forest Service, and Animal and Plant Health Inspection Service.

legal rights or responsibilities. *Id.* 6. Accordingly, Respondent-Intervenors assert the IBMP, nor its terms, provide any basis for Petitioners' claims. As provided for below, Respondent-Intervenors are wrong in each assertion.

i. Statutory basis for the IBMP.

As the IBMP states, the Plan implements DOL's statutory responsibilities to manage bison, and cites to Mont. Code Ann. §§ 81-2-120 and 87-1-216 as authority for the Plan. IBMP, 3-4. As previously explained, Montana law specifically authorizes DOL to regulate YNP bison under the provisions of Mont. Code Ann. § 81-2-120 when bison enter Montana and pose a threat to persons or livestock through the transmission of a contagious disease (*i.e.*, brucellosis). Mont. Code Ann. § 87-1-216(2)(c). Accordingly, the IBMP is derived from specific statutory duties delegated to DOL by the legislature in the management of YNP bison.

The legislature has established direction in delegating authority to DOL in managing YNP bison by stating:

1. any plan be approved by the governor (Mont. Code Ann. § 81-2-120(1));
2. that DOL may use any feasible method in taking actions (*Id.*);
3. that authorized actions include physical removal of bison from Montana (by hazing, capture, transportation, quarantine, or delivery to a slaughterhouse) (Mont. Code Ann. § 81-2-120(1)(a));
4. that bison may be destroyed by use of firearms or euthanasia (Mont. Code Ann. § 81-2-120(1)(b));
5. that bison may be taken through limited public hunts when authorized by the state veterinarian and DOL (Mont. Code Ann. § 81-2-120(1)(a));

6. that bison may be captured, tested, quarantined, and vaccinated (Mont. Code Ann. § 81-2-120(1)(d)); and,

7. that DOL may adopt rules with regard to management of bison (Mont. Code Ann. § 81-2-120(4)).

See, generally, Mont. Code Ann. § 81-2-120.

As such, the Montana legislature clearly authorized DOL to develop a plan to manage YNP bison. Under this authority, DOL developed the IBMP. The statute did not codify the precise terms of the legislatively authorized plan, but did state certain management actions were authorized by the legislature to be taken by DOL in managing bison. As the record referred to herein makes clear, the management actions prescribed in the IBMP define the specific circumstances in which bison may occupy lands in Montana, and the specific actions necessary to control bison to ensure that the risk of brucellosis that is transmitted from bison to cattle is minimized. *See*, Ex. A, 30. The fact that the underlying statute utilized the terms “may” in describing management actions authorized by the legislature does not affect the legal responsibilities of DOL to take the actions called for in the IBMP. By rule, DOL is required to take action when YNP bison enter Montana. *See*, Admin. R. Mont. 32.3.224(A). Accordingly, by statute and rule, the IBMP implements the responsibilities of DOL in managing YNP bison.

ii. The procedural nature of the Montana Environmental Policy Act does not affect the legal obligations of DOL in managing YNP bison under the IBMP.

Respondent-Intervenors argue that adoption of a ROD (*i.e.* IBMP) pursuant to review under the MEPA, does not make the IBMP enforceable. Respt.-Intervenors Memo. in Support 5. Respondent-Intervenors are correct that the MEPA review process itself is “procedural” in nature. *Id.* However, Respondent-Intervenors are not correct that the decision associated with a

MEPA/NEPA process does not result in an enforceable decision by the agency. *Id.* In fact, Respondent-Intervenors' argument that a ROD does not create any enforceable substantive legal rights or responsibilities, while novel, leads to obvious absurd results and is clearly wrong.

A ROD promulgated in conjunction with a MEPA/NEPA process is the decision of an agency in taking some agency "action" which triggers the MEPA/NEPA process. *See*, Admin. R. Mont. 32-2-222(1). A ROD represents the culmination of the MEPA/NEPA process and reflects public notice of what an administrative agency has decided to do as agency action. *See*, Admin. R. Mont. 32.2.238(1) ("At the time of its decision concerning a proposed action for which an EIS was prepared, the agency shall prepare a concise record of decision.") As such, the ROD represents the agency's decision on the proposed agency action to be undertaken.

To argue that a ROD is not legally enforceable, or that a ROD does not create legal obligations associated with the agency's action is simply wrong as a matter of law and common sense. If the agency's decision is not legally enforceable, why would the MEPA/NEPA process be necessary? If the agency is not bound by its decision, there would be no need to analyze environmental impacts in the first place, as there is nothing to bind the agency to a particular course of conduct. Of course, such a result defies the law on the effect of a ROD, and lacks common sense.

One court has accurately captured the effect of an agency ROD by stating, because the ROD "pre-determines" the future through the selection of a long-term plan (to the exclusion of others which will not be available options for implementation), it is ripe for judicial review if challenged. *See*, Lamb v. Dept. of Int., 343 F.3d 1080, 1091 (9th Cir. 2003). Another court has observed that the ROD is the decision of the agency making it subject to appeal. Wilderness Socy. v. Rey, 180 F. Supp. 1141, 1148 (D. Mont. 2002.). As Judge Molloy noted in Wilderness

Socy., to hold otherwise “defies common sense.” *Id.* If a ROD was not enforceable, and created no substantive rights, there would be no need for judicial review, or for any appeals process for agency decisions. Such a result, and such an argument, is spurious at best.

The IBMP and the authority of DOL over YNP bison is grounded in statute and regulation. The obligations and duties of DOL in managing YNP bison arises from these substantive laws which further become implemented by the terms of the IBMP and the associated ROD issued by DOL in December 2000. The IBMP clearly results in legal obligations of DOL in managing YNP bison in Montana, including the Western Boundary Area. Respondent-Intervenors’ arguments otherwise should be summarily rejected by this Court.

4. The terms of DOL regulations and the IBMP are clear and require DOL to take action with YNP bison including specific actions in the Western Boundary Area.

Respondent-Intervenors further argue that the IBMP vests with DOL discretion in managing bison. As such, Respondent-Intervenors argue the Petition for Mandamus and Declaratory Relief grounded on the terms of the IBMP affords no basis for relief. Repst.-Intervenors Memo. in Support 6-7. Again, Respondent-Intervenors argument misconstrues the statute, DOL’s rule, and the IBMP itself.

The FEIS probably best summarizes the obligations of DOL in bison management under the IBMP. As the FEIS states:

DOL is required to take action when bison move from YNP into Montana (A.R.M. § 32.2.224). The Interagency Bison Management Plan will not allow brucellosis infected and exposed bison unrestricted access within the state. It defines specific circumstances in which bison may occupy lands in Montana and the specific management actions necessary to control those bison to ensure that the risk of brucellosis transmission from bison to cattle is minimized.

See, Ex. A, 30.

The DOL rule specific to bison affected with a dangerous disease (*i.e.* brucellosis) states that when such bison are present within the state one of two actions will be taken:

1. the live bison may be physically removed from the state (including but not limited to capture, trucking, hazing or taken to slaughter); or,
2. if the live bison cannot be safely removed, they shall be shot or otherwise euthanized.

See, Admin. R. Mont. 32.2.224(A).

The rule, while providing discretion in how the live bison may be physically removed, unequivocally states one of two actions will be taken. *Id.*

The terms of the IBMP in Step 1 in the Western Boundary Area further defines the management actions that will be taken with YNP bison. As previously mentioned, in Step 1 bison in the Western Boundary: (1) will be hazed back into the Park after cattle are removed from Zone 2 in the fall; (2) when hazing is ineffective, bison will be captured; (3) captured bison will be tested; (4) seropositives will be sent to slaughter or to approved research; (5) seronegatives (up to 100 bison) will be released; (6) seronegative pregnant bison will be allowed under specified conditions. IBMP § III (2)(a)through (h); and, (7) certain bison will be vaccinated with safe a vaccine. Furthermore, under the terms of the IBMP in Step 1 the Plan specifically states that May 15 is the last date upon which bison are to be in Montana. IBMP § III(4), (7), (13), and (14).

As such, while the rule and the statute do not mention these specific actions, or state with particularity the May 15 date, the IBMP specifically identifies these actions will be taken. Under the express terms of the IBMP these management directives are not discretionary in nature.

Because the IBMP is enforceable as a ROD it creates legal duties and obligations upon which

DOL must abide, and upon which Petitioners' claims may be judged by this Court. Accordingly, as a matter of law, Petitioners' declaratory relief claims, and request for mandamus, are properly lodged within the jurisdiction of this Court to determine.

a. The IBMP's reference to "adaptive management" is event driven, not simply based upon changing circumstances.

In their briefing, Respondent-Intervenors also argue the IBMP does not create rights in Petitioners or legal obligations in DOL because of the reference to "adaptive management." Rept.-Intervenors Memo. in Support, 4. Respondent-Intervenors misconstrue the concept of adaptive management as used in the IBMP.

As the IBMP itself states, the Plan consists of three "adaptive management steps" which are prescribed in the IBMP. *See*, IBMP, 1. As the IBMP states, these steps, when all criteria are met, will provide for tolerance of a limited number of untested bison in Montana. *Id.* As the Plan specifically states, the actual change from one adaptive management step to another are dependent upon all criteria being met. *Id.*, 2. In addition, adaptive management as defined in the Plan is not based upon "changed circumstances" or "new information," but instead denotes the application of scientific principles should future management be adjusted. *Id.*

As the FEIS recognizes, the adaptive management framework, as used in the IBMP, is event driven. Ex. A, 10. As the FEIS states, specific events trigger changes in management in the Western Boundary Area. As the record is clear, those events have not occurred, and the criteria to move from Step 1 to Steps 2 or 3 in Western Boundary Area have not occurred. *See*, IBMP, 5-6 (describing events and triggers to move to Steps 2 or 3). As Rob Tierney, DOL's bison operating program manager acknowledges, in the Western Boundary Area, the IBMP remains in Step 1. Ex. F. Respondent-Intervenors "adaptive management" argument is simply misplaced.

V. CONCLUSION

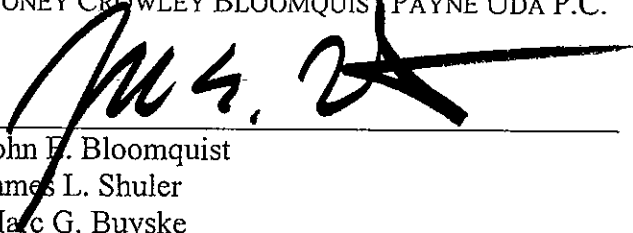
Based upon the record before this Court, Respondent-Intervenors' Rule 12(c), Mont. R. Civ. P., motion should be converted to a Rule 56, Mont. R. Civ. P., motion.

After reviewing the record, and the terms of the IBMP, this Court should enter partial summary judgment in favor of Petitioners on Count II (declaratory relief) by affirmatively stating:

1. the IBMP results in affirmative duties and obligations on DOL to control YNP bison in the Western Boundary Area;
2. the management actions identified in the Western Boundary Area in Step 1 of the IBMP are management actions required to be taken by DOL; and,
3. all bison are to be returned to YNP by DOL no later than May 15 of each year.

DATED this 7th day of November, 2008.

DONEY CROWLEY BLOOMQUIST PAYNE UDA P.C.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Petitioners' Response in Opposition to Respondent-Intervenors' Motion for Judgment on the Pleadings and Notice of Conversion of Motion to Rule 56 Motion for Partial Summary Judgment* was served via U. S. mail, first-class postage prepaid, on this 7th day of November, 2008, upon the following:

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