

PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

John E. Bloomquist
Rachel A. Kinkie
DONEY CROWLEY BLOOMQUIST PAYNE UDA P.C.
Diamond Block, Suite 200
44 West Sixth Avenue
P.O. Box 1185
Helena, MT 59624-1185
Telephone: (406) 443-2211
Facsimile: (406) 449-8443

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JUNE LITTLE
Clerk of District Court
Park County, Montana
By ORLINA HUNSAKER Deputy

Attorneys for Petitioner

MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

PARK COUNTY STOCKGROWERS
ASSOCIATION, INC., on behalf of its
members,

Petitioner,

vs.

MONTANA DEPARTMENT OF
LIVESTOCK, an agency of the State of
Montana; MONTANA DEPARTMENT OF
FISH, WILDLIFE AND PARKS, an agency of
the State of Montana; STATE OF
MONTANA; DR. MARTIN ZALUSKI, in his
capacity as Montana State Veterinarian; and
BRIAN SCHWEITZER, as Governor of the
State of Montana,

Respondents.

Cause No. DV 2011-77

**PETITION FOR DECLARATORY AND
INJUNCTIVE RELIEF**

COMES NOW Petitioner Park County Stockgrowers Association, Inc. (hereinafter referred to as "PCSGA" or "Petitioner") on behalf of its members, by and through its undersigned counsel and pursuant to 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 Mont. Const. Art. II, Sec. 3 and for its causes of action against the Montana Department of Livestock (hereinafter referred to as "DOL"); Montana Department

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of Fish, Wildlife and Parks (hereinafter referred to as "FWP"); State of Montana; Dr. Martin Zaluski (hereinafter referred to as "Dr. Zaluski"), in his capacity as the Montana State Veterinarian; and Governor Brian Schweitzer (hereinafter referred to as "Governor"), in his capacity as Governor of the State of Montana (hereinafter collectively referred to as "Respondents"), hereby incorporates fully the facts and allegations made in this petition alleging as follows:

I. BACKGROUND

1. Brucellosis is a contagious bacterial disease caused by various species of the genus *Brucella* that infect domestic animals, wildlife, and humans. The species of concern in the Yellowstone National Park (hereinafter referred to as "YNP") region is *brucella abortus*, whose hosts are bison and elk. Cattle infected with brucellosis characteristically abort after the fifth month of gestation. See, *Bison Management for the State of Montana and YNP Final Environmental Impact Statement* (hereinafter referred to as "FEIS") at ix and 16 (excerpts attached to Application TRO, Prelim. Inj., & Order to Show Cause & Br. Supp. (hereinafter referred to as "Application") as Ex. 4). Brucellosis in humans (also known as "undulant fever") manifests severe flu-like symptoms including fatigue, headaches, high fever, chills, sweats, joint pain, backache, and loss of weight and appetite. See, *United States Department of Agriculture Animal and Plant Health Inspection Service* (hereinafter referred to as "USDA-APHIS") *Facts About Brucellosis* at 6 (attached hereto and incorporated herein as Exhibit "A"). These symptoms recur throughout an individual's lifetime and can result in death. There is no known cure for brucellosis. See, *id.* at 5. Brucellosis is also a biological agent and toxin monitored by USDA-APHIS and Center for Disease Control as an agent that could be used for bioterrorism. 9 CFR § 121.

2. Brucellosis is transmitted by direct contact with infected animals or an environment contaminated with fluids from an infected animal. "Aborted fetuses, placental membranes or fluids, and other vaginal discharges present after an infected animal has aborted" all contaminate the environment. *See, Ex. A at 1.* Traditionally, unpasteurized milk products were the source of infection in humans. Now, "farmers, ranchers, veterinarians, and packing plant workers are infected most frequently because they come into direct contact with infected animals." *See, id. at 6.*

3. USDA-APHIS' Cooperative State Federal Brucellosis Eradication Program was established in 1934 to help eradicate the disease. *See, id. at 2.* That agency has created a comprehensive, nation-wide program that implements testing and vaccination in high-risk areas and slaughter for infected animals. *See, id. at 3.* As brucellosis is not curable, USDA-APHIS states that "the best prevention is to eliminate brucellosis from all animals in an area." *See, id. at 7.*

4. The presence of brucellosis in YNP bison that enter Montana subjects Montana livestock producers to animal health-related sanctions from DOL or other animal health authorities. The presence of brucellosis in YNP bison that enter Montana further subjects the human environment, human health, and other forms of wildlife to harm due to the potential risk of transmission. *See, Interagency Bison Management Plan (hereinafter referred to as "IBMP") FEIS at 3 (attached to Application as Ex. 3).* Because of these risks, a cooperative federal-state agreement for management of YNP bison was developed and approved by both DOL and FWP in 2000 and signed by the governor at that time. The IBMP was promulgated to protect domestic cattle in portions of Montana adjacent to YNP from the threats associated with the disease brucellosis, which bison are exposed to or infected with and which further poses a threat to

animal and human health in the State of Montana. *See*, IBMP Record of Decision (hereinafter referred to as "ROD") at 1 (attached to Application as Ex. 1). The IBMP sets forth management responsibilities for each signing agency and provisions that: maintain temporal and spatial separation between bison and cattle; manage bison populations; manage bison beyond YNP boundaries; and eventually institute vaccination procedures for YNP bison. *See, id.* at 2. The IBMP also implements Respondents' statutory responsibilities to manage bison under Mont. Code Ann. §§ 81-2-120, 81-2-121, and 87-1-216. *See, id.* at 3-4. To meet these responsibilities, IBMP agencies meet periodically to discuss and adopt "adaptive management" changes to the IBMP. *See, id.* at 4. As part of IBMP agency meetings, DOL and FWP adopted an agreement entitled "Adaptive Management Adjustments to the IBMP" (hereinafter referred to as "AMA") on or around April 14, 2011. *See*, AMA (attached to Application as Ex. 2).

5. Petitioner brings this action for declaratory and injunctive relief, on behalf of its members, based on Respondents' adoption of significant changes to the existing IBMP, through the April 14, 2011 AMA, that: 1) violate Respondents' statutory and regulatory duties to manage brucellosis and bison as set forth by Mont. Code Ann. §§ 81-1-102, 81-2-102, 81-2-103, 81-2-120, 81-2-108, 81-2-703, 87-1-201, 87-2-216, 87-1-301, 87-5-701, 81-4-201, and 81-4-201, and Admin. R. Mont. 32.1.101, 32.3.108, 32.3.109, 32.3.411, 32.3.224A, and 32.3.204; 2) were not analyzed under an adequate or sufficient environmental review required by the Montana Environmental Policy Act (hereinafter referred to as "MEPA"), Mont. Code Ann. § 75-5-101, *et seq.*, and regulations implementing DOL's and FWP's MEPA duties, Admin. R. Mont. 32.2.221, *et seq.* and 12.2.428, *et seq.*; and 3) violate Petitioner's members' right to a clean and healthful environment as granted by Mont. Const. Art. II, Sec. 3. In addition, Respondents' actions in adopting and implementing the AMA have resulted in public nuisance.

6. The action taken by Respondents constitutes a challengeable state agency action as it attempts to significantly modify the existing IBMP or is otherwise in violation of Respondents legal responsibilities. The modifications substantially change the IBMP by eliminating existing brucellosis transmission prevention management actions without the benefit of a legally required environmental review to assess the consequences of the action. Respondents' decision to modify the IBMP without following proper procedures renders the decision arbitrary and capricious, and otherwise violates Petitioner's members' legal rights and is contrary to Respondents' legal obligations. Specifically, Respondents failed to comply with their legal duties under MEPA, Mont. Code Ann. § 75-1-102, *et seq.* and Admin. R. Mont. 32.2.221, *et seq.* and 12.2.428, *e. seq.*; their disease and bison management duties under Mont. Code Ann. §§ 81-1-102, 81-2-102, 81-2-103, 81-2-120, 81-2-108, 81-2-703, 87-1-201, 87-2-216, 87-1-301, 87-5-701, 81-4-201, and 81-4-201; their disease and bison management duties under Admin. R. Mont. 32.1.101, 32.3.108, 32.3.109, 32.3.411, 32.3.224A, and 32.3.204; and their constitutional duty under Mont. Const. Art. II, Sec. 3.

7. Based on the Respondents' decision to sign the AMA without preparation of a legally adequate MEPA analysis, Petitioner seeks a declaration that Respondents must, pursuant to MEPA, sufficiently evaluate the impacts of the AMA for the Northern Boundary Area of YNP on the human environment prior to implementation. A legally sufficient analysis would include preparing an environmental impact statement (hereinafter referred to as "EIS") or, at a minimum, a supplemental environmental impact statement (hereinafter referred to as "SEIS") for the proposed modifications. Petitioner also seeks an order of this Court enjoining Respondents presently, and into the future, from violating their statutory duties, and from implementing the AMA for the Northern Boundary Area of YNP until an adequate MEPA review is completed.

Finally, Petitioner seeks abatement of the public nuisance caused by Respondents' actions.

II. PARTIES

8. PCSGA is a Montana not-for-profit organization representing 80 landowners, livestock producers, businesses, and community organizations located throughout Park County. *See*, Jamie Lannen Aff. ¶ 1 (May 5, 2011) (attached to Application as Ex. 12). PCSGA brings this action on behalf of its members. Certain PCSGA members are livestock owners who own and/or operate ranches on private property or on federal grazing allotments where livestock are situated and grazed either within or adjacent to the new management boundary established by the AMA and who depend upon proper management of YNP bison by Respondents when such animals are found within the borders of the State of Montana. *See*, Lannen Aff. ¶¶ 2-5; Jeff Cahill Aff. ¶ 5 (May 5, 2011) (attached to Application as Ex. 6). Other PCSGA members are private property owners who have experienced damage, or threats to public safety, caused by YNP bison. *See*, Lannen Aff. ¶2; Cahill Aff. ¶¶ 2, 5. These PCSGA members all have an interest in a clean and healthful environment. Cahill at ¶ 2, 5.

10. PCSGA member Frank Rigler (hereinafter referred to as "Rigler") is a Montana resident and property owner living in Gardiner, Montana. *See*, Rigler Aff. ¶ 1 (May 4, 2011) (attached to Application as Ex. 8). He owns and operates the Slip and Slide Ranch. The ranch produced livestock in the past, and Rigler plans to do so again in the future. *See, id.* at ¶¶ 2-4. Rigler leases property to FWP for bison, which are contained. *See, id.* at ¶ 4.

Rigler also owns a trailer court and rental property in the same area. *See, id.* at ¶ 5. Rigler's property and operation is in Zone 3 as established in the 2000 IBMP. *See, id.* As property within Zone 3 of the IBMP, bison are not to be present on Rigler's property. Since adoption of the AMA, Rigler has made calls numerous times to Respondents to have bison

removed from his property and has himself been forced to haze bison from the property many times. After the AMA was adopted, bison have damaged fencing, buildings, and trees and Rigler worries that the bison could injure one of his tenants. *See, id.* at ¶9. Rigler has significant concerns that bison will spread brucellosis to other wildlife, livestock, and humans on his property. He is also concerned about bringing cattle back to his property, which has been occupied for significant periods of time by bison after adoption of the AMA. *See, id.* at ¶¶ 10-11.

Rigler was never given the opportunity to participate in the adoption of the AMA. *See, id.* at ¶ 14.

11. PCSGA member Martin Davis (hereinafter referred to as "Davis") is a livestock producer who runs the Flying Diamond Ranch located near Pine Creek in Paradise Valley. *See, Davis Aff* ¶¶ 1-2 (May 5, 2011) (attached to Application as Ex. 13). Davis runs his cattle in two areas of Park County. *See, Davis Aff.* at ¶¶ 2-4. In mid-June of each year, Davis relocates his cattle to private property in Stands Basin that his family has owned since 1968. Before adoption of the AMA on April 14, 2011, this property was well outside Zone 2 as established by the 2000 IBMP. The AMA, however, has almost eliminated the land buffer between Stands Basin and land where bison are allowed to roam. Bison can easily walk around Yankee Jim Canyon to reach Stands Basin. *See, Davis Aff.* at ¶ 5.

As there is no geographic barrier containing the bison, he has significant concerns that diseased bison will be able to reach and contaminate his property. *Id.*

Davis and his brother also own and operate Flying Diamond Guide Service. *See, Davis Aff.* at ¶ 10. Through this business, Davis takes hunters into the area around the AMA to hunt for elk. As brucellosis is transmitted from bison to elk, Davis is concerned that adopting the

AMA will increase disease prevalence in local elk herds, thus putting him, his employees, and his clients at risk for contracting the disease. *See*, Davis Aff. at ¶¶ 10-11.

Davis was not given an opportunity to publically participate or comment on the AMA's creation. *See*, Davis Aff. at ¶ 12.

12. PCSGA member Joe Sperano (hereinafter referred to as "Sperano") is a property owner in the Gardiner Basin. *See*, Sperano Aff. ¶¶ 1-2 (May 5, 2011) (attached to Application as Ex. 10). Sperano has fenced acreage that he irrigates with a wheel line. *See*, Sperano Aff. at ¶ 4. He used to have some cattle and horses on this property but was forced to move them to Livingston and Big Timber because of the YNP bison. *See*, Sperano Aff. at ¶ 5. Bison tear down his fences every day and he could not keep his livestock contained. Furthermore, he feared that bison commingling with his cattle would result in brucellosis transmission. *Id.*

Even though his livestock are gone, Sperano continues to experience property damage. Bison have crushed segments of his wheel line and damaged his water cannon. *See*, Sperano Aff. at ¶ 4. They have eaten the hay he used for his horses. *Id.* He tries to haze the animals by himself but they often become aggressive and he is forced to stop. *See*, Sperano Aff. at ¶¶ 6-7.

Sperano was never presented with the opportunity to comment on, or participate in, the adoption of the AMA. *See*, Sperano Aff. at ¶ 8.

13. PCSGA member Lew Wilks (hereinafter referred to as "Wilks") is a rancher located near Pray, Montana. *See*, Wilks Aff. ¶¶ 1-3 (May 5, 2011) (attached to Application as Ex. 9). While he winters his cattle in Paradise Valley, Wilks cattle spend the summer (June 15 through October 15) on the Slip and Slide forest service allotment in the Gardiner Basin. *See*, Wilks Aff. at ¶ 4. Before adoption of the AMA, Wilks' allotment was outside Zone 2. Now, his allotment is squarely within the new "Bison Conservation" boundary created under the AMA.

See, Wilks Aff. at ¶ 5. This implicates the temporal and spatial separation of bison from his cattle as bison can easily access the allotment and would be difficult to remove. It also puts the allotment at risk for significant damage as fences, watering facilities, and other infrastructural elements on the acreage are made for cattle, not bison. *See, Wilks Aff. at ¶ 11.*

Adoption of the AMA has compromised Wilks' right to a clean and healthful environment as it allows diseased bison to spread across a large area, infecting other forms of wildlife, and puts Wilks and the general public at risks for disease. *See, Wilks Aff. at ¶¶ 8-9.*

Wilks was not presented with an opportunity to comment or participate in the adoption of the AMA. *See, Wilks Aff. at ¶ 12.*

14. PCSGA member Peter Schmidt (hereinafter referred to as "Schmidt") is a dispatcher for the National Park Service in Yellowstone National Park and lives with his wife about ten miles north of Gardiner on the east side of the Yellowstone River. *See, Schmidt Aff. ¶ 1-2 (May 5, 2011) (attached to Application as Ex. 11).* They own approximately 3.25 acres and their primary place of residence is located here. *Id.* A month before adoption of the AMA, when agencies allowed bison onto the Cutler Lake and Meadow area, Schmidt began experiencing problems with YNP bison coming onto his property. *See, Schmidt Aff. at ¶ 4.* Bison continue to cross the Yellowstone River to Schmidt's property and have bent the stem-pipe on his well, torn apart hay stacks and wood piles, and dug wallows into the ground. *See, id. at ¶ 5.* Schmidt usually finds himself hazing bison without the aid of agencies. *See, id. at ¶ 9.*

Schmidt was not given the opportunity to comment or participate in the adoption of the AMA. *See, Schmidt Aff. at ¶ 10.*

Should the AMA continue to be implemented by Respondents, Schmidt and his wife, Barbara, fear for their safety as bison make it difficult for them to leave their home. *See,*

Schmidt Aff. at ¶ 6. The bison also pose a safety risk to them as motorists because the bison are regularly on US Highway 89. *See, id.* at ¶ 7.

Schmidt is a member of the PCSGA. *See, Schmidt Aff.* at ¶ 3.

15. Petitioner has a direct interest in the management of bison migrating into Montana from YNP due to: 1) the known prevalence of the disease brucellosis in these bison; and 2) the danger these bison pose to the health, safety, and private property of Petitioner's members. In addition, Petitioner's members have a direct interest in the protection of Montana's environment, which could be impacted significantly by Respondents' failure to fully comply with their legal duties and fully analyze the environmental impacts of in the AMA.

17. Petitioner's members' interests are directly affected by Respondents' actions. In particular, Petitioner's members' private property, personal safety, personal health, and environmental livestock health interests are directly negatively impacted with the increased presence of diseased bison outside YNP resulting from Respondents' actions in adopting the AMA. Petitioner's members' use and enjoy the land, environment, and natural resources within, and directly adjacent to, the Northern Boundary Area. Petitioner's members' use of the area affected by Respondents' adoption of the AMA include livestock grazing, recreation, and residential uses, which are all threatened by diseased YNP bison that Respondents' fail to manage under the AMA.

18. The above-described interests of the Petitioner's members have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely and irreparably injured by Respondents' failure to comply with their statutory and regulatory legal duties the IBMP and MEPA mandates.

19. Petitioner's interests in protecting the quality and ecological integrity of Montana's human environment, and the subsequent threat posed by diseased bison, create a substantial interest in the procedural and substantive requirements of Montana's environmental protection laws that require Respondents' actions and associated impacts be adequately analyzed. Petitioner has stated previously to Respondents regarding the illegality of adopting the AMA, and the substantial IBMP changes therein, without first complying with MEPA. In spite of these statements and notice, and in clear violations of Montana law, Respondents have adopted the AMA without the requisite environmental review.

20. Petitioner has no administrative remedies available to it to prohibit implementation of the AMA by Respondents. The only form of relief available to Petitioner is to seek relief, on behalf of its members, from this Court for Respondents' illegal actions in adopting the AMA.

21. DOL 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. DOL has the specific statutory and regulatory responsibility to control bison entering Montana from YNP that may be exposed to or infected with brucellosis, specifically those bison within Montana and the Northern Boundary Area. Mont. Code. Ann. §§ 81-1-102, 81-2-120. *See also*, Application, Ex. 1). Respondent DOL is a signatory to the AMA adopted on or around April 14, 2011. *See*, Application, Ex. 2. DOL, as an executive branch agency, has rules and regulations promulgated directing it to comply with MEPA. *See*, Admin. R. Mont. 32.2.221, *et seq.*

22. Dr. Zaluski is the Montana State Veterinarian responsible for the administration of the animal health laws of the State of Montana. Mont. Code Ann. § 81-1-301. As an officer of DOL, Dr. Zaluski is charged with protecting the livestock interests of Montana from disease and theft. Mont. Code Ann. § 81-1-102(1). The Animal Health Division, of which Dr. Zaluski oversees, includes the Disease Control Bureau. This bureau's function is to diagnose, prevent, control and eradicate animal disease. Admin. R. Mont. 32.1.101(2)(a)(i), (5)(c).

23. FWP is an executive branch agency of the State of Montana and is charged with the statutory duty to cooperate with DOL in the implementation of Mont. Code Ann. § 81-2-120. FWP may also authorize public hunting of diseased YNP bison after agreement and authorization from DOL. Mont. Code Ann. §§ 87-1-216, 87-2-730. *See also*, Application, Ex. 1. FWP is a signatory to the AMA adopted on or around April 14, 2011. *See*, Application, Ex. 2). FWP, as an executive branch agency, has rules and regulations promulgated directing it to comply with MEPA. *See*, Admin. R. Mont. 12.2.428, *et. seq.*

24. State of Montana is one of the several states of the United States. The State of Montana has jurisdiction over YNP bison that enter the state in the Northern Boundary Area. The State of Montana, under the Montana Constitution, is charged with protecting the private property, human health, and environmental rights of all Montanans, including Petitioner's members. *See*, Mont. Const. Art. II, Sec. 3.

25. Brian Schweitzer is the Governor of the State of Montana, charged under Montana law to ensure executive branch agencies comply with all legal mandates imposed by the Montana Constitution, statute, or regulation.

III. JURISDICTION

26. Jurisdiction is proper in this Court pursuant to Mont. Code Ann. §§ 27-8-201, 27-

19-101, and 2-4-701; the general original jurisdiction of this Court under Mont. Code Ann. § 3-5-302; Mont. Const. Art. II, Sec. 3; and the inherent power of this Court to review state agency decisions and actions and to issue appropriate relief.

IV. VENUE

27. Venue is proper in Park County 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 in the county where the cause or some part thereof arose. Venue is further proper in Park County because when an action is brought by a resident of Montana against the State of Montana, the county of the party's residence is a proper place of trial. Mont. Code Ann. §§25-2-125 through 126. Venue also is proper in Park County pursuant to Mont. Code Ann. § 75-1-108. In this matter, the AMA activities will occur in Park County, and this action arises in part out of Respondents' failure to carry out their legal duties to manage bison within the State of Montana to protect Petitioner's members' property, human health, environmental interests, and livestock situated within Park County, Montana. Furthermore, it is the Petitioner's members' interests, residents of Park County, whose property, livestock health, constitutional, and environmental interests suffer by Respondents' failure to follow applicable legal requirements in managing YNP bison which enter Montana in the Northern Boundary Area.

V. FACTS

28. Collectively, Respondents are charged under Montana state law, promulgated Administrative Rules of Montana and the IBMP with protecting Montanans and Montana livestock from disease threats posed by YNP bison infected with or exposed to brucellosis. As part of those applicable statutory and regulatory obligations, Respondents are to manage and control bison outside the Northern Boundary Area of YNP within Zone 2's boundary designated

in the 2000 IBMP ROD. *See*, Mont. Code Ann §81-2-120; Admin. R. Mont. 32.3.224A (attached to the Application as Ex. 5); Application, Ex. 1 at Attachment 1, 6-10, Fig. 3. This action arises out of the Respondents' failure to properly carry out statutory and regulatory duties, failure to conduct northern boundary area management actions set forth in the IBMP, and failure to meet MEPA's procedural obligations. These actions jeopardize Petitioner's members' health and safety, property, and the health of their livestock.

29. On or about December 22, 2000, the State of Montana issued a ROD on the IBMP, which is the approved management plan governing YNP bison entering the State of Montana. Respondents are charged with meeting the IBMP's mandate to reduce the risk of transmission between bison and Montana cattle located in areas neighboring YNP. *See*, Mont. Code Ann. §§ 81-2-120, 87-1-216; Application, Ex. 1 1-2. Spatial and temporal separation between cattle and bison is crucial to mitigating disease transmission between bison and livestock. To maintain separation, the plan identifies management of bison into the following steps and zones for the area known as the Northern Boundary Area, with Zone 1 being YNP.

Step 2-Zone 2. Step 2 began when cattle no longer grazed private lands in Zone 2, namely the Royal Teton Ranch situated north of YNP and west of the Yellowstone River. Under the IBMP, Zone 2 was an area geographically limited. *See*, Application, Ex. 1 at Map for the Northern Boundary Area. In Step 2, a finite number of migrating YNP bison were to be allowed to graze only in Zone 2. Agencies were to begin with 25 head of bison allowed in Zone 2. After agencies were successful managing¹ 25 bison, 50 bison would be allowed in Zone 2. After successfully managing 50 head, 100 head would be allowed in Zone 2. At no time were there to be more than 100 head of bison in Zone 2. Under Step 2 bison are only allowed in Zone 2 if they

¹ Successful management of bison outside YNP means "that the agencies are able to enforce spatial and temporal separation including near the northern end of Zone 2 at Yankee Jim Canyon." *See*, Application, Ex. 1 at Attachment 1, 7.

have tested negative for brucellosis at the Stephens Creek capture facility and have been vaccinated. *See*, Application, Ex. 1 at Attachment 1, 6-8.

Step 2-Zone 3. Under the IBMP, no bison are allowed in Zone 3. Zone 3 under the IBMP is any area outside of Zone 2. *See*, Application, Ex. 1 at 9. Bison in Zone 3 are subject to lethal removal. *Id.*

Step 3-Zone 2. Under the IBMP, step 3 was to begin when: (1) studies on bacterial viability allowed agencies to determine an adequate time for temporal separation; (2) YNP initiated an in-park vaccination program via a remote delivery system; (3) agencies demonstrated the ability to enforce spatial separation; and (4) agencies demonstrated the ability to control the maximum number of bison (100) in Zone 2. *See, id.* at 8. If these conditions were met, 100 untested bison will be allowed to move into Zone 2. *Id.*

Step 3-Zone 3. Under the IBMP, no bison are allowed in Zone 3. Zone 3, under the IBMP, was again any area outside of Zone 2. Bison in Zone 3 are subject to lethal removal. *See, id.* at 9.

30. On or around April 14, 2011, DOL and FWP drastically modified management actions for YNP bison in the Northern Boundary Area by adopting what is termed as “adaptive management adjustments” to the IBMP. *See*, Application, Ex. 2. The adoption by Respondents of the AMA contradicts and arguably eliminates the basic protections of the IBMP. The change in management boundaries and provisions in the Northern Boundary Area is a significant and substantial change to the provisions of the IBMP and are contrary to Respondents’ constitutional, statutory and regulatory duties and obligations. Further, the significant changes to the IBMP warrant a thorough environmental review and public comment process provided by MEPA. Specifically, the AMA modifications:

- (1) Allow brucellosis exposed and infected bison to occupy all lands, both public and private, north of YNP and south of Yankee Jim Canyon, including large expanses of land that were formerly classified as "Zone 3" where bison were not tolerated;
- (2) Allow agencies to move 300 female and calf bison testing negative for brucellosis from the Stephens Creek capture facility to Corwin Springs until they can be moved back to YNP in the spring; and
- (3) Allow agencies to "evaluate the effects of these adjustments and modify as necessary." *See, id.* at 1.

31. Importantly, Respondents have also begun to implement changes that are **not** enumerated in the AMA and directly conflict with the IBMP. Since adoption of the AMA, Respondents no longer test or vaccinate migrating bison. *See, Cahill Aff.* at ¶ 4. Under the AMA, Respondents no longer limit the number of bison outside YNP's northern boundary. *Id.* Under the AMA, Respondents no longer limit bison to the previously existing Zone 2. *Id.* Under the AMA, bison are on roadways causing vehicular accidents. *See, News Arts.* (attached to Application as Ex. 7). Under the AMA, bison are threatening the physical safety of members of the public. *See, Rigler Aff.* at ¶¶ 6, 10; *Schmidt Aff.* at ¶¶ 6, 8; *Sperano Aff.* at ¶ 7. Under the AMA, bison are tearing out or damaging fences, trees, irrigation systems, straw bale stacks and wood piles, and well stem-pipes. *See, Rigler Aff.* ¶ 9; *Sperano Aff.* ¶¶ 4-5; *Schmidt Aff.* ¶ 5; *Cahill Aff.* ¶ 5. Under the AMA, the expansion of Zone 2, as depicted in the AMA and signed by Respondents, encompasses a significant amount of private property (formerly Zone 3) and eliminates any temporal and spatial separation between bison and livestock which exist in the area as maintained in the past. Under the AMA, hundreds of diseased, birthing bison are now commingling with livestock, causing severe property damage to residents, and threatening public

safety. *See*, Cahill Aff. at ¶¶ 2, 4-6, 8; Rigler Aff. ¶¶ 9, 12-13; Wilks Aff. ¶¶ 7, 9, 11; Sperano Aff. ¶¶ 4-5, 7; Schmidt Aff. ¶¶ 5-6; Lannen Aff. ¶¶ 3-5; Davis Aff. ¶ 8-9, 11. Under the AMA, Respondents have failed to follow the provisions of MEPA in implementing the AMA that exceeds and even contradicts the physical and ideological scope and intent of the initial IBMP FEIS and ROD.

32. Employing the term “adaptive management” to justify their actions, Respondents have used IBMP partner meetings to modify the IBMP contrary to their statutory and regulatory duties to 1) prevent the spread of brucellosis and 2) comply with Montana’s most basic environmental law, MEPA. “Adaptive management” is defined by the IBMP as “a systematic process for continually improving management policies and practices by learning from outcomes of operational programs.” *See*, Application, Ex. 1 at 4. Respondents’ interpretation and application of the term “adaptive management” is in contradiction of the term as specifically defined, and constitutes agency action which is arbitrary and capricious. Furthermore, to the extent implementation of the AMA rests on the agencies view of the term “adaptive management” the term is rendered vague and meaningless, contrary to Respondents constitutional, statutory and regulatory obligations.

33. The changes proposed by the partner agencies in the AMA were adopted by the partner agencies on or around April 14, 2011, including DOL and FWP. *See*, Application, Ex. 2. Because the AMA was adopted without proper environmental review, the modifications set forth in the AMA subject Petitioner’s members to increased health and public safety threats, create substantial increases in property damage, and expose livestock to a significant risk of brucellosis heretofore unknown. Such action also subjects wildlife and the environment in the Northern Boundary Area to a significant risk of brucellosis exposure without the benefit of any

environmental impact assessment of these modifications.

34. The stated purpose of the 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 2 of the IBMP and by ensuring proper temporal and spatial separation between bison and cattle. By agreeing to implement the AMA without first conducting a sufficient MEPA review, Respondents are subjecting the Petitioners to exposure of injury associated with YNP bison and brucellosis that, previously, did not exist. Respondents' failure to conduct an EIS or, at a minimum, an EA pursuant to MEPA, prior to revising their management activities is a breach of Montana law, violates the Petitioners' members' environmental rights under the Montana Constitution, and results in actual procedural injury to Petitioner's members. Such conduct is capable of being remedied by this Court. Consequently, Petitioner is entitled to relief, on behalf of its members, from this Court that directs Respondents to meet their legal duties, follow proper procedure, and conduct a sufficient MEPA review.

35. In light of the importance of compliance with the IBMP and Montana law, Petitioner has requested that Respondents comply with their statutory and regulatory directives to implement the management measures of the existing IBMP. However, Respondents have failed to manage, test, haze, capture, manage, transport, or otherwise remove bison from the Northern Boundary Area. Respondents are statutorily required to protect against health and environmental degradation risks associated with bison and to evaluate the impact of their decisions and actions on the human environment. *See*, Mont. Code Ann. §§ 75-1-101, 81-1-102, 81-2-120, 87-1-216. Respondents' failure to analyze the environmental impacts of its decision to adopt the AMA is a direction violation of their statutory obligations, jeopardizing the human environment and environmental interests of Petitioner's members. Such failure is both arbitrary and capricious

conduct and violates Montana law and the Montana Constitution.

36. Without immediate action by either Respondents or by an order of this Court to direct Respondents to comply with existing Montana law, Petitioner's members and their health, safety, property, and livestock will suffer significant and irreparable harm as a result. The harm that could occur includes: increased brucellosis in the human environment; increased brucellosis in cattle and other forms of wildlife, including elk; lost grazing opportunities; increased livestock testing requirements; damage to personal property; damage to public property; and harm to, or loss of, human life.

VI. CLAIMS FOR RELIEF

COUNT ONE—DECLARATORY AND INJUNCTIVE RELIEF—FAILURE TO FULFILL STATUTORY AND REGULATORY DUTIES

A. DOL is in Violation of Its Duty to Protect Montanans and Montana Livestock From Brucellosis.

37. Petitioner incorporates the allegations set forth in ¶¶ 1 through 36 as set forth above as though fully stated herein.

38. DOL is statutorily charged with supervising and protecting Montana's livestock from disease. Mont. Code Ann. § 81-1-102. To this end, DOL may protect livestock by investigating diseases and other subjects that prevent, extirpate, and control diseases. Mont. Code Ann. § 81-2-102(1)(b). DOL may also adopt rules and orders "that it considers necessary or proper to prevent the introduction or spreading of infectious, contagious, communicable, or dangerous disease affecting livestock..." Mont. Code Ann. § 81-2-102(1)(d). Brucellosis is an infectious and dangerous disease affecting livestock.

39. The Disease Control Bureau (hereinafter referred to as "DCB") within DOL is responsible for "the diagnosis, prevention, control, and eradication of animal diseases and

disorders,” in addition to maintaining a disease surveillance system and conducting research on the causes and control of animal disease. DCB must also work with the Department of Public Health and Human Services in controlling animal diseases transmissible to humans. Admin. R. Mont. 32.1.101(2)(a)(i). Brucellosis in wild animals, including bison, is transferable to humans and manifests itself as “undulant fever.” When humans contract undulant fever, the exhibit flu-like symptoms, including fever, chills, sweats, joint pain, and loss of weight and appetite. It is a recurring, incurable and can lead to death. *See*, Ex. A at 5-7. Brucellosis is also listed as a biological agent and toxin that has the potential to pose a severe threat to public health and safety as well as animal health. 9 CFR § 121.4. These biological agents are monitored closely by USDA-APHIS as well as the Center for Disease Control so as to prevent the use of brucellosis for acts of bioterrorism. 9 CFR § 121.2.

40. DOL shall “**adopt and enforce rules**”... “for the inspection, testing, treatment, or disposition of **livestock or other animals** affected with or which may have been exposed to infectious, contagious, communicable, or dangerous disease...” Mont. Code Ann. § 81-2-103 (emphasis added). Brucellosis is an infectious and dangerous disease to humans and livestock.

41. Insofar as general disease regulations, DOL defines “animal” as including “livestock, game animals, and furbearing and wild mammals.” Admin. R. Mont. 32.3.201(d). Animals are subject to disease control provisions if “affected with, directly exposed to, or suspected of being affected with or exposed to” diseases that require reporting and quarantine, such as brucellosis. Admin. R. Mont. 32.3.103(1)(a), 32.3.104(1). Animals subject to quarantine shall, as soon as possible, be “quarantined separate and apart from other susceptible animals.” Admin. R. Mont. 32.3.108.

42. The state veterinarian or his agent may examine all animals passing through Montana and, upon detection or suspicion of any quarantinable disease, may take possession of and treat and dispose of animals in transit in the same manner as animals resident in Montana. Admin. R. Mont. 32.3.109. Brucellosis is a quarantinable disease carried by both bison and elk that pass into Montana.

43. Brucellosis specific regulations define "animal" as "any quadruped of a species which can become infected with brucellosis. The term includes, but is not limited to a member of the bovine, porcine, canine, ovine, **bison**, caprine, or feline species, or the genus cervidae." Admin. R. Mont. 32.3.401(1) (emphasis added). Upon learning about infected animals, the state veterinarian has a duty to quarantine the animals and create and implement long term disease treatment and eradication plans and timelines. Admin. R. Mont. 32.3.411(1), (3).

44. In addition to the above disease protection duties and obligations of DOL and Dr. Zaluski, when publicly owned wild bison from a diseased herd enters Montana, and the disease "may spread to persons or livestock" or jeopardizes Montana's compliance with state or federal livestock disease control programs, DOL, under a governor-approved plan, is authorized by statute to haze, capture, transport, quarantine, or destroy these bison. Mont. Code Ann. § 81-2-120. DOL's administrative rules state that if strayed bison exposed to or infected with brucellosis enter Montana, the department **will** haze, capture, truck, or slaughter the bison. If the bison cannot "safely by reasonable and permanent means be removed from the state they **shall be summarily destroyed where they stand.**" Admin. R. 32.3.224A (emphasis added).

45. It is unlawful for any person in charge of domestic animals or "animals that are known to be suffering from or exposed to a dangerous, infectious, contagious, or communicable disease to permit such animal or animals to run at large on the public range or public highway."

Mont. Code Ann. § 81-2-108. "Person" is defined as "a corporation or other entity as well as a natural person." Mont. Code Ann. § 1-1-201(b).

46. By adopting the AMA, DOL and/or Dr. Zaluski are in violation of all aforementioned statutory and regulatory duties. DOL and Dr. Zaluski have disease control authority over "animals" such as bison, and a duty to protect livestock and humans from brucellosis that may be carried by bison. In adopting the AMA, DOL and Dr. Zaluski are failing to test, vaccinate, and dispose of animals suspected of carrying brucellosis. In allowing diseased, or potentially diseased, bison to run at large in residential areas and on private land and to commingle with livestock, DOL and Dr. Zaluski are jeopardizing Petitioner's members' personal health and livestock health interests. Furthermore, DOL has failed to effectively maintain the spatial separation required by the IBMP through hazing and, when appropriate, lethal removal of bison.

47. DOL and Dr. Zaluski's failure to control brucellosis exposed and diseased bison in the Northern Boundary Area under the adoption of the AMA are agency actions that are arbitrary, capricious, and unlawful.

B. DOL is in Violation of Its Import and Health Certificate Duties.

48. Petitioner incorporates the allegations set forth in ¶¶ 1 through 47 as set forth above as though fully stated herein.

49. For import and health certification purposes, animal is defined to include "livestock, dogs, cats, rabbits, rodents, game animals, fur-bearing and **wild animals**, and poultry and other birds." Mont. Code Ann. § 81-2-702(1)(emphasis added). Unless being transported through the state without being unloaded, animals brought into the state must have a permit and health certificate. Mont. Code Ann. § 81-2-703(1). Under Mont. Code Ann. § 81-2-703(4), this

requirement applies "regardless of species, breed, sex, class, age, point of origin, place of destination, or purpose of movement." This requirement is reiterated under Admin. R. Mont. 32.3.204, entitled "Permit Required for Livestock, Game, Furbearing, and Wild Animals." Animals are only exempt from the health certificate or permit requirement if there is "no significant danger to the public health." Mont. Code Ann. § 81-2-703(7).

50. YNP bison are fur-bearing wild animals that carry, or have been exposed to, brucellosis. They pose a significant danger to public health. Because they are entering the State of Montana, DOL and Dr. Zaluski are charged by statute to require permits and health certification prior to entry into Montana. DOL and Dr. Zaluski have failed to obtain these credentials.

C. **Respondents are in Violation of Animal Containment Laws.**

51. Petitioner incorporates the allegations set forth in ¶¶ 1 through 50 as set forth above as though fully stated herein.

52. It is unlawful for a person "in control of swine, sheep, llamas, **bison**, ostriches, rheas, emus, or goats to willfully permit the animals to run at large." Mont. Code Ann. § 81-4-201 (emphasis added). Any person violating Mont. Code Ann. § 81-4-201 is guilty of a misdemeanor, shall be fined, and is liable for damages to anyone injured by the violation. Mont. Code Ann. § 81-4-202.

53. DOL and FWP have willfully allowed the bison to run at large in violation of Montana statute. When 25 YNP bison were initially released onto the Royal Teton Ranch area in Zone 2, DOL and FWP were unable to contain the animals. In the first week, the bison broke through the electric fence and crossed the Yellowstone River to the west side. *See*, News Arts. (attached to Application as Ex. 6). Now, Respondents who were unable to control 25 bison, are

allowing an unlimited number of animals to run in the entire Gardiner basin. DOL and FWP were clearly unable to control a small number and have decided to let the animals run at large in violation of Montana law.

D. FWP is in Violation of Its Duty to Manage Bison in Cooperation With DOL.

54. Petitioner incorporates the allegations set forth in ¶¶ 1 through 53 as set forth above as though fully stated herein.

55. FWP is charged with supervising Montana's wildlife, fish, game and nongame birds and the game and furbearing animals. Mont. Code Ann. § 87-1-201. FWP is statutorily required to:

[C]ooperate with the department of livestock in managing publicly owned wild buffalo or bison that enter the state on public or private land from a herd that is infected with a dangerous disease, as provided in 81-2-120, under a plan approved by the governor. The department of livestock is authorized under the provisions of 81-2-120 to regulate publicly owned wild buffalo or bison in this state that pose a threat to persons or livestock in Montana through the transmission of contagious disease. The department may, after agreement and authorization by the department of livestock, authorize the public hunting of wild buffalo or bison that have been exposed to or infected with a contagious disease, pursuant to 87-2-730."

Mont. Code Ann. § 87-2-216(2)(c) (emphasis added).

56. FWP's commission is authorized to set policies that protect and manage Montana wildlife and game. Mont. Code Ann. §87-1-301.

57. The legislature has found that, in order to protect Montana's native wildlife, livestock, and human health and safety, there must be regulation of importation, transplantation, or introduction of wildlife. Any importation, transplantation, possession, sale or introduction must be done in a way that ensures wildlife "can be controlled if harm arises from unforeseen effects." Mont. Code Ann. § 87-5-701.

58. FWP has failed to satisfactorily cooperate with DOL's activities. They are further in violation of statutory directives as they have allowed bison introduction, but have no control

over the bison or subsequent damage. When called, FWP only hazes bison off private property and onto the road way. These bison frequently return after FWP has left. *See*, Rigler Aff. at ¶ 8. FWP has also told members of the public that the agency must have written permission from the private property owner before they will haze bison. Rigler Aff. at ¶ 8. These practices illustrate FWP's lack of control over these bison contrary to law.

**COUNT TWO—DECLARATORY AND INJUNCTIVE RELIEF—FAILURE TO
CONDUCT MEPA ANALYSIS**

A. Substantial Changes in the AMA, As Well As Changed Circumstances, Require Respondents to Conduct an Environmental Review of the AMA under MEPA.

59. Petitioner incorporates the allegations set forth in ¶¶ 1 through 58 as set forth above as though fully stated herein.

60. MEPA is designed to provide for adequate environmental review of state actions in order to ensure that environmental attributes 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).

61. DOL's and FWP's MEPA regulations require the agencies to comply with the terms of MEPA "to the fullest extent possible." Admin. R. Mont. 32.2.221, 12.2.428. If Respondents undertake "a major action of state government significantly affecting the quality of the human environment," they must prepare an EIS in order to evaluate the environmental impacts. Admin. R. Mont. 32.2.224, 12.2.430.

62. If it is not clear whether an action may significantly affect the environment, Respondents must prepare an 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, 12.2.432. If the Respondents' analysis of potential environmental effects in an EA reveals that an action significantly affects the environment, MEPA and its implementing regulations require an EIS.

63. Under MEPA, state agencies are required to provide the public with notice and opportunity to review and comment on any EA that the agency prepares. Admin. R. Mont. 17.4.610.

64. Respondents are a "state agency" subject to MEPA. Admin. R. Mont. 32.2.222(19), 12.2.429(19). The adoption and implementation of the AMA modifying the IBMP is a state action subject to MEPA review. *See*, Admin. R. Mont. 32.2.222(1), 12.2.429(1).

65. MEPA requires that Montana state agencies, such as DOL and FWP, and its employees take procedural steps to review "projects, programs, 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)(iv); Admin. R. Mont. 32.2.222(12), 32.2.223, 32.2.224, 12.2.429(12), 12.2.430, 12.2.431. MEPA requires that a state agency take the requisite "hard look" at the environmental impacts of a given project or proposal. *See*, Ravalli Co. Fish & Game Ass'n v. Mont. Dep. of St. Lands, 273 Mont. 371, 377-78, 903 P.2d 1362, 1366-67 (1995).

66. A supplemental environmental assessment is required if 1) an agency makes "substantial changes in the proposed action that are relevant to environmental concerns," or 2) there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." *See*, N.M. ex rel. Richardson v. Bureau of Land Mgt., 565 F.3d 683, 704 (10th Cir. 2009) (quoting 40 C.F.R. § 1502.9(c)(1)(i)); *see also* Admin. R. Mont. 32.2.233(1), 12.2.440(1). A supplement to a FEIS must include a description of

impacts, alternatives, or other items required for a FEIS that were either not covered in the original statement or that must be revised based on new information or circumstances concerning the proposed action. Admin. R. Mont. 32.2.233(2)(c), 12.2.440(2)(c).

Respondents' AMA is a significant change in managing YNP bison posing relevant environmental concerns that require analysis.

67. Petitioner incorporates the allegations set forth in ¶¶ 1 through 66 as set forth above as though fully stated herein.

68. If a change in an agency's action affects environmental concerns differently than analyzed previously, "the change is surely 'relevant' to those same concerns." See, N.M., 565 F.3d at 707. A supplement is also required when an adopted alternative "entails a different configuration of activities and locations, not merely a reduced version of a previously-considered alternative." See, Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1291-92 (1st Cir. 1996). Changes in location or extent of impact is a material change warranting supplementation, even if "the category of impacts anticipated" were well-known after an FEIS was issued. See, N.M., 565 F.3d at 707.

69. The EIS process should serve as a way to alert the public of what an agency intends and to provide the public with the requisite information to participate in the process. See, Cal. v. Block, 690 F.2d 753, 772 (9th Cir. 1982). In determining whether this was achieved, a court should look at whether an agency's selected alternative was "within the range of alternatives the public could have reasonably anticipated" the agency to be considering and whether the public's comments apply to the chosen alternative in a way that notifies the agency of the public's attitude. See, *id.*

70. The AMA signed by Respondents is significantly different from current IBMP management provisions as well as any of the alternatives analyzed in the 2000 IBMP FEIS.

First, the physical area is different from any area scoped in the IBMP FEIS. While Alternative 2 of the FEIS scoped some of the area in the AMA, the AMA includes a portion of land not analyzed in **any** alternative. Second, the extent of the AMA's impact was **never** analyzed for this particular area. If comparing the AMA to Alternative 2 of the IBMP FEIS, Alternative 2 assumed that bison would be vaccinated and that cattle operations would be changed or eliminated. *See*, Alternative 2: Minimal Management at 119 (attached hereto and incorporated herein as Exhibit "B"). The AMA also applies management of bison through hunting (examined primarily in Alternative 3) to areas either unexamined in the FEIS or, if examined, were examined in an Alternative that did not analyze hunting. *See*, Alternative 3: Management with Emphasis on Public Hunting (attached hereto and incorporated herein as Exhibit "C"). Under the AMA, Respondents are implementing vastly different configurations of activities and locations by allowing an unlimited number of diseased, unvaccinated bison in areas that were either never scoped in the FEIS or were not scoped or analyzed for these activities. Consequently, the public was never alerted, and could not have anticipated, these significant changes. Environmental review under MEPA is required for adoption and implementation of the AMA. Respondents have failed to comply with MEPA and its implementing regulations.

Significantly new circumstances and information require respondents to supplement their EIS.

71. Petitioner incorporates the allegations set forth in ¶¶ 1 through 70 as set forth above as though fully stated herein.

72. National Environmental Policy Act (hereinafter referred to as "NEPA") case law has generally set forth that an EIS must be supplemented if new information, circumstances, or criteria regarding a significant impact affect a plan or action's environmental considerations.

Marsh v. Or. Nat. Res. Council, 450 U.S. 360, 372-73 (1989). Agencies must prepare a

supplemental EIS if “there remains ‘major federal action’ to occur, and if the new information will affect the quality of the human environment in a significant manner or to a significant extent not already considered.” *See, Marsh*, 450 U.S. at 373. New information and circumstances can include changes in use patterns and development that occur since issuing an FEIS seven years earlier. *See, Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Transp.*, 2000 MT 5, ¶ 27, 298 Mont. 1, 994 P.2d 676.

73. New circumstances that have developed over the last 11 years since the 2000 IBMP FEIS that require a supplemental EIS prior to adoption of the AMA. First, the physical project area in the AMA is significantly different than any area in the proposed alternatives previously analyzed and covers a completely different area. Second, this area of analysis has changed since the IBMP FEIS was issued, both insofar as land use as well as wildlife use. Third, scientists have learned that elk are the vector that transports brucellosis from bison to livestock. Respondents claim that this “does not change the analysis” as the IBMP did not analyze brucellosis in elk. *See, Adequacy of National and Montana Environmental Policy Act (NEPA/MEPA)* (hereinafter referred to as “Adequacy Memo”) at 5 (attached to Application as Ex. 15). That said, research accumulated in the last eleven years regarding the disease and transmission creates a significant circumstance warranting review, especially in light of the fact that preventing brucellosis transmission to livestock or humans by bison is one of the primary duties and objectives of DOL and Zaluski. Because the change proposed by Respondents affects a disease component in a way previously unconsidered in the FEIS (*i.e.*, elk), that change is still relevant to the same concerns and must be examined. Finally, as set forth herein, the extreme change in disease requirements from USDA-APHIS is a significant circumstance warranting review.

B. The Adequacy Memo is an Insufficient Analysis of Whether SEIS is Necessary for the AMA as the Document Makes Statements that are Factually and Legally Incorrect.

74. Petitioner incorporates the allegations set forth in ¶¶ 1 through 73 as set forth above as though fully stated herein.

75. In deciding whether to supplement an EIS, an agency must make “a reasoned decision based on its evaluation of the significance-or lack of significance-of the new information.” *See, Mont. Env'tl. Info. Ctr., 2000 MT 5, ¶ 27 (citing Marsh v. Or. Nat. Resources Council, 450 U.S. 360, 378 (1989))*. A decision should consider all relevant factors. These factors can include changes in use patterns and development and other new circumstances following approval of a final EIS. *Id.* (Montana Department of Transportation was arbitrary and capricious in their decision not to prepare SEIS for highway project, where changed traffic patterns, patterns of development, and proposed project alternatives were significant new circumstances following FEIS completed seven years earlier) (citing *N. Fork Preservation Ass'n v. Dep't of State Lands, 238 Mont. 451, 459, 778 P.2d 862, 867 (1989)*).

76. In examining an agency decision not to supplement, a court should examine the “degree of care with which the agency considered the information and evaluated its impact, and the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data. *See, Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1024 (9th Cir. 1980)*.

77. In an attempt to fulfill their MEPA obligations, Respondents drafted the Adequacy Memo in an effort to assess whether NEPA and MEPA requirements had been fulfilled. In this document, Respondents claim that the requisite analysis was conducted in the initial IBMP FEIS 11 years earlier. *See, Application, Ex. 15 at 3*. Respondents infer that they

have gained the necessary “experience and knowledge” to employ the AMA provisions and that new scientific research (referenced superficially) and a new federal rule (incorrectly portrayed) justify their decision. *See, id.* at 4-5.

78. Respondents, in producing the Adequacy Memo, fail to exert the requisite degree of care in making the decision not to supplement the IBMP FEIS. In the document, Respondents incorrectly cite portions of the IBMP, misstate important points of law, and fail to consider significant circumstances occurring in the eleven years following the IBMP FEIS. Respondents’ failure to supplement is arbitrary, capricious, and unlawful.

Contrary to the Adequacy Memo, the Montana State Veterinarian makes the final decision regarding temporal separation.

79. Petitioner incorporates the allegations set forth in ¶¶ 1 through 78 as set forth above as though fully stated herein.

80. In the Adequacy Memo, Respondents incorrectly use guidelines and policies developed for bison management on the western boundary of YNP and apply it to the northern boundary, clearly contradicting management provisions for the northern boundary. In their assertion that current circumstances were covered under the initial FEIS, Respondents state:

The FEIS indicated the IBMP agencies would use the information from these research efforts to review pieces of the plan as appropriate (page 100). Likewise the Joint Management Plan indicated that the agencies would conduct further research regarding the viability of *B. abortus* bacteria in the environment and the rate of fetal disappearance in the area, under the principles of adaptive management. The research was intended to allow the agencies to further refine their ability to adjust the temporal separation between cattle and bison, given prevailing climatic conditions outside the park during the spring. Based on this information, the time periods for bison being outside the park could be modified by the **joint agreement of the agencies** (page 23).

See, Application, Ex. 15 at 4(emphasis added). This assertion is incorrect for several reasons. First, Respondents cite page 23 of the federal IBMP ROD (hereinafter referred to as the excerpt “Joint Management Plan,” attached hereto and incorporated herein as Ex. “D”), which only

relates to the Western Boundary Area and does not apply to the Northern Boundary Area. The correct citation for the northern boundary is page 27 of the Joint Management Plan.

81. Second, Respondents misstate and mischaracterize the IBMP provision. The Joint Management Plan clearly says that agencies will conduct bacteria viability research under the principles of adaptive management:

The research will allow the agencies to further refine their ability to adjust the temporal separation between cattle and bison, given prevailing climatic conditions outside the park during the spring. The agencies anticipate that this research will last one to two years. **The agencies will jointly determine when there is enough data to apply the findings of such research to management.**

See, Ex. D at 27 (emphasis added). Respondents portray the Joint Management Plan as saying that time periods for bison outside the park are to be modified by **joint agreement**. The only aspect to be jointly agreed upon is the time at which all agencies feel they have sufficient information to make a decision. “The final decision on the duration of temporal separation after April 15 will be made **by the Montana State Veterinarian.**” *See, id.* at 30 (emphasis added).

Respondents have not implemented the necessary requirements to allow for adaptive management.

82. Petitioner incorporates the allegations set forth in ¶¶ 1 through 81 as set forth above as though fully stated herein.

83. In the Adequacy Memo, Respondents state that “the Modified Preferred Alternative indicates that, with experience and knowledge gained from adaptive management steps and tolerance limits, zone boundaries and management actions within the zones may be modified.” *See*, Application, Ex. 15 at 4 (citing Federal FEIS at 186, attached to Application as Ex. 4). The federal ROD defines “adaptive management” as “testing and validating with generally accepted scientific and management principles the proposed spatial and temporal separation risk management and other management actions. Under the adaptive management

approach, future management actions [can] be adjusted, based on feedback from implementation of the proposed risk management actions.” *See*, Ex. D at 22.

84. “Adaptive management changes ‘were intended to be applied within the framework of the IBMP and **not alter its basic management direction or goals.**” *See*, W. Watersheds Project v. Salazar, ___ F.Supp.2d ___, 14-15, 2011 WL 499275 (D. Mont. 2011) (emphasis added).

85. “A series of three adaptive management steps are prescribed in [the] Joint Bison Management Plan that will minimize the risk of transmission of brucellosis to cattle grazing on public and private lands adjacent to Yellowstone National Park and will, **when all criteria are met**, provide for the tolerance of a limited number of untested bison on public lands and private lands where permitted adjacent to Yellowstone National Park during winter.” *See*, Ex. D at 22 (emphasis added).

86. While the federal FEIS generally describes the basics of each step, it is the Joint Management Plan in the ROD that clearly delineates the necessary requirements to be met before adaptive management changes are implemented. Respondents have implemented actions before meeting the specified requirements for adaptive management. Consequently, adaptive management cannot be used to rationalize or substantiate Respondents’ unjustified activities. Adopting the AMA is arbitrary, capricious and unlawful.

85. Step 2 of the IBMP clearly requires capture and testing of bison exiting YNP. It states that positive bison are to be slaughtered and the negative bison are to be vaccinated and released. Only 25 bison are to be moved to Reese Creek the first year. After gaining sufficient experience, the number may be increased to 50, and finally 100. After the applicable tolerance level is reached, the National Park Service will attempt to prevent any more bison from coming

outside YNP. If hazing and capture do not work, those bison are subject to lethal removal. Agencies are to evaluate the most effective means of keeping bison contained to Zone 2 and preventing animals from entering Zone 3. *See*, Application, Ex. 4 at 28. Since adoption of the AMA, hundreds of bison have been allowed to roam the Gardiner Basin. *See*, Cahill Aff. at ¶4.

86. Respondents are only to enter Step 3 (which allows **untested** bison outside YNP and into Zone 2) when Respondents have collected enough information on bison movements and behavior in Zone 2 and are able to manage the bison in the Reese Creek area. *See*, Ex. D at 30. Step 3 may only begin when: bacterial viability research is complete and the Montana State Veterinarian has decided upon a temporal separation time; an in-park vaccination program has begun; Respondents have demonstrated an ability to enforce spatial separation; and Respondents have “demonstrated ability to control the maximum number of bison in Zone 2.” *See, id.* Since adoption of the AMA, vaccination and testing have ceased, bison have commingled with livestock, and hundreds of bison have roamed the Gardner Basin. *See*, Cahill Aff. at ¶4.

87. Respondents use the guise of “adaptive management” to cover the fact that they have been completely unable to meet the IBMP management goals required to trigger IBMP modifications. Respondents have been unable to contain bison to Zone 2; an in-park vaccination program has not occurred; Respondents have been unable to keep bison from commingling with cattle in the Gardiner Basin; and Respondents have been unable to control the number of bison in Zone 2, as evidenced by the fact that only 100 bison, at most, should be in Zone 2 and there have been as many as 300 there this winter. The requirements for adaptive management have not been met, thus rendering adoption of the AMA arbitrary, capricious and unlawful.

Respondents incorrectly state the USDA-APHIS federal rule for brucellosis, which is a significant circumstance warranting review.

88. Petitioner incorporates the allegations set forth in ¶¶ 1 through 87 as set forth above as though fully stated herein.

89. Respondents state that the new USDA-APHIS brucellosis rule treats brucellosis outbreaks in livestock on a case-by-case basis. “As long as the outbreaks are investigated and contained, then state status does not change.” *See*, Application, Ex. 15 at 5. Treating and containing livestock outbreaks is only one of the requirements, however. The entire USDA-APHIS rule stays that a class-free state or area will be allowed to keep class-free status IF:

- i. “The affected herds are maintained under quarantine;
- ii. A herd plan has been implemented for each affected herd to prevent the spread of brucellosis;
- iii. The animals under quarantine are periodically tested for brucellosis as required by the Administrator and all animals that do not test negative are removed and destroyed until there is no evidence of brucellosis within the heard; and
- iv. **The state conducts surveillance adequate to detect brucellosis if it is present in other herds or species.**”

75 Fed. Reg. 81090, 81091 (Dec. 27, 2010) (emphasis added). The new rule requires any class-free state with wildlife that are infected with brucellosis, like Montana, to “develop and implement a brucellosis management plan approved by the Administrator.” *See, id.* The plan must:

- i. “Define and explain the basis for the geographic area in which a disease risk exists from *B. abortus* and to which the brucellosis management plan activities apply;”
- ii. **“Describe epidemiological assessment and surveillance activities to identify occurrence of *B. abortus* in domestic livestock and wildlife and potential risks for spread of disease;”** and

iii. "Describe mitigation activities to prevent the spread of *B. abortus* from domestic livestock and/or wildlife, as applicable, within or from the brucellosis management area."

See, id. (emphasis added).

90. The new rule still requires livestock producers to kill cattle testing positive for brucellosis, which means brucellosis is still a real and serious economic threat to these individuals. What Respondents overlook is that for Montana to keep its class-free status and livestock marketability, they also have to address the disease in wildlife. The rule requires Respondents to create and plan activities that prevent the spread of disease between livestock and wildlife. The AMA is in direct contravention of this newly changed rule, further requiring an adequate and sufficient environmental review.

C. **Respondents' Decision to Adopt the AMA Without Conducting an Adequate EA and/or EIS is Arbitrary and Capricious Conduct, and Not Otherwise in Accordance With Law.**

91. Petitioner incorporates the allegations set forth in ¶¶ 1 through 90 as set forth above as though fully stated herein.

92. Respondents' decision to adopt and sign the AMA without conducting the MEPA required environmental analysis is arbitrary and capricious and not otherwise in accordance with law. It is subject to challenge and immediate review by this Court as to whether Respondents acted arbitrarily, capriciously, or unlawfully pursuant to the standard of review for informal agency decisions as set forth in Langen v. Badlands Coop State Grazing District, 125 Mont. 302, 234 P.2d 467 (1951) and Johansen v. State Dep't of Natural Res. & Conservation, 288 Mont. 39, 955 P.2d 653 (1998). Such review is particularly warranted when, as is the situation here, there is no remedy available to challenge the Respondents' actions administratively.

93. As outlined above, the Respondents are charged by the legislature with controlling brucellosis and protecting against increased health and environmental degradation associated with brucellosis. *See*, Mont. Code Ann. §§ 75-1-101, 81-1-102, 81-2-120, 87-1-216. Furthermore, Respondents are required by regulation to analyze the environmental impacts of 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, 32.2.221, *et. seq.*, 12.2.428, *et. seq.* In sum, Respondents have a duty under MEPA to prepare an adequate EA, EIS, and/or a SEIS in order to assess the potential environmental impacts associated with the adoption of the AMA, which significantly amends the existing IBMP.

94. Contrary to the dictates of Montana law and regulation the Respondents conducted no adequate (or any) EA, EIS, or SEIS prior to signing the AMA and committing themselves to carrying out the revised management activities contained therein.

95. Respondents' failure to assess the potential environmental impacts of its decision to sign the AMA 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), 12.2.454(1). In fact, FWP's categorical exclusion rule specifically requires environmental review of actions specifically like the AMA. *See*, Admin. R. Mont. 12.2.454(2)(a),(d) through (f).

96. Respondents' 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 Coop State Grazing Dist., 125 Mont. 302, 234 P.2D 467 (1951) *supra*, N. Fork Pres. v. DSL, 238 Mont. 451, 778 P.2d 862 (1989), and Clark Fork Coalition v. Mont. Dep't of Env'tl.

Quality, 2008 MT 407 ¶¶ 47-48, 347 Mont. 197, 197 P.3d 482 (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 THREE—ADOPTION OF THE AMA VIOLATES PETITIONERS’ RIGHT TO
A CLEAN AND HEALTHFUL ENVIRONMENT**

97. Petitioner incorporates the allegations set forth in ¶¶ 1 through 96 as set forth above as though fully stated herein.

98. Article II, Section 3 of the Montana Constitution, gives all Montanans, including Petitioner’s members, certain “inalienable rights,” including the right to a clean and healthful environment

99. 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.

100. 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. This includes preventing unreasonable depletion of Montana’s resources, such as wildlife and domestic cattle, due to the presence and transmission of an infectious, communicable disease like brucellosis.

101. Respondents' decision to sign the AMA without first taking a hard look at the environmental impacts or analyzing whether their actions would result in a depletion and degradation of Montana's clean and healthful environment violate Mont. Const. Art. II, Sec. 3. In addition, by agreeing to allow unlimited numbers of diseased, unvaccinated bison to roam Montana in an unconfined manner, a significant number of which may shed *brucella* into the environment, Respondents have implicated and violated Petitioners' constitutional rights as preserved under Mont. Const. Art. II, Sec. 3.

102. Based on the proceeding allegations, Petitioner seeks: (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 AMA 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 adequate environmental review to assess the environment impacts associated with the decision to modify the IBMP and allow additional environmental contamination in the State of Montana.

**COUNT FOUR—DECLARATORY AND INJUNCTIVE RELIEF FOR PUBLIC
NUISANCE**

103. Petitioner incorporates the allegations set forth in ¶¶ 1 through 103 as set forth above as though fully stated herein.

104. A nuisance is anything "injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or which unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, river, bay, stream, canal, or basin or any public park, square, street, or

highway.” Mont. Code Ann. § 27-30-101(1). A nuisance is a “public nuisance” when it affects “an entire community or neighborhood or any considerable number of persons.” An act need not annoy or inflict damage upon people equally to qualify as a public nuisance. Mont. Code Ann. § 27-30-102(1). Rather, the nuisance must simply affect rights to which every person is entitled. *See, Gibbs v. Gardner*, 107 Mont. 76, 80 P.2d 370, 373 (1938).

105. Nuisance actions may be brought by any person injured by the nuisance or whose personal enjoyment is decreased by the nuisance. Mont. Code Ann. § 27-30-103.

106. A private person may maintain an action for public nuisance so long as the private person’s damage is distinct from that of the public at large. *See, McCollum v. Kolokotronis*, 131 Mont. 438, 444, 311 P.2d 780, 783 (1957).

107. Respondents actions to allow diseased, unvaccinated bison to roam in residential areas and on private property poses significant health and safety risks to humans and obstructs the use of both public and private property. Furthermore, these actions affect the entire community of Gardiner and surrounding rural areas by infringing on their right to health and safety and to use and enjoy property, injuring these rights as applied to Petitioners.

108. The severe impacts caused by Respondents’ actions in adopting and managing bison under the AMA constitute a public nuisance.

109. Petitioner’s members are persons who have been, and are being, injured by Respondents’ public nuisance. Consequently, judgment of this Court enjoining and abating the nuisance is appropriate.

110. Private individual members of Petitioner have damage that is distinct from that of the public at large. The injuries caused to Petitioner’s members by Respondents’ actions are specific to the types of property damaged by the uncontrolled bison.

111. Based on the proceeding allegations, Petitioner seeks: (1) a declaration that the Respondents' actions constitute a public nuisance; and (2) an order for Respondents to abate the nuisance.

COUNT FIVE—ATTORNEY'S FEES

112. Petitioner incorporates the allegations set forth in ¶¶ 1 through 111 as set forth above as though fully stated herein.

113. Pursuant to Mont. Code Ann. §27-8-313, Petitioner, on behalf of its members, is 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.

114. Attorney fees may further be awarded under the private attorney general doctrine under the following test: 1) the strength or societal importance of the public policy is vindicated by the litigation; 2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff; 3) the number of people standing to benefit from the decision; and 4) the equity of imposing attorney fees on the party against whom fees are sought. *See, Montanans for the Responsible Use of the Sch. Trust v. State, ex rel., Bd. Of Land Commrs, 1999 MT 263, ¶ 66, 296 Mont. 402, 989 P.2d 800 (citing Serrano v. Priest, 569 P.2d 1303, 1314 (Cal. 1977)); Finke v. State, ex rel., McGrath, 2003 MT 48, ¶ 33, 314 Mont. 314, 65 P.3d 576.*

115. Petitioner, on behalf of its members, is entitled to an award of its attorneys' fees under Mont. Code Ann. § 27-8-313 or alternatively under the private attorney general doctrine because: this case will vindicate important societal policies; this case requires private enforcement and the magnitude of the resultant burden upon Petitioner is great; a large number of people stand to benefit from the decision in this case; it is equitable and right to impose attorney fees upon Respondents.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays for judgment as follows:

1. For a declaration affirmatively stating Respondents have violated their legal duties under Mont. Code Ann. §§ 81-1-102, 81-2-102, 81-2-103, 81-2-120, 81-2-108, 81-2-703, 87-1-201, 87-2-216, 87-1-301, 87-5-701, 81-4-201, and 81-4-201; and Admin. R. Mont. 32.1.101, 32.3.108, 32.3.109, 32.3.411, 32.3.224A, and 32.3.204; and for mandatory injunctive relief directing Respondents compliance with such statutes, rules and the IBMP;
2. For a declaration affirmatively stating the obligation of Respondents to comply with Mont. Code Ann. §75-1-101, *et. seq.* (MEPA) and Respondents' MEPA regulations as set forth in Admin. R. Mont. 32.2.221, *et. seq.*, and 12.2.428, *et seq.* and to comply with the Montana Constitution by conducting an environmental review process prior to adopting and implementing the AMA for bison management in the Northern Boundary Area, namely to comply by preparing an EIS on the AMA which adequately analyzes the impacts to the human environment of any modification to the existing IBMP;
3. For permanent injunctive relief prohibiting Respondents from adopting and carrying out the management actions of the AMA 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 AMA is concluded. A preliminary injunction is particularly warranted in the present circumstances given that: (1) Respondents actions in adopting and implementing the AMA will, if not enjoined, render moot 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 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;

4. For a declaration that Respondents' actions constitute a violation of Petitioner's members' right to a clean and healthful environment as granted by Mont. Const. Art. II, Sec. 3;

5. For a declaration that Respondents' actions constitute a public nuisance and order for Respondents to abate the nuisance;

6. For an award to Petitioner of its attorney fees and costs as provided by law and equity; and

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

DATED this 5th day of May, 2011.

DONEY CROWLEY BLOOMQUIST PAYNE UDA P.C.



Rachel A. Kinkie
Attorneys for Petitioner