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MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

SITZ ANGUS RANCH, *et al.*, Petitioners, vs. MONTANA BOARD OF LIVESTOCK, *et al.*, Respondents, and EDITH FORD, *et al.*, Respondent-Intervenors.	Cause No. DV-09-388C Hon. John C. Brown **ORDER RE: PENDING MOTIONS**

INTRODUCTION

Pending before this Court are the following motions:

1. Respondent-Intervenors' Motion to Transfer Venue and to Dismiss, filed January 20, 2009[1];

2. Respondents' Motion to Dismiss, filed January 23, 2009;

3. Respondents' Motion to Strike Petitioners' Reply Brief, filed March 23, 2009;

4. Respondent-Intervenors' Motion to Strike Petitioners' Reply Brief, filed March 25, 2009;

[1] The Respondents join in this motion.

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5. Petitioners' Motion For Partial Summary Judgment on Counts 1 and 2 of the Second Amended Complaint ("SJ Reply Brief"), filed April 2, 2009; and

6. Petitioners' Motion For Leave to File Original Depositions, filed April 9, 2009.

On April 16, 2009, District Judge Loren Tucker of the Fifth Judicial District transferred venue of this case to this Court. This Court held a hearing on the foregoing motions on August 4, 2009. The pending motions are ripe for adjudication and this Court now issues the following Order.

BACKGROUND

This case involves management of bison that migrate into Montana, crossing the west boundary of Yellowstone National Park ("YNP") into the Horse Butte area north of West Yellowstone. Petitioners Sitz Angus Ranch, Bill Myers, and Montana Stockgrowers Association, Inc. ("Petitioners") filed this action on May 27, 2008, and they filed their First Amended Complaint for Declaratory and Injunctive Relief and Application for Alternative Writ of Mandate ("First Amended Complaint") on June 2, 2008.

In their First Amended Complaint, Petitioners raised two claims seeking mandamus, declaratory and injunctive relief and requested an order requiring the Montana Department of Livestock ("DOL") to remove wild bison, through hazing or slaughter, from private and public lands in the area known as Zone 2, which consists of Horse Butte and surrounding lands adjacent to the western boundary of YNP. *See* First Amend. Compl. ¶¶ 39, 44, 45. In requesting such relief, Petitioners relied on management provisions set forth in the Interagency Bison Management Plan ("IBMP") adopted in December 2000 by DOL and other agencies. *See, e.g., id.* ¶¶ 39, 45. The IBMP provisions that Petitioners asked this Court to enforce pertain to the designated Zone 2 area and generally called for hazing and capture of bison leaving YNP, testing of captured bison for exposure to brucellosis, slaughter of those testing positive, slaughter of untested bison when the YNP

population reaches certain levels, and hazing or slaughter of all bison from Zone 2 by May 15 each year. *See id.* ¶¶ 18, 23.

On December 17, 2008, the DOL and other state and federal agencies adopted new Adaptive Adjustments to the IBMP ("IBMP Adaptive Adjustments"). *See* Second Amend. Compl., Exs. 1, 2. The IBMP Adaptive Adjustments modified bison management prescriptions for the Horse Butte area, allegedly in response to land management changes that substantially reduced cattle presence in Zone 2. *See id.*

Petitioners responded to the IBMP Adaptive Adjustments on December 23, 2008 by seeking leave to file their Second Amended Complaint. The Second Amended Complaint repeats the same two claims originally pled in the Petitioners' First Amended Complaint, but supplements those claims with two new claims attacking the IBMP Adaptive Adjustments and requesting that Respondents be ordered to follow and implement the existing IBMP until they comply with their legal duties to analyze the existing environmental impacts of modifying the IBMP. *See* Second Amend. Compl., ¶¶ 49-87. The first of the new claims, styled as Count 3, alleges a MEPA violation, claiming that DOL erred in failing to prepare adequate environmental analysis before approving the IBMP Adaptive Adjustments. *See id.*, ¶¶ 61-81. The second new claim, styled as Count 4, alleges that the IBMP Adaptive Adjustments violate Article II, Section 3, of the Montana Constitution guaranteeing a clean and healthful environment. *See id.*, ¶¶ 82-87. Upon leave of Court, Petitioners filed their Second Amended Complaint on December 24, 2008.

The remaining procedural and factual background of this case is set forth on pages 2-3 of Judge Tucker's Order Granting Intervenors' and Respondents' Motion to Change Venue, filed on April 16, 2009, which is incorporated herein by reference.

ANALYSIS

I. Law Applicable to Motions to Dismiss and Conversion to Summary Judgment.

The Montana Supreme Court has held that:

> [A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. A motion to dismiss under Rule 12(b)(6), M.R.Civ.P., has the effect of admitting all well-pleaded allegations in the complaint. In considering the motion, the complaint is construed in the light most favorable to the plaintiff, and all allegations of fact contained therein are taken as true.

Cowan v. Cowan, 2004 MT 97, ¶ 10, 321 Mont. 13, 89 P.3d 6 (quoting *Powell v. Salvation Army*, 287 Mont. 99, 102, 951 P.2d 1352, 1354 (1997)). The court is under no duty, however, to take as true legal conclusions or allegations without any factual basis. *Id.*, ¶ 14. "Whether a complaint states a claim for which relief can be granted is a question of law . . . ." *Good Schools Missoula, Inc. v. Missoula County Pub. Sch. Dist. No. 1*, 2008 MT 231, ¶ 15, 344 Mont. 374, 188 P.3d 1013. "The only relevant document when considering a motion to dismiss is the complaint and any documents it incorporates by reference." *Cowan*, ¶ 11 (citing *City of Cut Bank v. Tom Patrick Constr., Inc.*, 1998 MT 219, ¶ 20, 290 Mont. 470, 963 P.2d 1283). A court may, at its discretion, convert a motion to dismiss to a motion for summary judgment if it decides to consider matters outside the pleadings. Rule 12(b), M.R.Civ.P. Such a decision, however, is left to the court's discretion. *American Medical Oxygen Co. v. Montana Deaconess Medical Ctr.*, 232 Mont. 165, 167, 755 P.2d 37, 38 (1988).

II. Petitioners' Request For Partial Summary Judgment.

In responding to Respondent-Intervenors' Motion to Dismiss, Petitioners presented materials outside the scope of the pleadings and requested this Court consider the Motion to Dismiss as a motion for partial summary judgment under Rule 56, M.R.Civ.P. Respondents and Respondent-Intervenors maintain that Petitioners' request is procedurally flawed and request that this Court strike

Petitioners' Reply Brief in Support of Partial Summary Judgment on Counts 1 and 2 of the Second Amended Complaint ("SJ Reply Brief") under Rule 12(f), M.R.Civ.P.

Having reviewed this matter, this Court declines to convert the instant Motion to Dismiss to a motion for partial summary judgment. *See American Medical Oxygen Co.*, 232 Mont. at 167, 755, P.2d at 38; *see also Swedberg v. Marotzke*, 339 F.3d 1139, 1142-46 (9th Cir. 2003) (district court must take some affirmative action to effectuate conversion to summary judgment). Petitioners failed to move the Court for summary judgment until after Respondents and Respondent-Intervenors moved to strike Petitioners' SJ Reply Brief. Petitioners' summary judgment motion is an afterthought to the substantive briefing on Respondent-Intervenors' Motion to Dismiss. It would be improper to convert the instant Motion to Dismiss to a summary judgment motion when Respondent-Intervenors have not requested conversion. Further, the additional materials submitted by Petitioners are irrelevant and unnecessary for this Court to decide the purely legal issue of whether the Respondents owe a legal duty to Petitioners sufficient to support Petitioners' Counts 1 and 2. Additional grounds for denying Petitioners' request for partial summary judgment are discussed in the briefing on the motions to strike. These arguments have merit and are incorporated by reference herein. *See* Motion of Respondent-Intervenor Edith Ford, *et al.*, to Strike "Petitioners' Reply Brief in Support of Partial Summary Judgment on Counts 1 and 2 of the Second Amended Complaint" and Brief in Support, filed on March 25, 2009, pp. 2-3; *see generally* Respondents' Motion to Strike Petitioners' Reply Brief in Support of Partial Summary Judgment and to Strike All Immaterial Portions of the Petitioners' Response Brief, and supporting brief, filed on March 24, 2009.

Thus, this Court exercises its discretion and DECLINES TO CONVERT Respondent-Intervenors' Motion to Dismiss to a partial summary judgment motion. For these same reasons,

Respondent and Respondent-Intervenors' separate motions to strike Petitioners' SJ Reply Brief under Rule 12(f), M.R.Civ.P., are GRANTED, Petitioners' request for partial summary judgment on Counts 1 and 2 is DENIED, and Petitioners' Motion For Leave to File Original Depositions is DENIED.

III. Respondent-Intervenors' Motion to Dismiss Counts 1 and 2.

A. Introduction.

Respondent-Intervenors request dismissal of Counts 1 and 2 of Petitioners' Second Amended Complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6), M.R.Civ.P.

In Count 1, Petitioners allege that Respondents have a clear legal duty to remove bison from Zone 2 of the Western Boundary Area by May 15 of each year, that Respondents failed to do so, and they request mandamus relief directing Respondents to manage or remove the bison as mandated by the IBMP. Petitioners allege that Respondents' legal duty stems from § 81-2-120(1), MCA, Admin.R.Mont. 32.3.224A, and the IBMP. Petitioners allege they have no speedy or adequate remedy available due to the significance of potential harm and because of Respondents' alleged repeated violations of law.

Count 2 alleges similar facts as Count 1 but requests the Court determine the obligations of Respondents to Petitioners and enjoin Respondents to comply with their statutory obligations and the IBMP. Petitioners allege they are persons affected by Respondents' compliance, or lack thereof, with § 81-1-102, MCA, and § 81-2-120, MCA, "as implemented through the IBMP." *See* Second Amend. Compl., ¶ 56. Petitioners allege that their ability and right to maintain brucellosis free cattle herds is directly affected by Respondents' noncompliance with these mandatory bison management

provisions, and that Respondents' noncompliance subjects Petitioners and their livestock to irreparable injury via the risk of brucellosis transmission and loss of brucellosis class-free status. Petitioners request this Court declare Respondents' obligations to Petitioners.

Respondent-Intervenors request dismissal of Counts 1 and 2 based upon the following alleged facts which they maintain are admitted in the pleadings. Petitioners ask this Court to enforce bison hazing and slaughter actions pursuant to the December 2000 Record of Decision ("ROD") for the IBMP (as it existed prior to the IBMP Adaptive Adjustments) in the Zone 2 area. In effect, Petitioners look to enforce legal obligations allegedly contained in the IBMP against the State of Montana. Yet, Petitioners cannot obtain the relief they seek because Respondents are not bound by a mandatory legal duty to take the actions requested by Petitioners. Because such a mandatory duty is a requirement to sustain Counts 1 and 2, these claims must be dismissed.

Specifically, Respondent-Intervenors contend the IBMP does not create any substantive, enforceable legal rights because: (i) it is not set forth in the Montana Constitution or state statute; (ii) it has not been promulgated as a legislative rule in accordance with the Montana Administrative Procedures Act ("MAPA"); and (iii) the ROD itself does not create any legal rights.

Petitioners respond as follows. The Montana Legislature delegated authority to DOL in managing YNP bison under § 81-2-120, MCA. Under this authority, DOL developed the IBMP, which the DOL is legally responsible to implement. DOL is required to take action when YNP bison enter Montana pursuant to Admin.R.Mont. 32.3.224A. As such, Petitioners contend, the IBMP implements DOL's responsibilities in managing bison via statute and administrative rule. Petitioners further contend that the IBMP is an ROD that represents the DOL's decision on the agency action to be undertaken. To rule that the ROD is not legally enforceable would render the

MEPA process unnecessary and defy common sense.

Respondent-Intervenors also contend that Montana law (§ 81-2-120, MCA) does not require a May 15 deadline for hazing bison, and the IBMP vests the DOL with discretion in managing bison. As such, without a mandatory legal duty charged to the DOL, Petitioners' claims for mandamus and declaratory judgment fail.

Petitioners respond that the terms of the DOL regulations and IBMP are clear and require DOL to take action with respect to YNP bison. For support, Petitioners cite Admin.R.Mont. 32.2.224A, as well as the IBMP, which requires in Step 1 that May 15 is the last date upon which bison are to be in Montana.

B. Are Petitioners Entitled to Enforce the IBMP Against the State Respondents?

Petitioners contend that the adoption of an ROD promulgated in conjunction with the MEPA/NEPA process, such as the IBMP, is an enforceable decision by the agency (here, DOL) and creates enforceable substantive legal obligations. Petitioners' Response Brief, p. 15. This Court disagrees, for the reasons explained below.

The NEPA process relies "on procedural mechanisms—as opposed to substantive, result-based standards." *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 353 (1989) (emphasis added); *see also Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 376 (2008) ("When the Government conducts an activity, NEPA itself does not mandate particular results.") (quotations and citation omitted). It is well settled that "[o]ther statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action." *Robertson*, 490 U.S. at 351 (footnote omitted).

MEPA, which is modeled on NEPA, is likewise exclusively procedural. § 75-1-102(1),

MCA (". . . The [MEPA] is procedural, and it is the legislature's intent that the requirements of parts 1 through 3 of this chapter provide for the adequate review of state actions in order to ensure that environmental attributes are fully considered.") (emphasis added); *see also Ravalli County Fish and Game Ass'n, Inc. v. Mont. Dep't of State Lands*, 273 Mont. 371, 377, 903 P.2d 1362, 1366, 1367 (1995) (cases construing NEPA are persuasive in interpreting MEPA) (internal citation omitted). "NEPA is essentially procedural; it does not demand that an agency make particular substantive decisions." *Ravalli County Fish and Game Ass'n*, 273 Mont. at 377, 903 P.2d at 1367 (internal citation omitted). Consistent with this procedural focus, an ROD issued at the conclusion of the MEPA process "is a public notice of what the decision is, the reasons for the decision, and any special conditions surrounding the decision or its implementation," Admin. R. Mont. 32.2.238(1), not a substantive mandate on the agency. The MEPA regulation setting forth the requirements for an ROD explicitly states that "[t]his rule does not define or affect the statutory decision making authority of the agency." *Id.*, 32.2.238(4) (emphasis added).

This Court has reviewed *Laub v. Department of Interior*, 342 F.3d 1080 (9th Cir. 2003) and *Wilderness Society v. Rey*, 180 F. Supp. 2d 1141 (D. Mont. 2002). Neither opinion stands for the proposition that a third party can enforce a management plan set forth in an ROD against an administrative agency.

For the foregoing reasons, Petitioners' argument that the IBMP creates substantive and mandatory legal obligations which DOL has to uphold, and for which they seek judicial enforcement, is without merit. A NEPA or MEPA ROD by itself does not create legal duties that are enforceable against the issuing agency.

With respect to Petitioners' argument that an ROD must be legally enforceable as a matter of

common sense to preserve the need for judicial review, this argument is unsupported. Further, appeals and judicial review of agency environmental analyses are necessary "to insure that the agency has taken a 'hard look' at environmental consequences," *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976) (internal citation omitted)—not to enforce an ROD against the issuing agency. It is precisely in the circumstance where there is nothing to bind the agency to a particular course of conduct that environmental analysis is necessary to ensure that the agency's exercise of discretion is fully informed by an assessment of the likely environmental consequences of its alternative proposals for action. *See Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 780 (9th Cir. 2006) ("NEPA's EIS requirements apply only to discretionary federal decisions.") (citing *Dept. of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004)); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995) (NEPA's "procedural requirements are triggered by a discretionary federal action"); *see also Ravalli County Fish & Game Ass'n*, 273 Mont. at 378, 903 P.2d at 1367 (describing purpose of MEPA "to make informed decisions"). Nothing in the NEPA or MEPA statutes indicate that discretionary agency actions are transformed into mandatory obligations merely by the issuance of an ROD at the conclusion of the environmental analysis process.

Ultimately, Petitioners' argument confuses two distinct concepts: (1) the need for environmental analysis, appeals, and judicial review to ensure that a discretionary agency decision is fully informed regarding environmental consequences as required by governing law, and (2) conversion of such a discretionary agency decision itself into governing law. While MEPA seeks to ensure the former, its purely procedural requirements do not accomplish the latter. *See Robertson*, 490 U.S. at 353 (reversing lower court holding that NEPA required implementation of environmental mitigation plan). Thus, the Court rejects Petitioners' attempt to convert the IBMP into a mandatory

legal requirement.

C. Petitioners' Remaining Arguments.

Petitioners further contend that the IBMP is derived from specific statutory duties that DOL must uphold, citing § 81-2-120(1), MCA. This statute states, in pertinent part:

> (1) Whenever a publicly owned wild buffalo or bison from a herd that is infected with a dangerous disease enters the state of Montana on public or private land and the disease may spread to persons or livestock or whenever the presence of wild buffalo or bison may jeopardize Montana's compliance with other state-administered or federally administered livestock disease control programs, the department may, under a plan approved by the governor, use any feasible method in taking one or more of the following actions:
>
> (a) The live wild buffalo or bison may be physically removed by the safest and most expeditious means from within the state boundaries, including but not limited to hazing and aversion tactics or capture, transportation, quarantine, or delivery to a department-approved slaughterhouse.
>
> (b) The live wild buffalo or bison may be destroyed by the use of firearms. If a firearm cannot be used for reasons of public safety or regard for public or private property, the animal may be relocated to a place that is free from public or private hazards and destroyed by firearms or by a humane means of euthanasia.
>
> (c) The live wild buffalo or bison may be taken through limited public hunts pursuant to 87-2-730 when authorized by the state veterinarian and the department.
>
> (d) The live wild buffalo or bison may be captured, tested, quarantined, and vaccinated.

§ 81-2-120(1)(a)-(d), MCA (emphasis added). The statute does not provide that a governor-approved bison management plan is legally enforceable against the state. To the contrary, the statute explicitly and repeatedly uses the term "may" in setting forth the DOL's actions. *See id.* Subsection 1 clearly states that the DOL "may. . . use any feasible method in taking" specified response actions. § 81-2-120(1), MCA (emphasis added).

It is this Court's duty to construe the applicable statute "as it is written," and "not to insert

what has been omitted." *Miller v. Eighteenth Judicial District Court*, 2007 MT 149, ¶¶ 39-40, 337 Mont. 488, 162 P.3d 121 (use of term "shall" concerning death penalty notice indicated that notice and timing requirements are mandatory, not discretionary or permissive) (citing *Matter of the Estate of Magelssen*, 182 Mont. 372, 378, 597 P.2d 90, 94 (1979) and § 1-2-101, MCA).

The Montana Legislature's use of the term "may" establishes that the agency has discretion in performing its actions, in contrast to mandatory legal requirements the agency "shall" perform. *See id.*; *see Laudert v. Richland County Sheriff's Dept.*, 2000 MT 218, ¶ 38, 301 Mont. 114, 7 P.3d 386 ("The use of the word 'may' indicates that the [agency] has the discretion ... ."); *In re Investigative Records of City of Columbus Police Dep't*, 272 Mont. 486, 488, 901 P.2d 565, 567 (1995) (holding that "the word 'may' is permissive"). Thus, Section 81-2-120(1), MCA, creates no legal duty mandating DOL to remove wild bison from Zone 2, as requested by Petitioners in Counts 1 and 2 of their Second Amended Complaint.

Petitioners further contend that DOL is required to act when YNP bison enter Montana pursuant to Admin.R.Mont. 32.3.224A. This rule provides that when "estrayed or migratory bison exposed to or affected with brucellosis" enter Montana, "one of the following actions will be taken:" the bison "may be physically removed" or, if removal cannot safely be accomplished, the bison "shall be summarily destroyed." Admin.R.Mont. 32.3.224A(1)(a), (b). The rule does not provide any time frame, however, for such actions, nor does it set forth any of the other actions Petitioners are requesting DOL conduct in Counts 1 and 2. Petitioners request an order that DOL be required and enjoined to haze bison back into YNP after cattle are removed from Zone 2 of YNP's western boundary area in the fall, capture and test those bison that cannot be hazed, and slaughter those testing positive for exposure to brucellosis, and remove all bison from the western boundary area by

May 15 of each year. These specific management requirements are not contained in Admin.R.Mont. 32.3.224A, nor do such requirements appear in any rule or statute. Petitioners concede that "the rule and the statute do not mention these specific actions, or state with particularity the May 15 date." Petitioners' Response Brief, p. 14, 18. Although Petitioners contend this absence is not fatal because "the IBMP specifically identifies these actions will be taken," *Id.*, 18 (emphasis in original), the IBMP does not create legal duties that are enforceable against the Respondents, for the reasons described above.

D. Without the Required Duty Charged to Respondents, Counts 1 and 2 Fail.

The touchstone of Petitioners' Counts 1 and 2 for mandamus and declaratory relief, respectively, is the existence of a duty on the part of Respondents to haze or kill bison in Zone 2 of YNP's western boundary by May 15 of each year. *See* Second Amend. Compl., ¶¶ 53-54, 58-60. Absent such a duty, Counts 1 and 2 cannot survive.

Under Count 1 seeking mandamus relief, Petitioners allege, in pertinent part:

> 53. Under either the IBMP or applicable administrative rules, the Respondents have the clear legal duty to remove all bison from Montana by May 15 of any year. Respondents have failed to comply with that duty.

Second Amend. Compl., ¶ 53.

The purpose of the writ of mandate is to "compel the performance of an act which the law requires as a duty resulting from an office." *Intake Water Co. v. Board of Natural Resources & Conservation*, 197 Mont. 482, 487, 645 P.2d 383, 386 (1982); § 27-26-102, MCA. A writ will issue where there has been a showing that a clear legal duty exists and there is no speedy or adequate remedy in the ordinary course of law. *Cain v. Department of Health*, 177 Mont. 448, 582 P.2d 332 (1978); *see also Common Cause v. Argenbright*, 276 Mont. 382, 390, 917 P.2d 425, 430 (1996).

"For a court to grant a writ of mandate, the clear legal duty must involve a ministerial act, not a discretionary act." *Smith v. County of Missoula*, 1999 MT 330, ¶ 28, 297 Mont. 368, 992 P.2d 834. Thus, mandamus will lie only when "the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Id.* (quoting *State v. Cooney*, 102 Mont. 521, 529, 59 P.2d 48, 53 (1936)).

Under the well-pleaded facts of the Second Amended Complaint, and admitting all facts stated therein as true, Petitioners have failed to show that a clear legal duty exists with respect to DOL's bison management practices, as requested by Petitioners. As such, Petitioner's mandamus claim fails for lack of a clear legal duty on the part of Respondents.

Petitioners' Count 2 seeking declaratory and injunctive relief alleges, in pertinent part:

> 57. Petitioners' ability, and right, to maintain brucellosis free cattle herds is directly affected by Respondents' failure to comply with Respondents' mandatory obligations under Mont. Code Ann. §81-1-102 and §81-2-120, as implemented through the IBMP, and to ensure no bison remain outside Yellowstone National Park within the Western Boundary Area after May 15 of each year.
>
> 58. The failure of Respondents to ensure no bison remain outside Yellowstone National Park within the Western Boundary Area after May 15 of each year, or to control and manage bison as otherwise directed by statute regulation and the IBMP, subjects Petitioners and Petitioners' livestock to irreparable injury.
>
> . . .
>
> 59. . . . This Court has the authority pursuant to Mont. Code Ann. §27-8-201 to affirmatively declare the obligations of Respondents to Petitioners under Mont. Code Ann §81-1-102 and §81-2-120, the applicable regulations, and under the IBMP, and pursuant to Mont. Code Ann. §27-8-313 to grant necessary supplemental relief to enforce that declaration.

Second Amend. Compl., ¶¶ 57-59.

The decision to dismiss a complaint for declaratory relief is within the sound discretion of the district court and will not be overturned absent an abuse of discretion. *Mt. Water Co. v. Mont. Dep't of Pub. Serv. Regulation*, 2005 MT 84, ¶ 8, 326 Mont. 416, 110 P.3d 20 (internal citation omitted).

The purpose of the Uniform Declaratory Judgments Act ("Act") is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. . . ." *Miller v. State Farm Mut. Auto. Ins. Co.*, 2007 MT 85, ¶ 7, 337 Mont. 67, 155 P.3d 1278 (quoting § 27-8-102, MCA). The Act provides a district court with the "power to declare rights, status, and other legal relations." § 27-8-102, MCA. "Any person . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." *Miller*, ¶ 7 (quoting § 27-8-202, MCA).

Petitioners maintain that Respondents have failed to comply with their statutory obligations, as implemented through the IBMP, to ensure no bison remain outside the western boundary of YNP by May 15, or to otherwise control and manage bison. Accepting Petitioners' alleged facts as true, for the reasons described above, Petitioners have no legal right under § 81-1-102, MCA, § 81-2-120, MCA, or any other state law or rule, to their requested action. Nor does the IBMP create enforceable rights on behalf of the Petitioners. Thus, Petitioners' Count 2 for declaratory and injunctive relief also fails.

For the foregoing reasons, Counts 1 and 2 of Petitioners' Second Amended Complaint should be dismissed.

IV. Respondents' Motion to Dismiss.

Respondents separately move to dismiss Counts 1 and 2 of Plaintiffs' Second Amended Complaint for lack of standing. Although Respondents' Motion to Dismiss is moot in light of this Court's foregoing ruling, a brief discussion of this pending motion is warranted.

Respondents contend that Petitioners are not signatories or parties to the IBMP and thus lack standing to bring an action against Respondents for the alleged failure to comply with the IBMP or to

compel specific performance thereunder. Respondents state:

> Nonetheless, Petitioners ask this Court to compel specific performance of what they allege are IBMP mandatory duties to be performed by the State Respondents. In effect, Petitioners claim the IBMP is a contract. A contract in which there are mandatory, non-discretional, unquestionable duties to be performed solely by the State Respondents. And Petitioners seek to compel specific performance of that alleged contract.
>
> The problem for Petitioners, of course, is that they are not a party to any alleged contract. And not being a party, they have no standing to seek specific performance of the terms of the alleged IBMP.
>
> For the sake of argument, let's assume the IBMP is a contract, and assume it contains clear unambiguous and mandatory duties that must be performed by the State Respondents. Who then can seek to compel specific performance of the contract terms?

Respondents' Brief in Support of Motion to Dismiss and Motion to Transfer Venue, filed on January 22, 2009. Respondents go on to explain the law on compelling specific performance, concluding that Petitioners lack standing to compel specific performance of the IBMP.

Petitioners respond as follows. First, Petitioners contend that the IBMP is not an unchallengeable contract between IBMP partner agencies. Rather, they maintain the IBMP, along with the ROD and Environmental Impact Statement, are state agency actions and decisions subject to review and challenge by interested parties. Second, Petitioners contend that Respondents have statutory duties to manage wild buffalo or bison for disease control and as such have standing to challenge Respondents' actions made under their statutory duties. Third, Petitioners contend that even if the IBMP is a contract, the Petitioners are third party beneficiaries and thus entitled to relief.

Having considered the arguments of the parties, this Court concludes that Respondents' request for dismissal of Counts 1 and 2 for lack of standing should be denied. Respondents have failed to establish how Petitioners lack standing because they were not parties to the IBMP. Moreover, taking the facts as alleged in Petitioners' Second Amended Complaint as true, and in the event the IBMP could be construed as a contract, Respondents have failed to convince this Court that Petitioners are not third-party beneficiaries to the IBMP.

Therefore, Respondents' Motion to Dismiss, based on the grounds that Petitioners lack

standing, is DENIED.

ORDER

THEREFORE, IT IS HEREBY ORDERED:

1. Respondent-Intervenors' Motion to Dismiss is GRANTED. Counts 1 and 2 of Petitioners' Second Amended Complaint are DISMISSED.

2. Respondents' Motion to Dismiss is DENIED.

3. Respondents' Motion to Strike Petitioners' Reply Brief and Respondent-Intervenors' Motion to Strike Petitioners' Reply Brief are GRANTED.

4. Petitioners' Motion For Partial Summary Judgment on Counts 1 and 2 of the Second Amended Complaint is DENIED.

5. Petitioners' Motion For Leave to File Original Depositions is DENIED.

DATED this 27th day of May, 2010.

HON. JOHN C. BROWN
District Judge

cc: John Bloomquist/James Shuler/James Brown/Marc Buyske email
Norman Peterson email
Douglas Honnold/Timothy Preso/Jenny Harbine email
5-27-10