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PARK COUNTY CLERK
OF DISTRICT COURT
JUNE LITTLE

2013 JAN 7 AM 11 34

FILED
BY *June Little*
DEPUTY

MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

PARK COUNTY STOCKGROWERS ASSOCIATION, INC., on behalf of its members,
Petitioner, and
MONTANA FARM BUREAU FEDERATION,
Petitioner-Intervenor,
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,
and
BEAR CREEK COUNCIL, GREATER YELLOWSTONE COALITION, and
NATURAL RESOURCES DEFENSE COUNCIL,
Respondent-Intervenors.

Cause Nos. DV-11-77
DV-11-78

Judge E. Wayne Phillips

FINAL ORDER AND JUDGMENT ON (AMENDED) JOINT PETITION

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PARK COUNTY,)
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Petitioner, and)
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MT FARM BUREAU FEDERATION,)
)
Petitioner-Intervenor,)
)
vs.)
)
THE STATE OF MONTANA, FISH WILDLIFE)
AND PARKS, an agency of The State of Montana;)
and **THE DEPT OF LIVESTOCK,** an agency of the)
State of Montana,)
)
Respondents, and)
)
BEAR CREEK COUNCIL, GREATER)
YELLOWSTONE COALITION, AND NATURAL)
RESOURCES DEFENSE COUNCIL,)
)
Respondent-Intervenors.)

This matter comes before the Court on a Joint Petition For Declaratory and Injunctive Relief filed by the Montana Farm Bureau Federation (MFBF) and the Park County Stockgrowers Association, Inc. (PCSA) (together, the "Petitioners"). The Petitioners seek declaratory relief (Mont. Code Ann. § 27-8-101, *et seq.*) and injunctive relief (Mont. Code Ann. § 27-19-101, *et seq.*) pursuant to the Montana Administrative Procedures Act (MAPA) (Mont. Code Ann. § 2-4-101, *et seq.*), Montana Environmental Policy Act (Mont. Code Ann. § 75-1-101, *et seq.*), and Montana Constitution Article II, Section 3, against the Montana Department of Livestock (DOL), Montana Department of Fish, Wildlife and Parks (FWP), the State of Montana, Dr. Martin Zaluski (Dr. Zaluski), in his capacity as the Montana State Veterinarian, and Governor Brian Schweitzer (Governor), in his capacity as Governor of the State of Montana (herein collectively referred to as "Respondents"). Petitioners bring this action for declaratory and injunctive relief on behalf of its members. This cause of action is based on Respondents' adoption of significant changes to the existing Interagency Bison Management Plan (IBMP) occurring in an April 14, 2011, Adaptive Management

1 Adjustments (AMA) to the IBMP and a subsequent February 28, 2012, Joint Decision
2 Notice on the AMA. Petr. Jt. Pet. for Decl. and Inj. Relief, 5-6 (Mar. 29, 2012). The
3 Petitioners assert the changes:

4 1) violate Respondents' statutory and regulatory duties to manage
5 brucellosis and bison as set forth by Mont. Code Ann. §§ 81-1-102,
6 81-2-102, 81-2-103, 81-2-120, 81-2-108, 81-2-703, 87-1-201, 87-2-
7 216, 87-1-301, 87-5-701, 81-4-201, and 81-4-201, and Admin. R.
8 Mont. 32.1.101, 32.3.108, 32.3.109, 32.3.411, 32.3.224A, and
9 32.3.204;

10 2) were not analyzed under an adequate or sufficient environmental
11 review required by the Montana Environmental Policy Act
12 (MEPA), Mont. Code Ann. § 75-5-101, *et seq.*, and regulations
13 implementing DOL's and FWP's MEPA duties, Admin. R. Mont.
14 32.2.221, *et seq.*, and 12.2.428, *et seq.*; and

15 3) violate Petitioners' members' right to a clean and healthful
16 environment as granted by Mont. Const. Art. II, Sec. 3.

17 *Id.* Petitioners also allege Respondents' actions in adopting and implementing the AMA
18 were arbitrary and capricious and have resulted in the creation of a public nuisance. *Id.*
19 at 6, 19.

20 Petitioners seek a declaration that Respondents must:

21 [P]ursuant to MEPA, sufficiently evaluate the impacts of the AMA
22 for the Northern Boundary Area of [Yellowstone National Park]
23 (YNP) on the human environment prior to implementation. A
24 legally sufficient analysis would include preparing an
25 environmental impact statement (hereinafter referred to as "EIS")
26 or, at a minimum, a supplemental environmental impact statement
(hereinafter referred to as "SEIS") for the proposed modifications. .
. Petitioners also seek 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 of
YNP until an adequate MEPA review is completed. Finally,
Petitioners seek abatement of the public nuisance caused by
Respondents' actions.

27 *Id.* at 7.

28 Although Petitioners' original action was founded upon violations which allegedly
29 resulted in the migration of wild bison during the winter of 2010/2011, the recent Joint
30 Petition was filed in March 2012. Petr. Jt. Pet. for Decl. and Inj. Relief (May 6, 2011).

1 This recent amended complaint encompasses changes and subsequent statutory reform
2 from the 2011 legislative session. The Court therefore utilizes the 2011 Montana Code
3 Annotated in this Order.

4 **BACKGROUND**

5 Wild bison located in Yellowstone National Park (YNP) have been found to host
6 brucellosis, a contagious bacterial disease caused by various species of the genus
7 *Brucella*. Brucellosis can infect domestic animals and other wildlife, such as elk.
8 Infection can cause the host animal to abort its fetus and, in cattle, it can additionally
9 cause decreased milk production, weight loss, infertility, and lameness. United States
10 Department of Agriculture Animal and Plant Health Inspection Service (hereinafter
11 referred to as "USDA-APHIS") Facts About Brucellosis at 1, http://www.aphis.usda.gov/animal_health/animal_diseases/brucellosis/downloads/bruc-facts.pdf (accessed
12 Oct. 23, 2012). Brucellosis is transmitted through direct contact with an infected animal
13 or an environment contaminated with fluids from an infected animal. Environments
14 are often contaminated when an infected animal aborts its fetus resulting in "placental
15 membranes or fluids, and other vaginal discharges," being left behind. *Id.* at 1.

16 Humans can also contract brucellosis where it is known as undulant fever. It can
17 cause severe flu-like symptoms, including fatigue, headache, high fever, chills, sweats,
18 joint and back pain, and loss of weight and appetite. *Id.* at 6. There is no known cure
19 for undulant fever and symptoms can recur throughout an individual's lifetime—and
20 may lead to death. *Id.* at 5. Farmers, ranchers, veterinarians, and packing plant
21 workers are at the highest risk for exposure because they frequently come into contact
22 with infected animals. *Id.* at 6.

23 In 1934, the USDA-APHIS established an education program to help eradicate
24 brucellosis. The agency created a comprehensive, nation-wide program implementing
25 testing and vaccination in high-risk areas. Since there is no known cure for brucellosis,
26 the program also incorporated slaughter of infected animals to aid in the elimination of
brucellosis. In the environs of YNP, federal and state agencies cooperated and
established the Interagency Bison Management Plan (IBMP) due to the risk of
transmission. The IBMP was created and approved by both the DOL and FWP in 2000
to aid in the management of the YNP bison population and protect domestic cattle in

1 areas of Montana adjacent to YNP. U.S. Department of Interior, Record of Decision for
2 Final Environmental Impact Statement and Bison Management Plan for the State of
3 Montana and Yellowstone National Park (Dec. 20, 2000) (available at
4 <http://ibmp.info/library.php>).

5 The IBMP sets forth the management responsibilities for each agency and
6 provides that the agencies: maintain temporal and spatial separation between bison and
7 cattle; manage bison populations; manage bison which migrate beyond YNP
8 boundaries; and, eventually, institute vaccination procedures for YNP bison. *Id.* at 10-
9 11. The IBMP also references Respondents' statutory responsibilities to manage bison.
10 *Id.* at 8-10. The objective of the IBMP is not to eradicate brucellosis, but rather manage
11 bison to prevent the transmission of brucellosis from bison to cattle. *Id.* at 22. The
12 plan's "principle purpose" is to "maintain a wild, free-ranging population of bison and
13 address the risk of brucellosis transmission to protect the economic interest and
14 viability of the livestock industry in Montana." *Id.* The IBMP incorporates three
15 Adaptive Management steps to minimize the risk of transmission, which "when all
16 criteria are met, provide for the tolerance of a limited number of untested bison on
17 public lands and private lands where permitted adjacent to Yellowstone National Park
18 during winter." *Id.* The IBMP continues, stating:

19 The management actions set forth in this plan which reflect
20 occurrence of certain actions by an expected date are the agencies
21 anticipated time periods in which certain management steps may
22 commence. The actual change in management from one step to
23 another are dependent upon all criteria being met or obtained prior
24 to the particular step being implemented.

25 *Id.*

26 As noted, the IBMP contains a three step process and designated zones to
manage the bison and maintain separation. The plan identifies three steps and three
zones for the area known as the Northern Boundary Area, which includes areas such as
Eagle Creek and Bear Creek, with Zone 1 being YNP. The zones and actions for each
step are described below.

In the Northern Boundary Area three zones are designated for bison
management. ROD 29 (Figure 4).

1 Zone 1 – YNP winter habitat in the Reese Creek vicinity that bison
2 normally occupy. Bison will be subject to hazing in the spring when
3 bison are being moved from Zone 2 back into YNP before May 15.
Admin. Rec. 2430.

4 Zone 2 – United States Forest Service (USFS) winter habitat with
5 some private property which includes the area north of park
6 boundary in the Reese Creek area, west of Yellowstone River, and
7 south of Yankee Jim Canyon. Bison will be managed for: i) spatial
8 and temporal separation; ii) lethal removal for private property
9 concerns; iii) bison tolerance limits (up to 100); and, iv) bison park
10 population size (3,000). Management actions within Zone 2 could
11 include tolerating, hazing, capturing and testing, vaccinating,
12 removing bison to quarantine, removing for use in jointly approved
13 research and lethally removing bison as set forth in this plan.
Admin. Rec. 2428, 2430.

14 Zone 3 - The area where bison that leave Zone 2 would be subject
15 to lethal removal. Admin. Rec. 2428, 2430.

16 The following three steps were established to manage and monitor the bison in
17 the Northern Boundary Area.

18 Step 1. After cattle are removed from Zone 2 in the fall, the
19 agencies will haze bison back into YNP. Bison not captured will be
20 hazed back into YNP before May 15. Those remaining are subject to
21 lethal removal. Agencies will perform further research regarding
22 brucellosis and every attempt will be made to capture and test bison
23 that leave YNP. Bison attempting to exit YNP may be subject to
24 hazing, capture, testing and vaccination, or lethal removal. These
25 practices will continue in Step 2 (Expected implementation during
26 the winter of 2002/2003). Admin. Rec. 2426-2427; ROD 11-12
(Dec. 20, 2000).

Step 2. Step 2 will begin when a safe and effective remote delivery
mechanism is available, allowing vaccination of eligible bison, and
when cattle no longer graze private lands in Zone 2, namely the
Royal Teton Ranch situated north of YNP and adjacent to Reese
Creek (the northern boundary). The agencies will allow up to 25
seronegative (testing negative for brucellosis) bison outside YNP,
increasing to 50, then to 100, when the agencies are confident in
their ability to manage these numbers. The agencies may adjust
these numbers based on the experience gained during this Step.
Bison attempting to exit YNP may be subject to hazing, capture,
testing and vaccination, or lethal removal after the number of

1 seronegative bison released to occupy Zone 2 specified in is
2 reached. Admin. Rec. 2427-2429, 2432.

3 Step 3. Step 3 is to begin when: (1) studies on bacterial viability
4 allowed agencies to determine an adequate temporal separation
5 period; (2) YNP initiate an in-park vaccination program via a
6 remote delivery system; (3) agencies demonstrate the ability to
7 enforce spatial separation; and (4) agencies demonstrate the ability
8 to control the maximum number of bison in Zone 2. During Step 3,
9 bison attempting to exit the Park may be subject to hazing, capture,
10 testing and vaccination, or lethal removal after the number of
11 untested bison in Zone 2 specified above is reached. (Expected
12 implementation during the winter of 2003/2004). Admin. Rec.
13 2429.

14 To meet these responsibilities, IBMP agencies meet periodically to discuss and
15 adopt "adaptive management" changes to the IBMP. In March and April, 2011, IBMP
16 agencies agreed to and signed proposed "Adaptive Management Adjustments to the
17 Interagency Bison Management Plan." See AMA (available at: [http://ibmp.
18 info/Library/AMAadjustments_IBMP_2011_All%20signatures.pdf](http://ibmp.info/Library/AMAadjustments_IBMP_2011_All%20signatures.pdf)) (accessed Oct. 23,
19 2012). The IBMP agencies agreed to three adjustments:

20 (1) Allow bison on habitat on U.S. Forest Service and other lands
21 north of the park boundary and south of Yankee Jim Canyon. Bison
22 would not be allowed north of the hydrological divide (i.e.,
23 mountain ridge-tops) between Dome Mountain/Paradise Valley
24 and the Gardiner Basin on the east side of the Yellowstone River
25 and Tom Miner basin and the Gardiner Basin on the west side of
26 the Yellowstone River.

(2) As necessary, trailer up to 300 female and calf bison testing
negative for brucellosis from the Stephens Creek capture facility to
a double-fenced quarantine facility in Corwin Springs for holding
until release back into the park in spring. The quarantine facility in
Corwin Springs is leased by APHIS and the State of Montana and
APHIS have collaborated to complete environmental analyses for
use of the facility.

(3) Evaluate the effects of these adjustments and modify as
necessary to prevent bison from occupying lands north of the
hydrological divide and minimize the risk of transmission of
brucellosis to livestock.

Id.

1 It was in response to these “adjustments,” that the Park County Stockgrowers
2 Association, Inc., filed on May 6, 2011, a Petition for Declaratory and Injunctive Relief
3 followed on March 29, 2012, by the Petitioners Joint Petition for Declaratory and
4 Injunctive Relief. This second petition is deemed the “Amended Petition,” which filing
5 was authorized by this Court. The Amended Petition alleges Respondents’ changes to
6 the AMA were significant because they: “(1) Allow brucellosis exposed and infected
7 bison to occupy all lands, both public and private, north of YNP and south of Yankee
8 Jim Canyon, including large expanses of land that were formerly classified as “Zone 3”
9 where bison were not tolerated; (2) Allow agencies to move 300 female and calf bison
10 testing negative for brucellosis from the Stephens Creek capture facility to Corwin
11 Springs until they can be moved back to YNP in the spring; and, (3) Allow agencies to
12 “evaluate the effects of these adjustments and modify as necessary.” Petr. Jt. Pet. for
13 Decl. and Inj. Relief, 18.

14 The Petitioners also allege that the changes to the AMA are arbitrary and
15 capricious because they constitute a challengeable final State agency action in direct
16 violation of Respondents’ legal responsibilities and duties to protect cattle and properly
17 manage bison. Petr. Jt. Pet. for Decl. and Inj. Relief, 5-6.

18 Petitioners request the Court to issue an order enjoining Respondents “presently,
19 and into the future, from violating their statutory duties and from implementing the
20 AMA for the Northern Boundary Area of YNP until an adequate MEPA review is
21 completed.” Petr. Jt. Pet. for Decl. and Inj. Relief, 7. They seek a declaration that
22 Respondents must, pursuant to MEPA, sufficiently evaluate the impacts of the AMA for
23 the Northern Boundary Area of YNP on the human environment prior to
24 implementation. Further, Petitioners assert that the proper analysis must include an
25 environmental impact statement (EIS) or, at a minimum, a supplemental environmental
26 impact statement (SEIS) for the proposed modifications. Finally, Petitioners seek an
order directing Respondents to abate the public nuisance created by their actions.

FINDINGS OF FACT

1) Bison are indigenous to the Greater Yellowstone Area and were observed there both before and after the creation of Yellowstone National Park in 1872. Admin. Rec. 88.

1 2) In the 1870s and 1880s, the North American bison were nearly driven to
2 extinction by market and "sport" hunting. *Id.* By 1901, only 25 bison remained in the
3 native Yellowstone herd. Admin. Rec. 317. Supplemented by 21 bison from other
4 remnant herds and protected from poaching, the population of bison in the Yellowstone
5 area have increased substantially. *Id.* Testimony from Mr. John Mundringer indicated
6 a current herd population of approximately 4500 bison.

7 3) More than 50% of the bison population in the Yellowstone area is infected
8 with *Brucella abortus*, an organism that causes the disease brucellosis. Admin. Rec. 88-
9 89; *See also* Hrg. Transc. 808-809 (Zaluski). The principal North American wildlife
10 hosts for this organism include bison and elk, but brucellosis may also occur in deer,
11 pronghorn, antelope, mountain sheep, and moose. Admin. Rec. 89, 94, 13184; *See also*
12 Hrg. Transc. 807-808 (Zaluski).

13 4) The record is replete with evidence and testimony at trial which
14 unequivocally affirms that YNP bison migrate out of the Park and into Gardiner Basin
15 (and the West Yellowstone Area) of Montana.

16 5) Because YNP bison are exposed or infected with brucellosis, they pose a
17 threat to animal and human health (called undulant fever in humans) in Montana,
18 including wildlife. Admin. Rec. 14, 391-392/ 2000 FEIS xiii, 360-361; Admin. Rec.
19 2417, 2419, 2423/ State ROD 1, 3, State ROD Attachment 1 at 1; Hrg. Transc. 789:18-
20 790:11, and 839:23-25 (Zaluski); Hrg. Transc. 376:6-15, 376:19-23 (Hillman).

21 6) In 2000, Yellowstone National Park, Gallatin National Forest, APHIS of the
22 US Department of Agriculture, several Indian Tribes, and the State of Montana entered
23 a cooperative federal-state agreement for the management of YNP bison, known as the
24 Interagency Bison Management Plan (IBMP). This was in settlement of a 1995 lawsuit
25 related to the management of bison naturally migrating from YNP. *See* Admin. Rec.
26 2415-2444 (Montana's Record of Decision for the IBMP); Admin. Rec. 2445-2519
(federal Record of Decision); *See also* 2447-2449 (discussion of lawsuit and history of
IBMP).

7) The 2000 FEIS provides:

Yellowstone National Park is not a self-contained ecosystem for
bison, and periodic migrations into Montana are natural events.
Some bison have brucellosis and may transmit it to cattle outside

1 the park boundaries in Montana. Left unchecked, the migration of
2 brucellosis-infected bison from Yellowstone National Park into
3 Montana could have not only direct effects on local livestock
4 operators, but also on the cattle industry statewide. The
5 cooperation of several agencies is required to fully manage the herd
6 and the risk of transmission of brucellosis from bison to Montana
7 domestic cattle.

8 The purpose of the proposed interagency action is to maintain a
9 wild, free-ranging population of bison and address the risk of
10 brucellosis transmission to protect the economic interest and
11 viability of the livestock industry in the state of Montana.

12 Admin. Rec. 2/ 2000 FEIS I. Further, the FEIS provides:

13 The “economic interest and viability of the livestock industry in the
14 state of Montana” is tied directly to the maintenance of a class-free
15 designation by the Animal and Plant Health Inspection Service (see
16 the section “Economic Impacts of Brucellosis in Cattle” above, the
17 “Environmental Consequences: Impact on Socioeconomics”
18 chapter, and the “Affected Environment: Socioeconomics” chapter).

19 Admin. Rec. 112/ 2000 FEIS 42.

20 8) To mitigate the threats associated with YNP bison, the IBMP sets forth
21 management responsibilities for each signing agency. It also provides for: temporal
22 and spatial separation between bison and cattle; protection of private property;
23 management of bison populations; management of bison beyond YNP boundaries; and
24 eventually institutes vaccination procedures for YNP bison. Admin. Rec. 2418/ State
25 ROD 2; State Respondents’ Combined Ans. ¶ 4.

26 9) As the IBMP states, DOL and FWP are to implement bison management in
Montana under the terms of the IBMP. Admin. Rec. 2417/ State ROD 1. No one
contests the migration of bison out of YNP, particularly during harsh winters. Bison
migrating from YNP into the Gardiner Basin are wildlife and are managed as wildlife by
the Department of Fish, Wildlife, and Parks (FWP). Hrg. Transc. 486 (Flowers). Bison
are, at one and the same time, wildlife and a heavily managed species – such
management is not totally unusual as state wildlife agents employ somewhat similar
measures to manage other wildlife species, particularly grizzly bears, and wolves and, to
a lesser extent, bighorn sheep and mountain lions. Hrg. Transc. 525-27, 557-58
(Flowers).

1 10) As noted in the FEIS and important as an independent finding of fact, the
2 IBMP's two express, fundamental purposes are to maintain a wild, free-roaming bison
3 population and to address the risk of brucellosis transmission to protect Montana's
4 livestock industry. Admin. Rec. 2423; Hrg. Transc. 442-43 (Flowers); *See also* Admin.
5 Rec. 2466.

6 11) In addition to the IBMP, the State of Montana has various statutes and rules
7 regulating the management of bison. Mont. Code Ann. Title 81, Parts 1 and 2; Title 87
8 Parts 1, 2 and 5; and, Admin. Rec. Mont. Ch. 32.1 and Ch. 32.3.

9 12) According to the IBMP, the target population for bison within YNP is 3,000.
10 Admin Rec. 24/ 2000 FEIS xxiii.

11 13) The basis for this population limit is manageability of the herd, as YNP lacks
12 enough forage resources to contain a herd above 3,000 during a harsh winter without
13 significant out-migration from YNP. Admin. Rec. 24, 152, 406/ 2000 FEIS xxiii, 84,
14 377.

15 14) The studies show that during a harsh winter, if the population is above
16 3,000, the bison will leave YNP to find forage. Admin. Rec. 24, 152/ 2000 FEIS xxiii,
17 84.

18 15) Under the preferred alternative in the 2000 FEIS, and according to the State
19 ROD, a total of 25 bison would be allowed outside of YNP onto the Royal Teton Ranch
20 once a lease agreement was reached with the Ranch. Admin. Rec. 2432/ State ROD 10;
21 Admin. Rec. 23, 243/ 2000 FEIS xxii, 183.

22 16) If that number was sustainable (i.e. the bison could be kept in that location)
23 then the number would increase in increments. Admin. Rec. 2432/ State ROD 10.

24 17) Furthermore, the IBMP Partners would attempt to find a way to remotely
25 vaccinate the bison. Admin. Rec. 2432/ State ROD 10; Admin. Rec. 250/ 2000 FEIS
26 190.

 18) The necessary lease agreement was eventually reached with the Royal Teton
Ranch. Hrg. Transcr. 271:15-19 (Mundinger).

 19) The IBMP anticipated and included a provision for future management
changes through "an adaptive management program." *See* Admin. Rec. 2452; *See also*
Admin. Rec. 2424, 2438-2439, and 2476. The IBMP provides: "The agencies may

1 agree to modify elements of this plan based on research and/or adaptive management
2 findings.” Admin. Rec. 2438-39 ¶ 29; *See also* Admin. Rec. 2476 ¶ 29. The best
3 definition of Adaptive Management was given by Mr. John Munding, former longtime
4 FWP employee and the “manager” of the MEPA process on the IBMP. “Adaptive
5 management is a very deliberative approach to applied research – learning by doing. We
6 do not necessarily have enough information to manage a natural resource so we attempt
7 to adaptively manage around those situations we are not sure of or are uncertain about.”

8 When applied to bison management in the Gardiner Basin Area, the focus of this
9 litigation, the essential goal of the AMA is to gradually increase tolerance of Bison, Mr.
10 Munding testified.

11 20) Acting pursuant to these provisions, the current eight federal, state, and
12 tribal signatory agencies to the IBMP entered into an agreement in principle on a
13 proposal for Adaptive Management Adjustments in 2011, and set them forth in a
14 memorandum signed by representatives of the individual partners between March 31
15 and April 21, 2011. *See* Admin. Rec. 2618-2620. Among other things, the AMA
16 proposed to address bison migration outside of YNP by expanding the area in the
17 Gardiner Basin in Montana in which bison would be managed and, to some extent,
18 tolerated during certain times of the year throughout the entire Basin. The area of
19 expansion follows hydrological divides separating the Gardiner Basin in southern Park
20 County from the remainder of the county. Admin. Rec. 3120; *See also* Admin. Rec.
21 3131-3133 (description of the project setting in the EA), 2620 (topographical map
22 depicting boundary of AMA), Hrg. Transc. 890-891 (McCluskey). The enlarged
23 conservation area encompasses the north end of the Gardiner Basin, on both sides of the
24 Yellowstone River, but does not extend any further north than Yankee Jim Canyon, the
25 original northern extent of the conservation area disclosed in the 2009 Federal
26 Environmental Impact Statement (FEIS). The time period during which bison would be
tolerated in the Basin remains unchanged under the AMA, and a May 1st haze back date
remains in place. Hrg. Transc. 452 (Flowers), 680 (Mackay).

21) One of the factual issues before the Court is whether the AMA were
implemented during the winter of 2010/2011. FWP Region 3 Supervisor Pat Flowers
(whose region includes Park County, including the Gardiner Basin), DOL Executive

1 comments); Admin. Rec. 3117-3170 (EA). The Joint Decision was the agencies' "final
2 agency decision."

3 24) The expanded bison tolerance area under the AMA encompasses
4 approximately 70,000 acres, approximately 56,000 of which is public and 14,000 of
5 which is private. This tolerance area is in addition to the 5,800 acres of Zone 2 and
6 29,000 acres of the Eagle Creek/Bear Creek area in the Gardiner Basin comprising the
7 bison tolerance areas under the IBMP as configured prior to the adoption of AMA. See
8 Admin. Rec. 3131-3132.

9 25) As the previous Finding illustrates, the AMA expands the area which YNP
10 bison can occupy. It also changes significantly the terms under which bison will be
11 managed. The AMA allows diseased, unvaccinated, and untested YNP bison to roam on
12 both public and private lands in a broad geographic area, including lands in Park County
13 and lands of PCSA and Farm Bureau members, reflected on the map attached to the
14 AMA, without landowner permission. Admin. Rec. 2618-2620/ 2011 AMA.

15 26) Under the AMA, bison may occupy lands directly adjacent to livestock, may
16 briefly occupy the public highways and private property. Admin. Rec. 2618-2620/ 2011
17 AMA.

18 27) The approximate population of the Gardiner Basin is 1220, 837 of whom
19 resided in bison tolerance areas existing prior to adoption of the AMA and 363 of whom
20 reside in the expanded tolerance area under the AMA. Admin. Rec. 3132, 3170 (2010
21 census block information for Gardiner Basin); See also Trial Exh. J; Hrg. Transc. 38
22 (Hamilton). However, witnesses testifying at trial stated they previously saw bison in
23 the expanded tolerance area in years before the AMA were adopted, although not in the
24 same numbers that they observed in the winter of 2010/2011. See, e.g., Hrg. Transc. 118
25 (Rigler), 215 (Sperano) ("many times"), and 562-63 (Berg); See also Admin. Rec. 2725-
26 2729 (2005-2006), 2730-2731 (2006-2007), 2740-2742 (2008-2009), 2774-2777
(2009-2010) (record of bison outside YNP contained in annual reports of IBMP
partners and DOL Bison Operations Reports, in both tolerance zones and outside
tolerance areas).

27 28) Since at least the inception of the IBMP in 2000, untested, unvaccinated,
and untreated bison have been allowed to migrate into the Eagle Creek area year-round

1 and onto private residence property in the town of Gardiner. Hrg. Transc. 51 (Malone),
2 330, 332 (Mundinger), 448, 451 (Flowers); *See also* Admin. Rec. 2620 (map of AMA,
3 identifying Eagle Creek area). Accordingly, since the IBMP was adopted in 2000, the
4 portion of the Gardiner Basin with the highest concentration of residents (the town and
5 environs of Gardiner, Montana) has been located within a bison management area
6 where untested, unvaccinated, and untreated bison are “tolerated” year-round.

7 29) Also prior to adoption of the challenged AMA, and as anticipated in the 2000
8 IBMP, the State of Montana acquired the grazing rights to the Royal Teton Ranch (RTR)
9 in the Gardiner Basin (*See* Admin. Rec. 2432, 2472), and in 2008, the IBMP partners
10 approved adaptive management adjustments that authorized a certain number of tested
11 bison to migrate onto the RTR and certain neighboring lands (designated Zone 2)
12 during winter months. Hrg. Transc. 433 (Flowers), 769 (Sheppard); *See also* map
13 Admin. Rec. 2620. Petitioners do not challenge this tolerance configuration. They ask
14 the Court to permanently enjoin the AMA at issue, essentially seeking a return to the
15 tolerance areas that were adopted by the IBMP partners in 2008.

16 30) The IBMP partners did not have the opportunity to see these 2008 adaptive
17 management changes—contemplated in the 2000 IBMP—implemented until the winter
18 of 2010/2011, as that was when the first significant out-migration of bison from YNP
19 occurred following the State’s acquisition of the RTR grazing rights. Hrg. Transc. 449
20 (Flowers).

21 31) The winter of 2010/2011 was particularly severe in many areas of Montana,
22 including the Gardiner Basin, and in YNP in Wyoming, which experienced heavy
23 snowpack at relatively low elevations. *See* Hrg. Transc. 36 (Hamilton), 435, 456-50
24 (Flowers), 697 (Mackay), 759 (Sheppard); *See also* Hrg. Transc. 223 (Sperano) (agreeing
25 that on a scale of 1-10, the winter of 2010/2011 was somewhere between 8 and 10 in
26 terms of severity). Consequently, a large number of bison migrated out of the northern
Park boundary. Hrg. Transc. 457-59 (Flowers). According to Pat Flowers, an out-
migration of this size has been rare since 1999, when he assumed his current position as
Regional Administrator. *Id.* It has been estimated that approximately 1,400 bison
migrated into the Gardiner Basin in the winter of 2010/2011, Admin. Rec. 3086;
however, these total counts include approximately 700 bison held at the YNP Stephens

1 Creek capture facility, which by and large was filled to capacity from January through
2 April of 2011, as well as approximately 90 bison testing negative for brucellosis in the
3 Stephens Creek capture facility that were hauled to the Corwin Springs capture facility.
4 Hrg. Transc. 698 (Mackay). The number of bison that were roaming freely in the Basin
5 (including *within* the then-existing tolerance areas) on any given day during the winter
6 of 2010-11 was anywhere from approximately 5 to 360 and varied from day to day. Hrg.
7 Transc. 698-699, 740 (Mackay).

8 32) In 2011, property owners who owned property where bison were not
9 previously authorized by law, had to call Respondents to haze bison from their property,
10 and in some circumstances, were even forced to haze the bison from their property
11 themselves. Admin. Rec. 12936, 13000, 13176-13194/ Comments to the 2011 Draft EA;
12 State Respondents' Combined Ans. ¶ 10.

13 33) Mr. Hatfield testified that bison on private property can become aggressive
14 towards domestic pets by making fake charges towards kenneled dogs. Hrg. Transc.
15 70:1-15 (Hatfield).

16 34) Mr. Hatfield was unable to continue to allow his dogs loose within his yard
17 when bison were within a half mile of his property because it was unsafe. Hrg. Transc.
18 72:9-21 (Hatfield).

19 35) Bison also caused physical damage to Mr. Hatfield's private property. Hrg.
20 Transc. 73:16-25, 74:1-2 (Hatfield).

21 36) Joe Sperano, a resident of Gardiner Basin, testified that bison during the
22 2010/2011 winter destroyed some of his wheel lines, caused damage to his buildings and
23 satellite dish, and his trailer. Hrg. Transc. 215:20-25, 216:1-2 (Sperano).

24 37) The bison also caused damage to his house siding by rubbing against it. Hrg.
25 Transc. 217:2-3 (Sperano).

26 38) The bison would be aggressive with Mr. Sperano's horses in order to eat the
horses' hay. Hrg. Transc. 217:11-18 (Sperano). In addition, the bison repeatedly
destroyed Mr. Sperano's electric fences. Hrg. Transc. 217:22-25 (Sperano).

39) Peter Schmidt also lives in the Gardiner Basin and has done so for thirty
years. Hrg. Transc. 233:12, 3 (Schmidt).

1 40) Mr. Schmidt is a dispatcher for YNP and is also a member of the PCSG. Hrg.
2 Transc. 234:9, 16 (Schmidt).

3 41) He also suffered property damage due to the bison in the winter of
4 2010/2011 including damage to his house, wood pile and other parts of the property.
5 Hrg. Transc. 235:9-13 (Schmidt).

6 42) Mr. Schmidt testified that bison have caused a number of motor vehicle
7 accidents in YNP. He is concerned that if bison are let out of YNP there will be bison
8 caused motor vehicle accidents in the Gardiner Basin particularly because of the high
9 speeds. Hrg. Transc. 239:11-25 (Schmidt).

10 43) Mr. Schmidt testified he believed, based on his experience as a dispatcher
11 that this would put further strain on Park County resources to remove bison from the
12 road and deal with bison caused injuries. Hrg. Transc. 240:1-16 (Schmidt).

13 44) Multiple witnesses testified that attempts by properties owners to remove
14 bison from their private property were unsuccessful because the bison either reentered
15 the property or would not leave. Hrg. Transc. 68:16-25, 69:1-2, 73:6-11 (Hatfield); Hrg.
16 Transc. 216:11-12, 218:18-22 (Sperano); Hrg. Transc. 114:9-17 (Rigler).

17 45) In 2011, large numbers of bison congregated at school bus stops on occasion,
18 prohibiting the children from getting on or off the school bus. 25:1-12; 26:7-12; Admin.
19 Rec. 13176-13194/Comments to the 2011 Draft EA.

20 46) Pat Flowers testified that Respondents have now designed and are ready to
21 utilize a corral-like facility for children to wait in at the bus stop to avoid such problems.
22 Hrg. Transc. 550:6-13 (Flowers).

23 47) Undersheriff Hamilton responded to four separate incidents at school bus
24 stops of which only once were Respondents' personnel present. Hrg. Transc. 27:9-22
25 (Hamilton).

26 48) Testimony revealed that drivers in the area have become distracted by
viewing bison along Highway 89 South such that they have driven passed a stopped
school bus with its red lights flashing. Hrg. Transc. 77:10-19 (Hatfield).

 49) Multiple people testified that they do not want bison on their property
because they feel they are a danger. Hrg. Transc. 220:2 (Sperano); Hrg. Transc. 236:1-5
(Schmidt).

1 50) Undersheriff Hamilton has concerns for the safety of Park County deputies
2 who respond to requests to haze bison in order to assist the public health and safety.
3 Hrg. Transc. 28:19-25; 29:1-5 (Hamilton).

4 51) The response of Park County Sheriff deputies to bison calls takes deputies
5 away from other duties, ability to patrol and where they need to be. Hrg. Transc. 32: 13-
6 17 (Hamilton).

7 52) Frank Rigler owns land within the bison tolerance zone, some of which he
8 leases to the State for bison quarantine and some land on which he has rental units.
9 Hrg. Transc. 109-140 (Rigler).

10 53) Mr. Rigler testified that there were many mornings (at least a dozen times)
11 that Undersheriff Hamilton helped him chase bison off of his property and that there
12 was nobody there to help from either Fish, Wildlife and Parks or the Montana
13 Department of Livestock. Hrg. Transc. 114:9-17 (Rigler).

14 54) Mr. Rigler testified that some of his tenants had trouble getting from their
15 houses to their cars because of the bison. Hrg. Transc. 115:21-23 (Rigler).

16 55) Mr. Rigler testified that the bison tore down his fence and damaged his trees.
17 Hrg. Transc. 117:14-23 (Rigler).

18 56) Since the winter of 2010/2011, the State has undertaken fencing projects to
19 mitigate impacts from bison in the Gardiner Basin where they are not wanted. Only two
20 livestock operations operate year-round in the Gardiner Basin when bison might be
21 present under the AMA. Hrg. Transc. 641, 645, 681-684, 747-748 (Mackay); 835-836,
22 838-839 (Zaluski). The DOL has worked directly with the owners of those two
23 operations to install fencing to prevent commingling of bison and cattle. Hrg. Transc.
24 691-696, 710 (Mackay); 823-835, 832-833 (Zaluski); *See also* Trial Exh. K (photograph
25 of fencing used at one of the two cattle operations). At one operation, at the request of
26 the operator, the fencing is three-sided (the river side is open), consistent with the
landowner's conservation easement that requires a wildlife corridor to be available.
Fencing was installed on all but one side of the second cattle operation, but that open
side is not expected to present a problem, as bison do not typically use that area and did
not typically use that area even in 2011. DOL worked with both landowners in designing

1 the fences, and those landowners are pleased with the fence. Hrg. Transc. 823-825
2 (Zaluski); *See also* 691-697, 705, 710 (Mackay).

3 57) In addition to the DOL fencing of the two cattle operations, FWP began
4 developing a fencing plan for private residences in the Gardiner Basin in an effort to
5 reduce unwanted interaction with bison. Hrg. Transc. 469 (Flowers); 762 (Sheppard);
6 *See also* Trial Exh. M (email from Sam Sheppard to landowners regarding strategic
7 fencing, including map indicating residents' preferences for fencing). Where
8 landowners have expressed a desire for bison occupation of their land, no fencing has
9 been placed. Hrg. Transc. 778-779 (Sheppard).

10 58) The AMA management prescriptions closely track a recommendation
11 forwarded to the IBMP partners by a Citizens Working Group established in 2010 to
12 provide public perspectives on bison management. *See* Hrg. Transc. 196-98, 203-05
13 (Grosfield); Trial Exh. C (Citizens Working Group report). The Citizens Working Group
14 involved diverse interests, including three representatives from the cattle industry
15 (rancher Lawrence Grosfield, another rancher, and a representative from the Montana
16 Stockgrowers Association). Hrg. Transc. 196-98 (Grosfield). The group's consensus
17 recommendations to the IBMP partners included a recommendation to establish the
18 Gardiner Basin as "year-round habitat" for bison after discussions with area landowners
19 and installation of strategic fencing. Hrg. Transc. 203-05 (Grosfield); Trial Exh. C.

20 59) The amended AMA permits the expansion of Zone 2 of the IBMP to allow
21 bison to roam on public and private land where bison were not previously allowed to
22 roam pursuant to the IBMP. Admin. Rec. 2618-2620/2011 AMA.

23 60) Dr. Zaluski has served as the Montana State Veterinarian since 2007. He
24 has a degree in veterinary medicine and has received post-graduate USDA training in
25 brucellosis in livestock, particularly regarding the epidemiology of the disease. He is
26 responsible for all of the State of Montana's livestock health programs. Dr. Zaluski
27 chairs a subcommittee on brucellosis for the United States Animal Health Association
28 and was the President of the Western States Animal Health Association. Hrg. Transc.
29 785-789 (Zaluski); *See also* Trial Exh. W.

30 61) Dr. Zaluski has had extensive experience with brucellosis in livestock,
31 including regularly participating in brucellosis testing of livestock and assessing the risk

1 factors of brucellosis to the Montana livestock industry. The subject of brucellosis in
2 livestock and wild animals has consumed a major portion of his work as Montana's State
3 Veterinarian. Hrg. Transc. 789-793 (Zaluski).

4 62) For the last five years, Dr. Zaluski has been a voting partner and member of
5 the IBMP and has exercised the duties designated in the IBMP as those of the Montana
6 State Veterinarian. His role as an IBMP partner is separate and apart from the role of
7 fellow IBMP partner, DOL Executive Officer Christian Mackay. Dr. Zaluski's duties
8 focus on the risk assessment of brucellosis transmission from wild bison and elk to the
9 State's domestic cattle herds and on the management of wild bison as they migrate into
10 Montana from YNP. By casting a negative vote, he has effectively vetoed proposed
11 programs promoted by other IBMP members because he believed the proposals
12 increased the risk of brucellosis to the cattle industry. Hrg. Transc. 806-807, 811-814
(Zaluski); *See also* Hrg. Transc. 673-675 (Mackay).

13 63) Dr. Brian McCluskey is employed by USDA-APHIS as the Chief
14 Epidemiologist for the western half of the United States. His duties include the study of
15 how livestock diseases are transmitted and how to manage such diseases. He is a Doctor
16 of Veterinary Medicine, has a Master's Degree in Infectious Diseases, and a Doctorate in
17 Epidemiology. As part of his Master's studies, he wrote a paper on the disease
18 brucellosis in wildlife and domestic cattle. In his present position, his office provides
19 technical assistance to states regarding the source of an outbreak of a livestock disease,
20 including brucellosis, and in preventing or managing the spread of the disease. Hrg.
21 Transc. 879-882 (McCluskey); *See also* Trial Exh. X.

22 64) Dr. McCluskey's previous position with APHIS was as the Regional Director
23 of Veterinary Services for the Western States. Prior to assuming that position, he served
24 as a USDA epidemiology officer and was responsible for the USDA oversight of the
25 brucellosis eradication program in Colorado. When he became Regional Director, he
26 became the chief veterinarian for the western states area of the United States. He had
direct responsibility for all APHIS veterinary services and APHIS services directed to
and on behalf of all the western states. In such capacity, from November of 2010 to
about February of 2012, he served as the APHIS representative on the IBMP partnership
group. During that time he gave his approval, on behalf of APHIS, to the AMA that were

1 adopted in principle in the spring of 2011. At the time the AMA received final approval
2 in 2012, he had moved to his present position. Therefore a different APHIS
3 representative, as a partner, signed off in final approval of the AMA on behalf of APHIS.

4 65) Both Dr. Zaluski and Dr. McCluskey have read and are familiar with the
5 literature on the IBMP website that concerns brucellosis, and both keep current with the
6 publication of other literature on the disease. In particular, as IBMP partners and
7 veterinarians, both depend on and use the studies written by Keith Aune. Hrg. Transc.
8 791, 829-830 (Zaluski); 884 (McCluskey).

9 66) In his capacity as State Veterinarian and IBMP partner – and prior to any
10 initial adoption of the AMA in principal or otherwise – Dr. Zaluski performed a risk
11 assessment as to whether the proposed expansion of the bison tolerance zone in the
12 Gardiner Basin would increase the present risk of transmission of brucellosis from YNP
13 bison to domestic cattle in the Basin and to cattle operations in the State of Montana.
14 Hrg. Transc. 830-843 (Zaluski). Similarly, in 2011, while serving as a voting IBMP
15 partner representative for APHIS, Dr. McCluskey completed a risk assessment of the
16 possibility of the transmission of brucellosis from wild YNP bison to domestic cattle
17 prior to his initial approval of the AMA. Hrg. Transc. 885-886 (McCluskey).

18 67) Dr. Zaluski and Dr. McCluskey, based on their education, knowledge, and
19 experience and based on their risk assessments, both concluded that the risk of
20 brucellosis transmission to cattle at a minimum would be unchanged, but probably
21 would be somewhat decreased under the AMA proposals. Brucellosis cannot be
22 absolutely prevented, as zero risk is unattainable. However, they opined that all risks in
23 the proposed expanded tolerance area can be reasonably and effectively managed using
24 new bison and cattle management tools available to the DOL and the livestock
25 operators. Hrg. Transc. 830-843 (Zaluski); Hrg. Transc. 900-901 (McCluskey).

26 68) Keith Aune is a wildlife biologist formerly employed as chief of research for
FWP and now serving as a senior conservation scientist for the Wildlife Conservation
Society. *See* Trial Ex. I. He is an expert on bison and elk conservation and
management, as well as maintenance and transmission of brucellosis by and between
these species. *See* Hrg. Transc. 621. This Court is well aware of Mr. Aune's stellar
reputation and finds Mr. Aune to be exceptionally credible. Mr. Aune testified about

1 published, peer-reviewed scientific research he performed concerning the persistence of
2 brucellosis bacteria in the natural environment of the Gardiner Basin. See Hrg. Transc.
3 623-38. This research revealed that brucellosis-infected material decays rapidly in the
4 late spring period due to mechanisms that include freezing, thawing, ultraviolet
5 radiation, and consumption by scavengers, such that if bison were to introduce
6 brucellosis-infected material into the environment during the month of May, there is
7 only a 0.05 percent chance that such material would persist after 30 days. See Hrg.
8 Transc. 630. Mr. Aune testified that, in his opinion, so long as bison move back into
9 Yellowstone National Park by early May as provided by the AMA, there would be a
10 negligible risk of brucellosis transmission from bison to cattle when cattle are brought
11 into the Gardiner Basin in June for summer grazing. Hrg. Transc. 632-38. Petitioners
12 presented no contrary expert testimony.

13 69) In December 2010, APHIS made regulatory changes that protect both the
14 State of Montana from a downgrade in its brucellosis class-free status and any particular
15 rancher from having to depopulate an entire herd due to confirmation of brucellosis in
16 one animal. 9 C.F.R. Part 78; See also Hrg. Transc. 797-805, 815-816 (Zaluski). Dr.
17 McCluskey participated in the APHIS decision-making process for the rule changes. He
18 favored the changes as they focus the efforts of APHIS on those geographical areas
19 where the disease exists and targets APHIS resources to where the disease is found,
20 while at the same time not punishing an entire State for an outbreak in a single area of
21 the State. Hrg. Transc. 888-890 (McCluskey).

22 70) If several herds came down with brucellosis, even though APHIS changed its
23 rules, other states could decide to not accept cattle from Montana. Hrg. Transc. 863:4-7
24 (Zaluski).

25 71) If a neighbor's cattle herd tests positive for brucellosis, then those
26 landowners neighboring that herd are classified as an "adjacent herd," and they have to
test their herd for brucellosis. Hrg. Transc. 871: 8-15 (Zaluski).

72) The APHIS rule changes, placing the onus of testing on the individual herd
and not on the entire industry, is of tremendous financial benefit to the livestock
industry in Montana, as it removes the specter of financial disaster for the industry
should a Montana cattle herd contract brucellosis. Every year the State avoids statewide

1 testing requirements, the Montana livestock industry saves from \$5 million to \$14.5
2 million. Hrg. Transc. 791-805, 814-815, 826-827 (Zaluski).

3 73) During Dr. Zaluski's tenure as State Veterinarian there have been five
4 outbreaks of brucellosis in Montana. Three occurred in domestic cattle herds, and two
5 in private bison herds. In all cases, the outbreaks were epidemiologically linked to elk.
6 Hrg. Transc. 797-805, 815-816 (Zaluski). During Dr. Zaluski's tenure as State
7 Veterinarian, there has not been a single case of brucellosis in a domestic cattle herd
8 that was linked to YNP bison. *Id.*

9 74) Dr. Bob Hillman, PCSA's expert witness, served as State Veterinarian in
10 Idaho when he found brucellosis in elk. As in Montana, Idaho had a brucellosis-infected
11 cattle herd for which the proven source of infection was elk. Hrg. Transc. 373 (Hillman).

12 75) Dr. Hillman admits that he is not knowledgeable as to the brucellosis rate of
13 infection of elk in the Greater Yellowstone Basin area, but that elk do abort from
14 brucellosis and do so at an even later time of the year than do bison. Hrg. Transc. 404-
15 405 (Hillman). Implicit in this testimony is that elk abortions could occur long after
16 YNP bison are hazed back into YNP by May 1st and, therefore, infected brucellosis
17 material from elk could remain in the environment even after cattle—under seasonal
18 grazing permits beginning on June 1st—are allowed back into the Gardiner Basin area.
19 Hrg. Transc. 747-748 (Mackay).

20 76) Dr. Hillman is not an IBMP member nor is he an employee of APHIS. Hrg.
21 Transc. 414 (Hillman). While he professes to have a strong interest in the issue of
22 brucellosis in the Yellowstone area, he has never, in the 12 years that the IBMP partners
23 have been meeting (2000-2012), attended an IBMP public meeting. Furthermore, he
24 has never submitted any comments to the partners or voiced any concerns to them
25 regarding the subject of brucellosis. During this time period, he was the State
26 Veterinarian of both Idaho and Texas. Hrg. Transc. 415 (Hillman).

77) Dr. Hillman admits the he knows of no cases in Montana where domestic
cattle herds became brucellosis-infected from a transmission of the disease from YNP
bison. Hrg. Transc. 405, 413 (Hillman).

78) In order to comply with APHIS requirements, and to manage the risk of
transmission of brucellosis where the risk of transmission from wildlife to livestock is

1 the greatest, in 2010 DOL adopted administrative rules identifying a Designated
2 Surveillance Area (DSA). Hrg. Transc. 794-805 (Zaluski). The DSA program, which
3 covers portions of Madison, Gallatin, Beaverhead, and Park Counties (the area was
4 delimited by DOL's known range of brucellosis positive elk) and which Dr. Zaluski
5 heads, has instituted a testing policy to prevent the transmission of brucellosis from any
6 domestic herd or wild animal in the DSA to a Montana cattle herd outside the DSA.
7 While the testing mandates are rigorous, the greatest portion of the costs of the testing
8 is borne by the DOL and not by the individual herd owner. Montana's DSA program
9 and surveillance area is fully compliant with any and all APHIS requirements regarding
10 herd testing and the assessment of the risks of brucellosis transmission from wild
11 animals in Montana. Hrg. Transc. 794-805 (Zaluski). Most importantly, establishment
12 of the DSA program was a result of brucellosis transmissions from elk to livestock and
13 preceded and exists independently of the AMA challenged in this action. *Id.* at 923
14 (Zaluski).

15 79) According to Mr. Aune, whose work frequently has focused on biological and
16 wildlife management issues concerning bison and elk in the Greater Yellowstone area,
17 the majority of the elk that migrate into the Gardiner Basin during the winter share
18 winter and summer ranges with bison in YNP. *See* Hrg. Transc. 638-39, 642-43. These
19 elk have the opportunity to commingle with bison inside YNP in addition to any
20 opportunities they may have to commingle with bison in the Gardiner Basin outside
21 YNP. *See* Hrg. Transc. 642-43. Furthermore, scientific studies have found that
22 brucellosis exposure rates among studied elk that commingled with brucellosis-infected
23 bison were similar to brucellosis exposure rates observed among elk elsewhere in the
24 Greater Yellowstone area that did not contact bison. *See* Hrg. Transc. 639-42. For elk,
25 the most important factors in brucellosis prevalence are the length of time elk spend
26 concentrated during the spring and the density of elk. *See* Hrg. Transc. 644-45. As a
result, Mr. Aune testified that, in his opinion, the AMA would have no influence on the
prevalence of brucellosis among elk in the Gardiner Basin. *See* Hrg. Transc. 645.
Petitioners offered no contrary expert testimony.

80) Dr. Zaluski and Dr. McCluskey agreed with Dr. Hillman that bison, if
exposed to a large enough dose of brucellosis bacteria, may become infected and may

1 transmit the disease to other bison, elk, or domestic cattle. They also agreed that the
2 main means of transmission of brucellosis from bison to another species comes from
3 female bison, generally from infected abortion tissue. Both disagreed with Dr. Hillman's
4 assessment that bull bison pose a real risk of brucellosis transmission. The transmission
5 possibility would only occur through bull semen, and there is such a low level of
6 bacterial concentration in semen that the possibility of transmission from a bison bull
7 coming into sexual contact with a female domestic cow is extremely low—almost to the
8 point of zero. Hrg. Transc. 899 (McCluskey). As opposed to Dr. Hillman's unsupported
9 opinion on that issue, Dr. Zaluski cited a recent USDA study that indicates bull bison
10 present, at best, a minimal risk. Hrg. Transc. 807-809 (Zaluski).

11 81) Dr. Zaluski and Dr. McCluskey also disagreed with Dr. Hillman's testimony
12 that bison will have unfettered access to cattle under the AMA. The opposite is true.
13 Under the AMA, the expansion of the bison tolerance zone and the use of fencing will
14 actually reduce the opportunity for bison and cattle contact. The fencing – found to be
15 satisfactory by the two year-round livestock operators – will reduce the opportunity for
16 commingling to the point where the odds are low that commingling will occur. Hrg.
17 Transc. 823, 833-834 (Zaluski); 888, 895-96 (McCluskey). In forming their opinions in
18 this matter, in addition to the fencing, both experts found that important factors were
19 the low number of livestock operations in the Gardiner Basin's proposed expanded area
20 and the low number of cattle on those operations. With only two operations and only a
21 few cattle, the chances of contact between bison and cattle will be low. Hrg. Transc. 831-
22 832 (Zaluski); 879, 886-888 (McCluskey); 681-684, 747-748 (Mackay).

23 82) The IBMP requirement of spatial separation will continue due to the fencing
24 in place and the continued surveillance efforts of the DOI. Testimony revealed that
25 DOL will still work to prevent cattle and potentially infected bison from occupying the
26 same space. Temporal separation will still occur in terms of the haze-back date. Hrg.
Transc. 832-833 (Zaluski); *See also* 895-896 (McCluskey); 679-680, 691-697, 707-710,
753-754 (McKay).

83) Dr. Zaluski also opined that with the much larger tolerance zone, it will be
easier for DOL to haze bison away from the two livestock operations and out into new
bison habitat, which will make hazing less time-consuming than previously. Therefore,

1 the DOL riders will have more time available to respond to any citizen or law
2 enforcement requests for assistance. Hrg. Transc. 688-691, 700-703 (Mackay); 832-
3 834 (Zaluski); *See also* Hrg. Transc. 890 (McCluskey) (geographic divide separating the
4 tolerance area from non-tolerance area allows for effective control).

5 84) Dr. Zaluski also concluded that the chances of fence line contact under the
6 AMA, and thus transmission of brucellosis, are extremely small. For such contact to
7 occur, a series of events need to happen, all of which are remote. First, there are only
8 two operations, both of which are fenced with bison deterrent fencing, and both of
9 which have few cattle. Second, there would have to be an infected female bison present
10 at the fence line leaving infected material at the fence line at the same time a cow were
11 present. Third, the cow would have to somehow ingest or contact the infected material
12 over or through the fence. Finally, the fact that all of the cattle in both operations have
13 been vaccinated helps prevent infection. Hrg. Transc. 835-836, 838-839 (Zaluski).

14 85) Similarly, Dr. McCluskey disagreed with Dr. Hillman's opinion that fence
15 line transmission risks were increased under the AMA. As an epidemiologist, Dr.
16 McCluskey is familiar with both cattle-to-cattle transmissions and wildlife-to-domestic-
17 livestock transmissions, and how the species interact. With cattle, there is a greater
18 density of contact, with multiple cattle congregating at a fence line across from other
19 groups of multiple cattle also congregating at the fence line, thus creating an
20 opportunity for contact. Bison do not congregate in the same manner, nor do cattle
21 congregate in the same immediate area as bison. For virtually the same reasons as were
22 cited by Dr. Zaluski and because of the different behaviors of the species, Dr. McCluskey
23 also concluded that the possibility of fence line transmission is quite remote. Hrg.
24 Transc. 891-894, 897 (McCluskey).

25 86) Both Dr. McCluskey and Dr. Zaluski provided similar testimony discounting
26 Dr. Hillman's theory as to the possibility of scavengers transporting infected material to
the few cattle in the fenced operations. The likelihood of infected material being left
near one of the operations is small, the likelihood of scavengers taking it and somehow
transporting it to the susceptible cattle is smaller still, and finally the likelihood of the
cattle ingesting it is even smaller. Again, the cattle in both operations have been
vaccinated, which further reduces the chances of infection. Both Dr. Zaluski and Dr.

1 McCluskey opined that Dr. Hillman's scavenger outcome is an extremely low risk to
2 cattle. Hrg. Transc. 836-839 (Zaluski); 894-95 (McCluskey).

3 87) Additionally, both Dr. Zaluski and Dr. McCluskey discounted Dr. Hillman's
4 opinion regarding the risk of transmission through the shedding of small amounts of
5 brucellosis-infected material—such as blood or tissue—on grass. The amount of any
6 such material on grass or feed would be minute, it would dry out quickly, and therefore
7 there would be virtually no chance that this material would be left in a viable condition
8 at an exact location in this large geographical area where a vaccinated cow in a fenced
9 operation would ingest it and become infected with brucellosis. Hrg. Transc. 837-838
(Zaluski); 896-897 (McCluskey).

10 88) Dr. Zaluski and Dr. McCluskey also disagreed with Dr. Hillman's opinion
11 that the AMA presented a risk of human contraction of undulant fever. Humans would
12 need to ingest infected material, which is highly unlikely. From his research, Dr. Zaluski
13 testified that in the last decade in Montana there have been no documented cases of
14 undulant fever in humans. Hrg. Transc. 811, 839-840 (Zaluski). Dr. McCluskey, as
15 APHIS Veterinarian for all of the western states, said that the transmission of undulant
16 fever in the United States is exclusively through the ingestion of food products. There is
17 little evidence that humans actually contract undulant fever from contact with abortive
18 materials. The 100 or so yearly cases of undulant fever in this country occur in states
19 such as Texas, California, or Arizona, the states that border Mexico where undulant
20 fever is caused by the consumption of food items made from unpasteurized milk
21 products. With the management tools in the AMA, which promote separation of bison
22 and humans, the risk of undulant fever to humans is not increased by the adoption of
23 the AMA, and may in fact be decreased. Hrg. Transc. 897-899 (McCluskey).

24 89) On the subject of undulant fever, Dr. Hillman admitted that the town of
25 Gardiner, where most of the people in the Gardiner Basin reside, is located in a bison
26 tolerance zone all twelve months of the year and that bison have "unfettered" access to
that town and its residents. He also admitted he knows of no instances in which a
Gardiner resident has contracted undulant fever from bison. Hrg. Transc. 403-404
(Hillman).

1 90) Petitioners also introduced evidence from witnesses living outside the
2 Gardiner Basin who fear that expanding the bison tolerance area to include the entire
3 Gardiner Basin will harm the livestock industry outside the Basin. For example, Bob
4 Hanson, President of the MFBF, described that the MFBF was a party to the lawsuit
5 because it believed the AMA would place ranchers throughout Montana at a greater risk
6 for brucellosis transmission. Hrg. Transc. 154, 155-56 (Hanson). Likewise, Martin
7 Davis testified that in the summer, beginning in mid-June, he grazes cattle near Dome
8 Mountain in the Stands Basin, north of the Gardiner Basin, and he believes bison can
9 cross the divide between the basins, placing his cattle at risk of exposure to brucellosis.
10 Hrg. Transc. 87-88, 99, 103 (Davis). He acknowledged, however, that the mountain
11 pass between the basins is 7,000 feet in elevation and covered with snow in the winter.
12 *Id.* at 103. He also acknowledged that he was unaware that the bison management
13 policy at issue requires that bison be hazed back to YNP by May 1 each year, that FWP is
14 authorized to shoot bison outside the tolerance zone, and that hunters can take bison
15 outside the tolerance zone at any time of the year. *Id.* at 105-106 (Davis); *See also* Hrg.
16 Transc. 453-454 (Flowers) (discussing FWP authority and new hunting regulations).

17 91) The testimony of these witnesses runs contrary to the opinions of the Citizens
18 Working Group, which consisted of diverse membership including Mr. Grosfield and
19 other livestock industry representatives, which made consensus-adopted
20 recommendations to the IBMP partners that included a measure very similar (and
21 actually broader) than the challenged AMA. Hrg. Transc. 203-205 (Grosfield).

22 92) Further, as noted above, Dr. Zaluski and Dr. McCluskey do not even believe
23 that the expanded tolerance area will increase the risk of brucellosis transmission from
24 YNP to cattle in the Gardiner Basin, much less beyond the Basin. Moreover, Dr. Zaluski
25 testified that the Montana Department of Transportation worked with Turner
26 Enterprises in the design of the bison guard at Yankee Jim Canyon. Both he and Dr.
McCluskey concluded that the use of the bison guard, along with the high elevation
geographical boundaries, further strengthens the IBMP partner efforts to provide a
“contained” environment for bison. The bison guard, along with the wing fences on
each side of the guard, and the geographical barriers work together to provide an
effective means of keeping bison from traveling north into the Paradise Valley. It

1 reduces the risk of transmission of brucellosis from any infected YNP bison to domestic
2 cattle north of the bison guard. Hrg. Transc. 840-841(Zaluski); 890-891 (McCluskey);
3 703-705, 710 (Mackay).

4 93) Yankee Jim Canyon has been regarded as the northern most boundary of the
5 tolerance area for bison migrating north out of YNP since adoption of the IBMP. *See,*
6 *e.g.*, Admin. Rec. 2435 at ¶ 22; *See also* Admin. Rec. 2474 at ¶ 22.

7 94) In the end, Montana's State Veterinarian Dr. Zaluski was adamant in his
8 opinion that the AMA will be of benefit to the Montana livestock industry. He testified
9 that the chances of commingling will be the same or reduced due to the use of fencing on
10 the two cattle operations in the Gardiner Basin. He further noted that creating a larger
11 management area that is more useful and is directed by geographical features, rather
12 than an artificial "line on the ground" as was used for the original IBMP Zone 2, is of
13 great value and helps reduce the previous pressures on the DOL. He also testified that
14 the likelihood of contact between infected bison and cattle is decreased, and the risk of
15 transmission of brucellosis from wild bison to domestic cattle is not increased under the
16 AMA and in fact may be reduced under the AMA. Hrg. Transc. 842-843, 874, 877
17 (Zaluski); 705, 707-709, 753-754 (Mackay).

18 95) The Montana Board of Livestock oversees the DOL and is composed of
19 representatives of the Montana cattle industry. The DOL supports Dr. Zaluski's
20 opinions and his decisions provided in his capacity as State Veterinarian and IBMP
21 partner regarding the approval and adoption of the AMA by the IBMP partners. Hrg.
22 Transc. 918-919 (Zaluski).

23 96) Petitioners also claim that adoption of the AMA limits the ability of their
24 members to take up livestock operations in the future. However, they produced no
25 testimony from any resident of the Gardiner Basin who has concrete plans to take up
26 livestock operations in the foreseeable future. For example, Frank Rigler has leased a
portion of his property to the DOL for a bison management study since 2006, and as a
condition of the lease, he is prohibited from running cows on his property. Hrg. Transc.
112, 142 (Rigler). While he testified that when his lease runs out, he intends to calve a
hundred pair on his property, *Id.* at 112, he also admitted he would like to continue the
current lease into the future. *Id.* at 143. Moreover, Dr. Zaluski testified that Mr. Rigler

1 expressed interest in extending the current \$25,000 annual lease on Mr. Rigler's
2 property to DOL for an additional six years. Hrg. Transc. 827-829 (Zaluski).

3 97) While bison may present public safety risks, See e.g., Hrg. Transc. 484
4 (Flowers), those risks are no greater than the risks presented by many forms of wildlife
5 in the Gardiner Basin. Likewise, the public safety risks posed by the presence of bison in
6 the expanded tolerance area are no greater than the risks posed by the presence of bison
7 in the town of Gardiner. *Id.*

8 98) Additionally, residents of the Gardiner Basin testifying both for Petitioners
9 and Respondents indicated that they frequently encounter large wildlife species on and
10 near their property, including elk, deer, moose, bighorn sheep, grizzly bears, black
11 bears, wolves, and mountain lions. See Hrg. Transc. 563 (Berg), 581 (Page), 594
12 (Schneider), 611 (Bumann); See also Hrg. Transc. 82-83 (Hatfield) (grizzly bears,
13 mountain lions, black bears), 123, 147 (Rigler) ("five grizzly bears at one time"), 226-28
14 (Sperano) (one or two grizzly bears pass through his property every night in the fall,
15 mountain lions have been present, 30 big horn rams were occupying his property at the
16 time of his trial testimony, and previously a herd of 800-900 elk grazed on the bench
17 above his home), 247 (Schmidt) (four grizzly bears on adjoining property at one time).
18 Indeed, the same individuals who expressed their concerns about the risks posed by
19 bison also acknowledged that other wildlife can present a threat to personal safety. See
20 Hrg. Transc. 43 (Hamilton) (grizzly bear maulings present a threat to public health and
21 safety); 83, 85 (Hatfield) (bear on property charged witness's wife; witness and family
22 confined in house due to wounded grizzly bear in yard; presence of grizzly bears,
23 mountain lions, and black bears present safety concerns for daughter accessing school
24 bus); 147 (Rigler) (bears present safety issue for witness and family); 247 (Schmidt) (he
25 and wife mindful of grizzly bears as they leave for and return from work in the dark).

26 99) Undersheriff Hamilton described an incident in 2011 involving a woman who
was unable to access her home due to the presence of a bison in her yard. The incident
occurred in the town of Gardiner, a bison tolerance area since the IBMP was adopted in
2000. Hrg. Transc. 25, 35 (Hamilton).

100) Related to the previous Finding, the Court also finds that residents of the
town of Gardiner have frequently encountered bison moving through the populated

1 town center area during winter and early spring months, crossing the bridge and
2 occupying streets, lawns, parking lots, and the Gardiner school football field. *See* Hrg.
3 Transc. 51-52 (Malone) (“the town of Gardiner tolerates bison”); 574 (Baker) (bull bison
4 in Food Farm supermarket parking lot); 579 (Page) (eight to ten bison walking down
5 Gardiner street in front of her house); 609-10 (Bumann) (herds of 20 to 40 bison
6 coming into town).

7 101) Despite the intermittent presence of bison for many years in the Gardiner
8 Basin—including in the town of Gardiner which is more heavily populated than the rural
9 areas comprising the expanded tolerance area—there have been no injuries caused by
10 bison attacking humans, even during the winter of 2010/2011 when large numbers of
11 bison migrated into the Gardiner Basin. *See* Hrg. Transc. 39 (Hamilton); 239
12 (Schmidt); 464 (Flowers). In particular, despite the frequent presence of bison on the
13 Gardiner school football field, no children have been injured by bison. *See* Hrg. Transc.
14 580 (Page); 709 (MacKay).

15 102) Gardiner Basin residents testified that a few practical measures generally
16 suffice to avoid problems with bison, just as with grizzly bears, black bears, elk, and
17 other species that are encountered by those who choose to live near the boundary of
18 YNP. *See* Hrg. Transc. 564 (Berg); 580-81 (Page); 595-96 (Schneider); 613-14
19 (Bumann). Measures such as installation of fencing around gardens and trees, use of
20 night lights and motion-activated lights, close watch of family pets, and general
21 heightened alertness during customary seasons of wildlife presence have served to
22 reduce or eliminate conflicts between people and wildlife in the area. *See* Hrg. Transc.
23 485-86 (Flowers); 564 (Berg); 580-81 (Page); 595-96 (Schneider); 611-14 (Bumann).
24 Petitioners’ witnesses also testified as to the precautionary measures they take or are
25 aware of given that they live in the presence of wildlife. *See, e.g.*, Hrg. Transc. 80-81,
26 83, 85 (Hamilton) (drove daughter to bus stop when grizzly bear was present on
property; uses electrical fence around garden; installed fence and gate); 247 (Schmidt)
(mindful of grizzly bears when he and wife leave for work and return home in the dark).

103) Additionally reflecting the tolerance for bison among the Gardiner Basin
residents, a 2011 FWP survey of landowners in the Gardiner Basin’s Little Trail Creek
neighborhood (where Petitioners’ witness, Mr. Sperano, resides) identified two out of 39

1 property owners who indicated no tolerance for wild bison on their property. *See* Hrg.
2 Transc. 772-74, 779-80 (Sheppard); Trial Exh. M.

3 104) To assist Gardiner Basin residents with installation of fencing to address
4 conflicts with bison under the AMA, five non-profit conservation organizations,
5 including Respondent-Intervenors Greater Yellowstone Coalition and Natural
6 Resources Defense Council, offered financial assistance to willing landowners for
7 fencing of their property to address past or anticipated conflicts with bison. *See* Hrg.
8 Transc. 600-602 (Pearson).

9 105) As of the date of the trial in this case, this effort had helped to fund five
10 projects in the Gardiner Basin, including installation of fencing around homes, trees,
11 and springs. *See* Hrg. Transc. 601 (Pearson). As initially crafted, the program asked
12 landowners to contribute either 25 percent of the cost of fencing or provide labor for
13 fencing construction. *See Id.* In the current year, the program has been modified to
14 provide a flat contribution of 50 percent of project cost, up to a maximum contribution
15 of \$1,000. *See Id.* In addition, for those Gardiner Basin landowners who installed
16 fencing at their own expense to address conflicts with bison, the conservation
17 organizations have offered to reimburse them for a portion of their out-of-pocket costs.
18 *See* Hrg. Transc. 602-03 (Pearson).

19 106) Keith Hatfield and Peter Schmidt, are Gardiner Basin neighbors who
20 recently installed new fencing to address past conflicts with bison. *See* Hrg. Transc. 80-
21 81 (Hatfield); 245-46 (Schmidt); Trial Exh. A (photo of Hatfield fence), D (photo of
22 Schmidt fence). The new fencing includes a gate that can be closed to block the
23 driveway through which bison accessed the Hatfield and Schmidt properties during the
24 winter of 2010-11. *See* Hrg. Transc. 81 (Hatfield); 245-46 (Schmidt).

25 107) The remaining two Gardiner Basin witnesses for Petitioners, Franklin Rigler
26 and Joseph Sperano, have declined to install new fencing to address conflicts with bison
even when offered subsidized assistance with fencing installation. *See* Hrg. Transc. 148-
49 (Rigler); 225-26 (Sperano).

108) Despite the inconveniences that are sometimes involved, many landowners
and residents in the Gardiner Basin accept their interactions with large wildlife species
as “part of living here.” Hrg. Transc. 564 (Berg); 596 (Schneider); 612 (Bumann). Even

1 Petitioners' witness, Joe Sperano, admitted that he had previously stated that he cannot
2 blame bison for property damage he experienced during the winter of 2010-11, because
3 he lives in a wildlife area in close proximity to YNP. Hrg. Transc. 229-30 (Sperano).
4 Indeed, many landowners and residents in the Gardiner Basin view the presence of
5 wildlife, including bison, on and near their property as a significant factor contributing
6 positively to their quality of life and the use and enjoyment of their property. See Hrg.
7 Transc. 564-65 (Berg) (neighbor of Joe Sperano, who lives across the road); 568
8 (Baker); 580-81 (Page); 586 (Hoeninghausen); 595-96 (Schneider); 612 (Bumann).

9 109) Petitioners PCSA and MFBF did not present evidence that any of their
10 members faces an actual threat of brucellosis transmission to cattle due to seasonal
11 bison occupancy of lands in the Gardiner Basin. There are two year-round cattle
12 operations in the Gardiner Basin. See Hrg. Transc. 681-84 (Mackay). Petitioners have
13 not demonstrated that either of these landowners is a member of their organizations or
14 that they fear injury from the challenged AMA. Rather, these landowners worked with
15 DOL to secure fencing for their cattle operations and are satisfied with the outcome. See
16 Hrg. Transc. 691-95, 710 (Mackay); 825 (Zaluski); 896 (McCluskey). Neither operator
17 appeared before the Court to object to the Gardiner Basin bison management
18 adjustments.

19 110) Although Petitioners have identified Messrs. Rigler and Sperano as
20 ranchers, neither has cattle on his property nor did either testify as to any concrete plans
21 to have cattle on his property in the foreseeable future. See Hrg. Transc. 142-43
22 (Rigler); 214 (Sperano).

23 111) Petitioners relied on the affidavit testimony of Jim Stermitz to establish an
24 interest in cattle operations in the Gardiner Basin, but Mr. Stermitz does not personally
25 conduct any cattle operation and the person to whom he leases his property (one of the
26 two operators) did not appear at trial in opposition to the AMA. Hrg. Transc. 683-84
(Mackay).

112) Petitioners did not present testimony by any member who holds a permit for
a federal grazing allotment in the Gardiner Basin. Petitioner PCSA originally submitted
the affidavit of Lew Wilks to demonstrate an interest in a federal grazing allotment in
the Gardiner Basin, but Mr. Wilks later voluntarily relinquished his grazing permit for

1 that allotment. See Letter from Lewis Wilks to Tina C. Lanier (July 27, 2011) [attached
2 as Ex. 3 to Respondent-Intervenors Bear Creek Council, et al.'s Response to Petitioners'
3 Opening Brief in Support of Summary Judgment on MEPA Claims (filed Oct. 22, 2012)].

4 113) DOL does not interpret its permit and health certificate statute and
5 regulations (Mont. Code Ann. § 81-2-703 and ARM 32.3.204) or the animals running at
6 large statute (Mont. Code Ann. § 81-4-201) as applying to wild bison. Aff. Dr. Martin
7 Zaluski ¶7 (Sept. 28, 2011). Likewise, DOL does not interpret its general quarantine
8 regulations to apply to wildlife, including YNP bison or any bison that are not owned or
9 controlled by a person. Rather, DOL interprets its general quarantine regulations to
10 apply to privately-owned domestic or captive animals. *Id.* at ¶ 8.

11 114) Numerous elk, in addition to bison, migrate from YNP into the Gardiner
12 Basin. Aff. Pat Flowers¶ 15 (Sept. 29, 2011). During the winter of 2010/2011,
13 approximately 3,300 elk migrated out of YNP into the Gardiner Basin and to points
14 further north in Park County. *Id.* If the State of Montana were to attempt to address the
15 transmission of brucellosis by quarantining elk that may be infected with brucellosis, it
16 would be an exercise in futility. *Id.*

17 115) Except for the fact that it is an *interagency* wildlife management plan that
18 was *court-approved* in settlement of a federal lawsuit, the IBMP is no different than all
19 FWP wildlife management plans, none of which are adopted by FWP as administrative
20 rules. Only, *portions* of certain wildlife management plans have been either
21 incorporated from, or adopted into, statutes or administrative rules. For example, FWP
22 adopts its wildlife regulations – such as its fishing and hunting regulations and its
23 seasons and quotas, which are enforceable and govern private conduct - through a
24 rulemaking-type process. However, the IBMP, like other FWP wildlife management
25 plans, is not adopted and does not regulate the conduct of private individuals. Aff.
26 McDonald (Jul. 30, 2012) (copy attached to State's Brf. in Supp. of Mo. for Part. SJ of
July 31, 2012).

116) Even Petitioners' own expert, John Mundinger, agrees that FWP wildlife
management plans generally are not adopted as administrative rules. Hrg. Transc. 335-
36 (Mundinger).

1 117) When asked whether, given these facts, he anticipated that in future years
2 when a large outmigration of bison into the Gardiner Basin might occur whether the
3 conditions from the winter of 2010/2011 would replicate themselves, Dr. Zaluski stated:
4 “with the ability to slaughter, I cannot imagine a year like we had in 2010/2011 is likely
5 at all. As a matter of fact, I would find it very difficult to foresee such a repeat of those
6 circumstances.” Hrg. Transc. 844-45 (Zaluski).

7 118) Similarly, when asked by the Court whether a harsh winter would result in a
8 situation similar to that of 2010/2011, Pat Flowers stated that he did not believe that
9 similar conditions would result, specifically because: “We’ll still have the trap available,
10 assuming there is no Executive Order that limits our ability to ship out of that trap.
11 Also, we’re going to be, hopefully, hunting on a broader landscape, so both through
12 tribal hunting and state hunting, hopefully, we can we remove more animals that way.
13 And we’ll have the ability, also, if we go into this winter with the adaptive changes, to
14 more proactively try to move the bison off of the valley floor, into nooks that we can find
15 that are suitable habitat.” Hrg. Transc. 458.

16 119) Jeff Cahill, President of PCSA, testified that his organization’s opposition to
17 the AMA was based on the “*potential* significant precedent, not just now, but down the
18 road.” He stated: “[T]hese issues really just boil down to the foot in the door sort of
19 thing.” Hrg. Transc. 254 (Cahill) (emphasis added).

20 120) After Petitioners’ initial Petition, FWP and DOL decided to conduct
21 additional MEPA analysis of the AMA in the form of an EA pursuant to the Montana
22 Environmental Policy Act, Title 75, chapter 1, parts 1-3. Hrg. Transc. 473, 475, 476
23 (Flowers); 705-706 (Mackay). The federal agency IBMP partners also completed a
24 sufficiency analysis, and determined that no further environmental analysis for the AMA
25 was necessary under federal law, a determination which has not changed since it was
26 made by the federal agencies in 2011. *See* Admin. Rec. 2639-2647.

 121) FWP and DOL released a Draft EA for public comment on December 15,
2011. *See* Admin. Rec. 13804-13820.

 122) Following a thirty-day public comment period on the EA (Hrg. Transc. 476
(Flowers); Admin. Rec. 3156), in which Petitioners and their members participated, *See*,
e.g., Admin. Rec. 13176-13188, 13198-13214 (testimony by Hertha Lund on behalf of

1 MFBF) and Admin. Rec. 12982-12983 (comments of Cahill); 13198 (comments of
2 Rigler); and 13191-13196 (comments of Sperano), FWP and DOL issued a Joint Decision
3 Notice on the AMA on February 28, 2012, which constituted their final agency decision.
4 See Admin. Rec. 13800-13820.

5 123) The Draft EA, which proposed significant changes to the IBMP, provided
6 four objectives:

- 7 a. To maintain a wild, free-ranging population of bison by
8 providing an expanded bison-tolerant area north of YNP.
- 9 b. To continue to reduce the risk of brucellosis transmission
10 between bison and cattle.
- 11 c. To promote cattle safety.
- 12 d. To provide the potential for greater hunter opportunity.

13 December 2011 Draft EA; Admin. Rec. 3123.

14 124) The Draft EA provided, "An EIS is not warranted for the proposed adaptive
15 management adjustments to the IBMP because predicted impacts to the physical and
16 human environment are either minor or negligible with the described mitigation
17 measures." Admin. Rec. 3155.

18 125) The Draft EA provided, "Beyond analyses presented in this EA, similar
19 analysis has been completed through the NEPA and MEPA processes for the Bison
20 Management FEIS and the ROD for the IBMP. In the FEIS, alternative two (minimal
21 management) included a special management area that closely resembled the proposed
22 boundary for adaptive management adjustment #1. Impacts for the use of that
23 expanded area were discussed in the FEIS on pages 396-400 (bison population), 445-
24 446 (recreation-bison viewing/hunting), 471-475 (livestock operations), 482-486
25 (socioeconomics), and 360-361, 613-617 (human health)." Admin. Rec. 3155.

26 126) The EA concluded that "[t]he negative economic impacts of any
transmission of Brucella from bison to cattle therefore would be less than described in
the FEIS for the IBMP." Admin. Rec. 3140.

127) In this matter, the EA provided that it was tiered to the FEIS that was
completed in 2000. Admin. Rec. 3155.

128) The FEIS provided that "[a]ll of the alternatives are intended to maintain a
viable bison herd in Yellowstone National Park." Admin. Rec. 151/ 2000 FEIS 83.

1 The Respondents have raised their mootness defense in regards to Petitioners'
2 clean and healthful environment and public nuisance claims. Respondents' Proposed
3 Findings of Fact & Conclusions of Law, 36. The basis of their defense is that Petitioners'
4 claims stem from events and circumstances "unique" to the winter of 2010/2011, and
5 since these conditions no longer exist, the claims must be deemed as moot. *Id.*

6 An issue is moot if "the issue presented at the outset of the action has ceased to
7 exist or is no longer 'live,'" or, "if due to a change in circumstances the court is unable to
8 grant effective relief[.]" *Plan Helena*, ¶ 10. Courts have developed exceptions to
9 mootness, specifically in situations where a wrong is "capable of repetition, yet evading
10 review." *Havre Daily News*, ¶¶ 33-34. This exception is limited to situations where the
11 conduct "invariably ceases" before the court can adjudicate the matter. *Spencer v.*
12 *Kemna*, 523 U.S. 1, 18, 118 S. Ct. 978, 988 (1998). The party invoking the exception
13 "bears the burden of showing that the challenged conduct inherently is of limited
14 duration, so as to evade review, and that 'there [is] a reasonable expectation that the
15 same complaining party [will] be subject to the same action again.'" *Id.* at ¶ 34 (citing
16 *Spencer v. Kemna*, 523 U.S. at 17-18, 118 S. Ct. at 988).

17 The Respondents contend that the likelihood of the "unique" conditions
18 occurring again is far too remote and speculative. Further, they state that the State and
19 local residents have erected fences in the area to decrease the chances of the bison
20 commingling with the cattle. Resp. Proposed Findings of Fact and Conclusions of Law,
21 37. Finally, Respondents argue that bison managers have additional tools available,
22 including the ability to transport bison outside the designated surveillance area. *Id.*

23 *Clean and Healthful Environment.* Petitioners assert that Respondents' actions
24 have allowed the "depletion and degradation of Montana's clean and healthful
25 environment." Petr. Jt. Pet. for Decl. And Inj. Relief, 50. As a result of these actions, an
26 "unlimited" number of "diseased, unvaccinated bison" were allowed to roam Gardiner
Basin, thereby creating a risk of the potential transference of *brucellosis* into the
environment and to local cattle. *Id.*; See FOF 23. Although Respondents contend this
was a "unique" occurrence due to the winter of 2010/2011 conditions, the Court
disagrees. It is a fool's errand to predict the weather, let alone weather that would
stimulate the migration of bison into the Gardiner Basin. However, the Court having

1 experienced several “once-in-a-lifetime” winters in its lifetime, determines that it is a
2 reasonable expectation that the conditions present during the winter of 2010/2011 will
3 occur again. Furthermore, there are approximately 1500 more bison now living in YNP
4 than even the Park Service believes the habitat can manage. See FOF. The
5 consequences of migration would be to subject Montana residents and Petitioners’
6 members to the same risks and require the same actions. The Court determines this
7 issue is not moot, because the condition may reoccur and denying Petitioners relief now
8 would only result in renewed litigation on the same issues, thus creating further
9 financial and additional burdens on the Petitioners and on the judicial system.

10 *Public Nuisance.* Based upon the analysis above, the Court also determines that
11 the issue of whether bison are a public nuisance is not moot.

12 **B. Ripeness.**

13 The Respondents raise a ripeness defense with respect to Petitioners’ public
14 nuisance claim on the grounds that the claim is “too speculative” because no bison are
15 currently present in the Gardiner Basin. The doctrine of ripeness “requires an actual,
16 present controversy.” *Havre Daily News*, ¶ 19 (citing *Montana Power Co. v. Public*
17 *Service Comm.*, 2001 MT 102, ¶ 32, 26 P.3d 91). A court cannot act if the legal issues
18 raised are “only hypothetical or the existence of a controversy merely speculative.”
19 *Havre Daily News*, ¶ 19. When determining whether a case is ripe for review, “federal
20 courts consider the ‘fitness of the issues for judicial review’ and the extent of hardship
21 that will be suffered by the parties if the court withholds review.” *Havre Daily News*, ¶
22 20 (citing *Artway v. Attorney General of State of N.J.*, 81 F.3d 1235, 1247 (3rd Cir.
23 1996)). The primary consideration is whether the record is factually sufficient to allow
24 the court to make the necessary legal determinations. *Id.*

25 Yellowstone National Park bison traveled into the Gardiner Basin during the
26 winter of 2010/2011 due to the harsh conditions and diminished food supply. See FOF
31. This migration has been rare since 1999 and did not occur during the winter of
2011/2012. *Id.* The Respondents contend the migration was tied to the unique
conditions of the 2010/2011 winter, and currently no bison are present in the Gardiner

1 Basin. Therefore, they assert the claim is hypothetical and speculative and not ripe for
2 review. The Court disagrees with this reasoning.

3 The Petitioners have presented sufficient facts and testimony for the Court to
4 make the required legal determinations. Mr. Sperano stated that during the winter of
5 2010/2011, the bison destroyed his wheel lines, electric fences, damaged buildings, and
6 his trailer—all located in Gardiner Basin. FOF 36-38. Mr. Schmidt, a 30-year resident
7 of the Gardiner Basin also testified that he suffered substantial property damage,
8 including damage to his house. FOF 39-43. In addition, Mr. Schmidt mentioned the
9 increase in motor vehicle accidents that occurred during the winter of 2010/2011 as a
10 result of the increase of bison activity in the area. FOF 43.

11 The Court acknowledges the public nuisance claim revolves around the presence
12 of bison. Although the bison are not present in Gardiner Basin today, tomorrow's
13 weather could change, leading to bison migrating to the area, and once again result in
14 property damage. An action for public nuisance may be brought by an individual
15 "whose property is injuriously affected or whose personal enjoyment is lessened by the
16 nuisance." Mont Code Ann. § 27-30-103. The Court determines, based upon the record,
17 that it has the information necessary to address Petitioners' public nuisance claims.
18 Failure to do so would impose considerable hardship upon the Petitioners. The Court
19 therefore finds the issue is ripe for review.

20 C. Standing.

21 Respondents next state Petitioners' lack standing to raise the following claims:
22 Count I, portions alleging statutory and regulatory violations by the DOL; Count III, any
23 MEPA challenges as to the adequacy of the State's EA in addressing the risk of
24 transmission of brucellosis to cattle; Count VIII, any claim alleging the risk of
25 brucellosis transmission violates Montana's constitutional provision protecting a
26 citizen's right to a clean and healthful environment; and Count IX, any claim alleging
the risk of brucellosis transmission constitutes a public nuisance. Respondents' &
Respondent-Intervenors' Proposed Findings Of Fact And Conclusions of Law, 38.

In order to have standing, a party must demonstrate "not only that the statute is
invalid, but that he has sustained, or is in immediate danger of sustaining some direct

1 injury as a result of its enforcement, and not merely that he suffers in some indefinite
2 way in common with people generally.” *Olson*, 223 Mont. at 470, 726 P.2d at 1166
3 (citing *Chovanak v. Matthews* (1948), 120 Mont. 520, 526, 188 P.2d 582, 585). The
4 question of standing is whether “the litigant is the proper party to seek adjudication of a
5 particular issue” and whether he is entitled to have the court determine the merits of the
6 dispute. *Mont. Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, ¶ 27, 361 Mont.
7 77, 255 P.3d 179 (citations omitted). The complaining party must clearly allege a past,
8 present or threatened injury to a property or civil right in order to have standing. *Id.*
9 Although courts have upheld the standing of associations suing on behalf of its
10 members, the association must still demonstrate that “at least one of its members would
11 have standing to sue in his or her own right,” or “the interests the association seeks to
12 protect are germane to its purpose[.]” *Heffernan v. Missoula City Council*, 2011 MT 91,
13 ¶ 43, 360 Mont. 207, 255 P.3d 80.

14 Here, the Respondents assert that neither the Park County Stockgrowers
15 Association (PCSA) nor the Montana Farm Bureau Federation (MFBF) have standing to
16 raise claims relating to the threats presented by the bison to the cattle industry. As
17 support they rely on *Heffernan*: that Petitioners have failed to demonstrate any one
18 member faces a threat of brucellosis transmission to cattle. However, this allegation
19 only encompasses a portion of the holding in *Heffernan*. In *Heffernan*, the Court held
20 that an association also has standing when the interests it seeks to protect are “germane
21 to its purpose.” *Heffernan*, ¶ 43. The PCSA and the MFBF have standing in both
22 instances.

23 According to its website, the MFBF is the “state’s largest agriculture organization
24 and advocate for Montana agriculture.” Montana Farm Bureau Federation,
25 <http://mfbf.org/about/> (accessed Dec. 10, 2012). The MFBF mission states:

26 To correlate and strengthen the member county Farm Bureaus;
support the free enterprise system and protect individual freedom
and opportunity; promote, protect and represent the business,
economic, social and educational interests of farmer/ rancher
members and all of their communities; and to enhance the
agricultural industry in Montana.

1 *Id.* The Petitioners state in their complaint that certain MFBF members “are livestock
2 owners who own and/or operate ranches on private property or on federal grazing
3 allotments where livestock are situated and grazed either within or adjacent to the new
4 management boundary established by the AMA,” or who “are private property owners
5 who have experienced damage, or threats to public safety caused, by the YNP bison.”
6 Petitioners’ Joint Petition for Declaratory and Injunctive Relief, 7-8. These facts satisfy
7 both prongs as set forth in *Ieffernan*.

8 Regarding the PCSA, the Court also finds it has standing to sue on behalf of its
9 members. In their complaint, Petitioners aver that PCSA (referred to in complaint as
10 “PCS”) represents “[eighty] landowners, livestock producers, businesses, and
11 community organizations located throughout Park County,” Montana. Petitioners’ Joint
12 Petition for Declaratory and Injunctive Relief, 8. Included in these members is Frank
13 Rigler, a member and private property owner living in Gardiner Basin. Although Mr.
14 Rigler does not currently run livestock on his ranch, he has experienced property
15 damage as a result of the migrating bison. *Id.* at 8-9. Further, the complaint addresses
16 PCSA members: Martin Davis, a livestock producer; Joe Sperano, property owner in
17 Gardiner Basin; and, Jim Stermitz, property owner in Gardiner Basin and livestock
18 operator. *Id.* at 9-11. These members each allege that they have sustained, or are in
19 immediate danger of sustaining a direct injury as a result of the agency action—as either
20 property damage resulting from the presence of the bison on their property or the
21 potential transmission of brucellosis to their livestock.

22 In sum, the Court rejects Respondents’ arguments as to Petitioners’ lack of
23 standing. The Court finds that the Petitioners have demonstrated standing and that
24 PCSA and MFBF have the associational standing to proceed on behalf of its members.

25 **II. REVIEW OF AGENCY DECISION**

26 Court review of an agency decision, including an environmental decision, is
limited. *Clark Fork Coalition v. Mont. Dep’t of Env’tl. Quality*, 2008 MT 407, ¶ 47, 197
P.3d 482 (citing *Friends of the Wild Swan v. DNRC*, 2000 MT 209, P 28, 6 P.3d 972, P
28). Although a court “is not to substitute its judgment for that of the agency, the
agency must examine the relevant data and articulate a satisfactory explanation for its

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action, including a rational connection between the facts found and the choice made.” *Clark Fork Coalition*, ¶ 47 (Citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2866, 77 L. Ed. 2d 443 (1983)). In other words, the court examines the agency decision to ensure that it is free from error of law and supported by evidence. “The Court focuses on the validity and appropriateness of the administrative decision making process without intense scrutiny of the decision itself.” *Clark Fork Coalition*, ¶ 47. On review, “courts will only inquire insofar as to ascertain if the board or commission has stayed within the statutory bounds and has not acted arbitrarily, capriciously or unlawfully.” *Langen v. Badlands Coop State Grazing District*, 125 Mont. 302, 308, 234 P.2d 467, 470 (1951). When a court makes the factual inquiry to determine whether an agency decision is arbitrary, capricious, or unlawful, the reviewing court “must consider whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment.” *North Fork Preservation Ass’n v. Department of State Lands*, 238 Mont. 451, 465, 778 P.2d 862, 871 (1989).

III. DECLARATORY JUDGMENT

The Uniform Declaratory Judgment Act serves a remedial purpose and is to be liberally construed “to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.” Mont. Code. Ann. § 27-8-102. The Act provides courts the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. Mont. Code. Ann. § 27-8-201. A Declaratory Judgment is appropriate if a justiciable controversy exists, when:

genuine and existing rights are affected by a statute; a judgment of the court can effectively operate on the controversy; and a judicial determination will have the effect of a final judgment upon the rights, status, or legal relations of the real parties in interest.

McGillivray v. State, 1999 MT 3, ¶ 8, 972 P.2d 804 (citing *Gryczan v. State* (1997), 283 Mont. 433, 442, 942 P.2d 112, 117). Any interested person,

whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under

1 the instrument, statute, ordinance, contract, or franchise and obtain
2 a declaration of rights, status, or other legal relations thereunder.

3 Mont. Code Ann. § 27-8-202. Generally, before a party can seek declaratory relief in
4 district court, it must exhaust its administrative remedies. *Brisendine*, 253 Mont. 361,
5 366, 833 P.2d 1019, 1021-22.

6 IV. INJUNCTIVE RELIEF

7 An injunction is an order granted by the court requiring a person to refrain from
8 engaging in particular acts. Mont. Code Ann. §27-19-101. A court may grant an
9 injunction to prevent further breach of an obligation, where: (1) pecuniary
10 compensation would not afford adequate relief; (2) it would be extremely difficult to
11 ascertain the amount of compensation which would afford adequate relief; [or] (3) the
12 restraint is necessary to prevent a multiplicity of judicial proceedings. Mont. Code Ann.
13 § 27-19-102(1)-(3). An action for injunctive relief initiated by a public interest
14 organization must demonstrate in the complaint “that there is an injury to a property or
15 civil right of individual members of the association, which injury is distinguishable from
16 an injury to the public generally[.]” Mont. Code Ann. § 27-19-104. The burden is on the
17 Petitioner to show he is entitled to injunctive relief. Public bodies and public officers
18 may be restrained by injunction from proceeding in violation of law, to the prejudice of
19 the public, or to the injury of individual rights. *Larson v. State*, 166 Mont. 449, 458, 534
20 P.2d 854, 859 (1975) (citing *Hames v. City of Polson*, 123 Mont. 469, 479, 215 P.2d 950,
21 overruled on other grounds).

22 Injunctive relief is an extraordinary remedy and granted only “with great caution
23 and in the exercise of sound judicial discretion.” *Great Northern v. Local Great Falls*
24 *Local of Int'l Ass'n of Machinist No. 287*, 283 F. 557, 563 (D.C. Mont. 1922). The
25 equities must strongly favor the issuance of an injunction. *Cavallaro by Cavallaro v.*
26 *Ambach*, 575 F. Supp. 171 (W.D.N.Y. 1983). “Injunctions go only in cases of urgent
necessity, made to appear by competent, material, credible, and preponderating
evidence, to guard against injuries, not merely feared by the applicant, but reasonably to
be apprehended, and likely to be irreparable.” *Great N. R. Co.*, 283 F. at 563. If the
party requesting the injunction is merely annoyed, threatened, or injured, this will not

1 justify a court to grant him an injunction, unless “these trespasses are so great that they
2 threaten him with irreparable injury, within the settled meaning of that term in equity.”
3 *Id.* Nevertheless, injunctions are granted only in the circumstances aforesaid, and “not
4 merely to bridge gaps of administrative dereliction.” *Great N. R. Co. v. Lumber &*
5 *Sawmill Workers, etc.*, 140 F. Supp. 393, 396 (1955).

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

8 **A. Is the DOL’s Adoption Of The AMA Arbitrary Or Capricious And**
9 **In Violation Of DOL’s Statutory Or Regulatory Duties To Protect**
10 **Montanans And Montana Livestock From Brucellosis?**

11 The Petitioners allege that the DOL and Dr. Zaluski violated statutory and
12 regulatory duties under Montana law and state their actions in adopting the AMA were
13 “arbitrary, capricious, and unlawful.” Petr. Jt. Pet. for Decl. and Inj. Relief, 24-25.
14 They allege that the adoption of the AMA resulted in the failure of the DOL and Dr.
15 Zaluski to “treat, vaccinate, and dispose of animals suspected of carrying brucellosis.”
16 *Id.* Petitioners contend the decisions have allowed potentially diseased bison to run at
17 large in residential areas and private land providing the opportunity for the bison to
18 commingle with livestock, thereby increasing the likelihood of the transmission of
19 brucellosis. Furthermore, Petitioners state the evidence reveals that the DOL has failed
20 to effectively maintain the spatial separation required by the IBMP through hazing and,
21 when appropriate, lethal removal of bison.

22 The Court determines that the DOL and Dr. Zaluski did not violate their statutory
23 or regulatory duties and finds the adoption of the AMA was not arbitrary or capricious,
24 because its adoption was based on consideration of relevant facts and is supported by
25 the evidence.

26 Courts interpret statutes in accordance with the provisions’ plain language. *Bd.*
Of Trustees, Butte-Silver Bow Public Library v. Butte-Silver Bow Co., 2009 MT 389, ¶
17, 221 P.3d 1175. Statutes must be construed so as to coincide with the purpose of the
whole statutory scheme in order to avoid absurd results. *Gamble v. Sears*, 2007 MT
131, ¶ 59, 160 P.3d 537. The term “may” is a permissive or discretionary grant of
authority, in contrast with the more compelling and mandatory implication of the term

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“shall.” See, e.g. *ISC Distributors, Inc. v. Trevor*, 273 Mont. 185, 201, 903 P.2d 170, 179 (1995).

The Department of Livestock (DOL) is an executive branch agency of the State of Montana headquartered in Helena, Montana. The DOL is charged with statutory authority and “shall exercise general supervision over and, so far as possible, protect the livestock interests of the state from theft and disease and recommend legislation that, in the judgment of the department, fosters the livestock industry.” Mont. Code Ann. § 81-1-102(1) (emphasis added). The DOL “may foster, promote, and protect the livestock industry in this state by the investigation of diseases . . . related to means of prevention, extirpation, and control of diseases or to the care of livestock.” Mont. Code Ann. § 81-2-102(1)(b). The DOL may adopt rules and orders that the agency considers necessary or proper to prevent the “introduction or spreading of infectious, contagious, communicable, or dangerous diseases affecting livestock[.]” Mont. Code Ann. § 81-2-102(1)(d) (emphasis added). In addition, the DOL “shall adopt and enforce rules for the inspection and . . . 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).

Under the Administrative Rules of Montana, the DOL’s Disease Control Bureau (DCB) functions are to “provide for the diagnosis, prevention, control, and eradication of animal diseases and disorders[.]” Admin. R. Mont. 32.1.101(1)(i). Further, the DOL is required to follow the terms set forth in the Montana Environmental Policy Act (MEPA), “to the fullest extent possible,” prior to “reaching a final decision on proposed actions covered by MEPA.” Admin. R. Mont. 32.2.221(1).

In this instance, the statutory language must not be interpreted and applied in a manner that would defeat the general purpose of the authority granted to the DOL. The plain language of the statutory scheme contained in Title 81, requires the DOL to protect the state’s livestock and provide rules for doing so. The remainder of the statutes offers permissive and discretionary grants of power to the DOL. By their own terms, sections 81-1-102 and 81-2-103 are made mandatory by the legislature’s use of the term “shall.” These two statutes direct the DOL to “protect the livestock interests of the state from disease,” and “adopt and enforce rules” regarding the inspection and disposition of

1 “livestock or other animals.” Mont. Code Ann. §§ 81-1-102, 81-2-103. In contrast, the
2 remaining statutes at issue use the permissive and discretionary term “may.” See Mont.
3 Code Ann. §§ 81-2-102, 81-2-120 (“the department may . . . use any feasible method in
4 taking one or more of the following actions[.]”) If the legislature intended these duties
5 and powers to be mandatory, rather than permissive, it would have used the term “shall”
6 in all instances. *Gaustad v. City of Columbus*, 265 Mont. 379, 381-382, 877 P.2d 470,
7 471 (1994). The record indicates that the DOL has performed its mandatory statutory
8 duties. It has exercised general supervision over its subordinate agencies and has
9 adopted rules to address the spread of brucellosis in Montana, thereby protecting
10 Montana’s interests in its livestock.

11 Next, the Petitioners allege that the DOL and Dr. Zaluski’s actions in adopting the
12 AMA were arbitrary, capricious and unlawful. Specifically, they assert that by adopting
13 the AMA, the DOL and Dr. Zaluski are failing “to control brucellosis exposed and
14 diseased bison in the Northern Boundary Area[.]” Petr. Jt. Pet. for Decl. and Inj. Relief,
15 25. The DOL’s adoption of the AMA, coupled with the discretion granted by the
16 legislature, completely defeats Petitioners’ allegations. The record and testimony from
17 Dr. Zaluski show that the implementation of the AMA required his signature and
18 indicate he considered a multitude of risks prior to signing off on it. Hrg. Transc. 813-
19 814 (Zaluski). During the hearing, Dr. Zaluski stated in response to the following
20 questions:

21 Q. Dr. Zaluski, let’s get to the heart of the matter here. When you are a
22 State Vet and an IBMP partner, prior to making any decision to
23 approve or disapprove these AMA, was it necessary for you to consider
24 the risk of transmission of brucellosis from Yellowstone National Park
25 bison to domestic cattle?

26 A. Yes, it was.

Q. In these livestock operations in the expanded zone?

A. That’s correct.

Q. Why?

A. You know, as I mentioned, disease control, preventing of disease
transmission to livestock, specifically to brucellosis, is one of my core

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duties.

Q. And did you make that assessment?

A. I did.

Q. Alright. Did you come to a conclusion regarding those risks?

A. I did.

Q. Alright. Was that before or after you actually approved the AMA?

A. Before.

Hrg. Transc. 830: 3-19 (Zaluski); *See also* FOF 69-70.

Furthermore, prior to final authorization of the AMA, Dr. Zaluski testified in order to manage risk “to the lowest level possible, and as practical,” he considered the numbers of livestock operations existing in the present Zone Two as compared to the proposed expanded zone to determine the number of susceptible animals, and the possibility of comingling as this potentially may led to the greatest likelihood of transmission. Hrg. Transc. 830-831 (Zaluski). Further, Dr. Zaluski stated the adoption of the AMA did not make any changes in the temporal separation requirements of the IBMP. Given the underlying policy, and the amount of discretion afforded by the statutes and regulations, the Court finds the DOL and Dr. Zaluski’s actions were not arbitrary, capricious, nor unlawful. The evidence supports the agency actions and shows the parties met their statutory and regulatory duties.

The Court turns now to Petitioners’ contentions that the DOL has failed to comply with the IBMP by maintaining spatial separation through proper hazing or lethal removal. The IBMP does not create an enforceable right, and therefore, the Court does not have the authority to mandate it be followed. This issue and the authority behind the conclusion is addressed further in Count III.

B. Is the DOL In Violation Of Its Import And Health Certificate Duties Or Its Animal Containment Laws?

The Petitioners contend that the DOL and Dr. Zaluski are charged by statute to require permits and health certification prior to any bison’s entry into the State of

1 Montana. Montana Code Annotated § 81-2-703 (1) requires that any animal brought
2 into the state must be accompanied by a “permit and health certificate.” They also allege
3 that Respondents are in violation of animal containment laws pursuant to Mont. Code
4 Ann. § 81-4-201. That statute dictates that it is unlawful for a person “in control of
5 swine, sheep, llamas, bison, ostriches, rheas, emus, or goats to willfully permit the
6 animals to run at large.” Mont. Code Ann. § 81-4-201.

7 The DOL and FWP allowed 25 YNP bison onto the Royal Teton Ranch area in
8 Zone 2. *Petr. Jt. Pet. for Decl. and Inj. Relief*, 26. Evidence demonstrates that the bison
9 broke through the fence and crossed the Yellowstone River to the west side. The
10 summation of Petitioners’ claims is that Respondents are now allowing an “unlimited
11 number of animals to run in the entire Gardiner Basin,” and based upon the previous
12 incident, are unable to control these bison as well, thereby violating Montana law.

13 Although the evidence uncontrovertibly demonstrates that the bison are traveling
14 from YNP into Montana, Petitioners’ position is flawed. FOF 4. Montana Code
15 Annotated § 81-1-101 provides definitions applicable to Title 81. Listed in the
16 definitions is “Bison.” However, the statute explicitly states this term “does not include:
17 (i) wild buffalo or wild bison,” which is further defined as “a bison that has not been
18 reduced to captivity and is not owned by a person.” Mont. Code Ann. § 81-1-101(1)(b)(i),
19 (6); *See also* FOF 9 (Bison are wildlife); 113 (Quarantine regulations do not apply to
20 wildlife, only to privately-owned domestic or captive animals). Based upon the
21 definition of Bison in Title 81, the Court determines that Respondents are not in
22 violation of either of these provisions because they do not pertain to the wild bison at
23 issue in this matter.

24 **C. Is FWP In Violation Of Its Duty To Manage Bison In** 25 **Cooperation With DOL?**

26 Petitioners claim that FWP has failed to satisfactorily cooperate with the DOL’s
activities and is in further violation of statutory directives as they have allowed the
immigration of bison, but lack the proper control over them. *Petr. Jt. Pet. for Decl. and*
Inj. Relief, 27. In support, Petitioners assert that FWP’s lack of control over the bison is
illustrated by their current practices. For example, when a resident contacts FWP with a

1 complaint, FWP only “hazes bison off private property and onto the road way,” resulting
2 in the frequent return of the bison. Aff. Frank Rigler ¶ 9. Local residents also claim that
3 FWP has informed members of the public that they must have written permission from
4 other private property owners before they can haze bison. Aff. Rigler ¶ 8.

5 Montana Fish, Wildlife and Parks is charged with supervising Montana’s wildlife,
6 including furbearing animals, and is authorized to set policies to protect and manage
7 wildlife. Mont. Code Ann. § 87-1-201 and § 87-1-301. Fish, Wildlife and Parks is
8 statutorily required to:

9 cooperate with the department of livestock in managing publically
10 owned wild buffalo or bison that enter the state on public or private
11 land from a herd that is infected with a dangerous disease, as
12 provided in 81-2-120, under a plan approved by the governor.

13 Mont. Code Ann. § 87-1-216(2)(c). Fish, Wildlife and Parks may enter into agreement
14 with the DOL authorizing the hunting of wild buffalo or bison infected with a contagious
15 disease, pursuant to Mont. Code Ann. § 87-2-730. Further, FWP may consult with the
16 DOL and adopt rules authorizing the taking of bison when necessary to prevent
17 transmission of contagious diseases, such as brucellosis. Mont. Code Ann. § 87-1-
18 216(2)(c).

19 Petitioners’ central allegations concern FWP’s failure to take action beyond just
20 the hazing of the bison, illustrating FWP’s “lack of control” over the bison population.
21 Petr. Jt. Pet. for Decl. and Inj. Relief, 27. The statutes cited, similar to the statutes
22 authorizing the DOL, give broad discretion to FWP to carry out its duties by means it
23 finds appropriate. In this instance, Petitioners have failed to provide any support for its
24 allegations. The Court must, of course, give great deference to the discretion of an
25 agency given the statements, the facts, and that deference, the Court finds that FWP has
26 “stayed within [its] statutory bounds.” See, e.g. *Langen*, 125 Mont. at 308, 234 P.2d at
470.

Based upon the foregoing analysis of the allegations contained in Count I of
Petitioners’ complaint, the Court determines no grounds exist for granting Petitioners’
requests for declaratory and injunctive relief and Count I is **DISMISSED**.

COUNT TWO—MEPA 1ST AGENCY ACTION

1 Count II of Plaintiffs' Petition cites the Respondents' failure to conduct MEPA
2 analysis and to follow MAPA. Petr. Jt. Pet. For Decl. and Inj. Relief, 28.

3 The key, consistent thread articulated throughout the thirteen pages of this
4 Count, is the failure of Respondents' to conduct "adequate (or any) EA, EIS, or SEIS
5 prior to signing the AMA and committing themselves to carrying out the revised
6 management activities contained therein." Petr. Jt. Pet. For Decl. and Inj. Relief, 40.
7 The flaw in Petitioners' analysis, one they acknowledge, is that "Respondent's [did]
8 conduct . . .[an] EA analysis." *Id.* While this acknowledgement is heavily qualified, ["a
9 post-hoc rationalization EA analysis that . . . is insufficient and does not comply with
10 applicable laws and regulations." *Id.*], the legal argument regarding that EA and its
11 "sufficiency" is actually set forth in Count III. As will be outlined below, such analysis
12 was conducted before final approval of the AMA.

13 Because the Respondents have, as Plaintiffs acknowledge, conducted an
14 environmental assessment on their AMA, Count II is **DISMISSED**.

15 **COUNT THREE—MEPA ANALYSIS—2ND AGENCY ACTION**

16 As noted, the sufficiency or adequacy of the EA conducted by the State on the
17 AMA is challenged in this Count. The proper standard of review of an agency decision
18 under MEPA is whether the record establishes that the agency acted arbitrarily,
19 capriciously or unlawfully. Mont. Code Ann. §75-1-201(6)(a)(iii); *North Fork Pres.*
20 *Ass'n v. Department of State Lands*, 238 Mont. 451, 458-459, 778 P.2d 862, 867 (1989);
21 *See also Friends of the Wild Swan v. DNRC*, 2000 MT 209, ¶ 27, 301 Mont. 1, 6 P.3d
22 972. Review of MEPA claims is confined to the record certified by the agency. Mont.
23 Code Ann. §75-1-201(6)(a)(iii). In making the inquiry as to whether an agency decision
24 is arbitrary or capricious, the Court must consider whether the decision was based on a
25 consideration of the relevant factors and whether there has been a clear error of
26 judgment. *North Fork* at 465, 778 P.2d 862, 871 (1989).

 A review under the arbitrary and capricious standard does not permit a reversal
merely because the record contains inconsistent evidence or evidence which might
support a different result. Rather, the decision being challenged must appear to be
"random, unreasonable or seemingly unmotivated based on the existing record."

1 *Montana Wildlife Fed'n v. Montana Bd. Of Oil & Gas Conservation*, 2012 MT 128, ¶25
2 (quoting *Hobble Diamond Ranch, LLC v. State*, 2012 MT 10, ¶24). While an agency is
3 required to take a “hard look” at its decisions under MEPA, the Court does not take a
4 hard look at the decision itself, instead focusing on the validity and appropriateness of
5 the administrative decision making process. *Id.* at ¶43, quoting *Clark Fork Coalition v.*
6 *Mont. Dept. of Evtl. Quality*, 2008 MT 407, ¶47. The Montana Supreme Court has
7 found that federal case law construing parallel provisions in NEPA is persuasive for
8 MEPA purposes. *Kadillak v. Anaconda Co.*, 184 Mont. 127, 137 (1979).

9 Petitioners bear the burden of proof in challenging the adequacy of the State’s
10 decision making process by clear and convincing evidence. Mont. Code Ann. §75-1-
11 201(6)(a)(i). Clear and convincing evidence is “definite, clear and convincing” and is
12 more than a preponderance of evidence but less than beyond a reasonable doubt. *In re*
13 *G.M.*, 2009 Mont. 59, ¶19.

14 One essential element in showing the deference required of the Court regarding
15 the FWP/DOL decision in the December 2011 EA (expansion allowing bison in a
16 significantly larger “tolerance” zone in the Gardner Basin) is the concept of “tiering”.
17 Tiering in this instance is the December 2011 EA’s reliance upon the 2000 IBMP FEIS
18 and subsequent processes. Tiering is the process of incorporating by reference coverage
19 of general matters in broader environmental impact statements into subsequent
20 narrower environmental analyses. *Montana Wildlife Fed’n*, 2012 MT 128, ¶38. Federal
21 NEPA regulations and decisions encourage tiering “to eliminate repetitive discussions of
22 the same issues and to focus on the actual issues ripe for decision at each level of
23 environmental review.” 40 C.F.R. §1502.20. One of the benefits of tiering is that it
24 allows agencies to increase the thoroughness of the decision making process without
25 increasing the time and expense necessary for in-depth analysis. NEPA regulations
26 make clear that when a subsequent environmental assessment is tiered to an earlier
environmental impact statement, “the subsequent statement or environmental
assessment need only summarize the issues discussed in the broader statement . . . and
shall concentrate on issues specific to the subsequent action.” 40 C.F.R. §1502.20.

The MEPA process arguably encourages tiering to a greater extent than the NEPA
process. The Montana Supreme Court has endorsed tiering, and has even found that an

1 and tangential nature of these EA “issues” represent a scatter shot attempt to show
2 “insufficiency” but do not shed light on the fundamental concern Petitioners raise –
3 bison migrating out of YNP carrying brucellosis infection with them, and posing risk to
4 public health and safety and Montana’s livestock industry.

5 One example that illustrates the insubstantial and rather muddled effort to show
6 “insufficiency” is Petitioners’ concerns about fencing implications. Pursuant to
7 testimony of Flowers and Mudringer, fencing in the AMA are to insure spatial
8 separation of bison and cattle. Petitioners’ attempt to connect the impact of fencing on
9 other wildlife (that it subjects them to greater predation) to their “sufficiency” complaint
10 is not germane to the substance of Count III. Furthermore, this is one issue where the
11 tiering concept is clearly successful as such issues were addressed in the FEIS. Admin.
12 Rec. 13820.

13 Petitioners sufficiency argument also encompasses public health and safety and it
14 is to this issue that the Court now turns. Petitioners’ testimony elicited a reasonable
15 number of public safety concerns: children at risk at bus stops, people at risk while
16 accessing cars and homes, and property damage (fences, house siding, landscaping,
17 etc.). See FOF 32-47. The December 2011 EA devotes a specific section to analysis of
18 such public safety issues. Again, Petitioners look to matters existing before the
19 December 2011 EA and do not contrast them with that new analysis. As the
20 administrative record illustrates, the EA addresses a multitude of public safety issues.
21 When the Court looks at the tiering with the 2000 FEIS; the Petitioners’ Complaint that
22 the environmental analysis is “insufficient” is incorrect in this Court’s view. Admin. Rec.
23 14, 304-402, 403-679.

24 As noted in the Findings of Fact, brucellosis causes undulant fever in humans.
25 FOF 5. Petitioners’ focus on an additional 70,000 acres of land in which the AMA allow
26 bison toleration, at least one-half of whom are likely to be infected with Brucellosis.
FOF 3. Petitioners struggle to find inadequacy in the EA analysis regarding the changes
made by the AMA and its implications on public health. They struggle because they are
unable to overcome the substantive testimony that bison have long frequented the
streets, yards and alleys of Gardiner, Montana, with its population of 875 citizens. Nor
can they overcome the very real issue of brucellosis in elk. As Mr. Keith Aune testified,

1 elk are “maintenance hosts” for brucellosis. Elk migrating out of YNP and in the Greater
2 Yellowstone area (including the area focused on by Petitioners’ Petition in the Gardiner
3 Basin) are not only infected with brucellosis, but are one of the most heavily hunted
4 species in Montana. Hrg. Transc. 638:22 (Aune). Consequently, threats to human
5 health from brucellosis are already prevalent in the Greater Yellowstone and Petitioners’
6 focus on bison in the expanded tolerance zone to the exclusion of considerations about
7 bison history in Gardiner and the prevalence of brucellosis in elk defeats their claim.

8 What unfolds in Count III (and Count II for that matter) is a disagreement with
9 the outcome of Respondents’ EA. The record, particularly the tiered record, is stuffed
10 with analysis of practically every one of the Petitioners raised issues. While Petitioners
11 couch their objections as a matter requiring yet more environmental analysis, they
12 actually seek the remedy from this Court which would require certain agency actions
13 pursuant to the IBMP. That, however, is not within the authority of this Court, as the
14 IBMP does not create an enforceable right. MEPA/NEPA is a procedural mechanism
15 not a substantive, result-based standard. Mont. Code Ann. §75-1-102(1); *Ravalli Co.*
16 *Fish & Game Ass’n, Inc. v. Mont. Dept. of State Lands*, 273 Mont. 371, 377, 903 P.2d
17 1362, 1366-67 (1995); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-
18 353 (1989). The MEPA process is a public involvement, public information process, not
19 a substantive mandate on an agency like FWP or DOL. *Ravalli Co. Fish & Game* at 377,
20 903 P.2d at 1367, Admin. R. Mont. 32.2 238(1), (4).

21 Petitioners reiterated frequently on the record that they want to “return” to the
22 IBMP status quo and (unspoken) that they want this Court to enforce that status quo.
23 As noted above, they can muddy the waters with a landslide of minute, detailed
24 complaints but, at bottom, this Court cannot enforce the IBMP at any rate. The agency
25 EA was neither arbitrary nor capricious. The agency EA was neither random nor
26 unreasonable nor based on other than the existing record. *Montana Wildlife Fed’n v.*
Montana Oil & Gas Conservation, 2012 MT 128, ¶25 (citation omitted). Petitioners
have not clearly and convincingly demonstrated insufficiency in the 2011 EA or in
overall the State’s failure to meet MEPA requirements. Count III is therefore
DISMISSED.

1 **COUNT FOUR—THE AMA’S COMPLIANCE WITH SB 212 WHICH**
2 **AMENDED MCA § 87-1-216, EFFECTIVE MAY 2011**

3 **A. Is Montana Code Annotated § 87-1-216 Applicable To the IBMP**
4 **Or The AMA?**

5 Petitioners allege the changes made to the IBMP by the AMA do not comply with
6 the May 2011 amendments to Mont. Code Ann. §87-1-216. Specifically, Petitioners
7 point to the AMA’s expansion of Zone 2 of the IBMP. Petitioners’ state that the AMA
8 now allows bison to roam in areas not designated in the original IBMP, creating a
9 detriment to several members. Petr. Jt. Pet. for Decl. and Inj. Relief, 45. Additionally,
10 Petitioners’ members have not authorized the FWP or the DOL to allow the migration of
11 bison onto their private property, nor were they provided an opportunity to provide
12 comments or attend hearings. *Id.*

13 The changes introduced by SB 212 prohibit FWP from releasing, transplanting, or
14 allowing wild bison on any private or public land not authorized for that particular use
15 by the landowner. Mont. Code Ann. § 87-1-216(4). The amendments obligate FWP to
16 develop and adopt a management plan before “any wild buffalo or bison under the
17 department’s jurisdiction may be released or transplanted onto private or public land.”
18 Mont. Code Ann. § 87-1-216(5). Subsection (6) requires the department to provide the
19 “opportunity for public comment and hold a public hearing in the affected county or
20 counties,” and prior to deciding to release or transplant bison onto private or public
21 lands, the “department shall respond to all public comment received and publish a full
22 record of the proceedings[.]” Mont. Code Ann. § 87-1-216(6).

23 Contrary to Petitioners’ assertions, Respondents argue that SB 212 is specifically
24 tailored to address FWP’s actions when releasing or transplanting disease-free bison
25 onto land in order to contain them. Respondents’ & Respondent-Intervenors’ Proposed
26 Findings Of Fact And Conclusions of Law, 49. Further, they state SB 212 does not apply
to the naturally migrating YNP bison, as they are not “released, transplanted, or allowed
by FWP into designated areas in Montana[.]” *Id.* at 50. Although the Court
acknowledges that the AMA expanded Zone 2, thereby allowing bison more area to
roam, the Court agrees with the Respondents that SB 212 was not meant to require FWP
to impede the bison’s migration in this particular instance.

1 Upon the Court’s inspection of the legislative history regarding the amendments
2 to Mont. Code Ann. § 87-1-216, the Court concludes these changes are inapplicable to
3 decisions made by the DOL and FWP in regards to the YNP bison population and the
4 adoption of the AMA to the IBMP. Senate Bill 212’s introductory paragraph states: “An
5 act clarifying the authority of the department of Fish, Wildlife, and Parks to manage
6 wild buffalo or bison; requiring a management plan *before* wild buffalo or bison *may be*
7 *released or transplanted* onto private or public land[.]” SB 212
8 ([http://laws.leg.mt.gov/legprd/LAWo203W\\$BSRV.ActionQuery?P_SESS=20111&P_](http://laws.leg.mt.gov/legprd/LAWo203W$BSRV.ActionQuery?P_SESS=20111&P_)
9 [BLTP_BILL_TYP_CD=SB&P_BILL_NO=212&P_BILL_DFT_NO=&P_CHPT_NO=&Z](http://laws.leg.mt.gov/legprd/LAWo203W$BSRV.ActionQuery?P_SESS=20111&P_)
10 [_ACTION=Find&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=](http://laws.leg.mt.gov/legprd/LAWo203W$BSRV.ActionQuery?P_SESS=20111&P_)) (emphasis added). The
11 Court examined the recordings of the legislative hearings in order to get a clearer
12 understanding of the motive behind the amendments to Mont. Code Ann. § 87-1-216.
13 Here are a few excerpts from the record:

12 Senator Rick Ripley, sponsor of SB 212, stated the purpose of SB
13 212 is to allow for FWP to “adopt a herd specific management plan
14 before any bison are relocated.” Fish, Wildlife, and Parks
15 Committee Hearing, 1:12 (Mar. 22, 2011). He continued,
16 “everything that could be considered should be considered for the
17 transportation of buffalo or bison.” *Id.* at 1:25. At minute 2:15, Mr.
18 Ripley stated, “this is a plan that specifies how [FWP] can transport
19 buffalo.”

17 Proponent, Errol Rice, representing the Montana Stockgrowers
18 Association, stated that “bison *relocation* creates a challenge.” *Id.*
19 at 12:33 (emphasis added).

19 Representative Austin Knudsen, SB 212 Floor Sponsor, stated “This
20 bill simply states that before the Fish, Wildlife, and Parks can
21 transplant any buffalo, they have to have a comprehensive plan.”
22 (H) Second Floor Reading Concurred, 23:56 (Mar. 30, 2011). He
23 goes on to specify that “this bill does not affect the Interagency
24 Bison Management Program, or Plan, excuse me, the IBMP. That
25 deals with the Yellowstone National Park bison that are specifically
26 under that Interagency Bison Management Plan. That is not
touched by this bill. The only thing we are dealing with here are
wild certified brucellosis-free bison under the authority of the Fish,
Wildlife, and Parks.”

1 *Id.* at 24:40. Based upon the foregoing statements surrounding the approval of SB-212,
2 the Court finds that the adoption of the AMA does not conflict with the amendments
3 made to Mont. Code Ann. § 87-1-216 because this section does not apply to the AMA or
4 the YNP bison’s migration.

5 **B. The Comment Period.**

6 In addition to the argument addressed above, Petitioners also contend that
7 subsequent measures, such as the comment period for the EA, do not correct
8 Respondents’ non-compliance with Montana laws and regulations regarding
9 implementation of the AMA. Petr. Jt. Pet. for Decl. and Inj. Relief, 47. Petitioners
10 assert that none of the property owners affected by the AMA were given the opportunity
11 to participate or provided public comments before it went into effect. *Id.*; *See also* Aff.
12 Davis, ¶ 12; Aff. Stermitz, ¶ 10; Aff. Rigler, ¶ 16; and, Aff. Sperano, ¶ 14. However, this
13 argument is flawed because the final AMA was adopted in October, 2012—after
14 numerous comment periods and risk assessments. FOF 121 (draft EA released for
15 public comment Dec. 15, 2011); FOF 131 (IBMP Partners collectively approved the AMA
16 in March, 2012—final signatory, Dr. Zaluski, signed AMA in October 2012). The Court
17 addresses this matter in its entirety in Count V below.

18 **COUNT FIVE— DOES THE STATE’S EA PROCESS SATISFIES
19 CONSTITUTIONAL AND STATE PUBLIC PARTICIPATION GUARANTEES.**

20 **A. Was An Opportunity To Participate Was Provided In
21 Compliance With Montana Law Prior To The Partners’ Final
22 Decision To Adopt The AMA?**

23 Petitioners’ Count V alleges that the adoption of the AMA violated members’
24 constitutional right to participate because members affected by the AMA were deprived
25 of a reasonable opportunity to participate and provide public comment. Petr. Jt. Pet. for
26 Decl. and Inj. Relief, 48. *See also* Aff. Davis, ¶ 12; Aff. Stermitz, ¶ 10; Aff. Rigler, ¶ 16;
and, Aff. Sperano, ¶ 14. Based upon the record, the Court is not persuaded by this
argument.

The right to participate is protected under Article II, Section 8 of the Montana
Constitution, which states in part, “[t]he public has the right to expect governmental

1 agencies to afford such reasonable opportunity for citizen participation in the operation
2 of the agencies prior to the *final decision* as may be provided by law.” Mont. Const. art
3 II, § 8 (emphasis added). In addition, under MEPA, state agencies are required to
4 provide the public with notice and opportunity to review and comment on any
5 environmental assessment (EA) that the agency prepares. Admin. R. Mont. 17.4.610.
6 Pursuant to the Montana Constitution, the legislature established guidelines to afford
7 reasonable opportunity to participate. Mont. Code Ann. § 2-3-101. The requirements
8 for compliance are set forth in Mont. Code Ann. § 2-3-104, and state an agency has
9 complied with public notice requirements if:

10 (1) an environmental impact statement is prepared and distributed
11 as required by the Montana Environmental Policy Act, Title 75,
12 chapter 1;

13 (2) a proceeding is held as required by the Montana Administrative
14 Procedure Act;

15 (3) a public hearing, after appropriate notice is given, is held
16 pursuant to any other provision of state law or a local ordinance or
17 resolution; or

18 (4) a newspaper of general circulation within the area to be affected
19 by a decision of significant interest to the public has carried a news
20 story or advertisement concerning the decision sufficiently prior to
21 a final decision to permit public comment on the matter.

22 Mont. Code Ann. § 2-3-104.

23 The nexus of Petitioners’ argument is centered on the adoption of the AMA in
24 December 2011. However, the December 2011 document was titled “Draft Joint
25 Environmental Assessment: Adaptive Management Adjustments to the Interagency
26 Bison Management Plan” (referred herein as “Draft Joint EA”). Admin. Rec. 3117-3169.
This was not the final decision of the agencies, and merely constituted the proposed
final decision. The final decision to adopt the AMA was made by the DOL and FWP on
February 28, 2012, in the “Joint Decision Notice,” which was finalized in October 2012.
FOF 121, 131. Further, the Draft Joint EA sets out the public comment procedure
required prior to adopting a final decision. Admin. Rec. 3156. It specifies that the
public will be notified in the following manners:

- Two public notices in each o these papers: *Helena Independent Record*, *Livingston Enterprise*, and *The Bozeman Chronicle*;
- One statewide press release;
- Direct mailing to adjacent landowners and interested parties in Montana;
- Public notice on the Fish, Wildlife & Parks web page: <http://fwp.mt.gov>: and
- Copies will be available for public review at FWP Region 3 Headquarters and Helena Headquarters.

Admin. Rec. 3156. Additionally, it states that a public meeting was held on April 14, 2011, in Gardiner, Montana, and extended the public comment period to January 13, 2012. *Id.* In February 2012, the DOL and FWP released a “Joint Decision Notice.” Admin. Rec. 13800-13820. The Joint Decision Notice reflects that the actions listed above were completed, thereby satisfying the statutory requirements. Admin. Rec. 13801-13802; Mont. Code Ann. §2-3-104. The Joint Decision Notice also includes a summary of the public comments, stating that it received over 5,400 comments “via e-mail or regular mail.” Admin. Rec. 13802.

After inspection of the Administrative Record, the Court finds it replete with evidence contradicting Petitioners’ assertions—specifically, by the comments documented in the record. Included in the comments reviewed by the agencies are letters sent from Hertha Lund, on behalf of MFBF, and other members of MFBF and members of PCSA including Jeff Cahill, Joe Sperano, and Frank Rigler. Admin. Rec. 13176-13188, 13198-13214, 12982-12983, 13190-13196, 12936. Although the Petitioners may not agree with the end result, the record indicates they were provided with ample opportunity to comment and participate in the process as required by statute. Count V is therefore **DISMISSED**.

COUNT SIX

1 **A. Failure To Provide Constitutional Right To Basic Necessities**
2 **And Protections Of Private Property.**

3 Count VI of Petitioners' amended complaint states Respondents' actions
4 negatively impacted Petitioners' members' property and right to "acquire, posses and
5 protect property," in violation of Article II, Section 3, of the Montana Constitution. Petr.
6 Jt. Pet. for Decl. and Inj. Relief, 48-49. Further, they allege Respondents' actions and
7 decisions have directly impacted Petitioners' members' "rights to pursue life's basic
8 necessities, and enjoy and defend their lives and liberties," as well as their ability to seek
9 "their safety, health and happiness in all lawful ways." Petr. Jt. Pet. for Decl. and Inj.
10 Relief, 48. Petitioners present little authority or support for their position and no case
11 law is provided indicating that the State of Montana has a duty to protect an individual's
12 property from damage by wildlife.

13 The Montana Constitution protects an individual's right to a "clean and healthful
14 environment," including the right to seek their health and safety, and the right to pursue
15 life's basic necessities, such as "acquiring, possessing, and protecting property." Mont.
16 Const. Art. II, § 3. The Supreme Court of Montana has observed that "[p]rivate real
17 property ownership is a fundamental right, Art. II, § 3, Mont. Const., and any statute
18 which allows the government to take a person's property must be given its plain
19 interpretation, favoring the person's fundamental rights." *City of Bozeman v. Vaniman*,
20 264 Mont. 76, 79, 869 P.2d 790, 792 (1994).

21 Although the Montana Constitution protects an individual's right to pursue life's
22 basic necessities, including the right to possess and protect property, that provision does
23 not grant an unfettered duty of the DOL, FWP, or the State for that matter, to protect an
24 individual's private property from damage by a wild animal. "[W]ild game . . . belong to
25 the State in its sovereign capacity," and the State cannot be sued by an individual for
26 damages without its consent. *State v. Rathbone*, 110 Mont. 225, 238, 100 P.2d 86, 91
(1940). Montana's wildlife is owned by the State; however, no fundamental right is
implicated by damage done to private property by the YNP bison. In *Rathbone*, the
Montana Supreme Court eloquently addressed a similar matter in which elk were
causing damage to an individual's property. The Court said:

1 response to the State’s adoption of the AMA. Petr. Jt. Proposed Findings of Fact and
2 Conclusions of Law, 88.

3 The Fifth Amendment provides, “No person shall be . . . deprived of life, liberty or
4 property without due process of law.” U.S. Const. amend. V. The Fourteenth
5 Amendment, applicable to the states, commands “[N]or shall any state deprive any
6 person of life, liberty or property without due process of law.” U.S. Const. amend. XIV.
7 These rights are further protected by the Montana Constitution: “[n]o person shall be
8 deprived of life, liberty or property without due process of law.” Mont. Const. art. II, §
9 17. The guarantees of due process are both procedural and substantive. *State v. Webb*,
2005 MT 5, ¶ 19, 106 P.3d 521. The Court addresses each below.

10 A. Procedural Due Process

11 The Petitioners’ argue three violations of procedural due process. The first and
12 second allegations concern protectable property interests, including violations of
13 members’ property interests and right to a livelihood. Petr. Jt. Pet. for Decl. and Inj.
14 Relief, 49. Third, Petitioners’ state the process for adoption of the AMA violated due
15 process requirements as well. Petr. Jt. Proposed Findings of Fact and Conclusions of
16 Law, 88. The Respondents contend that the procedural due process claim fails because,
17 “this case does not impinge upon any constitutionally protected property or liberty
18 interests, and . . . the State’s EA process provided Petitioners with all ‘process’ to which
19 they were legally entitled.” Respondents’ & Respondent-Intervenors’ Proposed Findings
Of Fact And Conclusions of Law, 60. The Court addresses these three issues below.

20 The process requirement necessary to satisfy procedural due process “comes into
21 play only after a showing that a property or liberty interest exists.” *Webb*, ¶ 19 (citing
22 *State v. Egdorf*, 2003 MT 264, ¶19, 77 P.3d 517. A protectable property interest exists
23 when an individual has “more than an abstract need or desire for it.” *Akhatar v. Van*
De Wetering, 197 Mont. 205, 211, 642 P.2d 149, 153 (1982).

24 First, the Court examines Petitioners’ claims of procedural due process violations
25 regarding the AMA adoption process. The Court has already addressed the sufficiency
26 of the State’s procedure in adopting the AMA, finding the procedure adequate and in
accordance with state law and regulations. To reiterate, the Court found that no process

1 was required prior to the adoption of the December 2011 Draft AMA. This was only a
2 proposal—and the State followed proper procedure prior to making its final decision.
3 The State provided the required notice and a thirty day public comment period prior to
4 making its final decision to adopt the AMA. Admin. Rec. 3117-3169; *See also* FOF 23,
5 122. (Formal adoption of the AMA occurred on February 28, 2012, when the DOL and
6 FWP issued the Joint Decision Notice); FOF 21, 131. (Final approval of the AMA
7 occurred in October 2012, when the final required signature of Dr. Zaluski was
8 acquired). Based upon the Court’s findings that the Respondents provided appropriate
9 process when adopting the AMA, this argument fails as a matter of law.

10 Second, the Court addresses alleged violation of due process concerning the
11 members’ property interests. The Petitioners’ claims are supported by little evidence or
12 applicable case law. *See, e.g.* Petr. Jt. Proposed Findings of Fact and Conclusions of
13 Law, ¶ 279-282. However, Petitioners do provide additional argument in their response
14 to Respondents’ motion for partial summary judgment, upon which the Court bases its
15 consideration. *See* Petitioners’ Response to State’s Partial Summary Judgment, 13-19.
16 (Aug. 10, 2012).

17 Petitioners claim the State has intruded on its members’ property interests by
18 way of bison trespass. Petr. Resp. to State’s Partial Summary Judgment, 16. Petitioners
19 rely on the holding in *Hendler*, which states, “In the bundle of rights we call property,
20 one of the most valued is the right to sole and exclusive possession—the right to exclude
21 strangers, or for that matter friends, but especially the government.” *Hendler v. U.S.*,
22 952 F.2d 1364, 1374-1375 (Fed. Cir. 1991). Petitioners assert that, at a minimum, due
23 process requires that “the state notify the person that his property right may be
24 extinguished, or conveyed, or partitioned, and allow him the opportunity to be heard on
25 the matter.” Petr. Resp. to State’s Partial Summary Judgment, 14 (citing *Grannis v.*
26 *Odean*, 234 U.S. 385, 394 (1914)). They continue, stating “[d]ue process does not require
perfect accuracy, however: even an imperfect notice is sufficient if the defendant
actually received it, or if he would have recognized it was meant for him in spite of the
defect.” *Grannis*, 234 U.S. at 396-397.

The Court finds this argument is addressed in its previous analysis addressing the
adequacy of notice provided by Respondents prior to the final adoption of the AMA.

1 Any notice of impact resulting from the proposed AMA to Petitioners' members' was
2 provided during the notice phase. This allowed members the opportunity to vocalize
3 concerns and was provided in accordance with State law and was sufficient. Therefore,
4 the Court finds the State's actions did not violate Petitioners' procedural due process by
5 adopting the AMA.

6 Finally, the Court addresses the alleged procedural due process violations of
7 Pctitioners' members' right to a livelihood. The Montana Supreme Court has recognized
8 a fundamental right to pursue employment. *Wiser v. State*, 2006 MT 20, ¶ 24, 129 P.3d
9 133. However, this right is circumscribed by:

10 the State's police power to protect the public's health and welfare.
11 'Liberty is necessarily subordinate to reasonable restraint and
12 regulation by the state in the exercise of its sovereign prerogative-
13 police power.' *State v. Safeway Stores* (1938), 106 Mont. 182, 203,
14 76 P.2d 81, 86. Accordingly, while one does have the fundamental
15 right to pursue employment, one does not have the fundamental
16 right to practice his or her profession free of state regulation
17 promulgated to protect the public's welfare.

18 *Wiser*, ¶ 24.

19 The State "holds police power to regulate for the health and welfare of its
20 citizens," and Montana's police power encompasses wildlife management. *Id.* (citing
21 *State v. Skurdal*, 235 Mont. 291, 294, 767 P.2d 304, 306 (1965)). The United States
22 Supreme Court recognized that "the protection and preservation of the state's wildlife is
23 peculiarly within its police power and the state has great latitude in determining by what
24 means are appropriate for protecting wildlife." *Egdorf*, ¶ 26 (citing *Baldwin v. Fish and
25 Game Commission of Montana* (1978), 436 U.S. 371, 391, 98 S. Ct. 1852, 1864).
26 Montana has also recognized in numerous decisions, the State's power to protect public
wildlife resources through regulations designed for that purpose. See e.g. *State v.
Boyer*, 2002 MT 33, ¶ 22, 42 P.3d 771 (Montana's Constitution and law mandate special
considerations to assure that our wild places and the creatures that inhabit them are
preserved for future generations); *State v. Huebner* (1992), 252 Mont. 184, 188, 827
P.2d 1260, 1263; *Nepstad v. Danielson* (1967), 149 Mont. 438, 440, 427 P.2d 689, 691.

As a component of bison management, the State enacted the IBMP which
provides the State the discretion to make changes through adaptive management. FOF

1 19. Broad discretion is also granted through Montana Statutes, including Mont. Code
2 Ann. §§ 81-2-102, 87-1-201 and 87-1-301. Undoubtedly, Petitioners are correct that its
3 members have a fundamental right to earn a livelihood; however, this right like many
4 others is still subject to the State's police powers and authority to "regulate for the
5 health and welfare of its citizens." *Wiser*, ¶ 24.

6 Accordingly, based upon the process utilized by the State in its adoption of the
7 AMA and the State's broad grant of police power, the Court finds the State did not
8 violate Petitioners' members' procedural due process rights. Therefore, this claim is
9 **DISMISSED.**

10 **B. Substantive Due Process**

11 Petitioners also allege that Respondents' adoption of the AMA constitutes a
12 violation of its members' substantive due process rights because the actions exceeded
13 the scope of the original IBMP and are therefore "arbitrary, discriminatory, without a
14 compelling state interest, and not reasonably tailored to any governmental need[]." *See*
15 *Petr. Resp. to State's Partial Summary Judgment*, 19-20; *Petr. Jt. Pet. for Decl. and Inj.*
16 *Relief*, 49. As support, Petitioners charge that "the State's action is completely opposite
17 to the original IBMP," and the changes made are "wholesale modifications of the
18 original IBMP." *Id.* at 20-21. Respondents' counter that the State's actions are in
19 accordance with the IBMP's legitimate governmental objectives, including: (1) to
20 maintain a wild, free roaming bison population, and; (2) addressing the risk of
21 brucellosis transmission to protect Montana's livestock industry. Respondents' &
22 Respondent-Intervenors' Proposed Findings Of Fact And Conclusions of Law, 67.

23 The due process clause "contains a substantive component which bars arbitrary
24 governmental actions, regardless of the procedures used to implement them, and serves
25 as a check on oppressive governmental action." *Newville v. State*, 267 Mont. 237, 249,
26 883 P.2d 793, 800 (1994). "The essence of substantive due process is that the State
cannot use its police power to take unreasonable, arbitrary or capricious action against
an individual." *Webb*, ¶ 22. In order to satisfy substantive due process guarantees, a
statute enacted under a state's police power must be reasonably related to a permissible
legislative objective. *Webb*, ¶ 22 (*quoting Egdorf*, ¶ 21). A substantive due process

1 analysis requires the court to test the reasonableness of a statute in relation to the
2 State's power to enact such legislation.

3 First and legally foremost, the Plaintiffs do not base their due process claim upon
4 a statute, but rather upon the IBMP and their view of its unreasonable implementation
5 or charge. However, as the Court has previously noted in Count III, the IBMP is not
6 enforceable, because MEPA is a procedural mechanism not a substantive, result-based
7 standard. Mont. Code Ann. § 75-1-102(1); *Ravalli Co. Fish & Game Ass'n, Inc.*, 273
8 Mont. at 377, 903 P.2d at 1366-67.

9 Even looked at from the sole perspective of the IBMP, Petitioners' claim lacks
10 merit. The Preamble to the Interagency Bison Management Plan (IBMP) contains a
11 paragraph setting forth the IBMP's Objectives, which states in part:

12 This plan is not intended to be a brucellosis eradication plan, but
13 rather is a plan for the management of bison, intended to prevent
14 the transmission of brucellosis from bison to cattle . . . This [IBMP]
15 reaffirms the principle purpose for action described in the Draft and
16 Final Environmental Impact Statements 'to maintain a wild, free-
17 ranging population of bison and address the risk of brucellosis
18 transmission to protect the economic interests and viability of the
19 livestock industry in Montana.' A series of three adaptive
20 management steps are prescribed in this [IBMP] that will minimize
21 the risk of transmission of brucellosis to cattle grazing on public
22 and private lands adjacent to Yellowstone National Park and will,
23 when all criteria are met, provide for the tolerance of a limited
24 number of bison on public and private lands where permitted
25 adjacent to Yellowstone National Park during winter.

26 Admin. Rec. 2423. The winter of 2010/2011 presented unique circumstances and
unforeseen problems not contemplated by the 2000 IBMP. In an attempt to address the
reoccurrence of these problems, the State drafted the AMA, which increased the bison-
tolerant area in the Gardiner Basin. FOF 59; Admin. Rec. at 2618-2620, 3117-3167/2011
Draft AMA. The basis for this action was to "enable bison to move outside of the park
when severe winter conditions are present and bison migrate from higher elevations
within YNP to lower elevations within the Gardiner Basin." Admin. Rec. 3121/2011
Draft AMA.

The AMA was the result of extensive research and environmental analysis. These
adjustments considered the changes to APHIS in the event of an outbreak of brucellosis,

1 e.g. that the state would not automatically be downgraded from its brucellosis free
2 status. Admin. Rec. 3122. Additionally, the Draft AMA incorporated the addition of
3 specific tools to the “bison management toolbox.” Admin. Rec. 3122. These additional
4 tools include fencing, hazing, vaccination, shipment to slaughter, lethal removal,
5 hunting, the use of the Corwin Springs facility, and others. *Id.* Testimony was also
6 provided touting the benefit of these tools. Dr. Zaluski testified that the additional area
7 to push bison, increased staff availability, and fencing would aid in decreasing the
8 likelihood of comingling. Hrg. Trans., Dr. Zaluski, 831:25-833:11. Testimony also
9 established that the increased area, at a minimum, would not impact the risk of bison-
10 cattle interactions and transmission. FOF 67, 80-81; Hrg. Transc. 830-843 (Zaluski);
11 900-901 (McCluskey); *See also* Admin. Rec. 3122.

12 The changes incorporated in the AMA support the IBMP’s objectives by providing
13 additional space for the bison to be “wild” and “free-ranging” while at the same time
14 addressing the risk of brucellosis transmission. The considerations made by the State in
15 proposing the AMA reflect that these changes were not made arbitrarily, but with
16 concern for both maintaining the State’s interests in the bison herd and the protection of
17 Montana’s livestock industry in accordance with the IBMP. The adjustments to the
18 IBMP are reasonably tailored to meet the government’s ongoing concerns and needs
19 because they were made with reasonable forethought and consideration of numerous
20 intervening factors.

21 The Court agrees with Respondents that the outcomes of the IBMP and the
22 subsequent AMA are a result of extensive and exhaustive environmental analysis, public
23 input, and court oversight. The Court finds that the decision to adopt the AMA is not
24 arbitrary, as it reasonably relates to the objectives of the IBMP and is not capricious for
25 the same reasons. Petitioners’ substantive due process claim is therefore **DISMISSED**.

26 **COUNT EIGHT—CLEAN AND HEALTHFUL ENVIRONMENT**

A. Does the Adoption Of The AMA Violate Petitioners’ Constitutional Right To A Clean And Healthful Environment?

Count VIII alleges that the adoption of the AMA by the Respondents violates the
clean and healthful environment clause found in Article II, Section 3, of the Montana

1 Constitution. Petr. Jt. Pet. for Decl. and Inj. Relief, 49-51. In support, Petitioners point
2 to three specific instances which comprise the alleged violations:

- 3 a. The bison have threatened Petitioners' members with
4 physical harm;
- 5 b. The bison are infected with brucellosis and Respondents
6 have allowed bison onto Petitioners' members' property in
7 increasing numbers, which increases the risk of transmission
8 of the disease to other animals and to humans; and,
- 9 c. Respondents failed to comply with MEPA.

10 Petr. Jt. Proposed Findings of Fact and Conclusions of Law, 89. Petitioners assert that
11 Respondents allowed "depletion and degradation of Montana's clean and healthful
12 environment," by signing the AMA without first examining the environmental impacts
13 of their actions. Petr. Jt. Pet. for Decl. and Inj. Relief, 50. These actions, in turn,
14 allowed an "unlimited" number of "diseased, unvaccinated bison to roam Montana in an
15 unconfined manner," creating a significant risk of the potential transference of *brucella*
16 into the environment and to local cattle. *Id.* Respondents argue that the Montana
17 Constitution does not provide safeguards against threats by wildlife, but seeks to
18 preserve it. Respondents' & Respondent-Intervenors' Proposed Findings Of Fact And
19 Conclusions of Law, 72. Further, Respondents contend that testimony establishes that
20 the increased tolerance area does not increase the risk of transmission of brucellosis. *Id.*

21 The Montana Constitution provides that each person shall "have certain
22 inalienable rights," including, "the right to a clean and healthful environment[.]" Mont.
23 Const. Art II, Section 3. The right to a clean and healthful environment is a
24 fundamental right "because it is guaranteed by the Declaration of Rights found in
25 Montana's Constitution." *Montana Env'tl. Info. Ctr. v. Department of Env'tl. Quality*,
26 1999 MT 248, ¶ 63, 988 P.2d 1236. Because those rights guaranteed by Art. II, sec. 3,
and those rights provided for in this section were intended by the constitution's framers
to be interrelated and interdependent, state action under either section is subject to
strict scrutiny. *Montana Env'tl. Info. Ctr.*, ¶ 64 (See also *Butte Community Union v.*
Lewis, 219 M 426, 712 P2d 1309, 43 St. Rep. 65 (1986), and *Wadsworth v. St.*, 275 M
287, 911 P2d 1165, 53 St. Rep. 146 (1996).

Physical Harm. Montana's Constitution contains no provision safeguarding
against threats to personal safety caused by naturally occurring conditions such as

1 native wildlife. To the contrary, Montana’s Constitution, laws, and regulations provide
2 “special considerations to assure that our wild places and the creatures that inhabit
3 them are preserved for future generations.” *Boyer*, ¶ 22. As stated in *Rathbone*, a
4 property owner in the State of Montana “must recognize the fact that there may be some
5 injury to property or inconvenience from wild game for which there is no recourse.”
6 *Rathbone*, 110 Mont. at 242, 100 P.2d at 93. Again, the Court recognizes the residents
7 of Gardiner, Montana, and their ability to live with bison. The implementation of a few
8 practical measures by Petitioners’ members may decrease the “threat of physical harm”
imposed by the bison in the Gardiner Basin. FOF 101-102.

9 Wildlife is unpredictable, at best. However, many residents in the great State of
10 Montana have learned to co-exist with wildlife by taking reasonable precautions and
11 being aware of his or her surroundings. Montana residents live with wolves, grizzly and
12 black bears, mountain lions, moose, and elk—all of which have the ability to threaten
13 our safety. Every one of these animals is subject to management by the State. And it is
14 true, that on occasion, a person does suffer harm as a result of contact with one of them.
15 Bison also fit in this category. However, in this case, there are a great many remedies to
16 deal with a report of a bison on an individual’s private property. That person has the
17 option of contacting FWP, who can respond and haze the bison or remove it, either by
18 transporting it or by lethal means. *See e.g.* Mont. Code Ann. § 81-2-120. This may not
19 be the most convenient and expeditious means of addressing a menacing bison, but as a
20 Montana resident, “who acquires property in Montana,” he “does so with notice and
21 knowledge of the presence of wild game and presumably is cognizant of its natural
22 habits.” *Rathbone*, 110 Mont. at 242, 100 P.2d at 93.

23 *Risk of Transmission.* Brucellosis poses a potential threat to the health and
24 property of Montana’s livestock industry, and because approximately 50% of YNP bison
25 are exposed or infected with brucellosis, they pose a threat to human and animal health.
26 FOF 3, 5. The changes to the AMA allow bison to occupy a larger area, which
incorporates public and private land. These changes were made in an attempt to
enlarge the range for the YNP during times of harsh winters when foraging was more
difficult. Admin. Rec. 3121. Dr. Zaluski testified that he performed risk assessments to
determine if the increase in the tolerance zone would impact the risk of transmission of

1 brucellosis. FOF 62, 66. Dr. McCluskey performed a similar risk assessment. FOF 66.
2 Based upon these risk assessments, both Dr. Zaluski and Dr. McCluskey concluded that
3 the risk would remain unchanged, if not decreased under the AMA. *Id.* Accordingly, the
4 changes to the AMA do not increase the risk of transmission of brucellosis to livestock or
5 humans and, therefore, do not implicate Petitioners' members' constitutional right to a
6 clean and healthful environment.

7 *MEPA Compliance.* In Count VIII, Petitioners' repeat the allegations regarding
8 the failure of Respondents to follow required procedure—specifically that they failed to
9 conduct an adequate environmental review in accordance with MEPA. *Petr. Jt. Pet. for*
10 *Decl. and Inj. Relief*, 50-51. The Court has previously addressed these allegations in
11 Count Three, and declines to do so again in this instance.

12 The Court concludes that the constitutional right to a clean and healthy
13 environment and right to be free from unreasonable degradation of that environment
14 are not implicated in this instance by any of Petitioners' claims. The allegations are not
15 supported by any evidence demonstrating that Respondents' actions have caused or
16 threatened to cause "degradation of the environmental life support system," or "the
17 unreasonable degradation of natural resources" thereby implicating Petitioners'
18 members' constitutional right to a clean and healthful environment. *Montana Envtl.*
19 *Info. Ctr.*, ¶ 77. Therefore, Count VIII is **DISMISSED**.

20 **COUNT NINE—PUBLIC NUISANCE**

21 Petitioners' Count IX requests the Court to grant declaratory and injunctive relief
22 because the Respondents' actions allowing diseased, unvaccinated bison to roam
23 constitute a public nuisance, such nuisance infringes on members' ability to use and
24 enjoy their property. *Petr. Jt. Pet. for Decl. and Inj. Relief*, 51-52. Petitioners allege its
25 members have suffered damage distinct from the public at large caused by the presence
26 of the uncontrolled bison. Respondents disagree, claiming Petitioners' public nuisance
claim is barred by the *Sackman* rule and "law on game damage." *Respondents' &*
Respondent-Intervenors' Proposed Findings Of Fact And Conclusions of Law, 76; See
State ex rel. Sackman v. State Fish & game Comm'n, 151 Mont. 45, 438 P.2d 663 (1968).

1 Generally, as a rule, animals are not regarded as nuisances per se, but may be or
2 become nuisances *per accidens* (by chance or extraneous circumstance), or nuisances in
3 fact or under the circumstances of the particular case. 4 Am. Jur. 2d Animals § 61
4 (1962). Montana Code Annotated, Section 27-30-101, defines a nuisance as:

5 (1) Anything that is injurious to health, indecent or offensive to
6 the senses, or an obstruction to the free use of property, so as to
7 interfere with the comfortable enjoyment of life or property, or
8 that unlawfully obstructs the free passage or use, in the
9 customary manner, of any navigable lake, river, bay, stream,
canal, or basin or any public park, square, street, or highway is a
nuisance. (2) Nothing that is done or maintained under the
express authority of a statute may be deemed a public or private
nuisance. * * *

10 A nuisance is a “public nuisance” when it “affects rights to which every citizen is
11 entitled” and “at the same time, an entire community or neighborhood or any
12 considerable number of persons, although the extent of the annoyance or damage
13 inflicted upon individuals may be unequal. *Gibbs v. Gardner*, 107 M 76, 80 P2d 370
14 (1938); Mont. Code Ann. § 27-30-102(1). An action for public nuisance “may be
15 brought by any person whose property is injuriously affected or whose personal
16 enjoyment is lessened by the nuisance.” Mont Code Ann. § 27-30-103. A nuisance may
be enjoined or abated by judgment and damages recovered. *Id.*

17 *Duty to Control Bison.* Montana and the Seventh and Ninth Circuit Courts of
18 Appeal have rendered numerous opinions addressing the ability of the government to
19 control wildlife—even when the same government is responsible for regulating the
20 wildlife. See e.g. *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988) (Montana sheep
21 ranchers requested compensation for the killing of their sheep by grizzly bears because
22 they were precluded from defending their sheep since the bears were protected by
23 Endangered Species Act); *Sickman et al. v. U.S.*, 184 F.2d 616 (7th Cir. 1950) (Claim for
24 depredation, nuisance, and damages to crops by federally regulated migratory birds
25 rejected); *State v. Sackman*, 151 Mont. 45, 438 P.2d 663 (1968) (Discretion to act in
26 response to a report of an elk damaging property remains with the [FWP]).

 Petitioners state that Respondents have “controlled the YNP bison for a hundred
years; therefore, Respondents have a duty to manage the bison so that they do not harm

1 Montana's citizens, prohibit the use of property, and protect citizens on roadways and
2 with regards to the transmission of brucellosis." Petr. Jt. Proposed Findings of Fact and
3 Conclusions of Law, 91. In *Christy*, the Ninth Circuit Court stated that "The Federal
4 Government does not 'own' the wild animals it protects, nor does the government
5 control the conduct of such animals." *Christy*, 857 F.2d at 1335. Further, the Court
6 stated that "the losses sustained by the plaintiffs are the incidental, and by no means
7 inevitable, result of reasonable regulation in the public interest." *Id.* The Court cited a
New York decision, which stated:

8 Wherever protection is accorded [to wild animals] harm may be
9 done to the individual. Deer or moose may browse on his crops;
10 mink or skunks kill his chickens; robins eat his cherries. In certain
11 cases the Legislature may be mistaken in its belief that more good
12 than harm is occasioned. But this is clearly a matter which is
confided to its discretion. It exercises a governmental function for
the benefit of the public at large, and no one can complain of the
incidental injuries that may result.

13 *Christy*, 857 F.2d at 1335 (citing *Barrett v. State*, 220 N.Y. 423, 116 N.E. 99, 100). The
14 Court finds the analysis set forth in *Christy* applicable to the current court.

15 The Court disagrees with Petitioners' argument that FWP has a duty to control
16 bison, thereby preventing them from damaging property. The Court acknowledges that
17 the State of Montana, through Respondents, manages and regulates bison and other
18 wildlife. However, Respondents do not have a statutory duty to ensure that no harm is
19 incurred by a Montana resident by a wild animal. If a duty existed, then FWP would
20 theoretically be liable for any harm carried out by a wild animal in this State. This
21 would encompass deer hit by motorists on State highways, bear maulings occurring
22 outside National Parks, mountain lion attacks on children, damage to feed and fields by
23 elk and deer, loss of timber by the busy beaver, and countless more scenarios. To
24 impose a duty upon FWP that would require them to "control" bison in a manner that
25 prevents them from engaging in behaviors that damage property and cause harm is a
26 legislative responsibility, not one of the Courts. The FWP has managed the bison for the
past century, in accordance with State law and regulation, and the Court finds no duty
existing beyond that.

1 *Reasonable Person.* In considering the criteria of what should constitute
2 interference with a property owner's peaceful enjoyment of property, courts have held
3 "that it is the ordinary and reasonable person's complaint that should serve as a basis for
4 what is a nuisance." *Kasala v. Kalispell Pee Wee Baseball League*, 151 Mont. 109, 114,
5 439 P.2d 65, 68 (1968). In making its determination, the court examines whether "a
6 particular annoyance or inconvenience is sufficient to constitute a nuisance," which
7 depends "upon its effect upon an ordinarily reasonable man, that is, a normal person of
8 ordinary habits and sensibilities." *Kasala*, 151 Mont. at 114, 439 P.2d at 68 (citing
9 *Amphitheaters, Inc. v. Portland Meadows*, 184 Or. 336, 198 P.2d 847, 5 A.L.R.2d 690).
10 It is established law that even an intentional interference with the use and enjoyment of
11 land is not actionable unless the interference is both substantial and unreasonable.
12 *Kasala*, 151 Mont. at 115, 439 P.2d at 69 (citing Restatement of Law of Torts, Vol. 4, §
13 822).

14 The evidence presented by the Petitioners included testimony by a number of
15 residents in the Gardiner Basin who suffered property damage and personal physical
16 threats when bison entered their property during the winter of 2010/2011. The damage
17 reported included destruction of wheel lines, damage to buildings and home siding,
18 fences, and feed. FOF 33-43. Likewise, Petitioners' members' stated that the use and
19 enjoyment of their property was hindered due to the aggressive nature of the bison
20 which would often inhibit their ability to go outside or walk to the bus stop. Reports of
21 the bison's aggression toward domestic pets and horses were also reported. FOF 33-43.

22 In contrast, Respondents presented evidence of residents in Gardiner Basin who
23 accept the bison as a "part of living here" despite the inconveniences that may be
24 involved. FOF 108. Joe Sperano, Petitioners' witness, even admitted that he has made
25 statements absolving the bison of blame for property damage because of his close
26 proximity to YNP. FOF 108; Hrg. Transc. 229-30 (Sperano). Many Gardiner Basin
residents find that the wildlife on and near their property is a significant factor that
contributes positively to their quality of life and the use and enjoyment of their property.
Id.; *See also* Hrg. Transc. 564-65 (Berg) (neighbor of Joe Sperano, who lives across the
road); 568 (Baker); 580-81 (Page); 586 (Hoeninghausen); 595-96 (Schneider); 612
(Bumann).

1 some reason, fails to properly enforce interests which are significant to its citizens."
2 *Matter of Dearborn Drainage Area*, 240 Mont. at 43, 782 P.2d at 900. Under the
3 doctrine of private attorney general, three basic factors are to be considered:

4 (1) the strength or societal importance of the public policy
5 vindicated by the litigation, (2) the necessity for private
6 enforcement and the magnitude of the resultant burden on the
7 plaintiff, (3) the number of people standing to benefit from the
8 decision.

9 *Montanans for the Responsible Use of the Sch. Trust v. State, ex rel., Bd. Of Land*
10 *Comms.*, 1999 MT 263, ¶66 (citing *Serrano v. Priest*, 569 P.2d 1303, 1314 (Cal. 1977)).
11 In *Finke v. State, ex rel., McGrath*, the Court recognized that the equity of imposing fees
12 against the party whom fees are sought must also be considered. 2003 MT 48, ¶ 33, 314
13 Mont. 314, 325, 65 P.3d 576, 583.

14 Lastly, Montana has constructed statutory exceptions to the American rule,
15 enumerated in §§ 25-10-711 and 25-10-711 of the Montana Code. Section 25-10-711 reads
16 as follows:

17 (1) In any civil action brought by or against the state, a political
18 subdivision, or an agency of the state or a political subdivision, the
19 opposing party, whether plaintiff or defendant, is entitled to the
20 costs enumerated in 25-10-201 and reasonable attorney's fees as
21 determined by the court if: (a) he prevails against the state, political
22 subdivision, or agency; and (b) the court finds that the claim or
23 defense of the state, political subdivision, or agency that brought or
24 defended the action was frivolous or pursued in bad faith.

25 Mont. Code Ann. § 25-10-711.

26 In this instance, the Court has dismissed Petitioners' claims, concluding that
Respondents did not violate any State law or regulation, nor did they fail to follow
required procedures. Although the Court has the discretion to award costs when it feels
it necessary and proper, the Court does not find it so in this case. The Court therefore
finds that an award of reasonable attorney fees is not warranted.

CONCLUSION

Petitioners have requested the Court grant declaratory and injunctive relief
barring Respondents from implementing the AMA and from engaging in further

1 conduct which would allow bison to migrate into the expanded tolerance areas. A
2 declaratory injunction is appropriate when “genuine and existing rights are affected by a
3 statute.” *McGillivray*, ¶8. Its purpose is to “settle and to afford relief from uncertainty
4 and insecurity with respect to rights.” Mont. Code Ann. § 27-8-102. Even with liberal
5 construction and application of the appropriate laws, Petitioners have provided no
6 evidence to the Court proving that the DOL’s adoption of the AMA affected Petitioners’
7 rights or indicating that the DOL or FWP violated any statutory or regulatory duty. In
8 regards to Petitioners’ request for injunctive relief, the Court determines Petitioners
9 have failed to demonstrate “an injury to a property or civil right of individual members”
10 which satisfies the principles of Montana law and statute. Mont. Code Ann. § 27-19-104.
11 Moreover, Petitioners have not established any urgent or irreparable injury resulting
12 from the agencies’ actions. In addition, Petitioners have specifically requested this
13 Court require Respondents to perform an evaluation of the impacts of the AMA, which
14 would include an EIS, or at a minimum, a supplemental EIS.

15 Further, Petitioners requested the Court to enjoin Respondents from engaging in
16 any future actions in violation of their statutory duties and seek abatement of the public
17 nuisance created by Respondent’s actions. The Court finds that Respondents have
18 followed proper procedure, including MEPA analysis, and notice requirements prior to
19 the implementation of the final AMA. The Court recognizes that the 2000 IBMP
20 created a flexible mechanism for the management of YNP bison in which it allowed for
21 changes based upon the experiences learned from completion of the designated steps,
22 and the implementation of such did not violate Petitioners’ constitutional rights nor
23 create a public nuisance. The Court emphasizes with the struggles some of the
24 Petitioners’ members have in encounters with bison, but as *Rathbone* so eloquently
25 stated that is “a consequence of living in Montana and with her abundant wildlife.” In
26 this case there is certainly a large potential of over-abundance of bison because the Park
Service refuses to address bison numbers within the context of their own policy
determinations. That refusal, however, is beyond the purview or jurisdiction of a
Montana District Court.

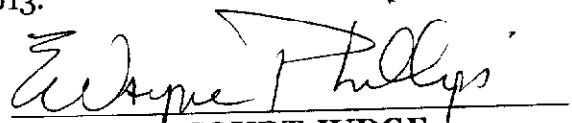
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In court, the agencies represented very affirmatively to this Court that they would make available resources to assist Petitioners in managing the negatives of bison migration. They are urged by this Court to fulfill those representations.

Based upon the foregoing and as indicated earlier in this Order, IT IS HEREBY ORDERED, Petitioners' Counts I through X are **DISMISSED**.

The Clerk of Court is directed to file this Final Order and Judgment On (Amended) Joint Petition and provide copies to counsel of record.

DATED this 4th day of January 2013.


DISTRICT COURT JUDGE
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