

J. Devlan Geddes
Kyle W. Nelson
Jeffrey J. Tierney
GOETZ, BALDWIN & GEDDES, P.C.
35 North Grand
P.O. Box 6580
Bozeman, MT 59771-6580
Phone: (406) 587-0618
Fax: (406) 587-5144
Email: devlan@goetzlawfirm.com knelson@goetzlawfirm.com
jtierney@goetzlawfirm.com
Attorneys for the Plaintiff

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

<p>SKYLINE SPORTSMEN'S ASS'N and ANACONDA SPORTSMEN'S CLUB,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>MONTANA DEPARTMENT OF FISH, WILDLIFE & PARKS and MONTANA FISH & WILDLIFE COMMISSION,</p> <p style="text-align: center;">Defendants.</p>	<p>Case No. _____</p> <p>Hon. _____</p> <p style="text-align: center;">COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF</p>
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Plaintiffs Skyline Sportsmen's Association and Anaconda Sportsmen's Club, through counsel, state their cause of action and claims for relief as follows:

INTRODUCTION

1. This is an action for declaratory and injunctive relief related to the Montana "Elk Management Guidelines in Areas with Brucellosis" and related work plans, including recently approved local modifications for the Paradise Valley (collectively referred to herein as the "elk-brucellosis management plan"). Plaintiffs seek a declaration that this program has been formulated and implemented

arbitrarily and capriciously in violation of the Montana Administrative Procedure Act ("MAPA"), in violation of environmental impact review requirements imposed by the Montana Environmental Policy Act ("MEPA"), in excess of the authority conferred upon Defendants by the Montana State Legislature, in violation of statutory limitations on the availability of publicly funded relief for private landowners, and in violation of the public trust doctrine. For all of these reasons, Plaintiffs also seek a permanent injunction against the implementation of the plan, requiring Defendants to develop a new management plan based upon sound science, following an adequate environmental review and in compliance with the law.

PARTIES

2. Plaintiffs Skyline Sportsmen's Association and Anaconda Sportsmen's Club are non-profit organizations comprised of Montana sportsmen and conservationists who are interested in preserving Montana's big game species and other natural resources. Plaintiffs stand to be significantly injured by the loss of recreational opportunities and aesthetic enjoyment due to depleted elk populations and other harms caused by the elk-brucellosis management plan.

3. Defendant Montana Fish, Wildlife & Parks (FWP) is a state administrative agency charged with the stewardship, preservation and protection of Montana's fish, wildlife, and recreational resources. Its specific powers and duties are set forth by statute in § 87-1-201, MCA.

4. Defendant Montana Fish & Wildlife Commission (FWC) is a quasi-judicial five member panel appointed by the Governor to set the rules and policies to

guide the execution of FWP's mandate. Its specific powers and duties are set forth by statute in § 87-1-301, MCA.

JURISDICTION AND VENUE

5. This court has jurisdiction over this case under §§ 3-5-302(1)(b)-(c), 2-4-506(4), 27-8-201 and 75-1-201(5)(a)(i), MCA.

6. Venue is proper under §§ 25-2-126(1) and 2-4-506(4), MCA.

7. Plaintiffs are entitled to bring these claims without exhausting administrative remedies because they challenge FWP and FWC's actions as illegal and in excess of their statutory authority, amounting to a lack of jurisdiction, *see Peterson v. School Board, Dist. No. 1*, 73 Mont. 442, 236 P. 670, 672 (1925); *McKart v. U.S.*, 395 U.S. 185, 194 (1969), and because further delay would result in irreparable injury, *see Matthews v. Eldridge*, 424 U.S. 319, 331, n.11 (1976). Plaintiffs' requests for declaratory relief pursuant to the Montana Administrative Procedure Act are further excused from administrative exhaustion under § 2-4-506(3), MCA, as is Plaintiffs' Count III (MEPA violation) under § 75-1-201(5)(a)(i), MCA. *See Pompey's Pillar Hist. Ass'n v. Mont. Dept. of Env. Quality*, 2002 MT 352, ¶¶ 20-21, 313 Mont. 401, 61 P.3d 148.

FACTS AND GENERAL ALLEGATIONS

Brucellosis infection and transmission:

8. Brucellosis is an infectious disease caused by bacteria of the genus *Brucella*. *Brucella abortus* is a species of *Brucella* bacteria which prefers bovine and cervid hosts, such as domestic cattle, bison, elk, and sometimes deer and moose.

Infection by *Brucella abortus* may sometimes induce an infected pregnant female to abort its first gestating calf. Subsequent pregnancies are usually not affected.

9. Brucellosis is believed to have been introduced into the Greater Yellowstone Area by infected cattle in the early 1900's, and is now naturalized in Montana's bison and elk populations. Brucellosis infections in domestic livestock are now rare.

10. Management efforts have historically focused on cattle vaccination. In recent years, management strategies have increasingly targeted wild bison and elk to discourage the possibility of transmission.

11. Epidemiological research regarding the transmission of brucellosis from elk to domestic cattle is limited and not independently confirmed. Only a few documented cases of a brucellosis infection of a Montana domestic cow have been attributed to transmission from wild elk, and those have relied heavily on anecdotal and circumstantial evidence.

12. *Brucella* bacteria cannot be transmitted through the air or by mere proximity. Rather, Brucellosis is typically transmitted by ingestion or inhalation of infected birth materials, such as by licking the newborn calf of an infected animal, or by ingesting an aborted fetus, birth fluids or placenta.

13. For various epidemiological, environmental and behavioral reasons, transmission of brucellosis from wild elk to domestic cattle is rare and unlikely.

Montana's elk brucellosis management policy:

14. In 2004, FWP published the "Montana Statewide Elk Management Plan 2004" ("MSEMP"), which had the self-described purpose of serving as "a source of information and guidance to the FWP Commission..." in crafting policies for the stewardship of Montana's wild elk population. The 2004 MSEMP remains in effect today.

15. The three-hundred and ninety-seven (397) page MSEMP dedicated just over one page to the issue of elk brucellosis infection and transmission, noting that the risk for transmission to cattle "is perceived to be very low." The MSEMP did not address the necessity, workability, or the potential environmental impact of any potential management strategies for addressing the infection of elk with brucellosis, or the potential for transmission from elk to cattle.

16. Upon information and belief, FWP relied upon Environmental Assessments ("EA") and/or Environmental Impact Statements ("EIS") in preparing the MSEMP, but none which were specific to brucellosis or brucellosis management.

17. In January of 2010, in response to the promulgation of new USDA-Animal and Plant Inspection Service ("APHIS") rules regarding "brucellosis-free" certification for beef exports, the Montana Department of Livestock issued an order creating the Designated Surveillance Area ("DSA"). The DSA defines the area which the Department perceived to be at risk for wildlife-to-cattle brucellosis transmission. It has been expanded twice since its creation, and covers areas within Beaverhead, Madison, Gallatin, and Park Counties.

18. In the fall of 2011, FWP and FWC organized the Elk Management Guidelines for Areas with Brucellosis Working Group (the "Working Group"), a citizen advisory panel charged with identifying problems and potential management options related to elk-livestock brucellosis transmission concerns in the DSA.

19. The Working Group issued its final recommendations in January of 2013. It concluded that efforts to eradicate brucellosis in wild elk are not feasible, and therefore rejected "test-and-slaughter" programs and population reduction efforts, while acknowledging that some limited lethal management for the purpose of discouraging comingling with livestock may be necessary. The Working Group recommended small scale stackyard fencing of food attractants, but expressly rejected the use of large "landscape-level" projects. The recommendations emphasized non-lethal management based on education and public outreach, and recommended the creation of local working groups representing "diverse perspectives" to help develop localized solutions.

20. After the issuance of the Working Group's recommendations, FWP presented to FWC for approval the "Elk Management in Areas with Brucellosis 2013 Work Plan" ("2013 Work Plan"), the first in a planned series of annual work plans. The 2013 Work Plan was a vague, bare-bones plan which only loosely followed the Working Group's recommendations, authorizing an "[u]nknown number of local elk hazing efforts," an "[u]nknown number of small scale fencing efforts," and an "[u]nknown number of small scale dispersal hunts" in the DSA. It

did not include any of the working group's recommendations for education or other non-invasive management options.

21. FWC approved and adopted the 2013 Work Plan on February 14, 2013.

22. All of the management tools specified in the 2013 Work Plan were utilized by FWP in 2013. Upon information and belief, FWP also authorized lethal removal of elk under the elk-brucellosis management plan outside of dispersal hunts via "kill permits," a practice not prescribed by the 2013 Work Plan, though the kill permits were not actually used.

23. In August of 2013, FWP presented to FWC for approval the "Elk Management in Areas with Brucellosis 2014 Proposed Work Plan" ("2014 Work Plan"). The 2014 Work Plan added to the 2013 Work Plan the use of an "[u]nknown number of kill permits," allowing late-season lethal removal of elk from January 15 to April 15, well into the typical gestating cow's third-trimester of pregnancy and into the beginning of calving season.

24. Following significant public criticism of the proposed 2014 Work Plan during the notice-and-comment period, FWP developed a revised work plan, which incorporated additional non-lethal options, per the Working Group's recommendations, such as education and public outreach, habitat management, and hunting season adjustments to minimize transmission risk.

25. FWC approved and adopted the revised 2014 Work Plan on October 10, 2013, against the weight of public comment.

26. FWP is currently implementing the lethal management, hazing and fencing tools authorized by the 2014 Work Plan. Upon information and belief, it has not implemented, prioritized, or seriously considered the other management tools authorized by the revised plan, such as education, habitat management, and hunting season adjustment.

27. In the spring of 2014, FWP presented for FWC's consideration the "Elk Management in Areas with Brucellosis 2014 Work Plan Local Modification" for the Paradise Valley in Park County ("2014 Local Modification").

28. The 2014 Local Modification was developed based on the recommendations of the Upper Yellowstone Watershed Group, a group comprised almost entirely of Paradise Valley ranchers purporting to act as the local working group for Park County, despite the state Working Group's earlier instruction that local working groups should represent diverse interests.

29. The 2014 Local Modification provided for "additional lethal removal" in the Paradise Valley, extending the use of kill permits until May 15, well into the calving season. It did not exclude pregnant cow elk from lethal takings under this provision, noting only that "emphasis shall be given" to yearling and bull elk, and did not demonstrate any consideration or concern for the impact these late season hunts may have on the health of gestating cows and their offspring.

30. The 2014 Local Modification further authorized large elk-proof fencing projects at FWC's discretion, contrary to the Working Group's specific rejection of

“landscape-level” fencing projects. It did not clearly specify the source of the funding for these projects, except to say that some form of “cost-sharing” is called for.

31. Despite yet another wave of public criticism, FWC approved and adopted the 2014 Local Modification on April 10, 2014 in a 3-2 decision.

32. With each action, FWP and FWC have moved further away from the state Working Group’s original recommendations, increasingly emphasizing lethal management options and seemingly pursuing an unfeasible brucellosis eradication agenda, to the detriment of Montana’s wild elk population and at the expense of Montana’s sportsmen and taxpayers.

Extent of environmental review:

33. Upon information and belief, in formulating and implementing the elk-brucellosis management plan, FWP and FWC have not reviewed or considered the most recent science regarding brucellosis epidemiology, the likelihood of elk-cattle brucellosis transmission, the likely modes of transmission, or the possibility of alternate sources of brucellosis infection in cattle.

34. During the numerous FWC meetings and public comment sessions related to the elk-brucellosis management plan, concerned citizens repeatedly inquired of FWP and FWC what study has been done that justifies the management plan, but no study was ever identified or produced. Instead, FWP officials asserted that they were not required to perform such a study.

35. Upon information and belief, FWP has not done any study, and has not prepared or published an EA or EIS regarding the potential impacts of any of the

management tools currently being implemented, or the efficacy of these tools to combat the spread of brucellosis.

36. Upon information and belief, FWP has not done any study, and has not prepared or published an EA or EIS regarding the viability or preferability of alternative management tools, particularly including non-lethal management options.

37. Upon information and belief, FWC never reviewed or considered any written environmental review, FWP study, EA or EIS in deciding to adopt any portion of the elk-brucellosis management plan.

38. Upon information and belief, FWP and FWC have relied exclusively upon the general policy guidelines set forth on the one-page discussion of elk brucellosis in the ten year-old MSEMP.

39. The MSEMP is outdated, and wholly inadequate to justify the actions taken by FWP and endorsed by FWC. It is not based on the most recent science, does not adequately address the issues raised by the elk-brucellosis management plan, and did not consider the potential impacts of the management tools currently being employed by FWP under the plan.

COUNT I: Violation of the FWC and FWP enabling statutes for failure to protect and preserve Montana's wildlife (§§ 87-1-201, 87-1-301, MCA)

40. Plaintiffs incorporate the foregoing facts and allegations as if set forth fully herein.

41. The FWP enabling statute, codified at § 87-1-201, MCA, charges the agency with enforcing the law and spending "... for the protection, preservation, management, and propagation of fish, game, fur-bearing animals, and game and non-game birds within the state."

42. FWP is not charged, by statute or otherwise, with protecting domestic livestock or the interests of livestock growers.

43. The FWC enabling statute, codified at § 87-1-301, MCA, charges the Commission with setting policies "... for the protection, management, and propagation of the wildlife, fish, game, furbearers, waterfowl, nongame species, and endangered species of the state and for the fulfillment of all other responsibilities of the department related to fish and wildlife as provided by law."

44. FWC is not charged, by statute or otherwise, with setting policies to protect domestic livestock or the interests of livestock growers.

45. Wild elk populations in many of the areas subject to the elk-brucellosis management plan are below FWP's own minimum population objectives, or are otherwise at risk, including Park County (the target of the 2014 Local Modification), Beaverhead County, and others.

46. As set forth in Paragraphs 19, 22 and 29, the elk-brucellosis management plan authorizes an "[u]nknown number" of brucellosis management killings, including the use of dispersal hunts and kill permits to lethally remove elk which may or may not be infected with brucellosis. Some of these killings will take place during the calving season, and may result in the killing of gestating females

during the third trimester of pregnancy. The unstudied use of these lethal management tools under the elk-brucellosis management plan has resulted in actual population loss, including the killing of pregnant cows, will result in further population loss, and may destabilize fragile elk populations or cause other harmful effects.

47. As set forth in Paragraph 30, the 2014 Local Modification authorizes obstructive landscape-scale fencing projects, against the recommendation of the state Working Group. Large elk-proof fences are likely to block habitat corridors, inhibiting genetic exchange, obstructing movement, and limiting access to feeding and breeding grounds for elk and other wildlife.

48. As set forth in paragraphs 33–39, the management tools authorized by the elk-brucellosis management plan were adopted by FWC, upon FWP's recommendation, and are being implemented by FWP without any study of the potential harm or benefit to elk or the environment in general.

49. FWP and FWC have failed to demonstrate that the elk-brucellosis management plan serves the “protection, management, and propagation” of Montana's wild elk population, that it will reduce brucellosis infection and transmission in and among wild elk, or that it offers any benefit beyond protecting agricultural interests.

50. Each of the management tools authorized by the elk-brucellosis management plan is actually harmful to Montana's wild elk population, and is instead designed to protect domestic livestock and the interests of livestock growers.

51. FWP and FWC are spending hunting and fishing licensing revenue, which should be used for conservation and wildlife preservation programs, to advance policies which are harmful to wildlife and which instead benefit agricultural interests in deference to Department of Livestock policy agendas.

52. Plaintiffs are entitled to a declaration pursuant to § 2-4-506, MCA, and § 27-8-201, MCA, *et seq.*, that the elk-brucellosis management plan was formulated and is being implemented arbitrarily and capriciously, illegally and in excess of FWP and FWC's statutory authority because the plan does not protect Montana's wildlife.

53. Plaintiffs are further entitled to a permanent injunction pursuant to § 27-19-102, MCA, *et seq.*, restraining the enforcement of the elk-brucellosis management plan in its current form, which has resulted in actual harm which cannot be monetarily compensated, and requiring that any new plan FWP and FWC might adopt conform with their statutory mandates and fall within their statutory authority.

**COUNT II: Violation of the FWC enabling statute for adopting policy
not based on adequate environmental review (§ 87-1-301, MCA)**

54. Plaintiffs incorporate the foregoing facts and allegations as if set forth fully herein.

55. The FWC enabling statute, codified at § 87-1-301, MCA, provides that FWC "shall comply with, adopt policies that comply with, and ensure the department implements in each region the provisions of state wildlife management

plans adopted *following an environmental review* conducted pursuant to Title 75, chapter 1, parts 1 through 3.” (emphasis added).

56. “Environmental review” means an EA, EIS, or other written analysis conducted by a state agency to examine the potential impact on the environment of a proposed action. § 75-1-220(5), MCA; *Pompey’s Pillar*, ¶ 17.

57. The FWC’s authority to act, specifically including actions to adopt policies for wildlife management, is thus contingent upon the preparation and consideration of an EA and/or EIS before final action is taken.

58. As set forth in paragraphs 33–39, FWP has not done any environmental review, prepared an EA or EIS, or submitted the results of any such study to FWC’s consideration or public process in connection with the elk-brucellosis management plan.

59. As set forth in paragraphs 33–39, FWC did not review or consider any EA, EIS or other written environmental study prior to adopting the elk-brucellosis management plan, or approving any management actions taken pursuant to the plan.

60. Because an adequate environmental review was not performed or considered as required by § 87-1-301, MCA, the elk-brucellosis management plan was approved outside of FWC’s expressly delegated authority, in contravention of the FWC enabling statute.

61. Plaintiffs are entitled to a declaration pursuant to § 2-4-506, MCA, and § 27-8-201, MCA, *et seq.*, that the elk-brucellosis management plan was formulated

and approved arbitrarily and capriciously, illegally and in excess of FWC's statutory authority because the plan was not adopted following an adequate environmental review.

62. Plaintiffs are further entitled to a permanent injunction pursuant to § 27-19-102, MCA, *et seq.*, restraining the enforcement of the elk-brucellosis management plan in its current form, which has resulted in actual harm which cannot be monetarily compensated, and requiring that any new plan FWC might adopt be based upon adequate environmental review as required by law.

COUNT III: Violation of MEPA (§ 75-1-101, MCA, *et seq.*)

63. Plaintiffs incorporate the foregoing facts and allegations as if set forth fully herein.

64. Article II, Section 3 and Article IX, Section 1 of the Montana Constitution require that the state and its agencies conduct their business in a manner that protects the right of the citizens to a clean and healthful environment.

65. One of the chief mechanisms created by the Montana State Legislature to ensure compliance with this constitutional mandate is the Montana Environmental Policy Act ("MEPA"), which is designed "to promote efforts that will prevent, mitigate, or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans." § 75-1-102(2), MCA.

66. Pursuant to those goals, MEPA requires state agencies to examine the potential impacts of state action and to evaluate alternatives which may reduce or avoid harmful impacts before taking action. *See* § 75-1-201, MCA.

67. Specifically, MEPA requires that state actors perform an EA prior to approving and implementing a state action unless it is subject to a categorical exclusion, in order to determine whether further study and a full EIS is required. §§ 18.2.236(5), 18.2.261, ARM.

68. The elk-brucellosis management plan is not subject to a categorical exclusion. At a minimum, an EA was therefore required by law to determine the necessity of a full EIS.

69. Because no EA was performed prior to adopting and implementing the 2014 Local Modification, it is in violation of MEPA.

70. A full environmental review, culminating in the publication of an EIS, must be undertaken whenever it is called for by an EA or when a state action is a “major” one which raises “substantial questions whether a project may have a significant effect” on the environment. *Ravalli Cnty. Fish and Game Ass’n, Inc. v. Mont. Dep’t of State Lands*, 273 Mont. 371, 379, 903 P.2d 1362, 1368 (1995) (quoting *LaFlamme v. Fed. Energy Reg. Comm’n*, 852 F.2d 389, 397 (9th Cir. 1988)).

71. Because Defendants failed to perform an EA, it was impossible for them to correctly determine that an EIS was not required.

72. The expanded lethal control measures and the possibility of obstructive fencing projects under the 2014 Local Modification raise substantial questions as to whether the Defendants’ actions will have a significant effect on the environment. Due to the severity of the potential environmental impacts and the degree of controversy generated by the proposal, an EIS was required in this case.

73. Because no EIS was performed prior to adopting and implementing the 2014 Local Modification, it is in violation of MEPA.

74. MEPA further requires that the agency must take a “hard look” at the potential environmental impacts of its proposed action, which requires an assessment of the “significance of impacts” associated with the action by compiling relevant information, analyzing it reasonably, and not ignoring pertinent data. *Ravalli*, 273 Mont. at 380–381, 903 P.2d at 1368–1369.

75. Because FWP and FWC did not prepare or consider an EA or EIS in developing, approving and enforcing the 2014 Local Modification, it was impossible for them to perform the necessary “hard look” to make an informed decision based on the significance of the impacts.

76. FWP and FWC also ignored pertinent data, including elk population statistics in the regions subject to the management plan and the unlikelihood of an elk-cattle brucellosis transmission incident.

77. FWP and FWC also failed to seriously consider or evaluate alternative management tools.

78. Because FWP and FWC failed to take an informed “hard look” prior to adopting and enforcing the 2014 Local Modification, it is in violation of MEPA.

79. Pursuant to § 75-1-201(6)(a)(i), MCA, Defendants should be required to compile and submit to the court a certified record of its decisions and actions related to the 2014 Local Modification for judicial review and determination of whether Defendants’ MEPA obligations have been satisfied.

80. Plaintiffs are entitled to a declaration pursuant to § 2-4-506, MCA, and § 27-8-201, MCA, *et seq.*, that the 2014 Local Modification was formulated, adopted, and is being enforced arbitrarily and capriciously, as well as illegally for having violated MEPA environmental impact review requirements.

81. Plaintiffs are also entitled to a declaration pursuant to § 27-8-201, MCA, *et seq.*, that due to the severity of the potential harm and the controversy generated by the 2014 Local Modification, a full EIS was required.

82. Plaintiffs are further entitled to a permanent injunction pursuant to § 27-19-102, MCA, *et seq.*, restraining the enforcement of the 2014 Local Modification, which has resulted in actual harm which cannot be monetarily compensated, and requiring the performance, publication and consideration of an EIS prior to any further action under the plan.

**COUNT IV: Violation of statutory eligibility requirements
for public assistance to private landowners (§ 87-1-225, MCA)**

83. Plaintiffs incorporate the foregoing facts and allegations as if set forth fully herein.

84. Montana law already contains provisions for addressing harm to property caused by big game animals. The “game damage assistance” program is codified at § 87-1-225, MCA, and addressed by various administrative rules.

85. Through the game damage assistance program, FWP responds to property damage incidents caused by big game animals with hazing, stack-yard fencing, kill permits and game damage hunts – analogous management tools to

those employed by the elk-brucellosis management plan. Reflecting that fact, the elk management complaint form for brucellosis borrowed heavily from the game damage complaint form and many aspects of the elk-brucellosis management plan were modeled after the game damage relief program.

86. By direction of the state legislature, game damage relief is only available to landowners who allow public hunting access on their land, and who do not impose restrictions that significantly reduce public hunting access. § 87-1-225(1), MCA.

87. FWP's own administrative rules regarding game damage relief recognize the purpose and value of this requirement, providing that assistance may be denied or discontinued when a landowner "creates or further contributes to game damage problems by not providing sufficient public hunting to aid in reduction of game populations." § 12.9.802(6), ARM.

88. No public hunting access requirement exists under the elk-brucellosis management plan.

89. Upon information and belief, publicly funded relief, including but not limited to financial assistance to build fences on and around private property, have been provided under the elk-brucellosis management plan to landowners who refuse to allow public hunting on their property, and who are not required to do so under the plan.

90. FWP's own rules for game damage hunts also require the use of a hunting roster to ensure fair and equal access to late-season hunting opportunities. § 12.9.804(e), ARM.

91. Upon information and belief, no hunting roster has been implemented under the elk-brucellosis management plan.

92. By adopting and implementing the game damage management tools but excluding the public hunting requirement, FWP and FWC have made an end-run around statutory and administrative limitations on the availability of publicly funded relief to private landowners.

93. Plaintiffs are entitled to a declaration pursuant to § 27-8-201, MCA, *et seq.*, that the presence of wild elk upon private property which may serve as vectors for brucellosis transmission is "damage to the property" within the contemplation of the game damage assistance statute, and therefore that § 87-1-225, MCA, applies to elk-brucellosis management. To the extent that these programs overlap, the elk-brucellosis management plan is therefore moot, redundant and superseded by the statutory game damage relief program, and landowners must open their land to public hunting access in order to be eligible for public assistance.

94. Plaintiffs are entitled to a declaration pursuant to § 2-4-506, MCA, and § 27-8-201, MCA, *et seq.*, that the brucellosis-elk management plan was formulated, adopted, and is being enforced arbitrarily, capriciously, and illegally because it violates § 87-1-225, MCA, and FWP and FWC are without authority to create a

management plan which violates, undermines and presumes to supersede an act of the state legislature.

95. Alternatively, if the game damage relief program does not apply to elk-brucellosis management, Plaintiffs are entitled to a declaration pursuant to § 2-4-506, MCA, that the brucellosis-elk management plan is invalid because it was adopted with an arbitrary and capricious disregard for the legislature's clear intent that the type of relief provided under the plan should be limited to landowners who open their property to public hunting, as evidenced by eligibility requirements for game damage relief.

96. Plaintiffs are further entitled to a permanent injunction pursuant to § 27-19-102, MCA, *et seq.*, restraining the enforcement of the elk-brucellosis management plan in its current form, which has resulted in actual harm which cannot be monetarily compensated.

COUNT V: Violation of the public trust doctrine

97. Plaintiffs incorporate the foregoing facts and allegations as if set forth fully herein.

98. Under Montana law, "...the ownership of wild animals is in the state, held by it in its sovereign capacity *for the use and benefit of the people generally...*" *Rosenfeld v. Jakways*, 67 Mont. 558, 216 P. 776, 777 (1923) (emphasis added); *see also Geer v. Conn.*, 161 U.S. 519 (1896), overruled in part on other grounds by *Hughes v. Okla.*, 441 U.S. 322 (1979).

99. Pursuant to this charge, state actors owe a duty to the people of Montana to act to preserve Montana's natural resources, including wildlife, for the benefit of the people and to secure that benefit for the future. *See Geer*, 161 U.S. at 553 (quoting *State v. Rodman*, 58 Minn. 393, 400, 59 N.W. 1098, 1099 (Minn. 1894)).

100. By developing, adopting and implementing a management plan which ignores principles of science-based wildlife management and is unreasonably harmful to Montana's wild elk population, Defendants have breached that duty.

101. Plaintiffs are entitled to a declaration pursuant to § 27-8-201, MCA, *et seq.*, that Defendants acted in dereliction of their duties under the public trust doctrine by failing to engage in science-based management, and by favoring private and special interests over the protection of Montana's living natural resources, and that the elk-brucellosis management plan is therefore void.

102. Plaintiffs are further entitled to a permanent injunction pursuant to § 27-19-102, MCA, *et seq.*, restraining the enforcement of the elk-brucellosis management plan in its current form, because it is in violation of the public trust doctrine and has resulted in actual harm which cannot be monetarily compensated.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for:

1. Declaratory relief adjudging that:
 - a. The elk-brucellosis management plan (including the 2013 Work Plan, 2014 Work Plan, and 2014 Local Modification) was

formulated, adopted and is being implemented arbitrarily and capriciously in violation of MAPA and is therefore void;

- b. The elk-brucellosis management plan was formulated, adopted and is being implemented illegally, in excess of the statutory authority of the FWP and FWC and is therefore void;
- c. The 2014 Local Modification was formulated, adopted and is being implemented in violation of MEPA environmental impact review requirements and is therefore void;
- d. The elk-brucellosis management plan, and the management tools authorized to execute the plan, are major actions which present a substantial risk of environmental impact such that the preparation and consideration of an Environmental Impact Statement was required;
- e. The presence of disease-bearing elk on private property is "game damage" within the contemplation of § 87-1-225, MCA, such that the elk-brucellosis management plan is moot, redundant and superseded by the game damage relief program to the extent that they overlap, or in the alternative, the eligibility requirements for game damage relief evince a clear legislative intent that public assistance under the elk-brucellosis management plan should only be available to landowners who open their land to public hunting; and
- f. The elk-brucellosis management plan fails to protect Montana's wildlife and fails to embrace science-based wildlife management in violation of the public trust doctrine, and is therefore void.

2. Permanent injunctive relief:

- a. Restraining all implementation and enforcement of the elk-brucellosis management plan in its current form (including the 2013 Work Plan, 2014 Work Plan, and 2014 Local Modification);
- b. Affirmatively requiring that the adoption and implementation of any future management plan rely upon adequate environmental impact study as required by law;

3. An award of fees and costs pursuant to the private attorney general doctrine and § 27-8-311, MCA; and

4. All other supplemental relief that the Court deems just and proper pursuant to § 27-8-313, MCA

DATED this 7th day of May, 2014.

GOETZ, BALDWIN & GEDDES, P. C.,
Attorneys for the Plaintiffs.

By: 

J. Devlan Geddes
Kyle W. Nelson
Jeffrey J. Tierney