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CLERK DISTRICT COURT

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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

<p>ENHANCING MONTANA'S WILDLIFE & HABITAT, Plaintiff, v. MONTANA DEPARTMENT OF FISH, WILDLIFE & PARKS and MONTANA FISH & WILDLIFE COMMISSION, Defendants.</p>	<p>Case No. <u>ADV 2015 22</u> Hon. <u>MIKE MENAHAN</u> PRESIDING JUDGE COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF</p>
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Plaintiff Enhancing Montana's Wildlife & Habitat, 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", Statewide Elk Brucellosis Working Group, local elk brucellosis working groups and related work plans, including the recently approved 2015 work plan and all local modifications to the work plans (collectively referred to herein as the "elk-brucellosis management plan"). Plaintiff seeks a declaration that this program has been formulated and

management plan”). Plaintiff seeks a declaration that this program has been formulated and implemented in excess of the authority conferred upon Defendants by the Montana State Legislature, in dereliction of environmental impact study and review obligations imposed by the Montana Environmental Policy Act (“MEPA”), in violation of statutory limitations on the availability of publicly funded relief for aggrieved private landowners, in violation of the public trust doctrine, and arbitrarily and capriciously in violation of the Montana Administrative Procedure Act (“MAPA”). For all of these reasons, Plaintiff also seeks a permanent injunction against the implementation of the plan in its entirety, and affirmative declaratory and injunctive relief requiring Defendants to base any future elk-brucellosis management activities upon rules based in sound science and upon adequate environmental impact study and review, and which otherwise comply with the law.

PARTY

2. Plaintiff Enhancing Montana's Wildlife & Habitat (“EMWH” or “Plaintiff”) public trust advocacy organization comprised of Montana sportsmen and conservationists who are interested in preserving Montana’s big game species and other natural resources. Plaintiff stands to be significantly injured by the loss of recreational opportunities, economic benefit, aesthetic enjoyment, and other benefits due to depleted elk populations and other harms caused by the elk-brucellosis management plan and working groups.

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 at § 87-1-201, MCA.

4. Defendant Montana Fish & Wildlife Commission (“FWC”) is a quasi-judicial five member panel appointed by the Governor of Montana to set the rules and policies to guide the execution of FWP’s mandate. Its specific powers and duties are set forth by statute at § 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. Plaintiff is 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). Plaintiff 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 Plaintiff Count III (MEPA violation) under a statutory exception provided by § 75-1-201(5)(a)(i), MCA. *See also Pompey’s Pillar Hist. Ass’n v. Mont. Dept. of Env. Quality*, 2002 MT 352, ¶¶ 20–21, 313 Mont. 401, 61 P.3d 148. Finally, administrative exhaustion is not required in this case because the concerns addressed by the exhaustion doctrine are not implicated with respect to rules promulgated through the notice-and-comment process. *See William Funk, Exhaustion of Administrative Remedies*, 18 Pace Envtl. L. Rev. 1, 17 (2000); *see also, e.g., Am. Forest & Paper Ass’n v. U.S. EPA*, 137 F.3d 291, 295–96 (5th Cir. 1998).

Alternatively, to the extent any administrative exhaustion may be required, Plaintiff have exhausted administrative remedies in this case by participating in the rulemaking process, including but not limited to contributing written and verbal comments, which have been ignored.

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 1900s, 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 bison and wild elk to discourage the possibility of transmission from wild hosts back to domestic cattle.

11. Epidemiological research regarding the transmission of brucellosis from elk to domestic cattle in Montana is limited and disputed. Much of the research indicating a likelihood of elk-cattle transmission incidents has been generated by agencies or entities associated with or funded by Defendants, the Montana Department of Livestock ("DOL") and the USDA-Animal and Plant Inspection Service ("USDA-APHIS"), or which are otherwise aligned with livestock interests.

12. Only a few cases of a brucellosis infection in a Montana domestic cow have been attributed to transmission from wild elk, and those attributions have relied heavily

on anecdotal and circumstantial evidence.

13. *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.

14. Transmission of brucellosis from wild elk to domestic cattle is naturally rare, and for various epidemiological, environmental and behavioral reasons, it is highly unlikely outside of the Wyoming elk feedground areas.

Montana's elk-brucellosis management policy:

15. 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.

16. 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 address the science underlying the theoretical transmission from elk to cattle.

17. Upon information and belief, FWP relied upon Environmental Assessments ("EA"), Environmental Impact Statements ("EIS"), and/or other environmental impact research in preparing the MSEMP, none which was specific to brucellosis or brucellosis management.

18. In January of 2010, in response to the promulgation of new USDA-APHIS rules regarding "brucellosis-free" certification for beef exports, the Montana Department

of Livestock (“DOL”) 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 three times since its creation, and covers areas within Beaverhead, Madison, Gallatin, and Park Counties. The DSA was created without the legally required MEPA Environmental Impact Study.

19. In the fall of 2011, FWP and FWC organized the Elk Management Guidelines for Areas with Brucellosis Statewide Elk 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.

20. The Working Group issued its final Proposed 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 which FWP included in the Elk Management Guideline in Areas with Brucellosis Working Group, presented to FWP Commission on November 8, 2012 for tentative adoption, which the FWP Commission approved. The Proposed Recommendations acknowledged that some limited lethal management for the purpose of discouraging commingling 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” fencing 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. The Plaintiff submitted public comment to the FWP Commission to reject the Proposed Recommendations.

The 2013 Work Plan:

21. After the issuance of the Working Group's recommendations, FWP presented to FWC for its approval the "Elk Management in Areas with Brucellosis 2013 Work Plan" ("2013 Work Plan"), the first in a planned series of annual work plans.

22. 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.

23. The 2013 Work Plan additionally authorized the creation of "local working groups," as recommended by the state Working Group.

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

25. Upon information and belief, all of the management tools specified in the 2013 Work Plan were utilized by FWP in 2013.

26. Upon further information and belief, FWP also authorized lethal removal of elk under the elk-brucellosis management plan outside of dispersal hunts via "kill permits" issued directly to landowners, a practice not prescribed by the 2013 Work Plan, though the kill permits were not actually used at that time.

The 2014 Work Plan:

27. 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 by landowners from January 15 to April 15, well into the typical gestating cow elk's third-trimester of pregnancy and into the beginning of calving season. Plaintiff submitted detailed public comment letter on August 8, 2013, objecting to work plan ambiguity, process, violations and accountability.

28. 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, consistent with the Working Group's original recommendations, such as education and public outreach, habitat management, and hunting season adjustments to minimize transmission risk.

29. FWC approved and adopted the revised 2014 Work Plan on October 10, 2013, against the weight of public comment. Plaintiff again submitted written and public comments against the Elk Management in Areas with Brucellosis program and Work Plan, this time including list of legal violations committed by FWP and FWP Commissioners with this Elk Management in Areas With Brucellosis program.

30. Upon information and belief, FWP implemented various invasive management tools authorized by the 2014 Work Plan, and did not implement, prioritize, or seriously consider the other management tools added to the revised work plan.

The 2014 Local Modification:

31. In the spring of 2014, FWP presented for FWC's consideration the "Elk Management in Areas with Brucellosis 2014 Work Plan Local Modification" ("2014 Local Modification") for the Paradise Valley, a region of the DSA located in Park County which has been the site of past cattle brucellosis infection incidents.

32. 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 elk brucellosis working group for Park County, despite the state Working Group's earlier instruction that local working groups should represent diverse interests. Plaintiff attended all meetings.

33. 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, or the behavior of affected elk in general.

34. The 2014 Local Modification further authorized large elk-proof fencing projects, contrary to the Working Group’s specific rejection of “landscape-level” fencing projects, subject to FWC’s approval. 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.

35. Despite yet another wave of public criticism, FWC approved and adopted the 2014 Local Modification on April 10, 2014 in a 3-2 decision. Commissioners Tourtlotte and Wetsit dissented, expressing concern regarding the lack of independent funding for fencing projects and the overwhelming public opposition to the plan. Plaintiff submitted written and public comments to the FWP Commission opposing 2014 Local Modification.

Challenge to the 2014 Work Plan and 2014 Local Modification:

36. In May of 2014, in response to the adoption of the 2014 Work Plan, Skyline Sportsmen and Anaconda Sportsmen's Club filed a lawsuit in this Court seeking substantially the same declaratory and injunctive relief sought hereby. Plaintiff provided documentation and testimony which was the foundation for the Skyline v. FWP/Complaint (Case number ADV 2014-354).

37. By agreement of the parties, FWP and FWC were given an indefinite informal extension to answer Skyline and Anaconda’s Complaint while the parties attempted to negotiate an out-of-court resolution. As a condition of that agreement, Defendants agreed to not exercise the lethal management options authorized by the 2014 Work Plan. Defendants likewise represented that no large-scale fencing projects

were currently under consideration, as authorized by the 2014 Local Modification. Therefore, upon information and belief, no lethal takings or large scale fencing projects occurred in the 2014 management season.

38. The Skyline lawsuit as to the 2014 work plan was resolved via a letter of agreement among the parties, which expressly reserved the Skylines' "right and express ... intent to re-file the lawsuit, including seeking injunctive relief as necessary, if future actions or decisions by FWP and/or FWC violate this agreement."

39. The Skyline lawsuit was voluntarily dismissed without prejudice under Rule 41(a)(1)(A)(i), M.R.Civ.P., pursuant to the parties' agreement, on October 31, 2014.

The 2015 Work Plan:

40. On August 7, 2014, while settlement negotiations as to the 2014 Work Plan Skyline lawsuit were ongoing, FWP presented for FWC's consideration the "Elk Management in Areas with Brucellosis 2015 Proposed Work Plan" ("2015 Work Plan"). On the same date, FWC provisionally approved the proposed plan, opening it for public comment.

41. The 2015 Work Plan included several new provisions, some of which addressed issues raised in settlement negotiations as to the 2014 Work Plan Skyline lawsuit, including: a requirement that a site specific EA be performed for landscape scale fencing projects; a commitment to consider non-lethal options before implementing lethal management tools; and a new requirement that FWC consider the composition of working group meetings and the perspectives represented as such meetings in deciding whether to adopt local working group recommendations.

42. With respect to the lethal management and fencing provisions, the proposed 2015 Work Plan authorized substantially the same management actions as prior work plans, but provided some greater specificity as to the limits on such actions. Specifically, the plan proposed to authorize up to two-hundred and fifty (250) lethal

takings per year for the purposes of brucellosis management, which the plan estimated to be approximately one percent (1%) of the total wild elk population in the DSA. It included the same provision as the prior work plan, giving “emphasis” to takings of yearling and bull elk, but not expressly limiting or prohibiting takings of pregnant cows.

43. The proposed 2015 Work Plan incorporated, in substantially unchanged form but for the EA requirement discussed in Paragraph 41, the landscape-scale fencing option for the Paradise Valley, as adopted by the 2014 Local Modification.

44. Additionally, the proposed 2015 Work Plan authorized FWP to “[w]ork with DOL and USDA APHIS to assess and potentially coordinate the need, opportunity and capacity for continued targeted elk surveillance captures beyond 2015.” No such targeted surveillance programs appeared in any of the prior work plans. Upon information and belief, this provision has the effect of incorporating into the elk-brucellosis management plan an ongoing program initiated in 2010 due to sunset in 2015 (thus pre-dating the elk-brucellosis management plan), whereby FWP, in cooperation with the DOL and USDA-APHIS, collared elk with GPS tracking devices, then, after five years of tracking, planned to kill those elk which tested positive for exposure to brucellosis. Upon further information and belief, that program was not preceded or supported by any environmental impact.

45. The proposed 2015 Work Plan also included a new provision which unilaterally expanded FWP’s geographical management authority. It authorized FWP to undertake brucellosis management actions not only *within* the DSA, as was the case under the prior management plans, but also “in immediately adjacent areas if there is confirmed elk movement from inside to outside the DSA representing increasing transmission risk to cattle.”

46. Likewise, the proposed plan temporally expanded FWP’s management

authority, providing that FWP can undertake management actions not only during the brucellosis transmission “risk period” defined by the plan, but also outside of that window whenever FWP determines, in its own unchecked discretion, that such action is “with cause.”

47. Upon information and belief, no environmental impact study or review was performed or considered prior to the development of the proposed 2015 Work Plan, or with respect to any of the management actions authorized thereby.

48. EMWH responded to the proposed 2015 Work Plan with a lengthy written comment on September 3, 2014, criticizing the incremental expansion of FWP’s management authority, and pointing to the continuing lack of adequate environmental impact study and review, clearly specified funding, and provisions to condition public assistance on public hunting access.

49. The proposed 2015 Work Plan was originally scheduled for review and final decision by FWC on October 9, 2014. FWP elected to postpone that decision pending the results of a collaborative study between FWP and the University of Montana, designed to assess public opinion regarding brucellosis management tools by polling hunters, landowners, and other Montana residents.

50. The preliminary results of that study, titled “Acceptability of elk and Brucellosis management tools in Montana: Initial summary findings,” found that while the participants of the study desired some action to be taken to address brucellosis concerns, many of the actions authorized by the work plans, particularly including landowner kill permits, are disfavored by most Montanans. The study also found that “[a]cross all groups, acceptability of all management tools increased in scenarios where landowners allowed public access for hunting.”

51. On November 13, 2014, additional verbal public comment was submitted by

the Plaintiff opposing the proposed 2015 Work Plan. Despite the many critical written and verbal comments, and the results of the public opinion study, FWC approved the plan without alteration in a 3-1 decision. Commissioner Tourtelotte again dissented. Commissioner Wetsit, who dissented from the 2014 Local Modification, was not present.

52. Upon information and belief, FWP intends to implement the lethal management tools, and other invasive management options, authorized by the 2015 Work Plan in the coming months.

53. With each action and decision, FWP and FWC have moved further away from the state Working Group's original recommendations, increasingly emphasizing lethal management options, despite their representations to the contrary, 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.

54. Furthermore, with each new work plan, FWP and FWC have expanded the geographical and temporal scope of the management plan, as well as the range of invasive management tools available, setting a course for statewide year-round invasive management, without offering any evidence that such actions are of demonstrable benefit to the people of Montana.

55. For all of the reasons set forth herein, the 2015 Work Plan continues to violate the law.

Lack of environmental impact review:

56. 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, the likelihood of elk-cattle brucellosis transmission, the likely modes of transmission, or the possibility of alternate sources of brucellosis infection in cattle in Montana.

57. During the numerous FWC meetings and public comment sessions related

to the elk-brucellosis management plan, the Plaintiff and other concerned citizens have repeatedly inquired of FWP and FWC what study has been done that justifies the management plan, but no study has ever been identified or produced. Instead, FWP officials asserted that they were not required to perform such a study.

58. Upon information and belief, FWP has not done any study, and has not performed or published an EIS or Environmental Review 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.

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

60. 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, including the related work plans and local modifications.

61. 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.

62. 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 authorized under the work plans.

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)

63. Plaintiff incorporates the foregoing facts and allegations as if set forth fully herein.

64. 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.”

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

66. 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.”

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

68. 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 landscape scale fencing provisions), Beaverhead County, and others.

69. As set forth in Paragraph 42, the current work plan authorizes the lethal removal of up to two-hundred (250) elk per year in the DSA, which may or may not be infected with brucellosis. Under the current work plan, kill permits can be issued and management hunts conducted as late as April 30 in most regions, and as late as May 15 in the Paradise Valley. Thus, some of these killings are likely to take place during the calving season, and may result in the killing of gestating females during the third

trimester of pregnancy.

70. 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.

71. As set forth in Paragraphs 30 and 43, the current work plan also 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.

72. As set forth in paragraphs 56–62, 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 the elk or the environment in general.

73. 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.

74. Many of the management tools authorized by the elk-brucellosis management plan, particularly including those that FWP has elected to make use of, are actually harmful to Montana’s wild elk population, and are instead designed to protect domestic livestock and the interests of livestock growers.

75. 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 APHIS and DOL policy agendas.

76. Plaintiff is entitled to a declaration pursuant to § 2-4-506, MCA, and § 27-8-201, MCA, *et seq.*, that the elk-brucellosis management plan, statewide and local elk brucellosis working groups, including all related work plans and local modifications, was formulated and is being implemented arbitrarily and capriciously and in excess of FWP and FWC's statutory authority because the plan does not protect Montana's wildlife.

77. Plaintiff is further entitled to a permanent injunction pursuant to § 27-19-102, MCA, *et seq.*, (1) restraining the entire elk-brucellosis management plan, statewide and local elk brucellosis working groups, including all related work plans and local modifications, which, due to Defendants' violation of the FWP and FWC enabling statutes, has resulted and will result in actual harm which cannot be monetarily compensated, and (2) affirmatively requiring that any new plan FWP and FWC might adopt conform to their statutory mandates and fall within their statutory authority.

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

78. Plaintiff incorporates the foregoing facts and allegations as if set forth fully herein.

79. 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).

80. "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.

81. FWC's authority to act, specifically including actions to adopt policies for

wildlife management, is thus contingent upon the preparation of an EA and/or EIS by FWP or another responsible agency, and consideration of those findings by FWC before it takes final action.

82. As set forth in paragraphs 56–62, FWP has not done any environmental review, prepared an EA or EIS, or submitted the results of any such study for FWC’s consideration, or for the consideration of the public during the notice-and-comment period.

83. As set forth in paragraphs 56–62, FWC did not review or consider any EA, EIS or other written environmental review study prior to adopting any iteration of the elk-brucellosis management plan, or approving any management actions taken pursuant to the plan.

84. Because an adequate environmental study and 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.

85. Plaintiff is entitled to a declaration pursuant to § 2-4-506, MCA, and § 27-8-201, MCA, *et seq.*, that the elk-brucellosis management plan, statewide and local elk brucellosis working groups, including all related work plans and local modifications, was formulated and approved arbitrarily and capriciously and in excess of FWC’s statutory authority because the plan was not adopted following an adequate environmental impact study and review.

86. Plaintiff is further entitled to a permanent injunction pursuant to § 27-19-102, MCA, *et seq.*, (1) restraining the enforcement of the elk-brucellosis management plan, statewide and local elk brucellosis working groups, including all related work plans and local modifications, which, due to FWC’s violation of its enabling statute, has

resulted and will result in actual harm which cannot be monetarily compensated, and (2) affirmatively requiring that any new plan FWC might adopt be based upon adequate environmental impact study and review as required by law.

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

87. Plaintiff incorporates the foregoing facts and allegations as if set forth fully herein.

88. 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.

89. 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.

90. 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.

91. 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/or a full EIS is required. *See* R.’s 18.2.236(5), 18.2.261, ARM.

92. Neither the 2015 Work Plan, nor any of the invasive management actions authorized by it, are subject to a categorical exclusion. At a minimum, an EA was therefore required by law to determine the necessity of a full EIS for the plan and its sub-parts.

93. Because no EA was performed prior to adopting and implementing the 2015

Work Plan, the elk-brucellosis management plan is in violation of MEPA.

94. 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)).

95. Because Defendants failed to perform an EA prior to adopting and implementing the 2015 Work Plan, it was impossible for them to correctly determine that an EIS was not required.

96. The expanded lethal control measures, possibility of obstructive fencing projects, and the expanded geographic and temporal scope of such actions under the current work plan 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.

97. Because no EIS was performed prior to adopting and implementing the 2015 Work Plan, the elk-brucellosis management plan is in violation of MEPA.

98. 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.

99. Because FWP and FWC did not prepare or consider an EA or EIS in developing, approving and implementing the 2015 Work Plan, it was impossible for them to perform the necessary “hard look” to make an informed decision based on the

significance of the impacts.

100. FWP and FWC also ignored pertinent data, including elk population statistics in the regions subject to the management plan and the statistical, empirical, and epidemiological unlikelihood of elk-cattle brucellosis transmission incidents in Montana.

101. FWP and FWC also failed to seriously consider or evaluate alternative less harmful management tools.

102. Because FWP and FWC failed to take an informed “hard look” prior to adopting and implementing the 2015 Work Plan, the elk-brucellosis management plan is in violation of MEPA.

103. 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 2015 Work Plan for judicial review and determination of whether Defendants’ MEPA obligations have been satisfied.

104. Plaintiff is entitled to a declaration pursuant to § 2-4-506, MCA, and § 27-8-201, MCA, *et seq.*, that the 2015 Work Plan was formulated, adopted, and is being implemented arbitrarily and capriciously and in violation of MEPA environmental impact review requirements.

105. Plaintiff is 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 2015 Work Plan, the performance, publication and consideration of a full EIS is required for all annual work plans, local modifications, and major actions under the plan(s), including but not limited to landscape-scale fencing projects and capture-and collar studies which may involve lethal takings.

106. Plaintiff is further entitled to a permanent injunction pursuant to § 27-19-102, MCA, *et seq.*, restraining the enforcement of the 2015 Work Plan, which, due to

Defendants' violations of MEPA, has resulted and will result in actual harm which cannot be monetarily compensated.

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

107. Plaintiff incorporates the foregoing facts and allegations as if set forth fully herein.

108. 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 is addressed by various administrative rules.

109. 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.

110. 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.

111. 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.” R. 12.9.802(6), ARM.

112. The people of Montana also recognize the purpose and value of public hunting access. As set forth in Paragraph 50, the public opinion study co-administered

by FWP found that public approval of all elk-brucellosis management tools increases when landowners allow public hunting access.

113. No public hunting access requirement exists under the elk-brucellosis management plan, nor does it include any provisions designed to incentivize landowners to elect to allow public hunting access.

114. 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, and will be 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.

115. By adopting and implementing 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.

116. Plaintiff is 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.

117. Plaintiff is 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, adopted, and implemented arbitrarily and capriciously and in violation of § 87-1-225, MCA, and

that FWP and FWC are without authority to create a management plan which violates, undermines and presumes to supersede an act of the state legislature.

118. Alternatively, if the game damage relief program does not apply to elk-brucellosis management, Plaintiff is entitled to a declaration pursuant to § 2-4-506, MCA, that the elk-brucellosis management plan is invalid because it was adopted arbitrarily and capriciously, in disregard of 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 codified at § 87-1-225, MCA.

119. Plaintiff is further entitled to a permanent injunction pursuant to § 27-19-102, MCA, *et seq.*, restraining the enforcement of the elk-brucellosis management plan, statewide and local elk brucellosis working groups, including all related work plans and local modifications, which, due to Defendants' violations of statutory eligibility requirements for conditioned public assistance to private landowners, has resulted and will result in actual harm which cannot be monetarily compensated.

COUNT V: Violation of the public trust doctrine

120. Plaintiff incorporates the foregoing facts and allegations as if set forth fully herein.

121. 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....*" *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).

122. Pursuant to this charge, state actors owe a duty to the people of Montana to act to preserve Montana's natural resources, including its wildlife, for the benefit of the people and to secure that benefit for future generations. *See Geer*, 161 U.S. at 553

(quoting *State v. Rodman*, 58 Minn. 393, 400, 59 N.W. 1098, 1099 (Minn. 1894)).

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

124. Plaintiff is entitled to a declaration pursuant to § 2-4-506, MCA, and § 27-8-201, MCA, *et seq.*, that the elk-brucellosis management plan is invalid because it was adopted arbitrarily and capriciously and in dereliction of the Defendants' 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.

125. Plaintiff is further entitled to a permanent injunction pursuant to § 27-19-102, MCA, *et seq.*, restraining the enforcement of the elk-brucellosis management plan, statewide and local elk brucellosis working groups, including all related work plans and local modifications, because it has resulted and will result in actual harm which cannot be monetarily compensated due to Defendants' violation of the public trust doctrine.

COUNT VI: Violations of MAPA (§ 2-4-101, MCA, *et seq.*)

126. Plaintiff incorporates the foregoing facts and allegations as if set forth fully herein.

127. The purposes of the Montana Administrative Procedure Act ("MAPA"), codified at § 2-4-101, MCA, *et seq.*, as expressed by the legislature, include providing notice to the public of government action, and ensuring uniformity in agency rulemaking in order to safeguard due process and establish standards for review of agency decisions.

See id.

128. MAPA authorizes agencies to promulgate rules via the procedures set forth

at § 2-4-301, MCA, *et seq.*

129. Certain “seasonal rules” are excepted from many of the rulemaking formalities imposed by MAPA. *See* § 2-4-102(11)(b)(iv), MCA.

130. MAPA defines seasonal rules, in pertinent part, as those “adopted annually or biennially relating to hunting, fishing, and trapping when there is a statutory requirement for the publication of the rules....” § 2-4-102(11)(b)(iv), MCA.

131. Although the elk-brucellosis work plans have been adopted annually, they are not “relat[ed] to hunting, fishing, and trapping,” and are not the subject of any statutory publication requirements separate from MAPA. The elk-brucellosis management plan is therefore not subject to the seasonal rule exception, and must comply with all of the formalities and requirements of § 2-4-101, MCA, *et seq.*, including the processes and procedures set forth at § 2-4-301, MCA, *et seq.*

132. Defendants have improperly treated the elk-brucellosis management plan as a seasonal rule, and have failed to comply with numerous substantive and procedural requirements for MAPA rulemaking.

133. The effect of Defendants’ improper reliance upon the seasonal rule exception has been to create a moving target, precluding meaningful judicial review as each management plan sunsets on an annual basis.

134. Under § 2-4-302(2)(a)(i), MCA, notice of a proposed agency rulemaking action must be filed with the Secretary of State for publication in the Montana Administrative Register.

135. A notice of proposed action (“proposal notice”) was never published in the Montana Administrative Register for the 2015 Work Plan, or for any prior iterations of the elk-brucellosis management plan.

136. An additional notice requirement is imposed by § 2-4-302(4), MCA, which requires that the responsible agency provide notice to interested persons at least twenty (20) days prior to a hearing on a proposed rule.

137. As set forth in Paragraph 49, the hearing date for the 2015 Work Plan was initially scheduled and advertised for the October 9, 2014 FWC meeting. As set forth in Paragraph 51, that hearing was cancelled and informally rescheduled for November 13, 2014. The rescheduled meeting did not appear on the FWC meeting agenda on FWP's website until November 5, 2014, only eight days before the scheduled meeting. Upon information and belief, the cancellation of the original hearing and the short-notice for the rescheduled meeting resulted in confusion and uncertainty, and prevented interested persons from appearing and effectively commenting on the proposed 2015 Work Plan.

138. Section 2-4-305(1)(a), MCA, requires that an agency "shall fully consider written and oral submissions respecting the proposed rule...."

139. Upon information and belief, Defendants did not fully consider the written and oral submissions tendered during the notice-and-comment period. Upon further information in belief, certain comments were not even provided to FWC for the Commissioners' review and consideration prior to the approval of one or more work plans.

140. "Upon adoption of a rule, an agency shall issue a concise statement of the principal reasons for and against its adoption, ..." § 2-4-305(1)(b)(i), MCA,

141. Defendants never issued a statement of reasons for their decision as to the 2015 Work Plan, or for any prior iterations of the elk-brucellosis management plan.

142. Once adopted, a copy of the final rule must be published in the Montana Administrative Register. § 2-4-306(1), MCA. A rule is not effective until that filing is made. *Id.*

143. A copy of the final rule was never published in the Montana Administrative Register for the 2015 Work Plan, or for any prior iterations of the elk-brucellosis management plan.

144. Under § 2-4-305(5), MCA, "[t]o be effective, each substantive rule adopted

must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.”

145. As set forth in Paragraphs 63–85, the elk-brucellosis management plan, statewide and local elk brucellosis working groups, including all related work plans and local modifications, has been promulgated in excess of the authority conferred upon Defendants by the legislature, as expressed in the relevant agency enabling statutes.

146. As set forth in Paragraphs 86–125, the elk-brucellosis management plan, statewide and local elk brucellosis working groups, including all related work plans and local modifications, is contrary to other provisions of the law, including but not limited to MEPA, clear statutory limitations on publicly funded assistance to private landowners as codified at § 87-1-225, MCA, and the public trust doctrine.

147. A rule is not valid unless proper notice is given and it is adopted in substantial compliance with §§ 2-4-302 through 306, MCA. *See* § 2-4-305(7), MCA.

148. The Montana Constitution guarantees the public a “reasonable opportunity for citizen participation in the operation of [state] agencies....” Mont. Const. art. II, § 8. MAPA is designed to uphold that mandate, *see* § 2-3-101, MCA, as is the MEPA environmental impact review requirement, which serves to provide the public with sufficient information that they are able to offer informed and meaningful public comment on proposed agency actions. *See* § 75-1-102(1)(b) and (3), MCA.

149. Defendants’ failure to perform an appropriate environmental impact study and review and publish the results of such review, as discussed in Paragraphs 87–106, has denied the public a reasonable opportunity to participate in the agency decision making process for lack of adequate information about the potential adverse consequences of the plan.

150. Plaintiff is entitled to a declaration pursuant to § 2-4-506, MCA, and § 27-8-201, MCA, *et seq.*, that the elk-brucellosis management plan, including all related work

plans and local modifications, was formulated and adopted arbitrarily and capriciously in violation of MAPA due to Defendants': (1) failure to file with the Secretary of State a notice of proposed rulemaking, (2) failure to timely notify interested parties of the rescheduled hearing, (3) failure to give adequate consideration to public comments, (4) failure to issue a statement of reasons for the decision, (5) failure to file a copy of the final rule(s) with the Secretary of State for publication, (6) failure to provide the public with adequate information regarding the potential environmental impacts such that they could provide meaningful public comment, and (7) because the rules exceed Defendants' statutory authority and are otherwise contrary to law.

151. Plaintiff is further entitled to a declaration pursuant to § 27-8-201, MCA, *et seq.*, that the elk-brucellosis management policy falls outside the seasonal rule exception.

152. Plaintiff is entitled to a further declaration pursuant to § 2-4-506, MCA, and § 27-8-201, MCA, *et seq.*, that Defendants are without authority to take any managerial action under the elk-brucellosis management plan because a rule is not effective until published in the Montana Administrative Register, *see* § 2-4-306(1), MCA, and no such publication was ever made for any aspect of the plan.

153. Plaintiff is further entitled to a permanent injunction pursuant to § 27-19-102, MCA, *et seq.*, (1) restraining the enforcement of the elk-brucellosis management plan, including all related work plans and local modifications, because it has resulted and will result in actual harm which cannot be monetarily compensated due to Defendants' violations of the MAPA, and (2) affirmatively requiring all future brucellosis management actions to be based upon rules which comply with the substantive and procedural rulemaking requirements of MAPA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for:

1. Declaratory relief adjudging that:
 - a. The elk-brucellosis management plan, including all related work plans and local modifications, was formulated and adopted 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 because it does not protect wildlife, and is therefore void;
 - c. The elk-brucellosis management plan was formulated, adopted and is being implemented illegally, in excess of the statutory authority of the FWC because the relevant rules were promulgated prior to conducting an environmental impact study and review, and is therefore void;
 - d. The 2015 Work Plan was formulated, adopted and is being implemented in violation of MEPA environmental impact study and review requirements and is therefore void;
 - e. The elk-brucellosis management plan, statewide and local elk brucellosis working groups, including all related work plans and local modifications, 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, and is required for all future comparable actions;
 - f. Defendants are without authority to enforce or implement the elk-brucellosis management plan, including all related work plans and local modifications, because the plan is without legal effect due to Defendants' failure to publish the rule in the Montana Administrative Register, as required by law;
 - g. Elk-brucellosis management plans are not "seasonal rules" subject to the § 2-4-102(11)(b)(iv) exception to MAPA;
 - h. 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 the elk-brucellosis management plan, including related work plans and local modifications, is void for failure to observe that intent and impose appropriate conditions upon public relief under the plan; and

- i. 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 Management Guidelines in Areas with Brucellosis" program as it presently exists, statewide and local elk brucellosis working groups, including all related work plans and local modifications;
- b. Affirmatively requiring that the adoption and implementation of any future management plan be based upon adequate environmental impact study and review as required by law;
- c. Affirmatively requiring that the adoption and implementation of any future management plan comply with the statutory mandates that FWP and FWC must act to protect wildlife;
- d. Affirmatively requiring that the adoption and implementation of any future management plan not exceed FWP's and FWC's statutory authority, including observance of the limitation that FWC can only approve a wildlife management plan following appropriate environmental impact study and review; and
- e. Affirmatively requiring that the adoption and implementation of any future management plan comply with the substantive and procedural rulemaking requirements set forth at § 2-4-301, MCA, *et seq.*

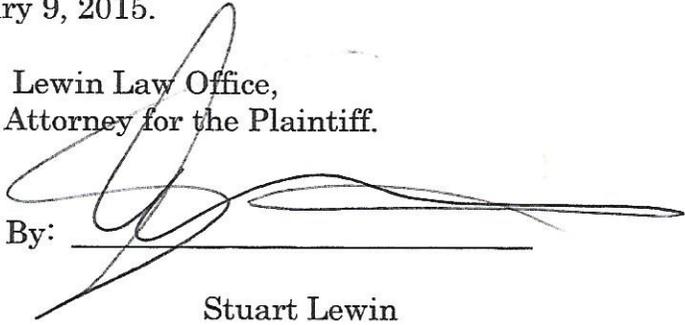
3. An award of fees and costs pursuant to the private attorney general doctrine and § 27-8-311, MCA; and

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

DATED this ____ day of January 9, 2015.

Lewin Law Office,
Attorney for the Plaintiff.

By: _____

A handwritten signature in black ink, appearing to read 'Stuart Lewin', is written over a horizontal line. The signature is stylized with a large loop at the beginning and a long, sweeping tail.

Stuart Lewin