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MONTANA SIXTH JUDICIAL DISTRICT COURT
PARK COUNTY

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

Petitioner, and

MONTANA FARM BUREAU FEDERATION,

Petitioner-Intervenor,

v.

MONTANA DEPARTMENT OF LIVESTOCK, an agency of the State of Montana; MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS, an agency of the State of Montana; STATE OF MONTANA; DR. MARTIN

Cause Nos. DV 11-77
DV 11-78

STATE RESPONDENTS' BRIEF IN SUPPORT OF MOTION FOR DISQUALIFICATION

ZALUSKI, in his capacity of Montana State VErterinarian; and BRIAN SCHWEITZER, as Governor of the State of Montana,

Respondents, and

BEAR CREEK COUNCIL, GREATER YELLOWSTONE COALITION, and NATURAL RESOURCES DEFENSEN COUNCIL,

Respondents-Intervenors.

PARK COUNTY,

Petitioner, and

MONTANA FARM BUREAU FEDERATION,

Petitioner-Intervenor,

v.

THE STATE OF MONTANA, FISH, WILDLIFE AND PARKS, an agency of the State of Montana, and THE DEPARTMENT OF LIVESTOCK, an agency of the State of Montana,

Respondents, and

BEAR CREEK COUNCIL, GREATER YELLOWSTONE COALITION, and NATURAL RESOURCES DEFENSE COUNCIL,

Respondent-Intervenors.

INTRODUCTION

From at least 1996 through 2004, counsel for the Park County Stockgrowers Association (PCSA) in this action, John Bloomquist, and his law firm, now known as Doney, Crowley, Bloomquist, Payne, and Uda, P.C. (the Doney law firm), served as lead counsel for the Department of Livestock (DOL) and at times the State of Montana, the Department of Fish Wildlife, and Parks (FWP) and certain state

officers, including a former Montana Governor, a former DOL Executive Officer, and a former FWP Director, in multiple lawsuits involving bison management in and around Yellowstone National Park (YNP). Bloomquist, on behalf of PCSA, has now filed this action involving the same or substantially related factual and legal issues against his former clients.

The State of Montana, DOL, FWP, Dr. Martin Zaluski, and Governor Brian Schweitzer (the State) move this Court for an Order disqualifying Bloomquist and the Doney law firm from further representation of PCSA in this matter and ask the Court to order their immediate withdrawal. Bloomquist's representation of PCSA constitutes a violation of Rule 1.9 of the Montana Rules of Professional Conduct (M. R. Pro. C.) relating to duties to former clients, and that violation has adversely prejudiced and will continue to adversely prejudice the State's defense of this matter and cause it irreparable harm.

As set forth in the PCSA Petition and pleadings filed with the Court, the current action arises out of and relies and depends upon the original bison proceeding initiated by then-Governor Marc Racicot against various federal agencies, Montana v. United States, Cause No. CV 95-6-H-CCL (D. Mont. filed Jan. 17, 1995), and the resolution of that matter through the adoption of the Interagency Bison Management Plan (IBMP) in 2000. Bloomquist and the Doney law firm represented the State and its Governor, the very entities now being sued, in that litigation. During the course of at least eight years, Bloomquist represented DOL, as well as the State, its agencies, and its officers, in various other bison-related litigation and administrative review processes and operated as a lead legal representative and consultant for the State on bison issues. He filed motions and briefs, provided advice on settlement, provided advice on the administrative record including environmental assessments, provided advice on the interpretation of statutes at issue in this case, had private communications with top Montana officials

including the then-Governor, attended meetings with such officials, commented on and edited the IBMP and corresponding environmental analyses, and was privy to information in his long-standing capacity as a lawyer representing the State in matters that form the genesis of this action, to which current agencies, officers, employees, and their lawyers no longer have access. The matters at issue in the former and current actions concern: YNP bison that migrate into Montana, federal and state agency management responsibilities for those bison, and the public health and safety issues, including the potential for the transmission of brucellosis to livestock and humans, that arise from that movement and the management practices surrounding it.

Because the parties are operating under an expedited scheduling order, the State respectfully requests an expedited ruling on its motion for disqualification.

STATEMENT OF FACTS

I. THE PCSA'S ALLEGATIONS IN THE CURRENT MATTER.

As stated in PCSA's Petition in this action, this matter arises out of "a cooperative federal-state agreement for management of YNP bison [that] was developed and approved by both DOL and FWP in 2000 and signed by the governor at that time." PCSA Petition, ¶ 4. The "cooperative federal-state agreement" is the IBMP entered into by state and federal agencies in 2000. The IBMP anticipated and included a provision for future management changes through "an adaptive management program." See Record of Decision for Final Environmental Impact Statement and Bison Management Plan for the State of Montana and Yellowstone National Park, December 20, 2000 ("ROD"), p. 8 (Appendix, hereinafter "App.," at 48), reprinted in the State's Administrative Record for this case. The ROD stated: "The agencies may agree to modify elements of this plan based on research and/or adaptive management findings." ROD p. 32, ¶ 29 (App. at 49).

PCSA alleges in the instant action that certain adaptive management adjustments to the IBMP, agreed to by the eight federal, state, and tribal signatory agencies to the IBMP in April 2011, which allow for the expansion of the area in Montana in which bison may move during certain times of the year, are "significantly different from current IBMP management provisions as well as any of the alternatives analyzed in the 2000 IBMP FEIS [Final Environmental Impact Statement]." PCSA Petition, ¶ 70. The Petition contains numerous substantive allegations in an attempt to support this general statement. See, e.g., id. at ¶¶ 70, 73, 80-81, 86. The Petition is replete with allegations that the State has violated duties owed or management responsibilities held under the IBMP. See, e.g., id., at ¶¶ 4, 6, 28-29, 31, 35, and 83-87 and Prayer for Relief, ¶ 1. In addition to claiming violations of the IBMP, the PCSA alleges that through the adoption of the adaptive management adjustments to the IBMP, the State violated the Montana Environmental Policy Act (MEPA), the Montana Constitution, and various other Montana statutes and regulations. The PCSA furthermore asserts a claim for nuisance based on allegations of increased risks to public health and safety posed by the presence of bison in Montana under the adaptive management adjustments. Id. at ¶¶ 103-11.

II. THE NATURE OF BLOOMQUIST'S FORMER REPRESENTATION OF THE STATE.

For at least eight years, Bloomquist served as counsel for the State in bison litigation concerning environmental challenges to interim bison management plans preceding the finally adopted plan, and in formal negotiations culminating in the adoption of the IBMP, which is at the heart of the PCSA's Petition in this case. Indeed, Bloomquist was directly involved in the formation of the IBMP, itself. After adoption of the IBMP, Bloomquist continued his representation of the State in

federal litigation involving bison and interpretation of the IBMP. A summary of the complex history and Bloomquist's involvement follows.

The IBMP was the culmination of a planning process regarding the management of bison leaving YNP and entering Montana that began in 1990 and lasted more than ten years. See ROD p. 3 (App. at 43). In 1992, DOL, FWP, and various federal agencies signed a Memorandum of Understanding (MOU) to work together to develop such a plan, and the parties entered into various interim bison management plans while the final plan was in development. See ROD p. 4 (App. at 44). Over concerns that Montana might lose its brucellosis class-free status, in January 1995, then-Governor Marc Racicot filed a complaint against the federal government in federal court in Montana v. United States, Cause No. CV 95-6-H-CCL (D. Mont. filed Jan. 17, 1995). See ROD p. 4 (App. at 44).

The parties signed a settlement agreement in Montana v. United States that provided a schedule for the completion of the long-term bison management plan and EIS, incorporated a 1992 MOU, and provided that the court would dismiss the lawsuit upon the issuance of the records of decision adopting a long-term plan, or upon the unilateral termination of the MOU by any party, whichever came first. Id.

In 1996, another interim bison management plan was signed, and amendments were made in 1997. Id. The 1996 interim plan and 1997 amendments were challenged in federal court by various environmental groups, alleging violations of the National Environmental Policy Act (NEPA) and other laws. See Greater Yellowstone Coalition v. Babbitt, 952 F. Supp. 1435 (D.Mont. 1996), aff'd, 175 F.3d 1149 (9th Cir. 1999); Intertribal Bison Coop. v. Babbitt, 25 F. Supp. 2d 1135 (D. Mont. 1998), aff'd, 175 F.3d 1149 (9th Cir. 1999); see also ROD p. 4 (App. at 44).

On November 16, 1996, DOL entered into a contract with Bloomquist for the provision of legal services. (Affidavit of Peterson, ¶ 5 and Ex. A to Affidavit.) The "Scope of Work" section of that original contract provided as follows:

> SECTION 1. SCOPE OF WORK. The Contractor agrees to act as counsel for Agency with respect to any contested cases involving federal or state action(s) in federal or state courts relative to the Montana bison/brucellosis problem under federal and Montana statutes, rules and regulations, as requested by Agency. The Contractor's duties may include preparation of pertinent documents, orders, depositions, or any other written documents and procedural matters involving the bison/brucellosis matter.

(Emphasis added.) (Affidavit of Peterson, Ex. A.)

Under this contract, Bloomquist appeared in the two federal lawsuits challenging the 1996 interim plan and its 1997 amendments on behalf of the State and then-Governor Racicot (CV-96-82) and on behalf of DOL and its Executive Officer (CV-97-30). Bloomquist is listed as counsel in several published court rulings on these two cases. See Greater Yellowstone Coalition v. Babbitt, 952 F. Supp. 1435 (D. Mont. 1996); Greater Yellowstone Coalition v. Babbitt, 952 F. Supp. 1446 (D. Mont. 1997); Intertribal Bison Cooperative v. Babbitt, 25 F. Supp. 2d 1135 (D. Mont. 1998); Greater Yellowstone Coalition v. Babbitt, 175 F.3d 1149 (9th Cir. 1999) (App. at 1, 2; 10; 13, 15; 20). To conduct this and subsequent work, Bloomquist's 1996 legal services contract with DOL was extended by amendment on eight separate occasions through 2004. (Affidavit of Peterson, ¶ 6.)

At the same time, Bloomquist also was acting under contract as a technical expert for DOL on the diseased bison issue. Under the contract, he was to advise the DOL regarding NEPA and MEPA requirements "involving federal or state actions(s) [sic] relative to the Montana bison/brucellosis problem" and the EIS "being prepared by federal agencies under federal and Montana statutes, rules and regulations. . . ." To summarize, based on his knowledge and experience, Bloomquist was part of a team that drafted the State's official position on the issues

arising under federal and Montana environmental laws, including the IBMP, and the administrative record to support it, reviewing, editing, and commenting on documents. (Affidavit of Peterson, ¶ 7.)

Following release of the joint Draft EIS (DEIS) for the IBMP in 1998, the federal agencies developed a strategy for bison management that they presented to the State as a possible modified preferred alternative for the Final EIS (FEIS). After several months of discussions and negotiations, the state and federal parties reached an impasse. In December 1999, the federal agencies gave notice that they were withdrawing from the 1992 MOU, an action which would trigger the dismissal of the State's federal suit in Montana v. United States. The State objected to dismissal and the court ordered mediation, to be conducted by United States Magistrate Judge Holter. See ROD p. 5 (App. at 45.); (Affidavit of Peterson, ¶ 8 and Exs. B and C to Affidavit).

Pursuant to a February 2000 order of Judge Holter, Bloomquist, serving as lead counsel for the State in the Racicot-initiated lawsuit, signed and submitted to the mediator the State's confidential mediation memorandum dated March 13, 2000. (Affidavit of Peterson, ¶ 9.) Mediation occurred during the spring, summer, and fall of 2000, resulting in the parties' final agreement on an amended version of the modified preferred alternative (the IBMP) and final resolution of the State's lawsuit. ROD p. 5 (App. at 45); (Affidavit of Peterson, ¶ 9).

Bloomquist was intimately involved in the development of the final settlement and decision, the IBMP, and the administrative documents used to support that decision. Those documents, their content, and their construction, are at the heart of the instant action. (Affidavit of Peterson, ¶ 9.)

Bloomquist also represented DOL in a 2003 action by environmental groups challenging a federal agency's decision to issue permits for a DOL bison capture and testing facility on grounds that the permits violated NEPA and the Endangered

Species Act. That action also involved interpretation of the IBMP and review of the administrative record in support of it. Cold Mountain v. Garber, 375 F.3d 884 (9th Cir. 2004); (Affidavit of Peterson, ¶ 10).

In his capacity as contracted legal counsel with the State, its agencies, and its officials for almost a decade, Bloomquist appeared in court and drafted and filed pleadings and briefs. Bloomquist created and had access to confidential attorney-client information, including draft documents and case strategies. Bloomquist appeared before the Board of Livestock at meetings that were conducted in closed session in order to advise his client and determine litigation strategy. The State has unearthed numerous documents marked "privileged" regarding bison issues that either were drafted, edited, or received by Bloomquist. Written documents contained in the agencies' files include, among other things, a memorandum Bloomquist sent to Governor Racicot on February 12, 1999, regarding then-pending litigation about the IBMP. Bloomquist marked the memorandum "Privileged Attorney / Client Information." Bloomquist sent a memorandum dated November 16, 1999, to DOL concerning the environmental impact statement and record of decision for bison management. Bloomquist marked the memorandum "PRIVILEGED ATTORNEY/CLIENT COMMUNICATION." (Affidavit of Peterson, ¶ 11.) As previously described, Bloomquist authored the State's confidential mediation memorandum dated March 13, 2000, that was submitted to the mediator, United States Magistrate Judge Holter in Montana v. United States, and led the State in the court-ordered negotiations culminating in adoption of the IBMP at issue in this case. (Id., ¶ 9.)

Furthermore, the State assumes Bloomquist has retained in his own custody records from his previous representation of the State, which likely contain confidential material. Counsel for DOL recently requested that Bloomquist provide

DOL with his complete records from the prior legal representations in their entirety. (Affidavit of Peterson, ¶ 12 and Ex. D to the Affidavit.)

III. NOTICE OF ALLEGED CONFLICT.

The State asserts that Bloomquist's continued representation of the PCSA in this action against the very same entities and officers that Bloomquist previously represented in the same or substantially related matters violates the Montana Rules of Professional Conduct that prohibit conflicts of interest, and has adversely impacted and will continue to adversely impact and cause prejudice to the State in its defense of this matter. On May 20, 2011, counsel for DOL sent a letter to Bloomquist, advising him of the conflict of interest and requesting that he and his firm withdraw from representation of the PCSA in this matter. (Affidavit of Peterson, ¶ 13 and Ex. E to the Affidavit.) In a letter dated May 31, 2011, Bloomquist refused to withdraw, arguing, in part, that he was entitled to the less stringent conflict of interest rules applicable to lawyers who are public employees because his former clients were governmental entities and that all of the information that he garnered during that representation is public information. (Affidavit of Peterson, ¶ 14 and Ex. F to the Affidavit.)

The State now asks the Court to resolve this issue and to order Bloomquist and the Doney law firm to withdraw from further representation of PCSA in this matter.

STANDARD OF REVIEW

The decision to grant or deny a motion to disqualify is within a district court's discretion and will be overturned only for an abuse of that discretion. Pro-Hand Servs. Trust v. Monthei, 2002 MT 134, ¶ 9, 310 Mont. 165, 49 P.3d 56. The gravamen of a motion to disqualify is that the continued representation will cause the moving party harm. Schuff v. A.T. Klemens & Sons, 2000 MT 357, ¶ 36, 303 Mont. 274, 16 P.3d 1002. Violation of a rule of professional conduct designed to

protect a party in the shoes of the moving party may be evidence that continued representation will result in prejudice. Id. at ¶¶ 36-37.

ARGUMENT

"[A] lawyer may be disqualified from appearing in an action because he or she has previously represented an adverse party." Pro-Hand Servs., at ¶ 13. Bloomquist previously represented the State and has now undertaken the representation of another entity, the PCSA, in a substantially related matter in which the PCSA's interests are materially adverse to the interests of the State without the State's consent. This conduct is a violation of M. R. Pro. C. 1.9(a) that will irreparably and fundamentally harm the State in its defense of this matter. Thus, the State seeks this Court's order disqualifying Bloomquist and the Doney law firm and ordering them to withdraw from continued representation of the PCSA in this action.

I. RULE 1.9 APPLIES TO BLOOMQUIST'S FORMER REPRESENTATION OF THE STATE.

As an initial matter, Bloomquist contends that he is entitled to take advantage of the more lenient conflict of interest rules that are afforded to public officers and government employees in M. R. Pro. C. 1.11 because his former clients were State agencies and employees. Bloomquist is mistaken. Because Bloomquist is and always was a private lawyer, not a government employee nor public officer, the proper conflict of interest rule is that applicable to attorneys in the private sector, namely, M. R. Pro. C. 1.9.

Rule 1.9, entitled "Duties to Former Clients," is virtually identical to the ABA Model Rule 1.9 (Model Rule 1.9) of the same name and from which it was derived. Model Rule 1.9 "generally defines a lawyer's conflict of interest obligations to former clients after the termination of a lawyer-client relationship."

ABA Formal Ethics Op. 97-409 at 1101:150 (Aug. 2, 1997) (App. at 11). M. R. Pro. C. 1.9(a) provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(Emphasis added.)

M. R. Pro. C. 1.11, entitled "Special Conflicts of Interest for Former and Current Government Officers and Employees," on the other hand, provides:

> (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
>
> (1) is subject to Rule 1.9(c); and
>
> (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

Where Rule 1.11 applies, it replaces or supplants the duties described in Rule 1.9(a) and (b). See ABA Annotated Model Rules of Professional Conduct (6th ed. 2007) at 184-85 (App. at 73-74). However, this is of no consequence here because Rule 1.11 does not apply to specially retained private counsel who perform *ad hoc* work on behalf of governmental agencies and officers such as that previously performed by Bloomquist.

By its own terms, Rule 1.11(a) only applies to lawyers who have "formerly served as a public officer or employee." Bloomquist was not an elected official or State employee when he represented the State of Montana and its departments and officials on previous bison matters. Rather, he was a partner in a private law firm that worked for the State pursuant to contractual agreements and was, therefore, an independent contractor. Indeed, his contract specifically identified Bloomquist as "Contractor" and Section 9 of the contract specified, "the Contractor is an

independent contractor . . . ." (Affidavit of Peterson, ¶ 5 and Ex. A to the Affidavit.) Because Bloomquist was not a public officer or employee, M. R. Pro. C. 1.11(a) does not apply to him.

In Formal Ethics Opinion No. 97-409, the ABA Committee noted "that a viable argument can be made, based on the stated purpose of Rule 1.11 reflected in its commentary and legislative history, that the conflict of interest obligations of lawyers who are retained on an *ad hoc* basis to perform work for a government entity will ordinarily be determined by Rule 1.9 and not Rule 1.11." ABA Formal Ethics Op. 97-409 at 1101:150, n.4 (Aug. 2, 1997) (App. at 55).

The purpose behind the more lenient conflict rule for lawyers in public service in Model Rule 1.11 is "to prevent the disqualification rule from imposing too severe a deterrent against entering public service" and from becoming "so restrictive as to inhibit transfer of employment to and from the government." ABA Annotated Model Rules of Professional Conduct (6th ed. 2007), Rule 1.11, cmt. 4, at 183 (App. at 72). Rule 1.11 applies not only to government lawyers who represent government agencies, but also to all lawyers who work in the public sector, even if they hold non-lawyer positions. Id., Rule 1.11, at 184 (App. at 73). The same concerns do not apply to a specially-retained private attorney who contracts with the State on an *ad hoc* basis for an agreed upon fee while continuing to represent private clients. The unique concerns that Model Rule 1.11 was designed to address simply do not apply to Bloomquist's situation. Because Bloomquist was not a public officer or employee, M. R. Pro. C. 1.11 does not apply to him. Bloomquist must be treated as a private attorney, which he is and always has been under his contracts with the State.

II. BLOOMQUIST'S REPRESENTATION OF PCSA IN THIS ACTION VIOLATES RULE 1.9(a).

A lawyer who has formerly represented a client cannot represent a person who is suing that former client on a substantially related matter absent the former client's written consent. M. R. Pro. C. 1.9(a). Four elements must be proven to establish a violation of Rule 1.9(a):

> First, there must have been a valid attorney-client relationship between the attorney and the former client . . . . Second, the interests of the present and former clients must be materially adverse. . . . Third, the former client must not have consented, in an informed manner, to the new representation. . . . Finally, the current matter and the former matter must be the same or substantially related.

Magin v. Solitude Homeowner's Inc., 255 P.3d 920, 925 (Wyo. 2011), quoting Sullivan County Regional Refuse Disposal Dist. v. Town of Acworth, 141 N.H. 479, 686 A.2d 755, 757 (1996) (App. at 22-26).

Here, it is beyond doubt that the first three elements of the test are satisfied: Bloomquist represented the State previously; his current client, PCSA, has sued the State; and the State has not consented to Bloomquist's representation of PCSA. The only plausible issue is whether the current matter and the former matter are "substantially related." The State believes there can be only one answer to that question.

Generally, a current matter is substantially related to an earlier representation if it involves the lawyer's own work for the former client. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132(1) (2000). See also Franklin v. Callum, 782 A.2d 884, 887 (N.H. 2001) (App. at 27-30) (current representation was not permissible because it involved interpretation of agreement drafted by lawyer in earlier representation). PCSA's claims against the State in this action center on work performed by Bloomquist in advising, editing, and commenting on both the IBMP and the NEPA and MEPA documents and administrative record created in support of that agreement. The very work performed by Bloomquist on behalf of

the State forms the basis for PCSA's current case against it. In addition, it is very possible that Bloomquist himself may be a person with knowledge of fact issues raised by the Petition and the discovery requests he has issued on behalf of PCSA.

In determining whether an attorney should be disqualified from litigating against a former client, the test is whether "'the attorney may have received confidential information during the prior representation that would be relevant to the subsequent matter in which disqualification is sought.'" Pro-Hand Servs., ¶ 15, quoting Trone v. Smith, 621 F.2d 994, 999 (9th Cir. 1980) (App. at 31-41). If the current and former representations involve the same parties and similar or related facts and similar or related legal issues, the attorney's involvement in the prior representation likely resulted in his receipt of confidential information material to the new representation that might harm the former client. See, e.g., Trone, 621 F.2d at 998 ("Substantiality is present if the factual contexts of the two representations are similar or related.").

Recognizing that it would be unfair to require a former client to reveal confidences in order to show that a lawyer's current representation will harm it, "[a] former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services." ABA Annotated Model Rules of Professional Conduct (6th ed. 2007), Rule 1.9, cmt. 3, at 154 (App. at 66); accord Pro Hand Servs., ¶ 16 (client should not be required to disclose actual confidences).

> To be fair about it, the substantial relationship test was developed to spare former clients from the self-defeating necessity of having to reveal what confidential information they imparted to their lawyer as a means of making sure (through a disqualification motion) that the lawyer would not use this information to their disadvantage in his

> representation of another client. The test also saves courts from having to hold in camera or ex parte proceedings every time a disqualification motion is filed.
>
> . . .
>
> The substantial relationship test is a shortcut. If the former client demonstrates that there is a good deal of commonality between the matter the lawyer handled for the former client and the matter on which the lawyer is now representing another client, the former client needn't go further and establish just what confidential information he gave the lawyer that will now likely be used against him. The very similarity in the two representations is enough to raise a common-sense inference that what the lawyer learned from his former client will prove useful in his representation of another client whose interests are adverse to those of the former client.

ABA/BNA Lawyer's Manual on Prof. Conduct, § 51:222 (App. at 78-79).

Bloomquist was involved in the creation of the IBMP and the administrative record to support it, reviewing, editing, and commenting on documents. The State has unearthed numerous documents marked privileged regarding bison issues that either were drafted, edited, or received by Bloomquist. (Affidavit of Peterson, ¶¶ 4, 9, 11.) There is evidence that he consulted directly with elected State officials, including the former Governor, on bison issues and litigation strategy. He appeared before the Board of Livestock in closed-session meetings in order to advise his client and determination litigation strategy. (Id. at ¶¶ 4, 11.) He has represented the State in multiple lawsuits involving the same or substantially related factual issues presented here with respect to brucellosis, bison, Yellowstone National Park, and private and public land use by bison. He also has represented the State in multiple lawsuits involving the same or substantially related legal issues presented here with respect to the meaning of the IBMP and the adequacy of the State's NEPA and MEPA analysis regarding Yellowstone bison. In fact, a defense to the PCSA's MEPA claim in this case is that no further environmental analysis was necessary prior to the 2011 adoption of adaptive management adjustments, because the environmental reviews conducted in the 2000 FEIS were sufficient to meet MEPA

requirements. As a result, this case is substantially related to Bloomquist's former representation of the State within the meaning of Rule 1.9(a), and there is more than a substantial risk that Bloomquist obtained confidential information during his many years of prior representation of the State on those substantially similar matters which would be relevant here and which has and could continue to adversely impact the State's defense of this matter.

III. BLOOMQUIST'S REPRESENTATION OF PCSA IN THIS MATTER HAS PREJUDICED AND WILL CONTINUE TO PREJUDICE AND HARM THE STATE AND, THEREFORE, DISQUALIFICATION IS REQUIRED.

When a lawyer undertakes the representation of a client whose interests are adverse to those of a former client with respect to the same or a substantially related matter in violation of Model Rule 1.9(a), an irrebuttable presumption necessarily arises that the lawyer acquired confidential information from the former client that could be used to its detriment in the current proceeding, that the former client will be harmed by the continued representation of the current client, and that withdrawal is required. See ABA/BNA Lawyers' Manual on Prof. Conduct, §§ 51:201, 51:222 (App. at 75, 78-79). The substantial relationship test is essentially a short cut to proving prejudice so that a former client need not reveal confidences or wait until it can show actual prejudice before filing a motion to disqualify. Because the prejudice element is built into the substantial relationship test in Rule 1.9(a), no further proof on this element is needed in order for disqualification to be required. Id.

Here, Bloomquist has personal knowledge regarding the formulation of the IBMP, which includes provisions for adaptive management adjustments, and the administrative reviews completed in support of the IBMP, all matters central to the instant case. Bloomquist acquired that knowledge through his representation of the State; yet, the State cannot take advantage of, or even discover, Bloomquist's

knowledge and experience regarding those matters, which are at the heart of this dispute. To the contrary, the State's adversary in this litigation, PCSA, can use that information against the State, without the State knowing or even having access to it. This is patently unfair and prejudicial to the State, and requires Bloomquist's disqualification.

A former client need only inform the Court "of the nature of the confidential information disclosed" in order to "alert the court of the possibility that confidential information had been previously disclosed." Pro-Hand Servs., ¶ 16. Here, Bloomquist represented the State in bison litigation for years. Obviously, there is a substantial risk that material confidential information was previously disclosed which could harm the State in the current litigation. The nature of the relationship between Bloomquist and his former clients explained in detail above was such that he undoubtedly received confidential information which could harm the State in this substantially-related matter. Based on the foregoing, the State has shown sufficient proof that Bloomquist's continued representation of PCSA in violation of M. R. Pro. C. 1.9 would adversely affect and prejudicially harm the State in this matter. As a result, Bloomquist should be disqualified from any further representation.

IV. BLOOMQUIST'S DISQUALIFICATION IS AUTOMATICALLY IMPUTED TO THE DONEY LAW FIRM AND IT, TOO, MUST WITHDRAW FROM REPRESENTING PCSA PURSUANT TO RULE 1.10.

M. R. Pro. C. 1.10(a) provides as follows:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

"The imputed disqualification rule imposed by Rule 1.10(a) is absolute." In re Marra, 2004 MT 8, ¶ 10, 319 Mont. 213, 87 P.3d 384; see also Trone, 621 F.2d at 999. The disqualification rule applies here. Bloomquist worked for the Doney law

firm when he previously represented the State. No ethical wall has been created. Bloomquist and his firm continue to represent PCSA, despite the lack of consent by the State. Bloomquist and his firm should not be allowed to continue their representation given the substantial risk of prejudice to the State caused by the conflict. The Doney law firm should be required to withdraw from representing PCSA in this matter.

CONCLUSION

Based on the foregoing, the State respectfully requests that the Court disqualify Bloomquist and the Doney law firm and order them to withdraw from continued representation of PCSA in this matter.

DATED this 2nd day of September, 2011.

By: _____
NORMAN C. PETERSON
Counsel for Department of Livestock and Dr. Martin Zaluski

By: _____
ANN BRODSKY
Counsel for Governor Brian Schweitzer

By: _____
REBECCA JAKES DOCKTER
Counsel for Department of Fish, Wildlife, and Parks

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing State Respondents' Brief in Support of Motion for Disqualification to be mailed to:

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