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Attorneys for United Property Owners of Montana, Inc.

MONTANA TENTH JUDICIAL DISTRICT COURT, FERGUS COUNTY

UNITED PROPERTY OWNERS OF
MONTANA, INC., a Montana non-profit
corporation,

Plaintiff,

vs.

MONTANA FISH AND WILDLIFE
COMMISSION and MONTANA
DEPARTMENT OF FISH, WILDLIFE &
PARKS,

Defendant.

Cause No.: DV-22-36

Judge: Jon A. Oldenburg

COMPLAINT AND RULE 5.1 NOTICE

Plaintiff United Property Owners of Montana, Inc. ("UPOM), files the following
Complaint on behalf of itself and its members against Defendants Montana Fish and Wildlife
Commission ("Commission") and the Montana Department of Fish, Wildlife, and Parks ("FWP"
or "Department").

INTRODUCTION

1. FWP and the Commission are statutorily required to *manage* elk populations to sustainable levels and to prevent over-population. Mont. Code Ann. § 87-1-323. The Defendants, however, have failed to do so in much of the state resulting in damage to property owners across the state. Defendants' proffered reasons for refusing to manage elk population levels in overpopulated hunting districts is in disagreement with property owners who choose not to allow public access for hunting. One Commission member stated that landowners "need to work with the Department [by allowing public hunting] or the Department will not work with them." Earlier this month even FWP's Director said that the Defendants will not address depredation from elk "if a landowner doesn't allow at least some public hunting."

2. UPOM seeks a declaratory judgment that Defendants are mandated by statute to manage elk populations at or below the sustainable population objectives set by the Defendants, irrespective of public access, and have failed to do so. In addition, the Court should declare that Defendants must make elk management decisions based on elk population levels and landowner tolerances — not the "equitable" considerations it has used to punish private property owners who do not allow public access and to reward powerful special interest groups.

3. UPOM seeks injunctive relief compelling Defendants to design and implement a plan reasonably calculated to bring the Defendants back into compliance with state law within 90 days. Amongst other relief, the Court should order the Defendants to remove, harvest, or eliminate thousands of elk this year, as there are around 50,000 *excess* elk in the state above the maximum population levels set by the Defendants themselves. Further, the Court should enjoin the Defendants from setting elk hunting regulations in a discriminatory and arbitrary manner based on "social issues" and an improper animus toward landowners.

4. UPOM also seeks judicial review of Defendants' elk hunting regulations for the 2022 – 2023 season, including review of the processes and information Defendants relied on. UPOM contends the rules illegally violate Defendants' nondelegable elk management mandates, do not appropriately reflect private landowner tolerances and concerns for the gross over-population of elk and damage caused by such, and are thus unlawful, arbitrary, and capricious.

I. History of Elk Management in Montana

5. By the 1890s, elk were extinct in the Missouri River Breaks region of Montana ("Breaks"), including Fergus County. For decades afterwards, the federal government patented parcels of the public domain to private homesteaders. This private title vested during a period of Montana history when no elk existed on the landscape. Many homesteaders who helped create what is now regarded as "the Last Best Place" learned the hard way that eking out a living on the fragile, arid range of the Breaks is a tough proposition, even without elk.

6. At the end of the 1940s, Defendants captured elk from Yellowstone National Park and shipped them on trucks and trains for release in North Central Montana.

7. In some cases, Defendants sought the consent and cooperation of landowners, whose private land was dedicated to providing a habitat incubator to grow the transplanted elk into sustainable herds. In exchange, Defendants agreed to limit the size of the elk herds to prevent property damage. Defendants, however, failed to do so, and the elk population in North Central Montana is far above the Defendants' own standards, and causing the exact type of damage to private property the Defendants agreed to prevent.

8. In other cases, the reintroduced elk were foisted on landowners without their knowledge or consent.

II. Increasing elk populations and the Legislative response in 2003 to protect private property owners.

9. Due in large part to the cooperation between private property owners and the Defendants, the reintroduction program of elk was a success.

10. By the 2000s, elk populations had increased to the point that they were causing property damage, and the Defendants were not responsive to landowners' concerns.

11. As a result, in 2003, the Legislature enacted House Bill 42, which requires the Defendants to establish population objectives based on the number of elk that can be viably sustained, and then to *actively manage* elk populations to keep the populations at or below the objectives.

12. The impetus for the new law is noted in the introduction to it: “[F]or over 70 years wildlife populations in Montana have continued to increase and the damage to private land as a result of this increased wildlife population has increased dramatically.” 2003 HB 42, Chap. 553 at 1 (emphasis supplied). The Legislature implored that “it is time for the Department of Fish, Wildlife, and Parks to use the tools that it has had available for many years, along with new tools to be implemented through this legislation, to manage Montana’s wildlife populations in a sustainable manner.” *Id.* The intended result of the law was “to *require* the commission, with advice of the department, to *manage* elk, deer, and antelope populations in a sustainable manner that keeps animal populations at a number that does not adversely affect Montana land.” *Id.* at 2 (emphasis added).

13. With this legislation, the Legislature created an affirmative legal duty on the Defendants to prevent over-population of elk in the state, which the Defendants admit they have failed to do.

14. To implement this mandate, the Bill created new code sections and amended other sections of existing law. Section 2 of 2003 House Bill 42 created Mont. Code Ann. § 87-1-323, entitled “Viable Elk, Deer, And Antelope Populations Based On Habitat Acreage — *Reduction Of Populations As Necessary.*” (Emphasis added). This section provides that “the commission shall determine the appropriate elk . . . numbers that can be viably sustained. The department shall consider the specific concerns of private landowners when determining sustainable numbers pursuant to this section.” “Once the sustainable population numbers are determined . . . the department shall implement, through existing wildlife management programs, necessary actions with the objective that the population of elk . . . remains at or below the sustainable population.” “The department shall . . . manage with the objective that populations of elk . . . are at or below the sustainable population number by January 1, 2009 . . .”

15. House Bill 42 also brought about was the addition of the word “management” to the list of FWP’s responsibilities. Before 2003, Mont. Code Ann. § 87-1-201(2) provided, “The department shall enforce all the laws of the state respecting the protection, preservation, and propagation of . . . game . . . within the state.” Section 6 of House Bill 42 amended this section to provide, “The department shall enforce all the laws of the state respecting the protection, preservation, *management* and propagation of . . . game . . . within the state.”¹ Defendants have continued to protect, preserve, and propagate elk populations, but they have failed to *manage* elk populations.

16. In later legislation, Mont. Code Ann. § 87-1-201(1)(h) was amended to place similar population control mandates on the Commission. Specifically, “the commission . . . shall manage elk . . . based on habitat estimates determined as provided in 87-1-322 and maintain elk .

¹ Likewise, section 7 of HB 42 added the word management to the list of the Commission’s responsibilities as well, “The commission . . . shall set the policies for the protection, preservation, *management*, and propagation of the wildlife . . .” (emphasis added).

. . population numbers at or below population estimates as provided in 87-1-323. In developing or implementing an elk management plan, the commission shall consider landowner tolerance when deciding whether to restrict elk hunting on surrounding public land in a particular hunting district.” Mont. Code Ann. § 87-1-301(1)(h).

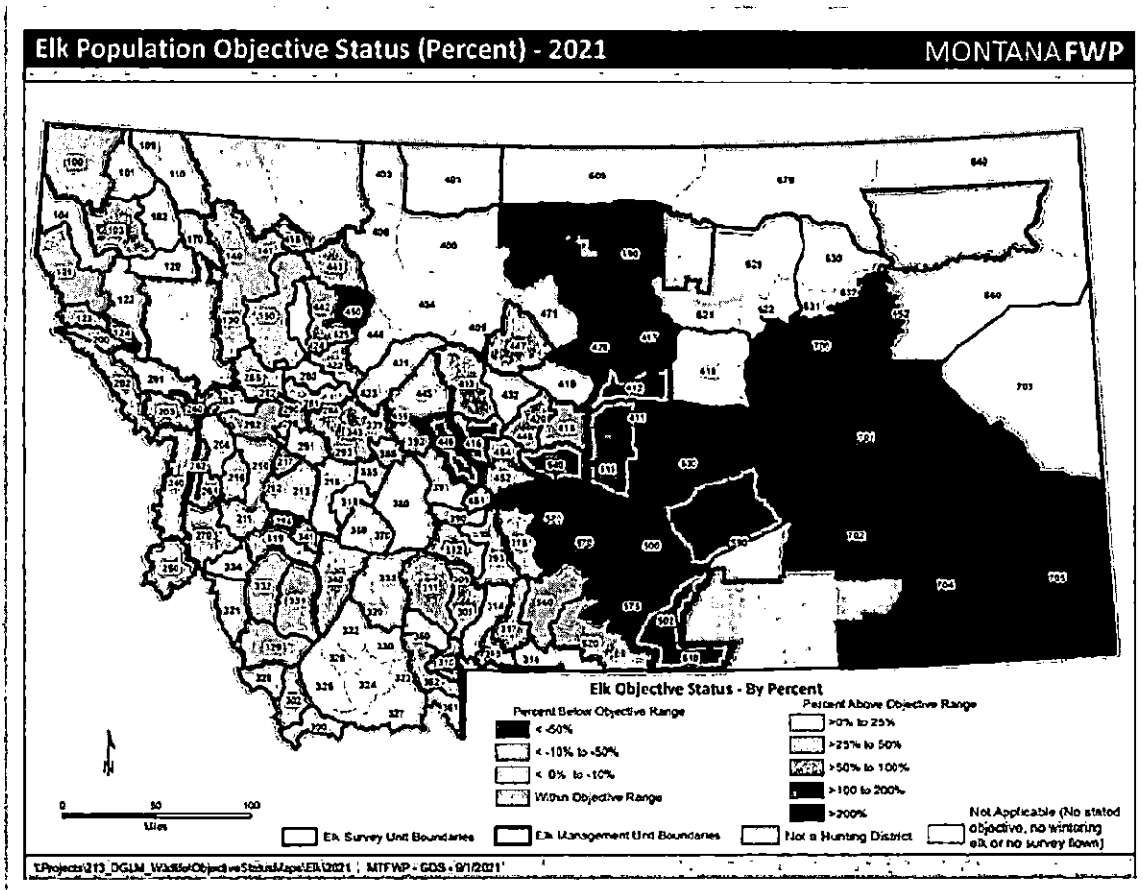
17. These statutory mandates are not *discretionary* and they are *not delegable*. They fall squarely on Defendants, who in turn have no legal excuse or justification to fail or refuse to follow the will of the people expressed in the legislation. No matter whether reducing elk numbers is popular with environmentalist or other special interest groups or not, Defendants are to keep populations at or below the population objectives.

18. In 2007, Commissioner Shane Colton attempted to discredit House Bill 42 saying, “A slim number of legislators² think there’s a problem and (are) forcing us to deal with this problem” but he disagreed that there was a problem the Commission needed to address. FWP’s Director responded by pointing out that in the Breaks, “the cow elk population is way up and efforts to cull the cows are failing.” Commissioner Willie Doll, put it more directly, “There are way too many cows in the Breaks.”

19. Commissioner Colton’s view of House Bill 42, however, has carried the day, and entrenched employees of FWP and rogue Commissioners have been allowed to override the intent of the Legislature. Despite the unambiguous language of Mont. Code Ann. §§ 87-1-301 and -323, Defendants failed to meet the 2009 deadline to reduce the numbers. Defendants have *never* fully complied with the law and they have worked to undermine and discredit the Legislature’s mandate ever since it was enacted.

² 2013 House Bill passed the senate with near unanimous support and was approved on third reading in the House by a 63-35 vote.

20. Currently, by Defendants' own count there are 7 Elk Management Units below the population objective, 30 units at the population objective, and 59 Units *over* the population objective. Of the units over the population objective, 14 hunting districts are at twice the population objective levels or above, as shown in red in the chart below.



21. There are now some 3,442 elk in HD 417 – an unlawful surplus of elk 918% over the sustainable population level set by the Defendants. With an estimated ratio of 50% to 50% bulls to cows, bred cows can be expected to add another 1,000 elk to the population in HD 417 in the next few weeks from the filing of this Complaint.

22. As part of Defendants' 2005 (and still enforceable) Elk Management Plan, the Defendants promised that “[i]f monitoring indicates that regulation packages do not achieve

objectives, the [Adaptive Harvest Management] process will require design and implementation of new regulation packages.” And the Defendants would “*recommend regulation changes immediately when the number of elk counted are above the objective range.*”

23. It is well known that Defendants’ employees will not respond to legitimate concerns about property damage if the landowner is unwilling to abdicate their private property rights and allow public hunting on their property. And when Defendants say, “public hunting” they require landowners to throw their property wide open to strangers, including dangerous and reckless hunters or people with a reputation for damaging private property, as allowing access to guests, family, friends, neighbors, church members, guides, and other acquaintances is not considered “public hunting.”

24. In 2007, the Defendants said the “No. 1 reason for the burgeoning herds is landowners who close their land to public hunting.” But the actual reason for the increase is the Defendants’ failure to follow House Bill 42 and the mandate to manage elk populations at or below the objective levels, irrespective of access for public hunting.

25. That same year Commissioner Vic Workman said, “The Department needs the option available that would allow it to tell the landowners they need to work with the Department *or the Department will not work with them.*” He added it would be preferable if “the Department will dictate to [landowners] what hunting will occur on their land.”

26. In 2016, FWP sent a letter to landowners in the Breaks stating that one of its goals was to provide “equity of opportunity” for hunting, but one of the “challenges” the agency faced in doing so was “private lands being open for only limited or no hunter access.” FWP added that “landowners [must] allow additional public access to bull and cow elk hunters, especially during the rifle season [] if elk numbers are to be managed to population objectives.” Defendants alone,

however, have the obligation to manage elk populations to the objectives and they should not be allowed to instead falsely and publicly blame landowners.

27. The letter noted “The Commission also adopted the cow elk annual harvest [in 2012] in an effort to reach population objective in not more than six years.” *Id.* Defendants’ promise (and statutory obligation) to reduce elk populations to reach population objectives by 2018 was not met, and the populations increased.

28. In 2020, Gary Bertellotti, FWP’s Regional Supervisor for Region 4, stated that the Defendants would not respond to property damage caused by elk unless landowners forego their right to limit access to their private property. Mr. Bertellotti asserted

[t]he current problem is a result of a large portion of the elk in 417 and 412 not being available for public hunting and harvest during the general archery and rifle seasons. This is the root of your game damage problem and others in the area. . .

29. Mr. Bertellotti added that “If a landowner significantly limits or restricts access to harvest elk then the solution doesn’t work nor can they blame FWP . . . keep in mind the root of the problem is not FWP but lack of access to harvest elk in an effective manner during the Commission sanctioned hunting season.”

30. In February 2022, FWP’s Director noted that FWP’s biologists had historically used public access “as an excuse . . . what they said is we can’t get access to private land so we’re not going to [increase hunting opportunities].” The Director pointed out this did not pass the “red faced test” and said “we don’t know what will happen or not if we don’t get access or not The bottom line is that we have to harvest more elk to bring that number closer to [objectives]. We have to bring that number down or it will continue to climb...”

31. In a March 2022 op-ed, the Director back-tracked on the issue saying, “Under state statutes, FWP can’t help reduce depredation, such as by fencing haystacks, *if a landowner doesn’t allow at least some public hunting.*”

32. Montana law requires the Defendants to respond to property damage from overpopulated elk even if landowners are not willing to forego with their private property rights. The Montana Constitution actually places property rights above the right to hunt elk, especially on private property, as “[t]he opportunity to harvest wild fish and wild game animals . . . does not create a right to trespass on private property or diminution of other private rights.” Mont. Const. Art. IX, § 7.

33. The overpopulated hunting districts are caused by the Defendants’ failure to change course from the mindset of preservation and propagation, to the need for *management* of elk populations.

34. FWP and the Commission’s refusal to follow state law regarding population levels have squandered our prized natural resource, turning the regal elk into a common nuisance, like locusts or grasshoppers.

III. UPOM’s attempts to work with the Defendants to address their continued failure to comply with Montana law.

35. UPOM has attempted to work with the Defendants by advocating for liberalized hunting regulations, like they historically existed before the regulations were politically weaponized.

36. In 2007, FWP proposed reducing hunting opportunities in the Breaks by changing from unlimited archery permits to a limited permit system in HDs 410, 417, 620, 621, 622, 630, 631, 632 and 700. The stated justification for the change was “a swell of public comment about

land being leased up because of unlimited permits” which resulted in “less public access.” *Id.* However, Defendant’s goals for the change were (1) to limit or decrease the value of the private property in the Breaks as recreational land by limiting hunting opportunities even where there were abundant elk; (2) to create a reservoir of protected bull elk that would result in extra revenue from people seeking to harvest a trophy animal; and (3) to force public access on private property.

37. Despite Defendants’ talk about “equity,” there is nothing equitable about their decision to single out particular landowners to bear the burden of feeding and dealing with a protected group of elk so the Defendants may offer “trophy hunting” opportunities, especially when the Defendants’ allow for liberal hunting opportunities on nearby ranches in adjoining hunting districts.

38. Members of UPOM pointed out in 2007 that elk numbers in the Breaks were above the population objective and there was no biological data or legal justification to support the proposed change to reduce hunting *opportunities*. Undeterred by the growing elk population, the Commission took the unprecedented step of passing a tentative hunting regulation that would create limited archery permits in the Breaks.

39. This tentative proposal was not popular with the public, and in nearly unanimous fashion, commenting outfitters, landowners, businesses, commerce, local governments and non-resident hunters adamantly opposed limited permits. Despite overwhelming public opposition from landowners, businesses, and industry leaders, the Commission voted unanimously to adopt the limited permit system starting for the 2007/08 season.

40. In 2020, a group of landowners in HD 417, including members of UPOM, filed a petition asking the Defendants to liberalize hunting regulations by going back to general either-sex elk season for HD 417.

41. The Defendants did not adopt the petition from the landowners, but they did issue twenty-five additional permits for HD 417 — not realistic when thousands of animals had to be harvested to meet the population objective.

42. In the fall of 2021, UPOM submitted a proposal to the Commission asking it to eliminate limited-entry archery permits in all districts over objective and to adopt a formula for setting the number of rifle permits for the limited entry districts. UPOM’s proposal pointed out that “Prior hunting regulations have failed to achieve this goal for elk populations, especially for limited-entry permit districts. Of the ten districts that are the most over objective, all have limited permits.” *Id.*

IV. Defendants’ adoption of unlawful elk hunting regulations for the 2022/23 season.

43. The election of a new administration in 2021 and the appointment of a new FWP Director suggested there might be a change in elk management.

44. In December 2021, FWP issued a press release echoing UPOM’s concerns about Defendants’ previous failures:

In recent years, Montana has seen a dramatic increase in elk populations in many hunting districts around the state. Currently, 14 hunting districts are at least 200% above population objectives. Data also shows an overcrowding of elk populations on private land, limiting opportunities for public land hunters.

“What we know is the status quo isn’t working,” said FWP Director Hank Worsech. “So, we’re going to propose a few new strategies we think can finally help us make progress in addressing the problem, both for hunters and for landowners.”

Required by law to achieve population objectives set by the Fish and Wildlife Commission, FWP proposes targeted provisions to fulfill the statutory requirement of managing to population objective, address the increasing impacts of high elk populations on Montana farmers and ranchers, and improve quality opportunities for hunters. Those numerical objectives are identified in the current elk management plan.

...

“We can’t keep doing the same thing over and over again and expect a different result. We have to try something different. This proposal is a new strategy we can implement for two years and see if it has the desired effect – more elk harvest, better elk availability on public lands, fewer landowner conflicts, and elk at population objective,” Worsech said. “In some hunting districts, we have broad public tolerance or outright support for limited permits, and we want to keep those in place.” (Emphasis added)

45. Defendants adopted tentative hunting regulations for the 2022/23 season that included a proposal for unlimited archery permits for many districts and an increase in rifle permits by 50% for 8 over-objective districts: HDs 411, 417, 426, 590, 702, 704, 705, and 535 (a new district combining 511 and 530). The adoption of unlimited archery permits would have undone the ill-advised and disastrous change to limited permits the Defendants had made in 2007.

46. Director Worsech’s rhetoric and the proposed hunting regulations might have been a good start, but he presides over a mutiny of entrenched employees within the Department who undermined the recommendations and Commissioners who decided to ignore the law and the population data. As Commissioner Tabor noted, there appears to be “two Departments,” the headquarters in Helena who understand the law and the need to reduce elk numbers, and biologists in the regional offices who work to undermine the recommendations from leadership.

47. As a result of the improper pressure from within FWP and from outside groups, at the February 4, 2022 meeting, the Commission adopted regulations for the 2022/23 season that

retreated from the changes it had adopted in December 2021 and which allow for less elk hunting opportunity than was offered in 2021/22 season.

48. At the meeting, Commissioner Cebull made a motion to not only scrap the unlimited archery permits in most of the proposed districts, he wanted to *reduce* the number of archery permits for HDs 417 and 426³ — two of the most overpopulated districts in the State — by over 100 permits.

49. Commissioner Cebull said he made the motion because of “social” pressures and his desire to limit special permits to balance the “opportunity” to harvest elk (*i.e.* increased harvest) with the desire for “quality” hunting (*i.e.* protected bull herds that cause property damage). To do so, Commissioner Cebull stated he wanted to limit the opportunity to hunt in the over-populated districts because he did not want “too many boots on the ground.”

50. But as Commissioner Tabor noted at the work session prior to the adoption of the new hunting regulations that “special permits were originally designed so we could manage the resource carefully, so if we had a resource concern we would use the special permit to control the amount of harvest so we wouldn’t hurt the resource.” This is confirmed by the Defendants’ Elk Management Plan, which states limited permits should be used to protect the resource in underpopulated districts, not to limit the opportunity in over-populated districts. Defendants, however, have decided to use special permits to increase elk populations by limiting hunting, even in overpopulation districts.

51. Commissioner Walsh (who represents Region 4) made a different motion to eliminate the proposed 50% increase in rifle permits in Region 4 (which includes the overpopulated HDs 411, 417, 426) that the Commission had adopted in the proposed regulations

³ As FWP’s Director noted at the meeting, “A good case in point is 426, we looked at these and said increase (quotas) because we’re not getting the harvest we need.”

in December. As a result of the motion the number of permits in HDs 411, 417, and 426 would remain at the 2021/22 levels — despite the clear need to reduce elk populations in the region. At the same meeting, the Commission enlarged HD 417. Thus, as a result of Commissioner Walsh’s motion, there would be same number of permits for the newly enlarged Hunting District 417, meaning there would be less permits *per elk* in HD 417 than in prior years.

52. Commissioner Cebull (who represents Region 5) offered a friendly amendment to Commissioner Walsh’s motion: “With regard to . . . Hunting District 535 . . . *the reason that these were increased 50% was because all these areas were over objective* so we wanted to offer more rifle hunting opportunity . . . with that and the number of elk in that area I would like to propose an increase . . . [the number of permits for HD 535] to 350.” Commissioner Walsh agreed to the amendment for HD 535 — but this did not apply to the overpopulated districts in Region 4.

53. Commissioner Cebull was correct that the Department’s recommendation to go back to a general season was designed to help reduce the population in overpopulated districts, and the Commission’s decision to reject the proposal indicates that the Defendants have no intention of actually managing elk populations to the statutory levels.

54. After Commissioner Walsh made his motion to keep the number of rifle permits in Region 4 at the same level as 2021, Director Worsech pointed out the fallacy of proposal:

“A good case in point is [HD] 426, we looked at these and said increase [quotas] because we’re not getting the harvest we need. Their goal is to have a ratio of 30 cows to 100 bulls, the ratio is 126 to 100 cows. [FWP biologists] haven’t increased the number of bull harvest. They’re using that as an excuse . . . what they said is we can’t get access to private land so we’re not going to raise it . . . **We have to bring that number down or it will continue to climb . . .**”

55. FWP’s Chief Legal Counsel also warned the Commission that its failure to reduce elk populations in response to landowner concerns would conflict with Montana law:

Your question about landowner tolerance and landowner concerns versus habitat . . . I see them as **both being necessary and required in the statute**. In [Mont. Code Ann. § 87-1-301], which is the roles and responsibilities of the commission there is a specific reference to the concerns of the landowner in considering elk numbers [reads the statutes]. In that same statute it references [Mont. Code Ann. § 87-1-323] . . . in that statute it talks about the Department considering the concerns of private landowners pursuant to this section . . .

56. However, the Commission approved Commissioner Walsh’s motion and adopted regulations that ignore the objections and will continue to allow the populations to increase.

57. Given warnings from FWP’s Chief Legal Counsel and FWP’s Director, the Commission intentionally and knowingly adopted elk hunting regulations for the 2022/23 season that do not comply with the requirements to “manage with the objective that populations of elk . . . remain[s] at or below the sustainable population number[s].” Mont. Code Ann. § 87-1-323(2).

58. Since the Defendants have chosen to continue to ignore the law, the data, and the resulting damage to private property, UPOM was forced to file this lawsuit.

**COUNT I – DECLARATORY JUDGMENT
(FAILURE TO MANAGE TO OBJECTIVE POPULATION LEVELS)**

59. UPOM incorporates the allegations above as if set forth here.

60. Jurisdiction is proper in this Court pursuant the original jurisdiction of this Court under Mont. Code Ann. § 3-5-302 and the inherent power of this Court to review state agency decisions and actions and to issue appropriate relief.

61. Venue is proper in Fergus County because the proper place of trial for an action against the state is in the county where the cause or some part thereof arose. In particular, UPOM is challenging the Defendants’ elk management and hunting regulations for Hunting District 417 (as well as the management and hunting regulations for all other overpopulation districts), which is located in Fergus County, and thus the claims arise, in part, in Fergus County. Mont. Code

Ann. § 25-2-126(1). Venue is further proper in Fergus County because UPOM is headquartered in, and a resident of Fergus County. Mont. Code Ann. § 25-2-126(1).

62. According to Mont. Code Ann. § 87-1-323(2)(a), Defendants “shall . . . manage with the objective that populations of elk . . . remain[s] at or below the sustainable population number[s].”

63. In 2003, the Legislature gave the Defendants until January 1, 2009 to implement necessary management actions to reduce elk populations “at or below” the sustainable population established in the Elk Management Plan. *Id.*

64. Based on the data published by FWP, it has failed to implement necessary actions to comply with Mont. Code Ann. § 87-1-323(2)(a).

65. Despite the guidance from FWP Director and FWP’s Chief Legal Counsel, the Commission has refused to adopt regulations that would manage elk populations to the objective population levels and bring the Defendants into compliance with state law.

66. UPOM’s members have been concretely and particularly harmed by the Defendants’ failure to comply with Mont. Code Ann. § 87-1-323 and -301, including, but not limited to, property damage and resource damage.

67. Moreover, several of UPOM’s members are located in Region 4, and Commissioner Walsh, backed by the beliefs of regional staff in favor of forcing public access, has decided to limit elk hunting opportunities in the overpopulation Hunting Districts in Region 4 because some landowners in the area are unwilling to allow public hunting on their private property.

68. There is a real and actual controversy between UPOM and the Defendants regarding whether the Defendants have violated their statutory duty to “manage with the

objective that populations of elk . . . remain[s] at or below the sustainable population number . . .” Mont. Code Ann. § 87-1-323.

69. The Court needs to send a clear legal message to the Defendants: no one is above the law, and Defendants must obey the Legislature’s clear, nondiscretionary and nondelegable mandates. In doing so, the Court should issue a declaratory judgment finding that the Defendants have violated Mont. Code Ann. § 87-1-323 and provide a remedy to bring the Defendants into compliance with the law as soon as practicable. Such a remedy could require the Defendants to take the actions listed in Mont. Code Ann. § 87-1-323(2): liberalized harvests, game damage hunts, landowner permits, and animal relocation.

COUNT II – WRIT OF MANDAMUS

70. UPOM incorporates the allegations above as if set forth here.

71. This Court may issue a writ of mandate or mandamus to compel the Defendants to perform an act that the law specially requires. *Paradise Rainbows v. Fish and Game Commission*, 148 Mont. 412, 417, 421 P.2d 717, 720 (1966). Mandamus may lie even in situations where the duty involved is discretionary, but the discretion has been abused to such an extent that it amounts to no exercise of discretion at all. *Id.*

72. Mont. Code Ann. §§ 87-1-323 and -301 place clear statutory duties on the Defendants to manage elk populations, but they have failed to do so.

73. Pursuant to Mont. Code Ann. § 27-26-203, the Court should issue an alternative writ of mandate requiring the Defendants to adopt, within 90 days, elk management regulations designed to reduce populations in over-objective districts to the designated levels as soon as practicable, or to show cause before the Court why Defendants have not done so.

COUNT III – INJUNCTIVE RELIEF

74. UPOM incorporates the allegations above as if set forth here.

75. Defendants' misconduct has resulted in a crisis of elk management of its own creation. Private landowners in Montana are coming off one of the worst drought years in recorded history. Compounding this is the ever-present threat of wildfires and grasshoppers, which also destroyed forage needed by livestock and wildlife.

76. The decrease in forage in these areas has forced ranchers to liquidate large numbers of their cattle, and BLM has taken the step of reducing public land cattle grazing by 30% for the 2022 season. Yet, gross overpopulations of elk consuming the forage go unaddressed.

77. While UPOM's members will be forced to reduce the number of livestock they graze this year, FWP had not taken any management actions to reduce the population of elk in the Breaks. The difference between wildfire, drought, and grasshoppers, and elk, is that Defendants are statutorily required to manage elk populations while the sources of reduced forage are largely acts of God. Defendants' Elk Management Plan promised that the agencies would follow an "Adaptive Harvest Management" process to respond to changes in forage and habitat, but they have failed to do so. Defendants continued and compounding failures have caused an economic crisis for landowners.

78. UPOM seeks injunctive relief in the form of an order compelling the Defendants to devise an emergency plan to reduce the illegal overpopulation of elk as soon as practicable.

79. UPOM further requests that this Court maintain continuing jurisdiction over Defendants and that it require Defendants to report periodically on depopulation metrics until the

Department has *managed* the population at or under the population caps established by the Legislature.

80. Finally, the Court should grant injunctive relief to prevent the Defendants from violating the remedy crafted by the Court and Montana law in its future management decisions.

COUNT IV – DECLARATORY JUDGMENT (MONT. CODE ANN. § 87-1-301)

81. UPOM incorporates the allegations above as if set forth here.

82. Mont. Code Ann. § 87-1-301(1)(a) purports to grant the Commission the authority to “*set the policies* for the protection, preservation, management, and propagation of the wildlife, fish, game, furbearers, waterfowl, nongame species, and endangered species of the state . . .” (Emphasis added).

83. Only the Legislature may set policy for the state of Montana, and Mont. Code Ann. § 87-1-301(1)(a) represents an unconstitutional delegation of the legislative power to the Commission.

84. The Court should declare that Mont. Code Ann. § 87-1-301(1)(a) is facially unconstitutional and as applied to the policies adopted by the Commission for elk management.

COUNT V – DECLARATORY JUDGMENT (ADMIN. R. MONT. 12.9.101)

85. UPOM incorporates the allegations above as if set forth here.

86. The Defendants’ administrative rule, Admin. R. Mont. 12.9.101(1), purports to establish the policy for the state on objectives in big game management.

87. The Defendants’ policy, adopted an administrative rule, is to

- “to *produce and maintain a maximum breeding* stock of big game on all suitable lands of Montana, public and private . . .”

- “to work out with interested parties an *equitable allocation* of forage for big game and livestock where conflict or competition exists . . .”
- “to *encourage* sport hunting and recreational use of the big game resource and *public access to hunting areas* . . .”

Admin. R. Mont. 12.9.101(1) (a), (f), (i).

88. According to Mont. Code Ann. § 2-4-314(1), “Each agency shall at least biennially review its rules to determine if any new rule should be adopted or any existing rule should be modified or repealed.” Defendants adopted Admin. R. Mont. 12.9.101 in 1972, but it has not been modified or amended in the last 50 years.

89. The Court should find that the Defendants have violated Mont. Code Ann. § 2-4-314(1) in connection with Admin. R. Mont. 12.9.101 by failing to modify or amend the rule in response to the legislative changes.

90. In 2003, the Legislature established that Defendants must “manage with the objective that populations of elk, deer, and antelope are at or below the sustainable population number . . .” Mont. Code Ann. § 87-1-323(3)(a). But Defendants’ administrative rules still state it is the policy of the state to “produce and maintain a maximum breeding stock of big game . . .” Admin. R. Mont. 12.9.101(1)(a).

91. The Court should find that Defendants violated Mont. Code Ann. § 2-4-314(1) when it did not amend Admin. R. Mont. 12.9.101(1) in response to the 2003 legislation.

92. “Rules adopted by administrative agencies which conflict with statutory requirements or exceed authority provided by statute, are invalid.” *Haney v. Mahoney*, 2001 MT 201, ¶ 6, 306 Mont. 288, 32 P.3d 1254.

93. The Court should declare that Admin. R. Mont. 12.9.101(1) (a), (f), (i) are invalid because they conflict with statutory requirements and are out of harmony with legislative guidelines.

94. In addition, the Legislature has never said the Defendants may encourage “sport hunting” or “equitable allocation,” and the Court should declare that the Defendants may not consider these improper factors in setting elk management regulations.

COUNT VI – DECLARATORY JUDGMENT (MONT. CODE ANN. § 87-1-225)

95. UPOM incorporates the allegations above as if set forth here.

96. Mont. Code Ann. § 87-1-225(1) provides that the Defendants will provide “game damage assistance” if the landowner (a) “allows public hunting during established hunting seasons” and (b) “does not significantly reduce public hunting through imposed restrictions.”

97. The FWP’s administrative rule defines “[r]estrictions that may significantly restrict public hunting” as a landowner not imposing conditions on the use of their private property such as:

- (a) species or sex of animals hunters are allowed to hunt;
- (b) portion of land open to hunting;
- (c) time period land is open to hunting;
- (d) fees charged; or
- (e) other restrictions that render harvestable animals inaccessible.

Admin. R. Mont. 12.9.803(1).

98. According to Mont. Code Ann. § 27-1-225(1), a landowner may only destroy elk causing property damage after (1) the landowner allows for unrestricted public hunting, (2) FWP

has “stud[ied] the situation,” and then (3) FWP “grant[s] the holders of the property permission to kill or destroy a specified number of the animals causing the damage.”

99. The requirement to allow unrestricted public hunting and obtain FWP’s permission before landowners may take action to defend private property is unconstitutional. “[T]he owner’s right to exclude others from entering and using her property [is] perhaps the most fundamental of all property interests.” *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005); *Kaiser Aetna v. United States*, 444 U. S. 164, 176 (1979) (the right to exclude others is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”). And “[t]he opportunity to harvest wild fish and wild game animals . . . does not create a right to trespass on private property or diminution of other private rights.” Mont. Const. Art. IX, § 7.

100. As the Montana Supreme Court held decades ago: “The Constitution of Montana guarantees to every person the right to enjoy and defend his property, including the right to kill a game animal out of season if it is reasonably necessary to do so.” *State v. Rathbone*, 110 Mont. 225, 100 P.2d 86, 90 (1940).

101. The Court should declare that Mont. Code Ann. § 27-1-225 and Admin. R. Mont. 12.9.803(1) are facially unconstitutional as it requires landowners to give up a private property right as a condition before the state will provide “game damage assistance.” Instead, the Court should reaffirm that landowners have the right to kill elk causing property damage if it is reasonably necessary to do so. The law is also unconstitutional as applied to UPOM and its members.

RELIEF REQUESTED

WHEREFORE, UPOM prays for judgment as follows:

1. Declaratory judgment, including but not limited, an order stating that:
 - a. Defendants have the exclusive, mandatory, and nondelegable legal duty to prevent elk overpopulation in Montana; they violated Montana law in adopting limited entry restrictions on private land when elk populations exceed sustainable populations;
 - b. Without legal excuse or justification Defendants have failed or refused to comply with their unambiguous mandate to prevent elk from exceeding sustainable population objectives;
 - c. Defendants are not justified in relying solely upon public hunting to carry out their exclusive legal duty to prevent elk over population;
 - d. Defendants must address landowner concerns even if the landowner does not allow for public hunting;
 - e. Defendants lack the authority to regulate hunting based on “equitable allocation of resource,” perceived notions of “wealth” of hunters, “privatization of public resource” or similar political arguments and memes;
 - f. Defendants must adopt liberalized hunting regulations for all over-objective hunting districts;
 - g. Defendants may not adopt hunting regulations that allow for limited permits in over-objective hunting districts;
 - h. That Mont. Code Ann. § 87-1-301(1)(a) is void as an unconstitutional delegation of the legislative power to the Commission;

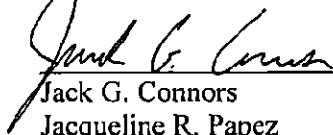
- i. That Admin. R. Mont. 12.9.101(1) (a), (f), (i) are void because they conflict with statutory requirements and are out of harmony with the legislative intent; and
 - j. That Mont. Code Ann. § 87-1-225 is an unconstitutional attempt to force landowners to give up their private property rights before the Defendants will take action to prevent property damage.
2. Injunctive relief including, but not limited to:
 - a. Requiring Defendants to take immediate action to harvest/relocate/eliminate elk in the overpopulated hunting districts; and
 - b. Preventing the Defendants from violating the remedy crafted by the Court and Montana law in its future management decisions.
 3. Judicial review of Defendants' 2022-2023 adoption of hunting regulations and an order invalidating the rules adopted as arbitrary and capricious, in violation of Defendants' statutory mandates and based on illegal and extra-legal political considerations.
 4. For a writ of mandate as described above.
 5. For an award to UPOM of its attorney's fees and costs as provided by law and equity.
 6. For such other relief as this Court may consider proper.

RULE 5.1 NOTICE

Pursuant to Rule 5.1, M. R. Civ. P., Plaintiff will serve a copy of this Complaint on the Attorney General upon filing.

DATED this 6th day of April, 2022.

DONEY CROWLEY P.C.



Jack G. Connors

Jacqueline R. Papez

Attorneys for United Property Owners of Montana