IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 24-0674

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

Plaintiff and Appellant,

VS.

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

Defendants and Appellees,

AND

MONTANA WILDLIFE FEDERATION, MONTANA BACKCOUNTRY HUNTERS AND ANGLERS, MONTANA BOWHUNTERS ASSOCIATION, HELLGATE HUNTERS AND ANGLERS, HELENA HUNTERS AND ANGLERS, SKYLINE SPORTMEN'S ASSOCIATION, AND PUBLIC LAND AND WATER ACCESS ASSOCIATION,

Intervenors.

ON APPEAL FROM THE TENTH JUDICIAL DISTRICT COURT,
FERGUS COUNTY, HON. TODD GREGORY PRESIDING
CASE NO. DV-14-2022-0000036

APPELLANT'S OPENING BRIEF

Matthew H. Dolphay
Brent R. Bihr
HOLLAND & HART LLP
401 North 31st Street, Ste. 1200
P.O. Box 639
Billings, Montana 59103-0639
Telephone: (406) 252-2166
mhdolphay@hollandhart.com
brbihr@hollandhart.com

Jack G. Connors
Jacqueline R. Papez
DONEY CROWLEY P.C.
Guardian Building, 3rd Floor
50 South Last Chance Gulch
P.O. Box 1185
Helena, Montana 59624-1185
(406) 443-2211
jconnors@doneylaw.com
jpapez@doneylaw.com

Attorneys for Appellant United Property Owners of Montana, Inc.

J. Stuart Segrest
CHRISTENSEN & PREZEAU PLLP
The Montana Club Building
24 West 6th Avenue
Suite 501 Helena MT 59601
Telephone: (406) 603-4406
stuart@cplawmt.com

Attorney for Appellee Montana Fish and Wildlife Commission

Kevin Barnett Rechkoff
Jeffrey M. Hindoien
1420 E 6th Ave
Helena, MT 59601-3871
Telephone: (406) 444-3312
kevin.rechkoff@mt.gov

Attorneys for Appellee Montana Department of Fish, Wildlife and Parks

David Kim Wilson
Robert M. Farris-Olsen
MORRISON, SHERWOOD, WILSON, DEOLA PLLP
401 N. Last Chance Gulch
Helena, MT 59601
Telephone: (406) 442-3261
kwilson@mswdlaw.com
rfolsen@mswdlaw.com

Graham J. Coppes
FERGUSON & COPPES, PLLC
425 East Spruce Street
PO Box 8359
Missoula, MT 59807
Telephone: (406) 532-2664
grahamc@fergusonlawmt.com

Attorneys for Intervenors Montana Wildlife Federation, Montana Backcountry Hunters and Anglers, Montana Bowhunters Association, Hellgate Hunters and Anglers, Helena Hunters and Anglers, Skyline Sportmen's Association, Public Land and Water Access Association

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STATEMENT OF THE ISSUES

1. Has the Fish and Wildlife Commission (Commission) failed to fulfill its duty in § 87-1-323(1), MCA, to set sustainable elk numbers?

2. Has the Department of Fish, Wildlife & Parks (FWP) failed to fulfill its duty in § 87-1-323(2), MCA, to implement its programs and take necessary actions with the objective of ensuring elk do not exceed sustainable numbers?

3. Do the provisions in §§ 87-1-225 and 87-2-520, MCA, that condition Game Damage Permits on landowners ceding access over their private property to the public for hunting violate the unconstitutional conditions doctrine?

STATEMENT OF THE CASE

This appeal involves a dispute over the legal obligations of the Commission and FWP concerning elk management. The Commission and FWP are the two agencies responsible for managing elk in Montana. By all accounts, elk populations are at untenable levels, which is costing Montana ranchers and farmers millions of dollars each year and, in many areas, is threatening their way of life.

In 2022, the United Property Owners of Montana (UPOM) commenced this action against the Commission and FWP. As relevant to the issues appealed, UPOM requested the District Court: (1) declare that the two agencies have failed to comply with their statutory duties under § 87-1-323, MCA; and (2) declare unconstitutional the provisions in §§ 87-1-225 and 87-2-520, MCA, that force landowners to cede access over their private property to the public for hunting as a condition of receiving Game Damage Permits.

Special interest groups intervened as additional defendants. The parties litigated through motions for partial summary judgment. In subsequent orders, the District Court granted summary judgment in favor of Defendants on all claims. UPOM timely appeals from the summary judgment rulings issued on July 22, 2024 (Doc. 164 and 165) and September 6, 2024 (Doc. 171) and the final judgment.[1]

[1] Insofar as any other orders may comment or bear upon the issues presented and the relief requested herein, UPOM appeals those orders as well.

FACTUAL BACKGROUND

I. Historical Elk Management

A. Restoration Years

In the early years of statehood, Montana elk management was one of restoration. In 1910, following the mid-1880s unregulated hunting that had sharply curtailed elk herds, Fish & Game started transporting elk from Yellowstone National Park to areas across Montana. App.0181-82. From 1910 to 1970, nearly 6,000 elk were transported to over 30 different locations in the State. *Id*.

By the late 1980s, elk had recovered to a population of nearly 80,000. App.0182. Biologists began growing concerned over the swelling numbers and the impacts on Montana land and to agricultural producers. App.0853. Elk directly compete with livestock for forage in the summer and target haystacks during the winter when natural forage is scarce. App.0010; App.0142.

B. 1992 Elk Management Plan

In 1992, FWP adopted a comprehensive elk plan—the 1992 Elk Management Plan (1992 Elk Plan or 1992 Plan)—to serve as the central planning document for elk management in the State. App.0001-180. The 1992 Plan established 35 separate elk management units (EMUs) that each encompassed the range of major elk populations. App.0008. Included within the EMUs were the smaller individual hunting districts (HDs) comprising the EMUs. App.0031.

In the 1992 Plan, FWP set population objectives in the EMUs, HDs, and on a statewide basis. App.0123. In setting population objectives, FWP considered many different factors, such as recreational benefits, ensuring trophy bull populations, and landowner tolerance. App.0021-23; App.0149. On a statewide level, FWP's population objective was to keep elk numbers below 89,000. App.0021.

In the 1992 Plan, FWP further set management objectives (goals) for elk in the EMUs, HDs, and on a statewide basis. App.0019; App.0082. Like its population objectives, FWP's management goals included many different items, including—in addition to landowner tolerance—ensuring recreational benefit and trophy bull populations. *Id*. Based on the 1992 Plan, FWP proposed its season hunting regulations—e.g., elk licenses, permits, quotas—to the Commission for its approval and FWP's implementation. *E.g*., App.0150.

C. Overpopulation

The 1992 Plan failed to control elk populations. Elk numbers expanded beyond the statewide objective of 89,000. And by 2002, many of the 35 EMUs exceeded FWP's objectives. App.0239-41. Montana's agricultural community bore "the brunt of wide-ranging elk that [were] overgraze[ing] croplands, destroy[ing] haystacks, and trampl[ing] fences." App.0853.

II. Legislative Response: House Bill 42 (§ 87-1-323, MCA)

By 2003, the Legislature had seen enough of FWP's multi-factored management and enacted new legislation—House Bill 42—to respond to the burgeoning population crisis.

Henceforth, under HB 42, FWP's singular objective for management of antelope, deer, and elk would be sustainability: ensuring "animal populations" remained below a "number that does not adversely affect Montana land." 2003 Mont. Laws Ch. 553, § 1. In arriving at sustainable numbers, FWP would assist the Commission in making the determination based on "habitat acreage" and "concerns of private landowners." *Id*., § 3.

In support of the legislation, the Legislature found that "for over 70 years" the elk "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 Mont. Laws Ch. 553, Whereas Clauses. The Legislature concluded that it was "time for the department to use the tools 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*.

To that end, in Section 3 of HB 42, codified at § 87-1-323, MCA, the Legislature sent down new directives for the Commission and FWP. 2003 Mont. Laws Ch. 553, § 3; § 87-1-323, MCA.

First, in subsection (1) of § 87-1-323, MCA, the Legislature directed that the Commission "shall determine the appropriate elk . . . numbers that can be viably sustained" based on habitat acreage and landowner concerns.

Second, in subsection (2) of § 87-1-323, MCA, once the Commission did so, the Legislature directed that FWP "shall implement" its "management programs" and take "necessary actions" with "the objective that the population of elk" are "at or below the sustainable population."

Throughout the legislation, the Legislature emphasized these provisions set a new singular lodestar of "sustainability." Section 87-1-325, MCA. The Commission and FWP were to execute their duties to ensure elk do not exceed sustainable populations:

> "[T]he commission . . . shall . . . maintain elk . . . population numbers at or below population estimates as provided in 87-1-323." Section 87-1-301(1)(h), MCA.
>
> "The department shall implement programs that . . . maintain elk . . . population numbers at or below population estimates as provided in 87-1-323." Section 87-1-201(10)(a)(iii), MCA.
>
> "The department shall . . . manage with the objective that populations of elk . . . are at or below the sustainable population number." Section 87-1-323(3), MCA.
>
> "The commission may exercise rulemaking authority . . . to ensure that elk . . . populations are at a sustainable level." Section 87-1-301(4)(b), MCA.

In doing so, the Legislature made clear that sustainability meant "animal populations" below a "number that does not adversely affect Montana land." Section 87-1-321, MCA. The Legislature set a compliance date of January 1, 2009, for FWP to see that this was done. *See* § 87-1-323(3), MCA ("The department shall [ensure elk numbers] are at or below the sustainable population number by January 1, 2009").

At the same time, recognizing that addressing overpopulation would burden FWP, the Legislature provided new funding to it and removed limits on the number of elk permits FWP could issue to hunters. *See* § 87-1-324; § 87-2-104, MCA. The Legislature also directed FWP to use all available tools to manage elk populations, including, but not limited to (a) liberalized harvests; (b) game damage hunts; (c) landowner permits; and (d) animal relocation. Section 87-1-323(2), MCA.

Testifying during the committee hearings on HB 42, FWP's Director made clear that, under this new legislation, the "department shall ensure the population" of elk "are at below the sustainable possible population by January 1st, 2009." Mont. Sen. Comm. on Finance and Claims, Hearing on H. Bill 42, 58th Legis., Reg. Sess. (March 7, 2003).[2] And so, as the Director of FWP testified, "we're required once a number is set to bring [populations] at or below that number." *Id*.

[2] The audio for the hearing is available by request to the Montana Historical Society. As a courtesy, a transcription is also available in the appendix to this brief.

III. Elk Management After § 87-1-323, MCA

In the years that followed HB 42, the Commission failed to adopt sustainable elk numbers; FWP continued to manage elk based on several different factors of its own preference; and elk populations swelled. All of which has come at a significant cost to Montana ranchers and farmers.

A. 2005 Elk Management Plan

In 2005, FWP replaced the 1992 Plan with a new elk management plan: the 2005 Elk Management Plan (2005 Elk Plan or 2005 Plan). App.0181-571.

1. Population Objectives

In the 2005 Plan, FWP dropped the statewide population objective from the 1992 Plan but retained population objectives for the EMUs and HDs. App.0234. As in the 1992 Plan, FWP arrived at population objectives based on many different considerations beyond sustainability (including recreation and trophy bull hunting). App.0233-34; 0269. Accordingly, it is undisputed the "population objectives" in the 2005 Elk Plan are not the same as "sustainable populations." *See*, e.g., Doc. 110 (FWP Summ. J. Br.), p. 17 ("These hunting district 'objectives,' however, are not the same as, nor the ultimate statement of, what is a 'sustainable population'. . . as required by § 87-1-323, MCA.").

2. Management Objectives

In the 2005 Elk Plan, FWP set management objectives in the EMUs. In doing so, just as it had in the 1992 Elk Plan, FWP arrived at its goals based on varied factors beyond sustainable populations. As FWP explained in the 2005 Elk Plan, management varies by area with factors including "trophy bull" harvest and other factors depending on the area:

> Some areas of Montana are managed for maximum sustained harvest, others are managed for **diverse or older bull age structure**, **'trophy bull' harvest**, quality of hunting and **viewing experiences** and others are somewhere in between.

App.0213 (emphasis added); App.0193; App.0329; App.0526.

Multi-factored management occurs even in heavily overpopulated EMUs. For example, in the Missouri River Breaks EMU, FWP lists its primary goal to "provide excellent recreational opportunities" for the public. App.0555. Likewise, in the Bull Mountain EMU, FWP emphasizes ensuring hunters are able to "harvest older bulls" and FWP emphasizes protecting "landowners who still allow public hunting" from economic harm, rather than simply protecting all landowners. App.0542. Similarly, in the Snowy EMU, FWP's management factors include to "provide hunter opportunity for harvesting older bulls." App.0527.[3]

[3] The 2005 Plan also increased the number of EMUs from 35 to 44. App.0235.

B. Biennial Season Setting Hunting Regulations

Since its adoption, as relevant to this suit, the 2005 Plan has served as FWP's central elk management planning tool. Based on the 2005 Plan, FWP has proposed hunting regulations to the Commission for approval or modification. App.0446; Doc. 110.02. These regulations include the type of licenses (document that grants individuals opportunity to hunt) and permits (document that, in conjunction with the licenses, allows individuals to hunt for specific animals) that FWP may issue as well as the quotas (number of licenses/permits issued in a specific land area) that FWP may set for permits/licenses. ARM 12.3.501(11), (14), (16); Doc. 110.02.

Accordingly, during this biennial process, FWP proposes the elk season setting regulations—licenses (e.g., class B licenses), permits (e.g., antlerless elk permits) and quotas (e.g., 50 antlerless elk permits) for different areas (e.g., Hunting District [HD] 210)—to the Commission. *E.g.*, Doc. 110.02, p.168. After which, the Commission approves or modifies FWP's proposals (e.g., changes quota from 50 to 100 for antlerless elk permits in HD 210). *Id.*

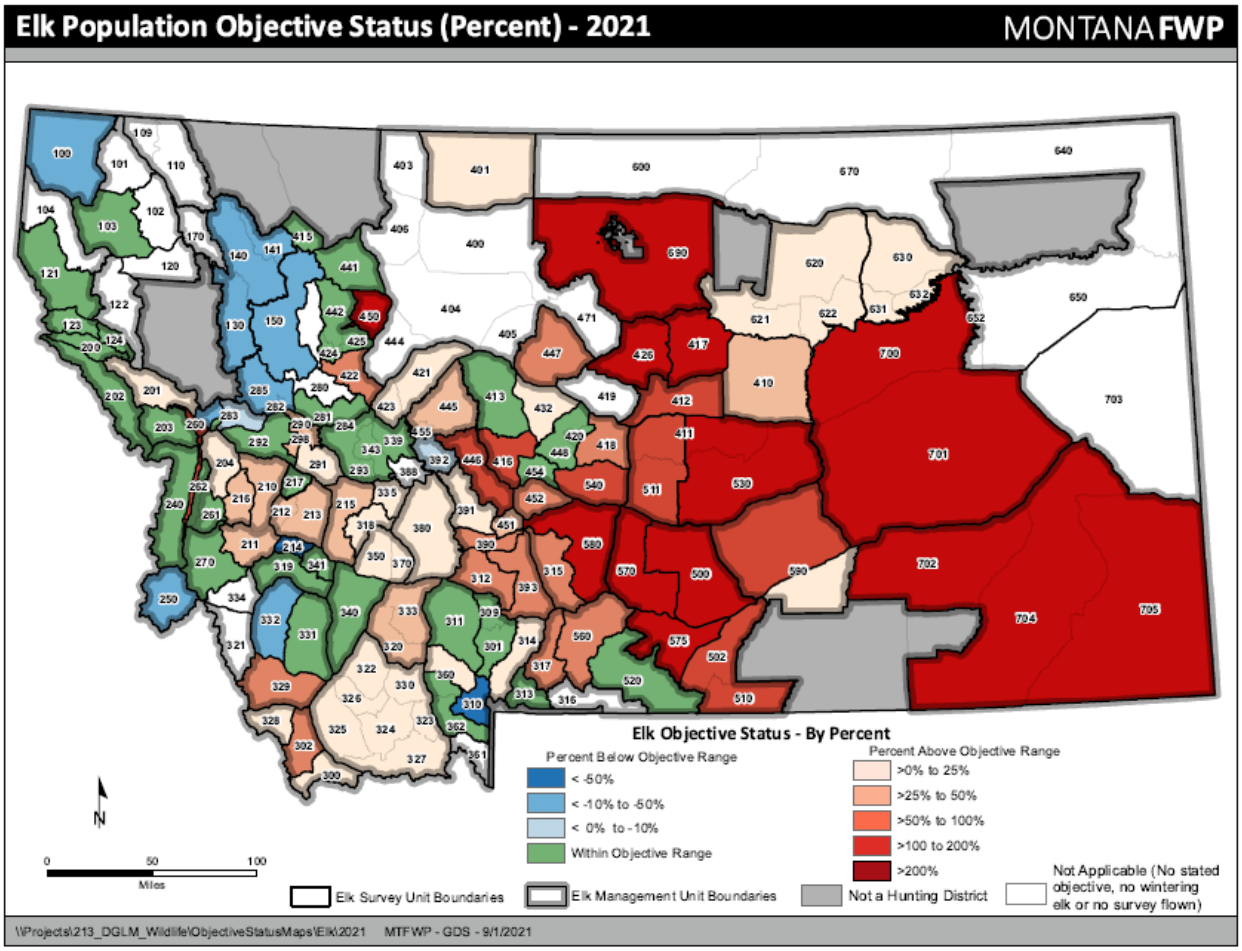
C. Worsening Overpopulation Crisis

Since the Legislature enacted HB 42, elk populations have increased dramatically. In the 2005 Elk Plan, FWP counted the elk numbers in the EMUs at **98,131**. App.0241.

Ten years later, in 2015, that number had increased by 35,000 to **133,726**. App.0833. By the time UPOM commenced this suit, elk populations had risen another 8,000 to **141,785**. App.0849. At last count, in 2024, the number had jumped to **145,050**. These numbers reflect counted elk. Actual population estimates are higher with estimates in the record showing elk exceeding 176,000. *E.g.*, App.0837 (FWP estimating elk at 176,716). By FWP's own admission, elk are now tens of thousands over any sustainable population, with FWP testifying that elk may exceed 50,000 animals over sustainable levels. *E.g.*, App.0662.

The population increases are particularly acute in the overpopulated HDs and EMUs. As of the filing of this action, 59 of the hunting districts exceeded FWP's population objectives. App.0847-49. Of the districts that were over population objectives, 14 of the districts were at least 200% over their population objectives, with some districts reporting nearly 1000% over their objective. *Id.*

The same situation exists on the EMU level. Three of the most overpopulated EMUs—Missouri River Breaks, Bull Mountain, Snowy—where FWP employs multi-factored management designed to protect elk populations for "trophy bull" harvest, "quality of hunting," and "viewing experiences"—all significantly exceed FWP's objectives. App.0847-49. On the following page is a map created by FWP immediately preceding the litigation showing the overpopulation by area against its own objectives.



[Figure 1 – Doc. 13, p. 7]

IV. Game Damage Assistance – Game Damage Permits to Harvest Elk

Since 1933, FWP has had discretion to provide game damage assistance to landowners, primarily in the form of authorizations (Game Damage Permits) allowing landowners to harvest elk that are "damag[ing]" their "private property." R.C.M. § 3729.1 (1933). Game Damage Permits have never been (and are not now) "trophy bull" licenses. The Legislature has always cabined their use to only allow harvesting of the animals that are causing the damage. *Id*. (allowing harvesting of "said elk" causing the "damage"); § 87-1-225 (1987); 87-1-225, -2-520, MCA.

In 1989, before the elk overpopulation crisis began, and after more than a half century of offering these permits, the Legislature abruptly added a new condition to receiving them: the landowner must surrender their private property to the public for hunting. *See* 1989 Mont. Laws, Chap. 568, § 1 (only allowed if landowner "(a) allows public hunting during established hunting seasons; or (b) does not significantly reduce public hunting through imposed restrictions").

A. Current Statutes: §§ 87-1-225 and 87-2-520, MCA

Today, the two types of Game Damage Permits are set out in two statutes: § 87-1-225 and § 87-2-520, MCA. Pursuant to the former, after receiving a complaint that wildlife is "doing damage to the property or crops on the property" and investigating it, the FWP may, among other things, issue a permit (called a "kill permit") for the landowner to harvest "specified number of the animals causing the damage." Section 87-1-225(3), MCA.[4] Per FWP policy, kill permits are limited to "harvest a set number and **gender** of animals." App.0769 (emphasis added). Stated practically, if a specific number of cow elk are causing damage, FWP may restrict the kill permit to a set number of cow elk.[5]

[4] FWP may also provide other damage assistance benefits too, including it may open a special season or destroy the animals itself. *See* § 87-1-225(3), MCA.

[5] Per FWP policy, kill permits also require landowners to field dress the animal and remit it to an appropriate social service organization (or the FWP). App.0769.

Pursuant to the latter statute, in the "alternative to issuing a kill permit to a landowner" under § 87-1-225, MCA, FWP may issue a supplemental game license for **cow** elk. Specifically, § 87-2-520, MCA, states that if FWP finds that "game animals on the property are causing a level of damage to crops or other vegetation that merits removal of a specific number of game animals or that the taking of a specific number of game animals is advisable for game management purposes," FWP may issue the landowner a "supplemental game damage hunting licenses for game management purposes on the property." Section 87-2-520, MCA. The licenses "may be issued only for **antlerless** animals." Section 87-2-520(2), MCA (emphasis added).

As a condition of eligibility for the Game Damage Permits, the landowner must "allow public hunting during established hunting seasons" on their property. Sections 87-1-225(1), -2-520(2), MCA. The only exception is if the property is "unique or special" (i.e., urban property) such that "public hunting" is "inappropriate." Section 87-2-520(2), MCA. Thus, so long as the landowner's property is normal ranch or farmland, the Game Damage Permits are conditioned upon the landowner surrendering their property to the public.

B. FWP's Administrative Rules

In defining what constitutes "public hunting," FWP takes a broad approach. Under its rules, if a landowner limits public hunting even in minor ways such as not allowing hunting on all the landowner's property or limiting hunting to a specific sex or species of animals (e.g., cow elk), that is often disqualifying. ARM 12.9.803. Specifically, limitations that may "restrict public hunting", rendering landowners ineligible, include those on the:

> (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.

ARM 12.9.803.

Based on these restrictions, FWP has denied Game Damage Permits to landowners (including UPOM members) even where they have allowed meaningful hunting opportunities to the public. Docs. 110.06 at 70:2-12; 63 at 60 (allowing "5 or 6 elk taken [by public hunters] in each of the last two years" insufficient); p. 62 (FWP warning further kill permits will not be issued unless "you invite [more] legal hunters to hunt" on your property); pp. 63-64 (allowing 90 hunters onto the landowner's property insufficient to show allowing public hunting).

V. Cost to Montana Agricultural Community

It is undisputed that the unsustainable elk crisis is imposing a heavy toll on Montana's agricultural community. According to independent third-party estimates, the overpopulation crisis is "cost[ing] private landowners in Montana millions of dollars annually in lost crops and property damage." Doc. 63, p. 23.

Similarly, the record is replete with testimony from everyday Montanans documenting the cost each year associated with the overpopulation crisis, including from even those who allow public hunting. *See*, e.g., Doc. 132 (Winifred rancher estimating "$15,000 in crop damages" each year and damages to grazing caused family to "reduce[] our cattle numbers by more than 30%"); Doc. 135 (Denton rancher who "allow[s] approximately 100 days of hunting" stating that "[a] good estimate is $10,000 to $15,000 in damages per year caused by elk").

VI. Present Lawsuit

In June 2022, UPOM filed its amended complaint against the Commission and FWP in District Court. In Count I, UPOM requested the court declare that the Commission and FWP have failed to comply with their directives in § 87-1-323, MCA. Doc. 13, p. 16. In Count VI, UPOM requested a declaration that the conditional provisions in §§ 87-1-225 and 87-2-520, MCA, violate the

unconstitutional conditions doctrine. Doc. 13.[6] During the litigation, the Commission admitted that it has not set sustainable numbers (App.0590), and FWP admitted that it manages based on different factors other than sustainability. App.0615-16. After discovery and depositions, the parties litigated through motions for partial summary judgment.

VII. District Court Summary Judgment Orders

The District Court granted Defendants summary judgment on all claims. As to Count I, the court concluded the Commission and FWP have complied with § 87-1-323, MCA. Seemingly, in its view, (1) the Commission sets sustainable numbers *sub silentio* by approving the biennial hunting regulations; and (2) FWP ensures sustainability just by offering its proposals to the Commission:

> The Commission, in other words, considers available acreage when reviewing the Department's proposals, and adopting season setting regulations and the quotas, permits, and licenses. By doing so, Defendants have executed their statutory management obligations found in Mont. Code Ann. § 87-1-322 and § 87-1-323.

Doc. 165, p. 3.

As to Count VI, the District Court did not mention the unconstitutional conditions doctrine, but it seemingly rejected UPOM's challenge for two reasons.

[6] Count II and Count III dealt with other remedies for the legal violations; Count IV challenged the constitutionality of § 87-1-301, MCA; and Count V challenged certain administrative rules, which FWP repealed after UPOM filed this suit.

First, the court seemingly concluded that step one of the unconstitutional conditions test was not satisfied because, in its view, allowing the public onto private property would not be a "taking," as the physical invasion would be "temporary" (only during hunting season) rather than "permanent." Doc. 164, p. 3. Second, the court seemingly concluded the doctrine did not apply because the benefit is gratuitous (or "voluntary" from FWP), as FWP is not required to issue Game Damage Permits to landowners as a matter of right. *Id*. at 4.

STANDARDS OF REVIEW

The standards of review in this appeal are all *de novo* with no deference offered to the District Court. This Court reviews the grant or denial of a summary judgment motion *de novo* for correctness. *Mont. Cannabis Indus. Ass'n. v. State,* 2016 MT 44, ¶ 11. The Court reviews "the interpretation and construction of a statute" *de novo* to determine "whether the district court interpreted and applied [it] it correctly." *State v. Southern*, 2022 MT 203, ¶ 6. The "standard of review pertaining to a declaratory judgment is to determine if the court's interpretation of law is correct." *City of Missoula v. Fox*, 2019 MT 250, ¶ 8. The "constitutionality of a statute is a question of law" and the district court's conclusions are reviewed for correctness. *Jaksha v. Butte-Silver Bow Cnty*., 2009 MT 263, ¶ 13.

SUMMARY OF THE ARGUMENT

The District Court erred by granting Defendants summary judgment. First, the court erred in concluding the Commission has set sustainable elk numbers as required by § 87-1-323(1), MCA. It has not. All agree the Commission has not done so expressly. And the court's conclusion the Commission somehow set them *sub silentio* by adopting the biennial hunting regulations is belied by the Commission's own testimony, the statutory text, and the record.

Second, the court erred in concluding FWP has implemented its programs and taken necessary actions with the objective that elk do not exceed sustainable numbers as required by § 87-1-323(2), MCA. For one thing, FWP cannot manage to sustainable numbers without the Commission setting those levels. That aside, FWP has not implemented its programs or taken necessary actions with sustainability as the objective. The record shows that FWP treats sustainability instead as one "factor" to consider, not the objective to achieve.

Lastly, the court erred in failing to strike down the provisions in §§ 87-1-225 and 87-2-520, MCA, that condition Game Damage Permits on landowners ceding access over their property to the public. As is uncontested, per the unconstitutional conditions doctrine, the U.S. Supreme Court has set out a three-part test to appropriately analyze the constitutionality of the condition in this case. *See*, e.g., *Sheetz v. Cty. of El Dorado*, 601 U.S. 267, 275-76 (2024).

In step one of that test, UPOM must show that, if FWP were to directly order the condition implemented—i.e., require landowners to allow the public on their property—doing so would constitute a "taking." That is an easy chore. Pursuant to the U.S. Supreme Court's controlling decision in *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021), state laws that limit a landowner's "right to exclude" others from their property "constitute[] *per se* physical takings." *Id*. at 143. The District Court overlooked *Cedar Point* and thus missed its holding. Step one is satisfied.

In steps two and three, the burden shifts forcefully to FWP to justify the condition under "heightened scrutiny." *San Remo Hotel, L.P. v. City & Cty. of S.F.*, 545 U.S. 323, 332 (2005). Under the next two steps, FWP must show an "essential nexus" and "rough proportionality" between the condition and the negative effects caused by the Game Damage Permits on its governmental interest. *Id*.

FWP has not tried to carry this burden. Nor could it. The main reason for that is because the Game Damage Permits do not intrude on the governmental interest; they advance the governmental interest in "keep[ing] animal populations at a number that does not adversely affect Montana land." Section 87-1-321, MCA. Therefore, the condition in the two statutes that requires landowners to cede access over their property to the public during hunting season in exchange for Game Damage Permits violates the unconstitutional conditions doctrine.

ARGUMENT

I. The Commission and FWP Have Not Complied with § 87-1-323, MCA.

A. The Statutory Directives Are Clear That the Commission Sets Sustainable Elk Numbers and FWP Manages to Them.

Section 87-1-323, MCA, is a simple statute that imposes separate, sequential obligations on the Commission and FWP. First, subsection (1) directs the Commission to set sustainable elk numbers:

> Based on the habitat acreage that is determined [by FWP], the commission **shall determine** the appropriate **elk**, deer, and antelope **numbers** that can be **viably sustained**.

Section 87-1-323(1), MCA (emphasis added).

Second, after the Commission does so, subsection (2) directs FWP to implement its programs and take necessary actions with the objective of ensuring elk do not exceed those sustainable numbers:

> Once the sustainable population numbers are determined as provided in subsection (1), the department **shall implement**, **through** existing wildlife management **programs**, **necessary actions with the objective that** the **population** of **elk**, deer, and antelope **remains at or below** the **sustainable population**.

Section 87-1-323(2), MCA (emphasis added).

Thus, the statute is straightforward: (1) the Commission sets sustainable elk numbers; and (2) FWP implements its programs with that objective and takes necessary actions to ensure elk do not exceed sustainability.

B. The Commission and FWP Have Failed to Comply with Their Statutory Directives.

Notwithstanding the statutory simplicity, the Commission and FWP have not complied with it. The Commission has not set sustainable populations. Nowhere in the record will this Court find any document where the Commission has ever adopted sustainable numbers—statewide, by EMU or HD, or otherwise. And since the Commission has not done so, FWP has not managed or taken necessary actions to ensure sustainability. FWP treats sustainability as a "factor" for its consideration instead. By allowing the agencies to shirk their duties, the District Court's decision forces the agricultural community to bear the brunt of the overpopulation.

1. The District Court Erred by Concluding That the Commission Has Set Sustainable Numbers.

For three independent reasons, the District Court's conclusion that the Commission is implicitly setting sustainable populations just by approving FWP's proposed biennial hunting regulations is error.

a. The Commission Admitted It Has Not Adopted Sustainable Numbers.

First, the Commission itself does not share that view. During its 30(b)(6) deposition, the Commission admitted it has not set sustainable numbers:

> Q. So is it the Commission's understanding that the Commission has actually adopted substantiable population numbers?
>
> A. **No**.
>
> * * *

> Q. Yeah. So has the Commission adopted the appropriate elk numbers that could be viably sustained?
>
> A. They **have not** – **they have not adopted those**.

App.0590, 35:20-23; 36:12-15 (emphasis added). *See also* App.0642-43, 72:10-11 ("Q. But the Commission has **never made the determination**? A. **That's correct**.") (emphasis added). Likewise, in approving the recent hunting regulations, the Commission could not represent that it adopted those to achieve sustainability:

> Q. Were the hunting regulations for the 2022-23 season intended to reduce populations in overpopulated hunting districts?
>
> A. There were – quota ranges were removed and it was from – we followed a lot of the recommendations from the FWP staff and so I don't – specifically in writing that is **not** what was said but some of the moves that we have made **could** lead to a reduction in population.
>
> Q. But was that the intended goal?
>
> A. Like I said, it'd **never been stated that that was the goal**.

App.0578, 13:4-15 (emphasis added).

In its Order, the court avoided these admissions by citing testimony concerning FWP's understanding. *See* Doc. 165, pp. 4-5. To be sure, FWP testified that its position is that the Commission sets sustainable numbers *sub silentio*. But that does not change the Commission's understanding, which it is the Commission who is vested with the duty to set sustainable numbers, not FWP. The Commission and FWP are to act as a system of "checks and balances," and HB 42 designated the

Commission as the entity to officially set sustainable numbers. The Commission's testimony as to its understating is dispositive of the issue.

b. The District Court's Interpretation Conflicts with the Statutory Language.

Second, the District Court's interpretation does not accord with the statutory text. To begin with, the statute is clear the Commission must identify actual "numbers" of "elk". That is plain enough in the language itself, which speaks to "elk numbers," not license or permit numbers (quotas). *See* § 87-1-323(1), MCA ("commission shall determine the **elk** . . . **numbers** that can be viably sustained") (emphasis added). Other parts of Title 87 speak to the Commission's obligations concerning quotas for licenses and permits. *See*, e.g., § 87-1-501(1) (class A licenses); -501(1) (class B licenses); § 87-2-104, MCA (quotas).

Further, the court's interpretation flips the statutory cadence on its head. The statute contemplates that the Commission will set sustainable numbers ***before*** FWP arrives at its proposed biennial hunting regulations (i.e., the necessary actions it intends to carry out) for the Commission's approval. *See* § 87-1-323, MCA ("***Once*** the sustainable population ***numbers*** are ***determined*** [by the Commission], [FWP] shall implement . . . necessary actions [to ensure elk numbers] remains at or below the sustainable population").

The reason for this cadence is obvious: FWP cannot know what actions are "necessary" to achieve the objective without first knowing the objective. But in the court's interpretation, FWP is proposing hunting regulations ***before*** the Commission is supposedly setting sustainable populations by approving the regulations. *See* Doc. 165, p. 4 ("The Commission then adopts [or] modifies the Department's propos[ed] [biennial hunting regulations]. Those final regulations are the Commission's sustainable population number determination[.]").

Lastly, the District Court's interpretation defeats the purpose of the statute. The statutory scheme is intended to require FWP to ensure populations do not exceed sustainability. However, if the District Court's interpretation is affirmed, there is no way to verify that FWP is doing so: FWP has no fixed sustainable numbers to achieve (statewide, by EMU, or HD).

The District Court's decision effectively insulates the Commission and FWP from oversight. The Commission avoids political judgment of setting the objective, and without the objective, FWP escapes accountability for managing to it. All in all, Montana is left in the present situation: elk numbers skyrocket to the detriment of folks living on the land. Put simply, contrary to the District Court's conclusion, § 87-1-323, MCA, directs the Commission to set sustainable "elk numbers"—not numbers of licenses and permits—as the objective.

c. The Hunting Regulations Are Based on Flawed Population Objectives in the 2005 Elk Plan That Do Not Follow Sustainability.

Lastly, even if it were permissible for the Commission to silently set sustainable numbers by approving hunting regulations, the court's decision is still error because the regulations are underpinned by faulty population objectives.

The hunting regulations upon which the District Court relied are themselves based on 2005 Elk Plan's population objectives, which, in turn, consider items aside from sustainability such as recreational opportunities and trophy bull hunting. As admitted by Defendants, the population objectives are not sustainable populations. *E.g.*, Doc. 110, p. 17. The regulations are thus necessarily not setting sustainability, because they are underpinned by other considerations of FWP's own preference.

2. The District Court Erred by Concluding That FWP Has Implemented Its Programs and Taken Necessary Actions to Ensure Sustainable Numbers.

For four independent reasons, the District Court's conclusion that FWP is complying with its obligation is error too.

a. FWP Cannot Comply with Its Statutory Duty Without the Commission First Setting Sustainable Numbers.

First, FWP cannot comply with its duty until the Commission first complies with its duty. Without sustainable numbers, FWP has no fixed objective to determine which programs or actions are "necessary" to achieve that objective. The Legislature intended for the Commission's determination of sustainable numbers to

act as the lodestar for FWP in reducing elk in overpopulated areas and ensuring elk do not exceed sustainability in areas that are not overpopulated. Absent the fixed objective, FWP is left to manage elk to goals of its own design, and, in doing so, is necessarily making management decisions based on those goals instead.

b. By Its Own Admission, FWP Treats Sustainability as a Factor, Not the Objective.

Second, by FWP's own admissions, it does not manage to sustainability but rather treats sustainability as a factor to consider, not the objective to meet. During FWP's 30(b)(6) deposition, it admitted as much using slightly different language:

> Q. So does that [being over elk plan objectives] indicate to you that there was a failure to manage to those population objectives?
>
> * * *[7]
>
> A. It's my understanding that the statute that deals with population objectives were to manage **with the objective in mind**, **not** **to the objective**.
>
> Q. Uh-huh. So you're saying it's a goal to achieve these population objectives?
>
> A. I'm saying my understanding of the statute is that we manage those populations with **that objective in mind**.
>
> Q. Okay. And is it FWP's understanding that it succeeded in managing with objective to achieve – sorry – to achieve the population objectives?

[7] There was an initial objection to this question but no objections to the balance.

> A. Once again, you know, we're **not bound to manage** [to sustainable numbers]. We're supposed to manage with **that objective in mind.**

App.0616, 19:12-20:07 (emphasis added). In its view, as FWP explained, it is only "bound to consider" sustainability, not manage to it. App.0615, 17:04. And as FWP testified, while sustainability is an item to consider (or "keep in mind"), FWP considers other items too:

> Q. So you would agree with me that FWP has **considered other inputs besides what's listed in the statute**?
>
> A. **Yes**.

App.0647, 81:19-22 (emphasis added). Indeed, as also tacitly agreed by FWP's counsel during oral argument, FWP treats sustainability as one factor among others. *See* 5/3/2024 Summ. J. Hr'g Tr. 80:12-13 ("We go through all of the **factors** in 323 ***plus*** **additional ones**.") (emphasis added).

In its Order, the District Court avoids these admissions by citing testimony where FWP stated that it is complying with the statute. Doc. 165, p. 3 ("We have done that [complied with the statute] in earnest to with that intent, yes, Sir.") (ellipsis omitted). But UPOM is not questioning the genuineness of FWP's belief that it is complying with the statute.

That is not the issue. FWP's belief notwithstanding, the issue is whether it is actually complying with the statute. It's not. In practical terms—all hand-waving aside—FWP considers sustainability as but-one factor. Yet, it undisputable in the statute—and undisputed by FWP's legal counsel—FWP must manage with the objective that elk do not exceed sustainable levels. *See* Doc. 124 (FWP Summ. J. Br.), p. 14 ("Defendants concur with Plaintiff that each entity has unique statutory mandates, all culminating with **one single directive**: MFWP must manage elk with the objective that populations remain at or below the sustainable number of elk.") (emphasis added).

c. The Hunting Regulations Are Based on Flawed Management Objectives in the 2005 Elk Plan That Do Not Follow Sustainability.

Third, regardless of those points, the District Court's conclusion that, by proposing hunting regulations, FWP is implicitly managing with sustainability as its objective is wrong for another reason: the hunting regulations that the District Court relied upon are based on faulty management objectives that do follow sustainability.

As with the population objectives, the hunting regulations the District Court relied upon are also based on the 2005 Elk Plan's management objectives. Consistent with FWP's testimony, the 2005 Elk Plan considers different factors—many of which are directly at odds with sustainability and protecting landowners from damage caused by overpopulated elk herds.

Consider three of the most overpopulated EMUs. In the Missouri Breaks EMU, FWP lists as its primary goal ensuring "excellent recreational opportunities":

MANAGEMENT GOAL

> Manage elk habit in its most productive conditions and elk numbers that **provide excellent recreational opportunities** while minimizing game depredation on private land. All FWP management actions and recommendations concerning elk habitat will give equal consideration to other wildlife species.

App.0555 (emphasis added). Likewise, in the Bull Mountain EMU, FWP emphasizes ensuring hunters are able to "harvest older bulls" and ensuring that—not all landowners are protected—but only those that allow public hunting:

MANAGEMENT GOAL

> Perpetuate viable elk populations and habitat**, provide opportunity for hunters to harvest older bulls**, and maintain populations within the constraints of landowner tolerance. We will **emphasize maintaining** the **numbers of elk** in individual herds **at levels that do not** economically **harm** the majority of **landowners who still allow public hunting.**

App.0542 (emphasis added). Lastly, in the Snowy EMU, where FWP's goal is to provide hunter opportunity for harvesting trophy bull elk:

MANAGEMENT GOAL

> Perpetuate viable elk populations and elk habitats**; provide hunter opportunity for harvesting older bulls**; and maintain population levels within the constraints of landowner tolerance (1,100 elk).

App.0527 (emphasis added). To state the obvious, providing recreational opportunities (increasing elk numbers for the public to view) and ensuring trophy bulls (increasing elk populations) do not advance sustainability. *See* Doc. 64.1, p.12; App.0649.

d. Elk Numbers Far Exceed Sustainability.

Lastly, if all of that were not enough, there are, of course, the numbers. More than anything, they offer the proof. Since the Legislature enacted HB 42 in 2003 and found elk populations were unsustainable, elk numbers have increased dramatically. As noted above, in the 2005 Elk Plan, elk numbers in the EMUs stood at 98,131. Last count, in 2024, Montana elk numbers were counted at 145,050. The estimates of actual numbers are even higher, likely exceeding 176,000. Even by FWP's own objectives, elk numbers are out of control. As of the date of filing of this action, 59 hunting districts exceeded their objectives with districts reporting nearly 1000% over their objectives. By FWP's own concession, elk numbers are now tens of thousands (and as many as 50,000 elk) in excess of any sustainable level.

Put simply, FWP does not manage to sustainability. As FWP stated during its deposition testimony; FWP's counsel tacitly admitted at oral argument; the 2005 Elk Plan provides; and the unsustainable elk numbers prove, FWP manages with sustainability as a factor to consider. The District Court erred in concluding that FWP has complied with its duty to ensure elk do not exceed sustainable populations.

In sum, the District Court improperly granted Defendants summary judgment. This Court should not bless the failure of the Commission and FWP to follow their statutory directives. UPOM requests this Court reverse the District Court and enter summary judgment in its favor on Count I of the Amended Complaint.

II. The Conditional Provisions in §§ 87-1-225 and 87-2-520, MCA, Violate the Unconstitutional Conditions Doctrine.

The District Court erred in upholding the constitutionality of the provisions in §§ 87-1-225 and 87-2-520, MCA, that require landowners to cede access over their private property as a condition of receiving Game Damage Permits. By conditioning Game Damage Permits on landowners surrendering their property to the public, the provisions run afoul of the unconstitutional conditions doctrine.[8]

"'Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right in exchange for a discretionary benefit.'" *Stavrianoudakis v. United States Fish & Wildlife Serv*., 108 F.4th 1128, 1136 (9th Cir. 2024) (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (ellipsis omitted). By constraining conditions that the government may impose, the doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist*., 570 U.S. 595, 604 (2013). Thereby, "the unconstitutional

[8] FWP's implementing rules also necessarily violate the doctrine as well.

conditions doctrine provides that 'even though a person has "no right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, it may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.'" *Autor v. Pritzker*, 740 F.3d 176, 181 (D.C. Circ. 2014) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)) (cleaned up).

Here, the constitutional right at issue is the "right to exclude" others from "private property" protected by the Fifth Amendment to the U.S. Constitution. U.S. Const. amend. V.[9] As this Court has recognized, of all the rights secured by the Fifth Amendment, the "right to exclude" is "one of the most valued." *Kafka v. FWP*, 2008 MT 460, ¶ 51. *Accord Nollan v. Cal. Coastal Com*, 483 U.S. 825, 831 (1987) ("[T]he right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property.") (citation omitted).

To assess the constitutionality of permit conditions in the context of the Fifth Amendment, the U.S. Supreme Court has set out a "two-part test" preceded by a predicate inquiry. *Sheetz*, 601 U.S. at 275. Given the predicate inquiry, lower courts also often refer to it as a "three-step unconstitutional-conditions test," *Knight v. Metro. Gov't of Nashville & Davidson Cty.*, 67 F.4th 816, 825 (6th Cir. 2023), and

[9] The Fifth Amendment is incorporated against the States under the Fourteenth Amendment, and Article II, Section 29 of the Montana Constitution secures the "right to exclude" as well. *Kafka*, ¶ 51.

so UPOM generally presents it that way at times too. No party to this appeal disputes that this test is the appropriate analysis to undertake or offers any other alterative unconstitutional conditions test.[10]

At step one, courts inquire "whether the condition would qualify as a taking if the government had directly required it." *Knight*, 67 F.4th at 825. *Accord Koontz*, 570 U.S. at 612 ("A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it [is conditionally requesting].").

If so (the condition would qualify as a "taking" if the government directly imposed it), the threshold inquiry is satisfied and the burden shifts to the government to show the condition is constitutional under the next two steps. *San Remo*, 545 U.S. at 332 (referring to the burden as "exacting scrutiny" once the predicate inquiry is satisfied). In step two, the government must show an "essential nexus" between the condition and the permit's impact on its legitimate interest. *Nollan*, 483 U.S. at 837. Lastly, in step three, the government must show "rough proportionality" between the condition's burden on the landowner and the permit's burden on the governmental interest. *Dolan*, 512 U.S. at 39.

[10] *E.g.*, 5/3/2024 Hr'g Tr., 32:2-7 (Intervenor defendants agreeing this "obvious[ly]" is the appropriate test).

A. Step One Is Satisfied: If FWP Directed Landowners to Open Their Private Property to the Public for Hunting, That Would Constitute a *Per Se* Taking Under *Cedar Point*.

The step one question is: if FWP demanded directly that landowners allow the public access over their private property for hunting, would that be a "taking" under the Fifth Amendment?

The answer is yes. *Cedar Point* is dispositive. Per that decision, state laws that limit a landowner's right to exclude "constitute[] *per se* physical taking[s] under the Fifth Amendment." 594 U.S. at 143.[11] This is true even where the intrusion is temporary or intermittent. *Id*. at 153 ("[A] physical appropriation is a taking whether it is permanent or temporary."); *id*. ("Physical invasions constitute takings even if they are intermittent as opposed to continuous."). Accordingly, the threshold inquiry is satisfied and the unconstitutional conditions doctrine is at play.

1. In Failing to Address *Cedar Point*, the District Court Wrongly Concluded That the Property Invasion Must Be "Permanent" to Constitute a *Per Se* Taking.

The District Court failed to address *Cedar Point*, and by so doing, the court improperly concluded a property invasion must be "permanent" to constitute a *per se* taking, which is the exact error the Ninth Circuit made in *Cedar Point* and upon which the U.S. Supreme Court reversed the Ninth Circuit.

[11] *See also* Doc. 58, p. 14 (Intervenor defendants agreeing "the state most certainly cannot force citizens to endure public access on private land").

The Fifth Amendment protects a variety of "sticks" in the "bundle" of legal rights that come with property ownership. *Cedar Point*, 594 U.S. at 150. One of those sticks is the "right to exclude" strangers, "one of the most essential sticks in the bundle." *Id. Accord Kafka*, 2008 MT 460, ¶ 51 ("In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession—the right to exclude strangers[.]") (citation omitted).

Government interferences that qualify as "takings" come in two forms: (1) "physical takings"; or (2) "regulatory takings." *Cedar Point*, 594 U.S. at 149. For physical takings, courts apply a *per se* rule that those are automatic takings. *Id*. The "paradigmatic" physical taking is the "physical invasion of private property." *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 537 (2005). This is because, as this Court has explained, "[a] physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests." *Kafka*, ¶ 71. For less intrusive regulatory takings, courts apply the *Penn Central* balancing test, in which courts evaluate several factors including economic impacts. *Id*.

In *Cedar Point*, the U.S. Supreme Court made clear that state laws/regulations that interfere with a landowner's "right to exclude" by allowing others onto their property are "*per se* physical takings." *Id*. at 149. In that case, at issue was a state regulation that "allowed union organizers onto [agricultural growers'] property for

up to three hours per day, 120 days per year" to "solicit support for unionization." *Id*. The landowners challenged the regulation, arguing that it constituted a "*per se* physical taking" because it allowed "union organizers to enter their property." *Id*.

The Ninth Circuit disagreed with the landowners. In its view, the regulation did not qualify as "a *per se* physical taking" because it did "not allow for permanent and continuous access 24 hours a day, 365 days a year." *Id. See also id.* at 145 ("The court rejected the [landowners' argument] that the regulation constituted a *per se* physical taking, reasoning that it did not allow the public to access their property in a permanent and continuous manner.").

The Supreme Court reversed the Ninth Circuit, concluding the regulation infringed on the right to exclude and thus constituted a *per se* physical taking:

> [The] regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking. The regulation grants union organizers a right to physically enter and occupy the growers' land for three hours per day, 120 days per year. Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude.

Id. at 149.

The Court expressly rejected the Ninth Circuit's reasoning that "temporary" or "intermittent" invasions are not *per se* takings. Recounting case law, the Court explained "a physical appropriation is a taking whether it is permanent or temporary." *Id* at 153. The Court likewise explained "physical invasions constitute

takings even if they are intermittent as opposed to continuous." *Id*. Thus, the Court reasoned the "duration" of the access or that the regulation "authorizes only limited and intermittent access for a narrow purpose" is irrelevant—"the fact that the regulation grants access only to union organizers and only for a limited time does not transform it from a physical taking." *Id*. at 154.

Turning to the case at hand, the District Court's conclusion that a state law must allow a "permanent" invasion to constitute a *per se* taking is wrong. As made clear in *Cedar Point*, "government-authorized physical invasions"—even temporary ones—are "takings." *Id*. If FWP were to direct landowners to allow public hunting on their private property, that would infringe on the right to exclude and constitute a *per se* taking. Just as in *Cedar Point*, such a requirement would "appropriate[] a right to physically invade [their] property." *Id*.

In short, step one is satisfied. If anything, requiring landowners to turnover their property to armed strangers for months during hunting season is a far more serious infringement on the right to exclude than allowing access to union folks for a few hours over the course of a couple months.

B. FWP Has Failed to Carry Its Exacting Burden to Justify the Condition Under Steps Two and Three.

Given the threshold inquiry is satisfied, the burden shifts forcefully to FWP under the next two steps to satisfy "heightened scrutiny" to justify the condition.[12] *San Remo*, 545 U.S. at 332. FWP must show an "essential nexus" and "rough proportionality" between the condition and the burden caused by the Game Damage Permits on its legitimate governmental interest. *San Remo*, 545 U.S. at 332.

FWP has never attempted to carry this burden. Nor did the District Court conclude it could do so. Make no mistake, FWP has a legitimate interest under the statutory scheme: reducing elk to sustainable populations. *See* § 87-1-323(2), MCA.

But the problem for FWP is that Game Damage Permits ***do not burden*** the governmental interest; they advance it. Indeed, the sole purpose of Game Damage Permits is to reduce elk by allowing landowners to harvest the ones that are causing damage. For kill permits or supplemental licenses, FWP must limit them to harvesting animals causing the damage. *See* § 87-1-225(2) (kill permit) ("a specified number of the animals causing the damage"); § 87-2-520(1) ("game animals on the property [that] are causing a level of damage to crops or other vegetation"). Even more specifically, FWP has stated cow elk are the cause of overpopulation

[12] FWP grants the Game Damage Permits, so UPOM refers to it here for ease of referencing a single party (but it is intended to encompass the Commission too).

(Doc. 110.01, pp. 6-7); supplemental licenses are statutorily limited to cow elk and FWP has discretion to limit kill permits to the same as necessary. *See* § 87-1-225; § 87-2-520(2), MCA.

In short, FWP cannot satisfy heightened scrutiny. Any defense of the condition essentially would amount to this: FWP must deny landowners permission to reduce cow elk because there are too many cow elk. And this defense would come with the backdrop of the condition's ineffectiveness—when the Legislature imposed it in 1989 there were 80,000 elk, today there are twice that many.

1. FWP Has Failed to Show an "Essential Nexus."

The specific inquiry under step two is: has FWP shown an "essential nexus" between the condition and the negative effects caused by the Game Damage Permits? The answer is no. As noted above, the "essential nexus" is lacking because the Game Damage Permits do not negatively impact the governmental interest under the statutory scheme to reducing elk numbers.

2. FWP Has Failed to Show "Rough Proportionality."

The specific inquiry under step three is: has FWP shown "rough proportionality" between the condition's burden on the landowner and the negative impacts caused by the Game Damage Permits on the governmental interest? Here again, the answer is no. This is so for the same reason FWP cannot show an essential nexus—the Game Damage Permits advance its interest under the statutory scheme.

However, that reason aside, even if the Game Damage Permits negatively impacted the government's interest under the statutory scheme, the condition is overly broad and extremely burdensome to landowners, especially relative to any conceivable burden caused by the Game Damage Permits. Beginning with any burden associated with what is requested by the Game Damage Permits. Per the statutes, the Game Damage Permits are not "trophy bull" licenses; they are cabined to harvesting just the animals causing property damage, with limitations on sex and species. *See* §§ 87-1-225(2), -520(1), MCA. So, the burden associated with the Game Damage Permits—insofar as there is one—is extraordinarily tailored to address the problem of unsustainable game populations damaging property.

Yet, the condition is grossly disproportionate—both exceedingly burdensome on landowners and overly broad relative to the government's interest. To begin with, under the condition, landowners must surrender their private property to random members of the public and for a continuous and lengthy period. Thus, the condition allows the most indiscriminate "physical invasion" possible by requiring random (and armed) strangers appropriate the property and demands that indiscriminate invasion effectively occur uninterrupted for months. Thereby, the government's condition hits harshly at "perhaps the most fundamental of all property interests." *Kafka*, ¶ 71.

Furthermore, in doing so, the condition is not tightly tailored to address the government's interest: sustainability. Under the statute, and as implemented under the rules, the condition may demand public hunting without regard to gender or species of the animals that may be causing damage to the property. Worse yet, under FWP's rules, the condition may be divorced from the specific portion of the property that may be damaged. *See* ARM 12.9.803(1)(b) (limitations that "restrict public hunting" rendering landowners ineligible for Game Damage Permits include limiting "portion of land open to hunting"). Thus, even if cow elk are damaging a portion of the property, FWP may require the landowner relinquish its entire property to hunters trying to chase down trophy bulls.

Stated simply, while the landowner's request of the government is a modest one under the statutes, the government's demand of the landowner in return is not. All along, at the same time that FWP is denying landowners the right to protect themselves from elk damaging their land unless they yield to its demand, FWP is allowing elk populations to overwhelm them. The U.S. Supreme Court has labeled schemes far less pernicious than this one as "out-and-out plan[s] of extortion" to acquire private property. *Sheetz*, 601 U.S. at 275; *Nollan*, 483 U.S. at 837 (concluding absent an "essential nexus" and "rough proportionately" permit condition is not valid but simply "an out-and-out plan of extortion").

In sum, FWP's bare desire for public hunting on private land is "not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). By any measure, FWP has failed to show "essential nexus" and "rough proportionality" to uphold the condition. This Court should accordingly strike it down under the unconstitutional conditions doctrine. This is not a radical request, as it simply returns Montana law to that which existed for over 50 years prior to the outset of elk overpopulation.

C. By Refusing to Apply the Unconstitutional Conditions Doctrine Because the Benefit Is Gratuitous, the District Court Gravely Misunderstood the Doctrine.

Lastly, the District Court also erred by declining to apply the unconstitutional conditions doctrine because the benefit is gratuitous. In doing so, the court ignored settled law. The U.S. Supreme Court has "repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights." *Koontz*, 570 U.S. at 607-08.

"Virtually all of [the Supreme Court's] unconstitutional conditions cases involve a gratuitous governmental benefit of some kind." *Id*. (collecting cases). *Accord Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't Health*, 699 F.3d 962, 986 (7th Cir. 2012) ("The first step in any unconstitutional-conditions claim is to identify the . . . constitutional right arguably imperiled by the denial of a public benefit."); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L.

Rev. 1413, 1415 (1989) ("The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, **even if the government may withhold that benefit altogether**.") (emphasis added). The District Court's conclusion is thus contrary to a plethora of controlling case law and the basic premise undergirding the doctrine.

CONCLUSION

In conclusion, this Court should not countenance the elk management system offered by the Commission and FWP. On one hand, it allows the two agencies to avoid their protective duties to landowners resulting in damage to their property. And on the other hand—the heavier one—it strikes at landowners demanding tribute paid to allow them to protect themselves: surrender your property to armed strangers.

UPOM requests that this Court reverse the District Court's summary judgment rulings on Counts I and VI (Doc. 164, 165, 171) and enter summary judgment in its favor on those two Counts as provided herein. Specifically, UPOM requests a declaration (1) that the Commission and FWP have failed to comply with their statutory obligations under § 87-1-323, MCA; and (2) that the conditional provisions in §§ 87-1-225 and 87-2-520, MCA, violate the unconstitutional conditions doctrine.[13]

[13] As a corollary, UPOM also requests a declaration that FWP's implementing rules necessarily violate the unconstitutional conditions doctrine as well.

Respectfully submitted this 19th day of March, 2025.

/s/ Matthew Dolphay
Matthew H. Dolphay
Brent R. Bihr
HOLLAND & HART LLP

Jack G. Connors
Jacqueline R. Papez
DONEY CROWLEY P.C.

Attorneys for Appellant United Property Owners of Montana, Inc.

CERTIFICATE OF COMPLIANCE

The undersigned, Matthew Dolphay, certifies that this Brief complies with the requirements of Mont. R. App. P. 11. The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 9,506 words, excluding the caption, certificates of compliance and service, table of contents and authorities, and exhibit index. The undersigned relies on the word count of the word processing system used to prepare this document.

/s/ Matthew Dolphay

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CERTIFICATE OF SERVICE

I, Matthew Herman Dolphay, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-19-2025:

Robert M. Farris-Olsen (Attorney)
401 N. Last Chance Gulch
Helena MT 59601
Representing: Helena Hunters and Anglers, Hellgate Hunters and Anglers, Montana Backcountry Hunters and Anglers, Montana Bowhunters Association, Montana Wildlife Federation, Public Land and Water Access Association, Inc., Skyline Sportmen's Association
Service Method: eService

David Kim Wilson (Attorney)
401 North Last Chance Gulch
Helena MT 59601
Representing: Helena Hunters and Anglers, Hellgate Hunters and Anglers, Montana Backcountry Hunters and Anglers, Montana Bowhunters Association, Montana Wildlife Federation, Public Land and Water Access Association, Inc., Skyline Sportmen's Association
Service Method: eService

Graham J. Coppes (Attorney)
425 East Spruce Street
PO Box 8359
Missoula MT 59807
Representing: Helena Hunters and Anglers, Hellgate Hunters and Anglers, Montana Backcountry Hunters and Anglers, Montana Bowhunters Association, Montana Wildlife Federation, Public Land and Water Access Association, Inc., Skyline Sportmen's Association
Service Method: eService

Kevin Barnett Rechkoff (Attorney)
1420 E 6TH AVE
HELENA MT 59601-3871
Representing: Montana Department of Fish, Wildlife, and Parks
Service Method: eService

Jeffrey M Hindoien (Govt Attorney)
1420 E 6TH AVE
HELENA MT 59601-3871
Representing: Montana Department of Fish, Wildlife, and Parks
Service Method: eService

J. Stuart Segrest (Attorney)
The Montana Club Building
24 West 6th Avenue
Suite 501
Helena MT 59601
Representing: Montana Fish, Wildlife & Parks Commission
Service Method: eService

Brent Richard Bihr (Attorney)
401 North 31st Street
Suite 1500
Billings MT 59101
Representing: United Property Owners of Montana, Inc.
Service Method: eService

Jack Connors (Attorney)
P.O. Box 1185
Helena MT 59624
Representing: United Property Owners of Montana, Inc.
Service Method: eService

Jacqueline Racquel Papez (Attorney)
P.O. Box 1185
Helena MT 59624
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Electronically signed by Arlene Forney on behalf of Matthew Herman Dolphay
Dated: 03-19-2025