IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause: DA 24-0674

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

Plaintiffs and Appellant,

v.

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 SPORTSMENT'S ASSOCIATION, AND PUBLIC LAND AND WATER ACCESS ASSSOCIATION,

Intervenors.

INTERVENORS' OPENING BRIEF

On Appeal from the Montana Tenth Judicial District Court
Fergus County, Honorable Todd Gregory Presiding
District Court Case No. DV 14-2022-0000036

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INTRODUCTION

This case presents a juxtaposition of competing views of how elk should be managed and for whom. The case illustrates a fundamental disagreement over the scope and breadth of private rights in real property in relation to state-owned migratory wildlife resources. Necessarily, this controversy extends to and includes disagreement over how Montana is obligated to manage those natural resources and for whom. A review of the District Court briefing highlights how United Property Owners of Montana's (UPOM's) legal arguments constantly evolved, but its aim has remained narrow: privatize and monetize elk hunting on private land.

From UPOM's perspective, the State of Montana's sole focus must be on protecting private property from the "nuisance" that wild game imparts. In proffering this view, Plaintiffs ask the Court to ignore binding precedent in *State v. Rathbone*,110 Mont. 225, 100 P.2d 86 (1940) which it fails to cite. Appellants further ask the Court to ignore the reality that its Directors and leadership own commercial hunting and outfitting business that profit dramatically from the wild game of which they complain. Dkt. 110.06, *Robbins Depo*, 61:25-63:8. In this way, UPOM asserts that as landowners, they have an incidental, or direct, "right to kill" – a right which does not exist to the general public.

Foundationally, Intervenors disagree; wildlife is publicly owned resource, held in trust by the state, and which must be managed for all Montanans, not just landowners. As a part of that responsibility, the Montana Department of Fish, Wildlife and Parks

(FWP) offers assistance to landowners experiencing any number of problems with wildlife that utilize or travel across private lands. This assistance can come in the form of capturing and relocating a grizzly bear, financial remuneration for livestock depredation, or – at issue here – providing additional hunting licenses to reduce elk presence on private lands. The fact that Montana's statutory system requires some limited form of public access or public accommodation for this damage assistance is a reasonable balancing of rights – both private and public.

Sections 87-1-225, MCA and 87-2-520, MCA represent the Legislature's acknowledgement of the relationship between public wildlife resources and private lands. To that end, these statutes arise out of the Montana Supreme Court's repeated recognition that "wild game including elk belong to the State in its sovereign capacity." *Rathbone*,110 Mont. at 238, 100 P.2d at 91. Thus, Montana's statutory regime for "sustainably" managing elk populations and providing game damage assistance program – as challenged here - seeks to reasonably balance the impacts of inherently public resources on private lands. This balancing of interests is a challenge, but FWP and the Montana Fish and Wildlife Commission (the "Commission") have complied with their legislative directives and those directives themselves comport with settled principles of law in relation to private property and, as a result, does not violate any constitutionally protected interests of the Plaintiff

STATEMENT OF THE ISSUES

1. Whether the Commission has fulfilled its duty under § 87-1-323(1), MCA, to determine and manage for sustainable elk numbers when it annually determines the number of elk that should be harvested in each hunting district?
2. Whether Montana's statutory and regulatory conditioning of state sponsored game damage assistance on some form of public access to state-owned wildlife resources carries the requisite "nexus" and "rough proportionality" necessary to survive 5th Amendment takings jurisprudence?

STATEMENT OF THE CASE

This case is about UPOM's desire to uproot Montana's foundation of wildlife management. On April 6, 2022, UPOM filed a complaint against FWP and the Commission. (Dkt. 1.) After learning of the complaint, Intervenors filed a contested motion to intervene on June 1, 2022. (Dkts. 8-9, 11, 12, 16.) On June 17, 2022, UPOM filed its first amended complaint. (Dkt. 13.) And on August 31, 2022, the Court granted Intervenors' motion to intervene. (Dkt. 27.)

While the motion to intervene was pending, UPOM filed a motion for partial summary judgment as to Count IV. (Dkts. 20-21.) The Commission and FWP filed a cross-motion for summary judgment on Count IV, and Intervenors filed a response to UPOM's motion on Count IV. (Dkts. 31-32.) Briefing on Count IV was completed by February 1, 2023, and on February 3, 2023, the Court denied the motions on Count IV. (Dkt. 47.) Thereafter, on September 20, 2023, FWP and the Commission moved for

partial summary judgment on Count VI, to which Intervenors and UPOM both filed cross motions. (Dkts. 54-55, 57-58, 61-63.) By December 1, 2023, briefing on Count VI was complete. (Dkts. 64-66 65, 66, 73, 74.) Thereafter, Intervenors filed a motion for partial summary judgment on Counts II and III, while FWP and the Commission filed a motion for partial summary judgment on Counts I, II, III, V, and VII. (Dkts. 104-05, 109-10.) Simultaneously, UPOM filed its own motion for partial summary judgment on Count I. (Dkts. 106-07.) The Court granted Intervenors and Defendants motions on Counts I, II, II, V, VI and VII, while simultaneously denying UPOM's motion for summary judgment on Count I. (Dkts. 164, 165, 171). UPOM then appealed.

Although UPOM brought seven claims by and through its complaint, UPOM appeals its loss on only two: Counts I and VI.

STATEMENT OF FACTS

A. UPOM's Complaint:

UPOM's Complaint asks the State to "remove, harvest or eliminate 50,000 elk." (Dkt. 13, ¶ 13.) More specifically UPOM asks that 50,000 elk be killed, and they want their members (and others similarly situated) to be the individuals charged with keeping the population at a low level for all subsequent years. (Dkt. 13, ¶ 3.) They want to reduce the elk populations, not through any involvement of the public, but by increasing private licenses. *Id.*, Request for Relief at ¶ 1.a, c-d, f-g. They want to privatize elk by eliminating "equitable allocations" of licenses – or said another way – eliminating

consideration of the public interest. And they want to overturn decades of collaborative and science-based elk management by removing managerial authority vested in FWP and transferring all decision making to the whims of the legislature. (Dkt. 13, ¶¶ 84-87.) Finally, UPOM demands that this Court declare § 87-1-225, MCA; § 87-2-520, MCA, and A.R.M. 12.9.803(1) as facially unconstitutional to the extent they require landowners to give up a private property right as a condition before the state will provide 'game damage assistance. (Dkt. 13, ¶¶ 104-05.)

B. Harm to UPOM's membership:

Critically, UPOM makes these requests, and this appeal, without *any* knowledge of the damage the elk are allegedly causing to its members property, without knowledge of any actions its members are taking to limit the alleged damage, and without any knowledge of whether its members allow public access for hunting. (Dkt. 110.06, *Depo of Robbins*, 64:18-65:20, 108:2-109:16, 111:22-112:3, 103:19-105:10; Dkt. 105, Ex. 2, UPOM Objections to Topics 3, 5-15, 9.) Moreover, it has no records of any damage caused to its members' property and has provided none in this lawsuit; does not keep records related to any alleged damage; and cannot identify any specific costs associated with the alleged damage caused by elk. (Dkt. 105, Ex. 2, UPOM Objections to Topic 3 objection; Dkt. 110.066, *Robbins Depo*, 103:19-104:10 (Objection by counsel and direction to answer with personal knowledge).) It has no knowledge of whether its members are enrolled in any game damage assistance programs or whether its members have utilized the programs. (Dkt. 105, Objections to topics 5- 6, 8; Dkt. 110.06, *Robbins*

Depo. 108:2-109:16 (deponent has no knowledge "other than for [himself]")). It also does not know whether its members take any action to haze, scare or otherwise redistribute elk from their property, or whether those methods are effective. (Dkt. 105, Objections to topics 9-10; Dkt. 110.06, *Robbins Depo.* 108:2-109:16.) It doesn't even know if its members oppose or allow public hunting. Nevertheless, UPOM claims FWP, and the Commission are failing to appropriately manage elk, and exclude its members from the game damage assistance program.

C. The Role of Fish, Wildlife and Parks in Managing Elk:

UPOM knows the State is best equipped to manage and limit elk populations: "the Department . . . has the scientific staff and expertise, [and it] considers habitat acreage, landowner tolerance, and carrying capacity when making recommendations to the Commission." (Dkt. 165, p. 4.). In that role, FWP and the Commission have taken a "number of actions to manage elk with the objective of reducing elk populations in over-objective districts." *Id.*, p. 10. Those actions include investing in improved public access and hunter harvest, expanding block management programs, liberalizing cow elk harvest in over objective populations, introducing extended seasons, implementing the Public Access Land Agreement (PALA) Program, and growing the Elk Hunting Access (EHA) program by working with landowners. *Id.* These strategies successfully maintain and sustaining elk levels in hunting districts where landowners cooperate. (Dkt. 124, pp. 9.) But when landowners eliminate public access, thereby reducing hunter harvest of cow elk, there is little FWP, and the Commission can do. As explained by FWP and

Commission, "the combination of privately owned landscapes, restricted public access, and bull elk harvest preference is the cause of population reduction challenges." (Dkt. 124, p. 9.)

The 2005 elk plan further explains the problem:

> The effectiveness of elk population management in Montana depends on public access to those elk during hunting seasons. Any elk hunting season or regulation, no matter how innovative, will not successfully achieve its intended harvest results without adequate hunter access to elk. . .. [R]ecent management problems more frequently deal with inadequate access to achieve the antlerless elk harvest necessary to control populations in some areas. FWP biologists estimate that up to 35% of Montana's elk may be on private lands that are inaccessible to the general public hunter during the 5-week general season. Most hunters may not have access because of no hunting allowed by anyone, outfitting, leasing, blocked access, or other factors.

(Dkt. 110.07, p. 25.).

The District Court understood that UPOM, by its members' prohibiting public access in the hopes of increasing their own elk harvest and permits, was the architect of its' own problems. As noted, "UPOM members have substantial number of elk on their property, and they have the right to exclude the public and FWP cannot force public access on them." (Dkt. 165, p. 11.) But "[i]t is universally accepted that the most effective way to reduce elk populations is to reduce antlerless elk populations through hunting." *Id.* UPOM's failure to utilize existing programs, is the cause of its problems, not the State's management. *Id.*

UPOM, though, wants to blame FWP and the Commission, and appeals the District Court's correct findings that FWP and the Commission have appropriately and

"sustainably" managed elk in Montana, and that the game damage assistance programs are unconstitutional because they require a level of public access from private landowners to rectify the externalized harm caused by private control of public resources. This Court should reject UPOM's arguments and affirm the District Court's opinions.

STANDARD OF REVIEW

This Court reviews a grant or denial of summary judgment de novo using the same M. R. Civ. P. 56(c) criteria applied by the district court. *City of Missoula v. Fox*, 2019 MT 250, ¶ 6, 397 Mont. 388, 450 P.3d 898. If the district court determines that no genuine issue of material fact exists, the court then determines whether the moving party is entitled to judgment as a matter of law. *Id.* This determination is a conclusion of law, which is reviewed for correctness. *Id.* The standard of review pertaining to a declaratory judgment is to determine if the court's interpretation of law is correct. *Id.*

SUMMARY OF THE ARGUMENT

For centuries, wildlife and elk, have been managed as a trust resource, for the benefit of all people, not simply wealthy landowners. Thus, like all other public trust resources, the state as trustee must not only protect the corpus of the trust, but also public access to the trust resources. To effectuate these parallel aims Montana has – for more than a century – delegated responsibility to FWP and the Commission. FWP utilizes its scientific and technical expertise to estimate the number of elk that can be viably sustained. These numbers are transferred to the Commission, who then

determines how many elk should be harvested each year. In this way, the Commission, in conjunction with FWP, is determining the number of elk that can viably sustained in Montana as required under § 87-1-323(1), MCA. At the same time, FWP uses multiple management tools with the objective of creating incentives to help Montana's citizens reach and maintain those elk numbers as required under § 87-1-323(2), MCA.

UPOM takes issue with the State's approach, but ignores FWP's trust relationship, the plain language of the statutes and the efforts FWP and the Commission have taken to increase harvest, both by increasing hunting opportunities for landowners and while incentivizing access for the general public. Absent this access and harvest, elk numbers will likely remain higher than FWP's objectives – objectives which in fact determine a sustainable number of elk per unit.

Montana law allows landowners who provide public access to obtain game damage assistance under §§ 87-1-225 and 87-2-520, MCA. Or, if special or unique circumstances exist, they can obtain assistance without any public access. Instead of utilizing these opportunities, UPOM blames the State and claims that conditioning game damage assistance on public access is an unconstitutional conditional and constitutes a "takings." UPOM's argument is belied by the decades of case law specifically allow these types of bargains because they contain the "essential nexus" and "rough proportionality" relevant to this specific inquiry.

ARGUMENT

A. FWP and the Commission historically managed elk for all Montanans.

1. Montana's Ownership and Trust Management of Wildlife

In medieval England, wildlife, and huntable "game," were owned by the Crown. *Wildlife Law: A Primer*, Eric T. Freyfogle et al., 57 (2d ed. 2019). Landowners and hunters could only pursue and harvest game with the Crown's permission. *Id.* at 21. Over time the law evolved, and it was eventually determined that wildlife in England was owned by the Crown in a sovereign capacity, rather than in a proprietary capacity. *Id.* This evolution of law included the determination that landowners could control access to their land (i.e., the right to exclude), but wild animals living on private property were subject to the ownership rights of the sovereign, as a public resource.[1] *Id.*

In the United States, after the Revolutionary War and adoption of the Constitution, the sovereign authority over wildlife passed to the states. United States courts and lawmakers embraced the English wildlife law precedent, confirming that states owned wild animals as a public resource in a sovereign capacity, in trust for the people generally. *See Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842); *McGready v. Virginia*, 94 U.S. 391 (1876). This legal structure became known as the "state ownership of wildlife doctrine" and in 1896 the U.S. Supreme Court officially endorsed the doctrine

[1] The roots of this concept can be traced back to early Greek and Roman civil law. Michael Bean & Melanie J. Rowland, The Evolution of National Wildlife Law 8-9 (3d ed. 1997).

in *Geer v. Connecticut*. 161 U.S. 519 (1896) (overruled by *Hughes v. Oklahoma* 441 U.S. 325 (1979), *on other grounds*). In *Geer*, the Supreme Court found that the state's authority to regulate wildlife existed as "a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good." *Id.* at 529.

State wildlife agencies implement this wildlife trust duty through an array of state wildlife laws and regulations. While state agencies are structured in numerous ways, a commonalty is that the agency is responsible to some sort of politically appointed fish and wildlife commission, board, or advisory council.[2] Similarly, the language delegating authority is "often a sweeping delegation of power to regulate as needed to protect fish and wildlife populations." *See* Biber, 42 Ecology L.Q. at 808-10 at n. 95, 96.

Moreover, most states have requirements for commission membership, such as a specific knowledge of conservation and wildlife issues, political and geographic balance, or requiring that they have experience in related industries. This is also true in Montana, where the commission framework stems from the state's history of wildlife extermination and the public's desire to secure their hard-fought protections for fish

[2] *See generally*, Idaho Dep't Of Fish & Game, Fish and Game Commission, https://idfg.idaho.gov/about/commission (last visited 11/15/2022); Mont. Fish, Wildlife & Parks, Fish and Wildlife Commission, https://fwp.mt.gov/aboutfwp/commission (last visited 11/15/2022); Wyo. Game And Fish Dep't, Game and Fish Commission Meetings, https://wgfd.wyo.gov/About-Us/Game-and-Fish-Commission (last visited 11/15/2022).

and game. *See, e.g.*, Section 2-15-3402(3), MCA. In fact, the initial reaction of residents of the Montana Territory to their disappearing wildlife included passage of protective legislation, creation of a wildlife agency, introduction of revenue-generating licenses, organization of an enforcement effort, and the start of a wildlife restoration program.[3] It was for these narrowly tailored and compelling governmental interests that the Montana legislature eventually entrusted and empowered the Commission to "set wildlife policy" for the state.

2. The Commission has exercised supervisory authority over wildlife for more than 100 years.

The years between 1864, when Montana became a territory, and the establishment of a Game and Fish Commission in 1895, marked the genesis of wildlife conservation in Montana. In 1872, Granville Stuart took a comprehensive wildlife protection bill to the seventh legislative assembly. The bill codified numerous wildlife protective measures into one general law covering large game, game birds and fish. While this was a start, the acceptance of wildlife conservation as a legitimate concern crystallized in 1895, when the Legislature established a Board of Game and Fish Commissioners. *See*, S.B. No. 44, Senate Journal of the Fourth Session of the State of

[3] The first Montana Territorial Legislature (1864–65) passed a bill requiring "...a rod or pole line and hook...to catch trout in the Territory." H.B. No. 104, House Journal Of the First Session of the Legislative Assembly of the Territory of Montana 1864-1865. In 1876 a law was passed prohibiting fishing with explosives. *See also*, *Montana's Comprehensive Fish and Wildlife Conservation Strategy*, Montana FWP, pg. 14 (2005). Starting in 1883 the popular pastime of collecting bird eggs was prohibited, and in 1893 moose and elk hunting seasons were closed statewide. *Id.*

Montana, 1895. The Board was "composed of 3 members appointed by the Governor for 3 years and serving without compensation." The duties were "to secure through and by agents and subordinates the enforcement of all laws of the State for the preservation and propagation and protection of game and fish in the State." *Id.* This law recognized that the largest issue facing Montana wildlife at that time was enforcement. However, the existence of the game and fish committees, combined with the creation of the Game and Fish Commission in 1895, marked a significant transition for wildlife management in Montana.

Evident from this history is that since its earliest days, the Montana legislature delegated significant authority over wildlife management to the Commission, or its predecessor. The first iteration of § 87-1-301(1)(a), MCA, was passed in 1921, and provided,

> The Commission hereby created, shall have supervision over all of the wildlife, fish, game, game and non-game birds and water fowl, and game and fur bearing animals of the state, and shall possess all powers necessary to fulfill the duties prescribed by law with respect thereto. . . It shall have the full power and authority to enforce all the laws of the State of Montana, respecting the protection, preservation and propagation of fish, game, game and non-game birds within the State.

See 1921 Session Laws, Ch. 193, § 4. This gave authority over wildlife management to the Commission.

Seventeen years later in *State ex rel. State Fish & Game Comm'n v. District Court*, 107 Mont. 289, 84 P.2d 798 (1938), this Court upheld the Commissions' broad authority to manage wild game, even when conflicting statutes existed. At issue, there, was whether

the Commission had authority to set the elk season from September 15 to November 30, when a separate statute set the dates from October 15 to November 15. *Id.* In upholding the Commission dates, the Court found that "the legislature intended to give the commission authority to adopt rules and regulations amounting to a modification of existing statutes." *Id.*, 107 Mont. at 292, 84 P.2d at 799.

Two years later, the Supreme Court reaffirmed this broad grant of power in *Rathbone*. There, the Court reversed a criminal conviction for killing an elk out of season. *Id.*, 110 Mont. 225, 100 P.2d 86. In reversing, the Court noted, "The State Fish and Game Commission was created to protect the wildlife of the state." *Id.*, 110 Mont. at 238, 100 P.2d at 91. And that this delegation of power deserved special deference because "laws relating to the protection of fish and game are special enactments pursuant to the police power of the State." *Id.*, 110 Mont. at 239, 100 P.2d at 91. Relying on these standards, the Court also upheld the broad grant of authority delegated by the legislature as to whether an individual may cull elk. *Id.*, 110 Mont. at 247, 100 P.2d at 95.

The State's regulation of wildlife, and Court's holdings, buttressed by Montana's longstanding tradition that landowners purchase wildlife inhabited land at their own risk. As noted in *Rathbone*,

> Montana is one of the few areas in the nation where wild game abounds. It is regarded as one of the greatest of the state's natural resources, as well as the chief attraction for visitors. Wild game existed here long before the coming of man. **One who acquires property in Montana does so with notice and knowledge of the presence of wild game and presumably**

> **is cognizant of its natural habits**. Wild game does not possess the power to distinguish between *fructus naturales* and *fructus industriales*, and cannot like domestic animals be controlled through an owner. **Accordingly, a property owner in this state must recognize the fact that there may be some injury to property or inconvenience from wild game for which there is no recourse.**

Rathbone, 110 Mont. at 242, 100 P.2d at 92–93 (emphasis added).

Following *Rathbone*, this Court continued to support the Legislature's delegation of power. In 1967, for example, the Court upheld the power of the Commission to regulate season setting and hunting on Indian reservations by non-Indians. *State ex rel. Nepstad v. Danielson*, 149 Mont. 438, 440-41, 427 P.2d 689, 691 (1967). Then, in 1971, the Court confirmed the power of the Commission to regulate the process of applying for special elk permits. *State ex rel. Jones v. Dist. Court*, 158 Mont. 67, 72, 488 P.2d 1141, 1143 (1971); *see also*, *State v. Jack*, 167 Mont. 456, 459, 539 P.2d 726, 728 (1975).

Until this point, the general language delegating power to the Commission remained the same – the Commission "shall have supervision" over wildlife. In 1977, though, the Legislature adopted a new version, codified at § 26.103-1, R.C.M. (HB 791) The new language provided, "The Commission shall: (1) *set the policies* for the protection, preservation, and propagation of the wildlife, fish, game, furbearers, waterfowl, nongame species and endangered species of the state. . . as provided by law. . .." *Id.* (emphasis added).

In the first hearing on HB 791, everyone recognized that the Commission had always been the policy making body for wildlife regulation. But the opponents were

worried without additional language, that wildlife would be subject to special interest politics. Former Senator Harry Mitchell testified that without providing special guidance for the commission, the "net effect of [the bill would weaken] the independence of the Commission and, make[] it more responsive to special interests." (Dkt. 33-1, MSWD 14-17.) In his closing, the staff attorney for the governor acknowledged that the Commission would continue to set policy for the state. *Id.*, MSWD 16

HB 791 was eventually heard by the Senate Fish and Game Committee. *Id.*, MSWD 27-29. During that hearing, FWP explained that the bill clearly delineated between the Commission and the Department. *Id.* It would "make the commission in more of a policy setting position." *Id.*, MSWD 28. By this point, the language giving the Commission authority to "set the policies" had been incorporated in HB 791. And there were no opponents at the Senate Fish and Game Committee hearing. HB 791 was ultimately approved by the Legislature and signed into law. *Id.* This is the same language that exists today. *Compare* § 26.103-1, R.C.M. *with* § 87-1-301(1)(a), MCA.

More recently, in 2002, the Montana Supreme Court upheld this grant of authority again. *See generally*, *State v. Shook*, 2002 MT 347, ¶ 25, 313 Mont. 347, 57 P.3d 863 ("Under § 87–1–301(1)(a), MCA, the Commission is charged with setting 'policies for the protection, preservation, and propagation of the wildlife . . . of the state and for the fulfillment of all other responsibilities of the department as provided by law.'")

Based on this history, the very purpose of the Commission is to set the policy

for wildlife in concert with FWP, and this Court has long deferred to the scientific and technical expertise of this body and agency in that quest." *Mont. Power Co.*, ¶ 24.

B. Within this historical context, the Commission and FWP are complying with § 87-1-323, MCA.

UPOM's argument is inconsistent with the statutory scheme delegating elk management to FWP and the Commission. Section 87-1-323, MCA, demonstrates that FWP is first tasked with calculating "sustainable [elk] populations", which are then approved, altered or disapproved by the Commission.

Sections 87-1-323(1), (2) MCA, provide, in pertinent part:

> **Viable elk, deer, and antelope populations based on habitat acreage -- reduction of populations as necessary.**
>
> (1) Based on the habitat acreage that is determined pursuant to 87-1-322, the commission shall determine the appropriate elk, deer, and antelope numbers that can be viably sustained. The department shall consider the specific concerns of private landowners when determining sustainable numbers pursuant to this section.
>
> (2) 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. . ..

Id.

In interpreting this statute, the Court first looks to its plain language. *Mont. Sports Shooting Ass'n v. State* ("*MSSA*"), 2008 MT 190, ¶ 34, 344 Mont. 1, 185 P.3d 1003. If that language is "clear and unambiguous, the statute speaks for itself and there is nothing left for the Court to construe." *Id.* And the Court should not examine the

legislative history of a statute unless a law is ambiguous. *Christenot v. State*, 272 Mont. 396, 401, 901 P.2d 545, 548 (1995). It is the Court's job to "ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Section 1-2-101, MCA. Nor may the court "create an ambiguity where none exists, [or] rewrite a statute, by ignoring clear and unambiguous language, in order to accomplish what [the Court] may feel is a more sensible or palatable purpose." *MSSA*, ¶ 34. "It is a well-accepted rule of statutory construction that the long and continued contemporaneous and practical interpretation of a statute by the executive officers charged with its administration and enforcement constitutes an 'invaluable aid in determining the meaning of a doubtful statute.'" *Mont. Power Co. v. Mont. PSC*, 2001 MT 102, ¶ 24, 305 Mont. 260, 26 P.3d 91.

Using these canons of statutory construction, the District Court did not err in determining that FWP and the Commission have fulfilled their responsibilities under § 87-1-323, MCA.

1. The Commission and FWP work together to determining sustainable elk numbers.

UPOM ignores statutory language contrary to its position. (Dkt. 165, p. 4 ("UPOM selectively reads the statute").) With respect to § 87-1-323(1), MCA, UPOM omits the second sentence, implying that section (1) is composed of a single sentence. *UPOM Br.*, p. 21. This is so it can claim that the Commission, alone, is responsible for determining the sustainable elk numbers k. *UPOM Br.*, p. 21. The second sentence,

though, contradicts UPOM's argument. It places the burden on FWP: "The department shall consider the specific concerns of private landowners when determining sustainable numbers pursuant to this section." Section 87-1-323(1), MCA. If accepted, then, UPOM's argument would require this Court to ignore the second sentence, or "omit what was inserted," in violation of § 1-2-101, MCA.

Rather than omitting the second sentence, the Court can harmonize any ambiguity by finding that FWP is responsible for the initial sustainability calculation, which is approved, altered or rejected by the Commission. Doing so is consistent with FWP's past practices to which deference is appropriate, *Mont. Power Co.*, ¶¶ 25-26. Since this mechanism has never been challenged, FWP's interpretation "should be regarded as a great importance in arriving at the proper construction of a statute." *Id.*, ¶ 26.

This interpretation also comports with the separate entities' expertise. The Commission, for example, is made up of seven members, from seven different regions. Section 2-15-3402(2), MCA. Commission members need not have any particular experience, except one must be "experienced in the breeding and management of domestic livestock." *Id.* Otherwise, commission members must only be "informed or interested and experienced in the subject of fish, wildlife and recreation, and the requirements for the conservation and protection of fish, wildlife, and recreational resources." Section 2-15-3402(3), MCA. The extent a commissioner is "informed or interested and experienced" is not defined, and there are no educational requirements to be on the Commission. Moreover, the Commission members are citizen members,

whose job is not necessarily related to wildlife management. *See e.g.*, *UPOM App.* 575, 6:11-24 (Commission chair has no "specialized experience with Fish & Wildlife" besides being a rancher.)

In contrast, FWP is composed of seven divisions, including a wildlife division. A.R.M. 12.1.101(7). The responsibility of the wildlife division is "to protect, enhance, and regulate the wise use of the state's wildlife resources for public benefit now and in the future." A.R.M. 12.1.101(10). It "collects the scientific information necessary for managing all wildlife species and their habitats and conducts wildlife research and habitat projects." *Id.* In other words, FWP is composed of full-time professional biologists and other scientists who specifically evaluate elk numbers and elk management strategies. As described below, "the Department . . . has the scientific staff and expertise, considers habitat acreage, landowner tolerance and carrying capacity," while the Commission does not. (Dkt. 165, p. 4.) It, thus, makes sense for FWP to first determine sustainable numbers and then for the Commission to adopt or alter those numbers.

This is also consistent with the broader purpose of the Commission. Section 87-1-321, MCA, sets forth the purpose of, *inter alia*, § 87-1-323, MCA, which is to require "the commission, *with the advice of the department*, to manage" elk in a sustainable manner. That is exactly what happens under FWP's longstanding policy – FWP calculates sustainable numbers and advises the Commission, which then adopts or alters those numbers through season setting and license limitations. (Dkt. 165, p. 5.)

2. FWP and the Commission determine sustainable elk numbers each year.

UPOM complains about FWP calculating the sustainable level of elk under § 87-1-323(1), MCA. But again, UPOM "selectively reads the statute and ignores the overlapping responsibilities of the Commission and the Department." (Dkt. 165, p 4). As noted, FWP is tasked with the actual calculation of sustainable number: "The Department shall consider the specific concerns of private landowners *when determining sustainable numbers*." Section 87-1-323(1), MCA. Thus, FWP must make the initial calculation, not the Commission. The Commission then can alter or adopt the numbers that can be "viably sustained." (Dkt. 165, p. 5.)

That is what happened here. FWP calculates the sustainable level of elk and presents it to the Commission. *UPOM App.* 0641-42, 69:18-70:25. As FWP described, "The Department captures those population goals, the sustainable numbers in the plan, and the Department references those in recommendations to the Commission . . . the Commission has picked up the opportunities to amend those sustainable numbers and in other places by their actions the Commission sees those - - - has seen those sustainable numbers as part of their reception of their deliberative process, as part of their reception of the Department's recommendations." *Id.* In other words, the "Commission has – recognizes and through their actions have responded to the population, the sustainable populations that are themselves reflected in the proposals in front of – the management proposals in front of the Commission." *UPOM App.*,

0641, 69:12-16. This satisfies the statute because the "Commission weigh[s] and recognize[s]" FWP's calculations. *Id.*, 69:22-70:1.

UPOM disregards this procedure and instead tries to force the Department and Commission to implement the statute in a specific way. However, § 87-1-323, MCA, does not require any particular method for the Commission to determine elk levels. To that end, it has discretion to adopt them, per se, via season setting. And that's what happened here.

The Commission's deposition testimony further elucidates this process. UPOM cites the M. R. Civ. P. 30(b)(6) deposition in an attempt to pigeonhole the Commission into admitting that it hasn't set sustainable numbers. But again, UPOM misleadingly quotes the testimony. Indeed, UPOM "cherry picks deposition testimony . . . to argue that Defendants have not complied with the statutes regarding establishing a sustainable elk population." (Dkt. 165, 3.) Here, UPOM's quotation leaves out much of the deposition answer:

> Q: Okay. So is it the Commission's understanding that the Commission has actually adopted sustainable population numbers?
>
> A: No. **Interestingly enough, you know, we see the plan primarily as -- we see the plan as guidance for the department in framing its recommendations to the Commission for those things that need Commission approval, like seasons. And we've heard the Commission -- and the plan actually states that the plan doesn't bind the Commission. So they can -- they can in essence endorse that status assessment, that sustainable number objective and the status relative to that same objective that the Department has made in an approval of either a maintenance status quo or a change or they can in essence endorse that status assessment, *that sustainable***

> ***number objective*, that the Department has made in an approval of either a maintenance status quo or a change or they can in essence challenge that with an adjustment to the proposal.**
>
> Q: Yeah. So has the Commission adopted appropriate elk numbers that could viably be sustained?
>
> A: They have not -- they have not adopted those. **They bring those -- those functionally come to bear in their decisions on seasons.**

Compare UPOM Br., pp. 22-23 *with UPOM App.* 590, 35:20-36:17 (bolded language omitted) (emphasis added.)

Continuing, UPOM obfuscates the testimony, and indicts the District Court for only citing FWP's understanding of how the Commission determines sustainable numbers. *UPOM Br.*, p. 23 (the court cited "testimony concerning FWP's understanding.") It asserts that FWP's understanding was the that the Commission sets sustainable numbers *sub silentio*, but that the Commission had a different understanding. *Id.* Importantly, Quention Kujala was the 30(b)(6) deponent for both the Commission *and* FWP. To be sure, the Court cited testimony from Mr. Kujala as an FWP deponent, but in his role as the Commission deponent, Mr. Kujala adopted his answers from the FWP deposition. *UPOM App.* 589, 35:1-19. So, the mere fact that the District Court relied on Mr. Kujala's FWP testimony, when his Commission testimony was identical, does not undercut its Orders.

UPOM continues to ignore much of Mr. Kujala's testimony, where he notes that the Commission adopts sustainable numbers by endorsing FWP's calculations:

> Q: So is it accurate to say that the Commission has never determined the

> appropriate elk numbers that could be viably sustained?
> . . .
>
> A: The Commission – the Commission has functionally endorsed those in its actions on –
> . . .
>
> Q: But it has never actually determined them?
> . . .
>
> A: The mechanics of determining that has been the Department.
>
> Q: So yes, the Commission has never determined [sustainable levels].
>
> A: The mechanics of determining that has been the Department and then that is essentially vetted against -- vetted by the Commission through its decision on regulations.

UPOM App. 590-91, 36:25-37:18. Nothing prohibits the Commission from adopting the numbers determined by FWP as the mechanism for complying with § 87-1-323(1), MCA.

Ultimately, FWP and the Commission each have the responsibility to determine sustainable numbers and there is no statutory guidance or prohibition on the order or manner in which those numbers are calculated. Accordingly, the District Court did not err.

3. FWP and the Commission fulfilled their duty to manage elk with the goal of reaching sustainable numbers.

Because UPOM misapprehends FWP and the Commission's obligations, its argument that FWP and the Commission did not fulfill their responsibilities to manage and maintain must also fail. *See* UPOM Br. at 7-12.

UPOM FWP and the Commission for failing to manage elk to the number that is considered "sustainable." It cites § 87-1-323(2), MCA, to suggest that FWP is required to maintain elk populations at or below sustainable population number. But § 87-1-323(2), MCA, only requires that FWP manage elk "with *the objective* that the population of elk . . . remain[] at or below the sustainable population." (Emphasis added.) "Objective" in this statute is used as a noun and means "something toward which effort is directed; an aim, goal or end of action." Merriam-Webster, online dictionary, https://www.merriam-webster.com/dictionary/objective (last accessed July 2, 2025). Under the plain language, then, FWP must manage elk with the "goal" that elk numbers are at or below the sustainable population, not that the numbers actually are at or below the sustainable population. (Dkt. 165, p. 10.) This makes sense, given the inherent difficulties and natural season-to-season variations in elk populations.

UPOM ignores this plain reading and argues that FWP has not "manage[d] to sustainability." *UPOM Br.*, p. 27. In support, UPOM cites to Mr. Kujala's testimony to suggest that FWP is not managing elk with the objective of reaching sustainable numbers. But that's exactly what FWP testified to: "we're not bound to manage [to sustainable numbers]. We're supposed to manage with that objective in mind." *UPOM App.*, 616, 20:5-7. Continuing, Mr. Kujala testified that he believed that FWP managed elk with the sustainable numbers in mind. *UPOM App.* 616-17, 20:1-21. As such, FWP is managing elk with "the objective" that numbers remain at or below sustainability. UPOM has pointed to no evidence in the record, other than the fact that elk numbers

on private property are above objective levels, to suggest that FWP is not managing elk with the objective of maintaining numbers at or below a sustainable level.

Similarly, UPOM attempts to play both sides of the coin. On one hand, it argues that because the "objectives" on a district-by-district basis are not met, this constitutes *per se* violations of the Commission's goal to keep numbers below "sustainable" levels." Then, out of the other side of its mouth, it argues that the Commission and FWP have never actually established those levels and thus, are violating the statute in a different way. In contrast, the elk objectives on a district-by-district level either constitute the Commission and FWP's discretionary interpretation of "sustainable populations" or they do not. UPOM has not even attempted to draw this connection, and it cannot do so in retrospect now.

Moreover, even a cursory review of FWP's efforts demonstrates that it is managing elk with the objective of reducing elk populations in over-objective districts. UPOM admits as much: "Defendants have acknowledged and attempted to address the issue of overpopulated districts. . ." (Dkt. 107, p. 8.) In managing with the *objective to* meet and maintain sustainable numbers, FWP has taken numerous actions. The Department has regularly tried to liberalize antlerless elk harvest, *UPOM App.*, 635-37, 58:24-62:5; it has prioritized public access in overpopulated districts through the block management program, EHAs and PALAs, *Id.*, 638-40, 63:14-66:17; 677-81, 142:8-148:21; and it has increased landowner access to licenses or permits, as well as allowing game damage hunts. *Id.,* 672-77, 131:23-136:23; 139:20-141:16. These types of

adjustments occur regularly, with FWP making changes in, at least, 2012, 2015, 2017, and 2021. *Id.*, 617-19, 21:11-25:21; 658, 103:2-14; 659-661, 106:4-110:1; 709-11, 204:20-208:13. And every other year the Commission adopts new regulations in an effort to reach the objective levels for each district. *Id.*, 636-47, 60:12-23. In all, FWP and the Commission are doing their jobs.[4] And UPOM has presented no evidence to the contrary.

The District Court, therefore, correctly determined that FWP is managing elk with the objective of reducing and maintaining elk numbers to a number that can be viably sustained.[5] *Kostelecky v. Peas in a Pod LLC*, 2022 MT 195, ¶ 18, 410 Mont. 239, 518 P.3d 840 (non-moving party cannot rely on "mere denial, speculation, or pleading allegation," it must "set out specific facts" showing the existence of a genuine issue of material fact.)

C. Montana's game damages assistance programs do not include an unconstitutional condition.

UPOM's "takings" arguments have been ever-evolving. First, after Intervenors

[4] Elk management is a collaboration between various stakeholders, including UPOM. *UPOM App.* 730-31, 248:4-249:7. And there is no disagreement reducing antlerless elk through harvest is the most effective way to reduce elk populations. To that end, FWP has liberalized antlerless licenses, but without harvest, the population is not reduced. The biggest impediment to harvest is a lack of public access to the elk, which UPOM refuses to grant.

[5] UPOM also complains that FWP goes "through all of the factors in 323 plus additional ones." *UPOM Br.*, p. 28. But that's exactly what § 87-1-323(2), MCA, allows, when it provides a non-exhaustive list ("may include, *but are not limited to*) of management tools.

moved for summary judgment on Count VI, UPOM argued, it "is not asserting that their members' property has been taken…" (Dkt. 65, p. 2.) It then argued the District Court should "disregard" all of Intervenors takings arguments, which were specifically related to the cases it now cites on appeal. *Compare* Dkt. 65, p. 4 *with UPOM Br.*, pp. 32-43. In that response brief, UPOM further alleged that one of the rights being taken was their members "constitutional *right to protect* property from game damage", a claim it has now abandoned. (Dkt. 65, p. 5 (emphasis added).) Regardless, UPOM alleges, here, that the conditional provisions in §§ 87-1-225 and 87-2-520, MCA, violate the unconstitutional conditions doctrine.

Nevertheless, no doubt exists that "Takings Clauses" of both the Federal and Montana State constitutions prohibit taking private property without just compensation - with takings cases generally falling into three categories. The first is a direct physical taking of private property without just compensation by a governmental authority. The second is "regulatory taking," which concerns onerous government regulation amounting to direct appropriation of the property. *Pennsylvania Coal Co v Mahon*, 260 U.S. 393, 412 (1922). And third, is where a condition, or "exaction," imposed on a landowner by a governmental authority to obtain a governmental approval to use the landowner's property is so burdensome that it amounts to a taking of the property. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013). At issue, here, is only the third category or the "exaction." *UPOM Br.*, ¶¶ 32-43.

With respect to exactions, the Court must determine whether the exaction has a

sufficient nexus with the land use or harmful effects of the land use at issue, *Nollan v. Cal. Coastal Com*, 483 U.S. 825, 831 (1987), and whether the exaction is roughly proportional to the use or the public burdens it may create, *Dolan v City of Tigar*. 512 U.S. 374, 385 (1994). Therefore, *Nollan* and *Dolan* "involve a special application" of this doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits. *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 547 (2005); *Dolan,* 512 U.S., at 385 (invoking "the well-settled doctrine of 'unconstitutional conditions'"). As viewed by the briefing, the parties agree this is the most closely analogous set of circumstances to the issues presented here. As described in *Koontz,* the Court's decisions in those cases reflect two realities of the unconstitutional condition doctrine in the land use context.

The first is that land-use problems "are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take." *Koontz,* 570 U.S. at 604-06. The second is that "land uses threaten to impose costs on the public that dedications of property can offset." *Id.* As the Supreme Court explained "[i]nsisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack." *Id.* (citation omitted). Thus, "*Nollan* and *Dolan* accommodate both realities by allowing the government to condition approval of a permit on the dedication of property to the public so long as

there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal." *Id.* Authorities can, therefore, "insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in 'out-and-out ... extortion' that would thwart the Fifth Amendment right to just compensation. *Id.* In short, the government may choose whether and how a person "is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts." *Id.*

In addition, *Cedar Point* clarifies the application of the Takings Clause, particularly in the context of government-mandated physical access to private property. *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). It expands the concept of *per se* physical takings by addressing situations where the government, through regulation, grants a third party a right to physically access private property, even if that access is temporary or limited. *Cedar Point* at 143. While *Cedar Point* is relevant, UPOM cannot fault the District for failing to cite the same, when no party ever raised the case to it below. *State v. Zakovi*, 2005 MT 91, ¶ 28, 326 Mont. 475, 110 P.3d 469 (not the Court's job to conduct legal research or argument on behalf of a party).

Even if UPOM had argued *Cedar Point*, it would change nothing because *Cedar Point* leaves intact the relevant inquires under Steps Two and Three, as described by UPOM. *UPOM Br.*, pp. 39-43. Thus, while UPOM recognizes that Step One is satisfied

(i.e. the governments exaction constitutes a *per se* taking), it completely fails the proper analysis on Steps Two and Three and its takings claim must fail.

Specifically, as UPOM admits "the government [may permissibly] condition the use of one's property on agreeing to an exaction, or the dedication of one's other property to the public use, "so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal." *Koontz*, 570 U.S. at 605-06. This is the critical analysis UPOM omits. It does so because "when the exaction advances a legitimate state interest and does not deny an owner of economic viability, then the exaction is not an unconstitutional condition." *Nollan v. Cal. Coastal Com*, 483 U.S. at, 834-35.

At issue in this case is the nexus between the condition of providing public access to receive public funds to help manage public wildlife on private land and the government's pursuit of its legitimate interest in mitigating the harm being externalized on the public by UPOM restricting access to sovereign resources. Next, the Court should ask if the burden of public access is roughly proportional to the benefit being derived both by the public and landowners. What emerges from the exercise is an answer in the affirmative.

1. A sufficient nexus between requiring public access for game damage assistance and the social costs of the of allowing such access because elk exists.

In failing to recognize that the State has other legitimate interests than assisting private landowner, UPOM's analysis derails. ("Furthermore, in doing so, the condition

is not tightly tailored to address the government's interest: sustainability. ") Br. at 41. UPOM most egregiously misunderstands or misrepresents that Montana has other legitimate interest that are not contained in the specific statute it challenges; namely, that elk are managed for all Montanans because they are a public trust resource.

"[N]owhere has the idea of wildlife as a commonly shared resource, a concept known as the public trust, been as legally and legislatively secure as it is in [Montana]." Williams, Martha, *Where the Public Trust Concept Began*, Montana Outdoors, p. 4 (Mar.-Apr. 2020) (Williams was the director of FWP at the time). This public trust exists to prevent the extinction of wildlife and access to elk for all Montanans. *Id.* To that end, FWP and the Commission must "protect and manage [wildlife] for the common good, today and far into the future." *Id.*

This Public Trust concept has its roots in both the 1972 Constitution, and centuries of history. Under the 1972 Montana Constitution, Montanans are guaranteed the fundamental right to have access to a clean and healthful environment. Mont. Const. Art. II, § 3. This right includes the corresponding obligation on the part of the State to protect and enhance the environment, while preventing "unreasonable depletion and degradation of natural resources." Mont. Const. Art. IX, § 1(3). The State must also ensure that Montanans' right to "harvest wild fish and wild game animals is a heritage that shall forever be preserved to the individual citizens of the state." Mont. Const. Art. IX, § 7. Taken together, these constitutional rights create a public trust over wildlife

such that it is managed for the benefit of *all Montanans*, and not a few wealthily landowners who want bull elk permits. *See, Supra,* § A.

Montana's public trust wildlife management strategy appeared over 100 years ago. In 1923, this Court adopted that same rationale to conclude that elk, are not "subject to private ownership except in so far as the state may choose to make them so." *Rosenfeld v. Jakways*, 67 Mont. 558, 216 P. 776 (1923). That's because wildlife is managed "for the use and benefit of the people generally," *Id.* Seventeen years later, this holding was reaffirmed in *Rathbone*, 110 Mont. at 238, 100 P.2d at 91. Over the next 50 years, this Court regularly confirmed that elk are managed "for the benefit of the public at large." *State ex rel. Sackman v. State Fish & Game Comm'n*, 151 Mont. 45, 53, 438 P.2d 663, 667 (1968); *Heiser v. Severy*, 117 Mont. 105, 117, 158 P.2d 501, 505 (1945) ("The state holds such ownership in its sovereign capacity for the use and benefit of the people generally. The wild life of the state is one of its most prized and valuable assets"); *State ex rel. Visser v. State Fish & Game Comm'n*, 150 Mont. 525, 530, 437 P.2d 373, 376 (1968); *State v. Fertterer*, 255 Mont. 73, 80, 841 P.2d 467, 471 (1992) ("State's ownership in wild game for the use and benefit of its people.") *overruled on other grounds State v. Gatts*, 279 Mont. 42, 51-52, 928 P.2d 114, 120 (1996) (refusing to overrule whether wild animals are public property.) And most recently, in 2008, this Court quoted *Rosenfield* with approval: "That the ownership of wild animals is in the state, held by it in its sovereign capacity for the use and benefit of the people generally[.]" *Kafka v. Mont. Dep't of Fish, Wildlife & Parks*, 2008 MT 460, ¶ 50, 348 Mont. 80, 201 P.3d 8.

Montana's recognition of a public trust in wildlife is consistent with cases from across the country, including "Washington, Colorado, Oregon, Indiana, Texas, Michigan and Alabama." *Fertterer*, 255 Mont. at 80, 841 P.2d at 471 *citing State v. Gillette*, 621 P.2d 764, 767 (Wash. App. 1980) *and Collopy v. Wildlife Com., Dep't of Nat. Res.*, 625 P.2d 994, 999 (Colo. 1981); *see also Ridenour v. Furness*, 504 N.E.2d 336, 340 (Ind. Ct. App. 1987); *Wiley v. Baker*, 597 S.W.2d 3, 5 (Tex. Civ. App. 1980); *Glave v. Mich. Terminix Co.*, 407 N.W.2d 36, 37 (Mich. App. 1987). This widely accepted public trust over wildlife recognizes that "the state has a duty to exercise the legitimate state/public concerns for conservation, protection, and regulations of wildlife that underlie 'the 19th-century legal fiction of state ownership.'" *Ctr. for Biological Diversity, Inc. v. California Dept. of Fish & Wildlife*, 166 Cal. App. 4th at 1362 n.14; *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 392 (1978); *Lacoste v. Dep't of Conservation*, 263 U.S. 545, 549 (1924). It is in this context, that each of UPOM's claims on appeal must be viewed in the context that the State has a legitimate interest in managing elk for the benefit of all Montanans, and the exclusion of the public from the land imposes a significant burden on this interest. As such there is a sufficient nexus under *Nollan* and *Dolan*.

2. Because elk are public resources held in trust, there is a rough proportionality between requiring access and the benefit of game damage assistance.

Ultimately, UPOM asks this Court to declare Montana's Game Damage Assistance program as unconstitutional because it conditions public assistance on landowners providing a public benefit – public access. This issue finds close analogy

with stream and beach access, both which suffer from similar conditions inherent in private land ownership. To that end, if the State wanted to condition building permits on providing public access to a river over and across private property it could do so, even though that exaction constitutes a *per se* taking of the right to exclude. Much like in those cases, there is a rough proportionality between requiring access and providing game damage assistance.

The proportionality, here, is significantly less onerous that the cases relied on UPOM. For example, in *Dolan* the petitioner was required to dedicate a portion of her property to flood control and traffic improvements. 512 U.S at 377. She was also required to place to allow recreation on the flood control easement. *Id.*, at 393. The Court agreed that the City had a legitimate interest in controlling flood hazards, but that the Petitioner was already required to set aside 15% of the land as open space. *Id.* Because the city demanded more, and public access, its exaction was not roughly proportional to the legitimate interest in reducing flooding problems. *Id.*

In contrast, here, UPOM complains of an overabundance of elk on its members property and wants to receive game damage assistance to facilitate their removal or relocation. In order to receive the game damage assistance (i.e. licenses to kill elk from the State, like the permit in *Dolan*), though, UPOMs' members must provide some level of public access, which can be as few as three hunter days. Section 87-2-513, MCA. And in some cases, no public access is even required. Section 87-2-513(7)(a), MCA. Not only that, but the allowance of public hunting is one of the most successfully methods to

remove or relocate elk from property. So, unlike the recreational access in *Dolan*, the public access required to receive game damage assistance is roughly proportional to UPOM's members having to give up some of their right to exclude.

As noted by one court, requiring access to public beaches may inevitably harm neighboring lands, but that "damage to the property rights of upland owners" does not result in an unconstitutional exaction because providing public access to public beaches shares a nexus with mitigating harm from private landowners controlling that access to the exclusion of the public. *Grupe v. Cal. Coastal Com*, 166 Cal. App. 3d 148, 171 (1985); *Miramar Co. v. Santa Barbara*, 143 P.2d 1, 2-3 (Cal. 1943). Those cases, though, went beyond the condition involved here, because demanding a public easement for access is a physical exaction of title to land (as described in *Cedar Point*), not merely a condition for an incentive or benefit through funding mechanisms, as is the case with Montana's Game Damage Assistance program. *See, e.g.*, *Madison v. Graham*, 126 F. Supp. 2d at 1324-25. Thus, there is a nexus between the goal of reducing elk numbers to benefit private landowners and requiring public access.

3. There is no unconstitutional condition because the State is encouraging, not requiring public access.

As explained by the U.S. Supreme Court, "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Rust v. Sullivan*, 500 U.S. 173, 193 (1991). While *Rust* concerned free speech, its holding is instructive. At issue, there, were

regulations under Title X that limited the ability of Title X fund recipients to engage in abortion-related activities. In upholding the regulations against an unconstitutional conditions argument, the Court noted that prohibiting the government from funding programs "to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect." *Id.*, 500 U.S. at 194. "[W]hen the Government appropriates public funds to establish a program, it is entitled to define the limits of that program." *Id.* And the government was "not denying a benefit to anyone but [rather] is insisting that public funds be spent for the purposes for which they were authorized." *Id.*, 500 U.S. at 196.

The same is true here. The legislature is spending funds as part of its police power to regulate wildlife and manage it in a sustainable way so that all Montanan's have access to the resource, not just large landowners. UPOM does not dispute that State regulation of wildlife is within its police power, nor could it. *UPOM Br.*, p. 39. Under that power, the State has broad discretion to allocate funding and determine how to manage elk. *See, e.g.*, *Maitland v. People*, 23 P.2d 116, 117 (1933). Here, it has chosen to "define the limits of the program" to, generally, only those property owners that allow public access. Section 87-1-225, MCA; *see also*, *Regan v. Taxation with Representation*, 461 U.S. 540, 545 (1983) (upholding congress' power to refuse to subsidize lobbying activities of 501(c)(3)'s).

The Legislature determined as a matter of public policy that it wants to promote

public access for hunting in recognition of the fact that a large majority of necessary habitat for wildlife is controlled by a small group of private landowners, to the exclusion of all others. One of the options it had to pursue this legitimate goal is by using game damage assistance as the mechanism. As described above, this is not an unconstitutional condition on the game damage assistance benefit because there is a strong nexus between the need, the goal, and the mechanism. Similarly, providing public access to public resource is more than roughly proportional to mitigating the access problem by incentivizing needed access with a benefit that is provided for with public funding. Further supporting this conclusion is the reality that that management of wildlife and access to the same is a valid and appropriate exercise of Montana's police power and spending authority. *Rust*, 500 U.S. at 198 *citing Regan*, 461 at 548.

CONCLUSION

UPOM seeks to use this lawsuit to upend wildlife policy in Montana and to privatize a public trust resource for their benefit. Not only do they challenge FWP's technical and scientific expertise in sustainably managing elk numbers, but they more harmfully challenge the requirement for public access as a predicate to game damage assistance as violation of their constitutionally protected rights in private property. As described above, The District Court correctly held that neither of their arguments render FWP's and the Commissions actions unlawful, nor are the rules and statutes unconstitutional.

//

DATED this 17th day of July, 2025

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Garamond text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word for Mac 2016 is 9,993 not averaging more than 280 words per page, excluding caption, certificate of compliance, and certificate of service.

By: /S/ROBERT FARRIS-OLSEN
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I hereby certify that a true and accurate copy of the foregoing Brief of Appellant was mailed via e-service on the 17th of July, 2025, to:

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I, Robert M. Farris-Olsen, hereby certify that I have served true and accurate copies of the foregoing Brief - Intervenor to the following on 07-17-2025:

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Electronically signed by Amy Kirscher on behalf of Robert M. Farris-Olsen
Dated: 07-17-2025