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 JUDICAL DISTRICT COURT,
FERGUS COUNTY, HON. TODD GREGORY PRESIDING
CASE NO. DV-14-2022-0000036

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INTRODUCTION

The United Property Owners of Montana (UPOM) filed suit against the Montana Department of Fish Wildlife and Parks (Department) and the Montana Fish and Wildlife Commission (Commission) (collectively the State) ostensibly concerning elk population numbers and their effect on private property. UPOM claims that the State has never set a sustainable elk population, failed to implement a sustainable population number in its regulatory activity, and has unconstitutionally required some level of public hunting for game damage assistance from the State.

UPOM's claims misstate and ignore the State's practices and programs. Moreover, UPOM's theory and requested relief, if adopted by this Court, contrary to the district court's findings, would upend decades of fundamental wildlife management practices, and enable private landowners to harvest bull elk at will *outside* of any population management regulatory structure. As UPOM's position is factually and legally incorrect, this Court should affirm the district court's well-reasoned decision.

STATEMENT OF THE ISSUES

1. Whether the Commission fulfilled its duty in § 87-1-323(1), MCA, to determine the appropriate number of elk that can be viably sustained through its season-setting determinations based on Department recommendations, and,

relatedly, whether the Department fulfilled its duty in § 87-1-323(2), MCA, to implement programs and take necessary actions with the objective that Montana's elk population remains at or below a sustainable population.

2. Whether the optional programs provided in §§ 87-1-225 and 87-2-520, MCA, which require public hunting to be eligible for certain landowner game damage assistance, are constitutional when the programs have a direct nexus and relationship to a public interest and do not require physical occupation.

STATEMENT OF THE CASE

In 2022, UPOM filed suit against the Department and the Commission. Together, the Department and the Commission are statutorily responsible for managing Montana's wildlife, including elk. UPOM requested the district court: (1) declare that the Department and the Commission have failed to comply with their statutory duties under § 87-1-323, MCA; and (2) declare unconstitutional Montana's longstanding game damage programs under §§ 87-1-225 and 87-2-520, MCA.

The parties litigated a myriad of procedural and substantive motions resulting in the district court granting summary judgment in favor of the State on all claims. UPOM appealed those orders (Docs. 164, 165 and 171, and the final judgment).

STATEMENT OF FACTS

While Montana's elk population has recently stabilized, it is undisputed the last 30 years have seen significant population growth. *Id*. Nonetheless, the State has proactively pursued management solutions, aimed at maintaining a sustainable population. Those have included adoption of liberalized hunting seasons, advocating and incorporating shoulder seasons, leveraging an increase in the number of elk an individual hunter can take, offering increased payments for access program participants, improving game damage technologies provided to landowners, and expanding access programs designed to increase elk harvest. *See* below and Doc. 110.01 (Kujala Decl. ¶ ¶ 5-10). The State has thereby pursued every population reduction tool that is *scientifically supported*. Doc. 165 at 1011.

UPOM's frustration is rooted in bull elk harvest restrictions. Doc. 110.06 at 35:1-17. There is no evidence in the record, however, that allowing increased bull harvest, without changes to hunting pressure on private refuges where hunting is restricted by the landowner, will meaningfully impact the statewide elk population. As determined by the district court, the Department and the Commission have managed Montana's elk population with the objective that it remains at or below a sustainable number. *Id.*

Historical Background

In the early 1900's, Montana's elk population had nearly collapsed. Due to robust twentieth century reintroduction programs, Montana's elk population expanded significantly. Doc. 110.07 (2005 Elk Plan at 4-5). With this statewide expansion and dispersal came management challenges, especially with some landowners and agricultural producers. Simultaneously, the public and the outfitting community enjoyed improved hunting opportunities from this revitalized natural resource. *Id*. at 4-15.

Over the years the Department recognized and highlighted that elk population management's "biggest issue" was "the decline in public hunting access." Doc. 110.01 (Kujala Decl., ¶ 4). The Department reiterated this well understood obstacle in its 2005 elk plan (Plan), stating that "[a]ny elk hunting season or regulation, no matter how innovative, will not successfully achieve its intended harvest results without adequate hunter access to elk." Doc. 110.07 (2005 Elk Plan, at 25). Even 17 years ago, the agency was confronted with the reality that roughly 35% of the state's elk may be on private lands inaccessible to the general public. *Id.* at 25, 64. Recent studies have determined that over three million acres of Montana's landscape are currently 'landlocked', with no public access available. Doc. 110.01 (Kujala Decl., ¶ 4). The undisputed biological reality is that elk, faced with human disturbance and hunting pressure, seek refuge upon land with minimal

human presence. *Id*. at ¶ 9; Doc. 124.10. Thus, many well-studied regulatory efforts aimed at reducing local populations proved unsuccessful, as harvest was repeatedly frustrated and prevented by a lack of access. *Id.* As the following sections and the district court record unequivocally demonstrate, the State has sought creative and inclusive solutions to address landowner concerns, mitigate conflict, and manage with the objective to keep elk populations at or below sustainable levels. That we are not there yet does not indicate the State is not complying with elk-management requirements.

The State's consistent population management actions under HB 42

In 2003, the Montana Legislature passed House Bill ("HB") 42, enumerating specific Commission and Department duties regarding elk population management. At the time, many believed Montana's elk were causing a disproportionate amount of damage to agricultural landowners and that the State needed to exercise more aggressive management. To address this concern, the Legislature required the State to follow a specific administrative process. First, the Commission is tasked with calculating the "total acreage" serving as elk habitat each odd-numbered year. Mont. Code Ann. § 87-1-322. Then, based on the habitat acreage, the Commission determines "the appropriate" number of elk that can be "viably sustained." Mont. Code Ann. § 87-1-323. Simultaneously, the Department must "consider the specific

concerns of private landowners when determining sustainable numbers pursuant to this section." *Id.*

After the Commission and the Department determine the sustainable population number, the Department shall "implement, through existing wildlife management programs, necessary actions with the objective" that elk populations remain "at or below the sustainable population." *Id.* The statute then goes on to list, as discretionary tools available to the Department: (1) liberalized harvests, (2) game damage hunts, (3) landowner permits, and (4) animal relocation. *Id*. Relevant to UPOM's challenge, the law concludes with the Department's charge to "manage with the objective" that the elk population remains at or below the sustainable population number by January 1, 2009. *Id*.[1]

The record demonstrates the State's immediate and consistent compliance with HB 42's mandates to establish a sustainable population number and then manage with the objective to maintain that population level. Specifically, the State has incorporated into the elk season setting process its duties to: (1) determine a habitat acreage, and (2) establish a sustainable population level. Doc. 165 at 3-4. This cycle enables the State to revisit previously established sustainable population

[1] Prior to each season setting process, the Department also posts a population status update, which includes a color-coded map showing where populations are in relation the elk management plan objectives. An example of this map is in UPOM's Opening Brief, at page 12.

numbers, and adjust them based on biological changes, shifts in landowner tolerance, and public input. *Id.*

Ahead of each season-setting process, the Department publicly posts a map of available elk habitat in Montana. Doc. 110.01 (Kujala Decl., ¶ 5). Shortly thereafter, the Department publishes its season-setting recommendations to the Commission. *Id.* These recommendations represent HD specific targets for both bull/antlered and cow/antlerless elk harvest. The recommended quotas, reflected as the number of licenses available in a specific HD, are determined after the Department staff conduct hunter and population surveys and in accordance with the Department's existing management plan. Doc. 110.01, ¶ 4. The quotas reflect a range of harvest that is predicted to produce a sustainable population number consistent with available elk habitat. *Id.* ¶ 5.

After considering the Department's recommendation package and public comment, the Commission either accepts or modifies the Department's proposal. The Department will then manage under the adopted regulations for (typically) two years, in accordance with § 87-1-323, MCA. Doc. 110.01 (Kujala Decl. ¶¶ 4-7). Notably, this process has been in place for decades, with UPOM consistently and substantively participating. Doc. 13.00, First Amend. Cmplt., ¶¶ 36-43. As found by the district court, the State's practices comport with the law and incorporate Department staff expertise, and public (including landowner) opinion. Doc. 165 at

4. The following discrete season-setting actions demonstrate how this process works, and how it executes HB 42's directives.

Examples of the State implementing HB 42 via season setting

In 2004, the Department's season setting regulation recommendations and Commission adoptions included: (1) an increase in antlerless/cow harvest opportunity on the general elk license in many southwest Montana HDs, (2) extension of the antlerless season in portions central Montana, (3) authorization of the newly available resident antlerless elk license ("A9/B12") in central and eastern Montana, and (4) increased antlerless permits in eastern Montana. Doc. 110.02 at 9376-9377. These changes were designed to boost harvest in areas with high elk populations by targeting the ultimate population driver: cow elk. Doc. 110.01, ¶ 7. Increasing elk harvest enables the State to keep elk populations at a sustainable number.

In February 2005, the Department recommended, and the Commission adopted, the following liberalizations to the elk harvest regulations: (1) extension of the general elk season in HDs 204 and 261 in western Montana, (2) the issuance of 250 A9 licenses for rifle hunting in HD 290 due to landowner concerns, and (3) the creation of a new HD (HD 309) upon landowner request. Doc. 110.02 at 10148-10151. In February 2006, the Department recommended, and the Commission adopted, (1) 25 additional A9/B12 archery licenses in HD 283-80, (2)

an increase in antlerless permits in Region 3, and (3) the extension of the antlerless season in the Gallatin Valley. *Id*. at 10777-10781. Again, these management strategies and adoptions were aimed at maximizing cow harvest in areas with high elk populations to keep elk populations at the sustainable number. Doc. 110.01, ¶ 7.

In 2007, the Department recommended, and the Commission adopted reductions in bull elk archery opportunity in multiple hunting districts, while concurrently expanding cow elk harvest opportunities. Doc. 110.02 at 11876-11922. These archery bull permits were comparable to the previously existing bull elk permits for firearm hunting in these HDs. At the December 2007 Commission meeting, UPOM's current President, Mark Robbins, gave public comment. The minutes summary states Mr. Robbins felt as though the reduction in archery permits were a "threat to his private ownership" and would "reduce public access. The Bowhunter's Association is trying to kick out the nonresidents." *Id.* at 11883, 11885. Mr. Robbins' wife, Deanna, also gave public comment and stated, "Non-residents and outfitters are being singled out. Limited permits would do little to affect the situation. The Department has failed to sit down with private landowners." *Id*. at 11883. Neither individual mentioned crop or property damage, nor did they assert that the State was violating any population management duty by reducing archery permits in one region. *Id*. at 11883, 11885.

Alongside these new restrictions in bull elk archery opportunity in Region 4, liberalizations occurred for other license types. For example, the Commission approved unlimited cow elk A9/B12 archery licenses for much of Region 2, increased the number of either-sex permits in Region 3 HDs, increased the number of antlerless permits in HD 417, and issued 300 A9/B12 licenses in HD 417. *Id.* at 11887.

In 2010, the Department recommended, and the Commission adopted a broad replacement of antlerless permits with antlerless B licenses. This change increased the potential for hunters to take two elk because an individual hunter had two licenses instead of one license and one qualifying permit, which only allowed a hunter to harvest one elk. *Id*. at 16742.

One of the most effective and prescribed means to reduce elk population has been the adoption of shoulder seasons targeting cow elk. In 2015, the Department recommended, and the Commission adopted shoulder seasons targeting increased antlerless harvest in over objective HDs. *Id*. at 1203. Shoulder seasons, as the name suggests, extend the season in a HD at both ends. At its broadest, an HD can be open for hunting between August 15 and February 15. The Department was clear in its rationale that shoulder seasons were being recommended to "increase antlerless harvest in order to reduce the elk population to within objective and disperse large aggregations of elk" across HDs. *Id.* at 1159. Additional shoulder seasons in

multiple HDs were adopted as an additional tool aimed at increasing harvest, reducing elk herds, and improving overall population management. Doc. 110.01 (Kujala Decl. ¶ 7). The State's adoption of shoulder seasons was one of the more recent strategic experimentations of different season structures intended to keep the population at a sustainable number.

From 2016 to 2022, shoulder seasons were used in 44 to 54 HDs depending on the year. *Id.* As of the 2022 hunting season, 38 percent of HDs use shoulder seasons (22 percent of HDs have both early and late, 6 percent offer early only, 10 percent offer late only). *Id.* General elk licenses, limited B licenses, and unlimited B licenses are used in different HDs to allocate antlerless harvest during elk shoulder seasons. *Id.* In 2019, the Montana legislature amended § 87-2-501, MCA, to allow an individual hunter to take an additional elk during an adopted shoulder season. *Id.* This, for the first time, allowed a single hunter to harvest three elk in a single license year. *Id.*

These targeted actions demonstrate a concentrated effort to attack the source of elk population growth: cow elk. It is undisputed that the Commission has repeatedly authorized an unlimited number of cow elk licenses in overpopulated HDs. *Id.* The 'tool' UPOM asks for, on the other hand, unlimited bull opportunity, would not meaningfully reduce the elk population. Doc. 165 at 11; Doc. 110.01 (Kujala Decl. ¶¶ 7, 9).

The district court record thus shows that the Commission has determined sustainable population numbers through the season setting process. The Department has then implemented these liberalized seasons, including shoulder seasons, to reduce elk populations. Doc. 165 at 10. Contrary to UPOM's speculation otherwise, the season setting process, and the sustainable population number, directly influence how the Department executes its 87-1-323(2), MCA, duties. UPOM's argument that the State has sat idle and allowed elk populations to swell is unsupported by the record and biology.

The Game Damage Program

The Department's game damage program represents a longstanding and critical compromise between Montana landowners and sportsmen designed to prioritize conflict mitigation and access. Doc. 110.01 (Kujala Decl. ¶ 8); Doc. 164. Contrary to UPOM's assertion, the game damage program was not designed as a population control scheme. Doc. 165 at 6. Instead, the program consists of a large array of non-lethal and lethal dispersal opportunities, and conflict mitigation tools. Doc. 110.01 (Kujala Decl. ¶ 8). Through the program, the Department may issue kill permits and supplemental game damage licenses, relocate elk via hunting pressure, and provide landowners non-lethal dispersal tools. Doc. 110.04, Ex. D at 136:15-138:22; 141:17-142:01; 115:22-127:21; 261:01-265:11.

For over 35 years, the program's eligibility has hinged on whether a landowner allowed public hunting opportunities. Mont. Code Ann. § 87-1-225. This requirement recognizes the importance of increasing public access to elk on private land to reduce elk numbers. At a local scale, the game damage program also creates an opportunity to engage landowners in the benefits of using public hunting as the most effective management tool. Absent an exception for special circumstances contemplated in § 87-1-225(2), MCA, landowners have access to Department-funded tools to address game damage where there is adequate public hunting access. This balancing recognizes the increasingly complex and mixed ownership landscape across Montana. The Department has and continues to work daily with landowners to encourage access and hunting – to the benefit of all Montanans. Doc. 110.01 (Kujala Decl. ¶ 5).

A common way landowners become eligible for Montana's game damage program is through Department access programs. Over decades, the Department has spent significant public money acquiring and gaining access on and across private land, providing more access to elk on private land refuges where elk are shielded from public hunting. These efforts have been facilitated through three signature programs: (1) the elk hunting access program (EHA), (2) the block management program (BMA), and (3) public access land agreements (PALA). *See* §§ 87-1-265 and 87-2-513, MCA.

The EHA gives landowners free either-sex elk permits, or other license types, in exchange for allowing at least three public hunters access to their property during the general elk season. *See* § 87-2-513(3), MCA.

Under the BMA, the Department enters into site-specific access agreements with the landowner. Doc. 110.01 (Kujala Decl. ¶ 9). The BMA was created in 1985 and expanded in 1996. *Id.* The program is a voluntary, cooperative agreement between the Department and landowners. *Id*. The program provides hunter management assistance, an impact payment, a weed management bonus, and a complimentary license benefit to offset the impacts from allowing free public hunting access on private lands. *Id.* By enrolling private land acres in block management, additional public land may become accessible by access to the enrolled lands. *Id.* By 2022, 6.8 million acres were enrolled in the program; equating to 7% of Montana's land area. *Id*. Of the enrolled acres, 5.7 million are privately owned. *Id.* The remaining 1.1 million acres are on public lands, some of which would not be accessible if the surrounding private lands were not enrolled. *Id.* Acres enrolled in block management peaked at 8.8 million in 2002. *Id*. Since then, the BMA has lost approximately two million acres or over 3,000 square miles of enrolled land. *Id.* Despite this drop, in 2020, landowners in the BMA were surveyed along with elk license holders. *Id*. Ninety percent of enrolled landowners

indicated they were satisfied or very satisfied with the program, and 67 percent of elk license holders responded that they are supportive of the program. *Id.*

Lastly, PALA seeks to open or improve free public access to isolated parcels of state or federal land, by identifying private land corridors, and compensating landowners for allowing access. Through these agreements, landowners can limit where, when and how many hunters enter their property. Mont. Code Ann. § 87-1-295.

If a landowner "does not significantly reduce public hunting through imposed restrictions" (§ 87-1-225, MCA) including participation in the BMA, EHA, or PALA programs, they have access to the game damage program to address elk issues outside of a general hunting season. Doc. 124.7. This includes a toolbox of non-lethal options such as repellants, hazers, and fencing. Doc. 64.1 at 3. While landowners can use these methods *without* state assistance, the game damage program effectuates, recognizes, and encourages landowner participation through equipment and supplies or harvest opportunity incentives. Doc. 165 at 10.

UPOM is correct that the Department has sparingly denied landowner applications for game damage assistance even though they allow limited public hunting. In those instances, Department personnel determined the harvest opportunities allowed by the landowner would not effectively aid in management of the local elk population. Doc. 63 at 63-64. These rare decisions, based on the

Department's case-by-case analysis of the local population, represent another opportunity to find a solution through adequate public hunting opportunity. In the principal case UPOM cites, the landowner *did* qualify for some game damage assistance on the portion of the property where the public had more robust opportunity. *Id*. The Department stands by its biologists, and believes these decisions comply with the plain language of § 87-1-225, MCA.

In short, the Department has further fulfilled its management obligations by administering various wildlife programs – aimed at building trust amongst stakeholders, providing conflict mitigation assistance, improving access, and pursuing additional cow elk harvest. Doc. 110.01 (Kujala Decl. ¶ 8).

STANDARDS OF REVIEW

Summary judgment should be granted when the pleadings, discovery, and affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law. M.R.Civ.P. 56. "The primary policy and general purpose underlying summary judgment is to encourage judicial economy through the prompt elimination of questions not deserving resolution by trial." *Gwynn v. Cummins*, 2006 MT 239, ¶ 12, 333 Mont. 522, 144 P.3d 82.

This Court reviews orders granting summary judgment *de novo* for correctness under Rule 56. *Zinvest, LLC v. Hudgins*, 2014 MT 201, ¶ 11, 376 Mont. 72, 330 P.3d 1135. "If there are no genuine issues of material fact" this Court

determines "whether the district court correctly concluded that the moving party is entitled to judgment as a matter of law," reviewing "this legal conclusion for correctness." *Id.* A district court's "statutory interpretation is a conclusion of law, which [is reviewed] to determine whether the district court's interpretation of the law is correct." *Id.* (citation omitted).

Because UPOM and the State cross-moved for summary judgment on the counts related to (1) compliance with §§ 87-1-322 and 87-1-323, MCA, and (2) the constitutionality of Montana's game damage, there is no genuine issue of material fact as to the issues on appeal. Docs. 165 at 3-4; 164 at 1-2.

SUMMARY OF THE ARGUMENT

The district court correctly concluded that the State has complied with § 87-1-323, MCA, by determining the appropriate numbers of elk that can be viably sustained. The State has long used the season-setting process to execute their statutory obligations, and UPOM has consistently participated and advocated for various regulatory structures through that process. UPOM's manufactured concern with this historical process falls flat.

As to their constitutional claim regarding the statutory requirement that a landowner allow some level of public hunting to receive game damage assistance from the State, this optional program does not constitute an unconstitutional condition. First, the State's program is not coercive, as the program is entirely

optional and there are a myriad of non-lethal elk control options available apart from the program. Second, there is, in any case, an essential and obvious nexus between allowing public hunting and the State's goal of moving elk off private property to increase harvest. The link between allowing public hunting and addressing elk damage is directly proportional to the State's important game-management interests.

ARGUMENT

I. The District Court correctly determined that Commission and Department processes for establishing sustainable elk population numbers, and then managing with the objective that the population remains at a sustainable number, comply with Montana law.

UPOM argues the Commission and the Department have failed to satisfy the requirements of § 87-1-323, MCA, because the Commission has not explicitly set a target "elk population number" as they interpret the statute, and because the Department has not implemented its programs in a manner sufficient to ensure elk populations do not exceed this target number. The district court correctly granted summary judgment in favor of the Commission and the Department, finding that both met their statutory obligations through the season setting process and subsequent management actions.

A. Under longstanding practice, the Commission determines appropriate elk numbers through the season setting process.

As the district court recognized, the State's procedure in identifying habitat acreage and adopting appropriate and sustainable numbers have complied with Montana law for over 20 years. Doc. 165 at 3-4. The parties agree as to how the Department and the Commission have interpreted and executed their statutory obligations, as reflected in the fact that the parties cross-moved for summary judgment. Thus, the question for this Court is whether the district court correctly concluded that the State's longstanding process complies with § 87-1-322, MCA, and § 87-1-323, MCA.

The process followed since HB 42's adoption is simple. Prior to each season setting, the Department posts an elk habitat map on its website. Around the same time, the Department makes its population recommendations publicly available, which incorporate landowner and various other stakeholder's perspectives. The Commission then meets, and either adopts the Department's proposal, or modifies it to incorporate landowner or sportsmen concerns – determining the appropriate numbers of elk that can be viably sustained. *Id.* at 3-5.

UPOM's argument that the Commission failed to set "sustainable" numbers ignores both reality and legislative intent. The Commission is a volunteer, quasi-judicial, *seven-person* board (five-persons prior to 2023) with no independent resources or employees. Mont. Code. Ann. § 2-15-3402. Although the

Commission is responsible for establishing hunting rules and regulations, including the task of reaching the ultimate determination of viable elk numbers pursuant to § 87-1-323, MCA, UPOM's insistence that the Commission must independently develop population numbers is unworkable.

The Commission simply does not have the capacity or expertise to autonomously set elk numbers. Instead, the Commission incorporates its own collective experience, public comment, and Department data and proposals when reaching a final policy decision.

It is the Department that does the groundwork to allow the Commission to set sustainable numbers. The Department conducts studies to produce estimates of existing populations, meets with communities across the state to gauge landowner tolerance, and proposes regulations to address ongoing management goals in accordance with its elk management plan. Doc. 165 at 3-5. The Commission then considers this information and invites additional public comment. At that point the Commission is in position to decide whether steps should be taken to reduce the population and, if so, by how much. *Id.*

This process allows the Commission to arrive at a sustainable elk population number. This 'policy decision' within the season-setting process establishes appropriate population numbers which the Department relies on to execute its various programs to manage and control elk populations, as explained in the fact

section. As the district court concluded, UPOM's contrary argument that the Commission and Department have failed to comply with this legal framework for over 20 years is incorrect, both factually and legally.

Likewise, UPOM's claim that the Commission "admitted is has not adopted sustainable numbers" misrepresents the deposition testimony. Op. Brf. at 22. UPOM selectively relies on deposition testimony which, taken in isolation, might suggest the Commission always adopts Department recommendations without incorporating its own judgment or landowner concerns. As the district court recognized, "UPOM cherry picks deposition testimony of Kujala to argue that Defendants have not complied with the statutes regarding the sustainable elk population number." Doc. 165 at 3. The district court continued:

> UPOM also argues that the Commission has not determined the appropriate elk numbers that can be viably sustained. Mont. Code Ann. § 87-1-323(1). But UPOM selectively reads the statute and ignores the overlapping responsibilities of the Commission and the Department. Kujala explained in his deposition that the Department calculates the sustainable level of elk and presents it to the Commission. The Commission then can alter or adopt the numbers that can be viably sustained.

Id. at 4-5.

In contrast to UPOM's selected testimony, the district court referenced the following exchange:

> A. 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.

Q. So that's a no, the Commission has never determined the appropriate elk numbers that can be viably sustained.

Objection, misstates prior testimony.

A. The Department has worked on those numbers and the Commission – we have presented those numbers in various ways to the Commission. So we do see the Commission weighing those and recognizing those.

Q. But that's different than determining.

A. The task of determining those on behalf of the Commission is the Department. That's how those are developed.

Q. So you're saying the Commission has not done so directly but allowed the Department to make the determination?

Objection, misstates prior testimony.

A. The Department has worked on what is a sustainable number in the different management units' hunting districts and those are brought to the Commission in a number of ways. And so, for example, where there is a proposal to do something with elk relative to the population status and that status relative to the sustainable population number, we see inherent in that process the Commission's recognition and endorsement of that sustainable number when they endorsed that recommendation. (Deposition of Kujala, 12/20/2023, p. 69, line 12 – p. 70, line 32.)

Doc. 165 at 5.

The district court understood this point perfectly. As Judge Todd explained:

In other words, the Department, which has the scientific staff and expertise, considers habitat acreage, landowner tolerance, and carrying capacity when making recommendations to the Commission. The Commission then adopts, rejects, or modifies the Department's proposals. Those final regulations are the Commission's sustainable

> population number determination – and the way Defendants comply with Mont. Code Ann. § 87-1-322 and § 87-1-323.

Doc. 165 at 4, (emphasis added).

As recognized by the district court, the State adapted its process to comply with HB 42's directives, repeatedly establishing and updating viable and sustainable elk population numbers, and then managing with the objective to keep the population at those numbers.

Finally, UPOM argues the State's process "flips the statutory cadence on its head." Op. Br. at 24-25. UPOM contends the Commission must determine the population number *before* the Department can propose hunting regulations. Otherwise, UPOM opines, "FWP cannot know what actions are 'necessary' to achieve the objective without first knowing the objective." *Id*. at 25.

UPOM's reading of a required order into the statutes ignores the overlapping relationship and duties of the Commission and the Department – most glaringly, that *both* entities have the legal obligation to "determine" appropriate and sustainable numbers, respectively. Mont. Code Ann. § 87-1-323(1). The statute does not require the Commission to independently determine a sustainable population without input from the Department. As explained above and by the district court, that is not possible because the Commission does not have independent staff or the functional capacity. Instead, the Commission considers and determines a sustainable population number based on Department expertise and

recommendation, thus satisfying the statutory requirement. The Department then manages to these Commission-set objectives until the process repeats at the next season setting.

B. The Department manages with the objective that elk populations remain at or below the Commission's sustainable number.

UPOM's argument that the Department has failed to comply with its statutory requirement fails at the start because it is based on the incorrect notion that the Commission has failed to set sustainable population numbers.

UPOM correctly points to § 87-1-323, MCA as the statute outlining the Department's obligations *after* the Commission has adopted its sustainable numbers through the season setting process. In its entirety, the law reads:

> **87-1-323. 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… 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… remains at or below the sustainable population. The programs may include but are not limited to:
>
> (a) liberalized harvests;
> (b) game damage hunts;
> (c) landowner permits; or
> (d) animal relocation.
>
> (3) The department shall:

> (a) manage with the objective that populations of elk… are at or below the sustainable population number by January 1, 2009; and
> (b) evaluate the elk, deer, and antelope populations on an annual basis and provide that information to the public.

Emphasis added.

The district court agreed with the Department's interpretation that the statute only requires the Department to manage *with the objective* to maintain the sustainable numbers set by the Commission. As the District Court explained:

> The Department is directed to implement wildlife management programs "*with the objective* elk population 'remains at or below the sustainable population.'" § 87-1-323(3)(a). Both Director Dustin Temple and Quentin Kujala testified that FWP manages elk with the objective of maintaining elk population to remain at or below sustainable numbers." "We have done that in earnest to... with that intent, yes, Sir."

Doc. 165 at 10 (emph. orig).

In rejecting the argument of a strict mandatory duty, as interpreted by UPOM, the district court wrote:

> The words following 'shall' in § 87-1-323 are 'implement...with the objective' to meet certain numbers and 'manage with the objective' of reaching numbers. Because FWP followed said statutes, UPOM's motion must fail."

Id. at 10. In short, the Department is tasked to manage with the *objective* that elk populations remain at or below the Commission's number. This "objective" is a goal, not an absolute, and is met when the Department makes and implements management decisions in line with the Commission's season setting direction.

UPOM's argument that the Department has not implemented its programs or taken necessary actions to "ensure sustainable numbers" contradicts the record. The district court agreed and properly rejected each of UPOM's arguments. Under § 87-1-323(2), MCA, the Department *may* implement (1) liberalized harvests, (2) game damage hunts, (3) landowner permits, and (4) animal relocation, as programs when managing towards a sustainable population. The Department's uncontroverted 30(b)(6) testimony provides a clear distillation of *why* and *how* certain management programs are implemented:

> Q. Yeah. Well, do you have topic 15 in front of you? So what is FWP's understanding of whether the defendants have managed elk populations to remain at or below sustainable population numbers?
>
> A. We have done that in earnest to – with that intent, yes, sir.
>
> Q. So with intent. Has it actually happened?
>
> A. In some instances, yes. In other instances we have not reached through the management applications that are in place, the objective, the target, population target.
>
> …
>
> Q. Okay. What about the areas where the Department has managed with intent to keep elk population at or below the sustainable population numbers but has not been able to do so?
>
> A. Those districts are there. Central Montana has some of them.
>
> Q. So you said the Department has intent to keep the elk populations at low numbers but the --at or below sustainable population numbers. How has it exercised that intent or how would it see this intent? What evidence is there that that intent actually exists?
>
> A. So it's manifest -- if you look over time in the liberalization of hunting seasons, in particular with a focus on the antlerless component that's the population driver, that reproductive engine, as tools have become available. There certainly have been tools like increased bag limit for elk, and you see the increased bag limit

> reflected in regulations as those regulations grew more liberal over time. There is also -- the legislature has contributed -- has contributed over that time spectrum to add tools to the toolbox, if you may refining access options and creating new access options. The Department has picked up those refinements and those new tools and implemented them, as some examples of intent.
>
> Q. Can you give me five concrete examples in which the Department has taken actions to manage elk populations at or below sustainable population numbers?
>
> A. Increased antlerless harvest opportunity on the general license; transitioning from antlerless permits to antlerless B licenses; making antlerless B license -- adding additional antlerless B licenses to fit the opportunity represented by the increased bag limit -- B license is different than permits -- increasing the number of elk hunting access agreements, the old 454 agreements; and putting in place PALA agreements, public access land agreements, working with the PLPW council. Those last two working on access pieces, getting hunters to elk.

Doc. 110.04, pp. 58:01-60:11.

The testimony paints a clear picture which UPOM has not and cannot refute: the Department has used its most aggressive population management tools (liberalizing cow elk harvest opportunities) and access programs with the intent to manage for a sustainable population number. As the district court recognized, UPOM's arguments to the contrary are based on speculation from its principal members. Those members, have for decades, sought liberalization of *bull elk* opportunity, a population segment unrelated to managing for a sustainable number. This was, and remains, undisputed.

In practice, and as the record demonstrates, the Department has consistently designed, refined, and executed a multitude of programs aimed at boosting harvest

in heavily populated areas. Somewhat confusingly, the 2005 elk plan sets "objectives" for each hunting district. These "objectives," however, are not the same as, nor the ultimate statement of, what is a "sustainable population" statewide (as required by § 87-1-323, MCA). There is nothing in the plain language of the statutes that requires the Commission or the Department to even set such "objectives" in each hunting district. The Department and the Commission have merely chosen this as the best method to provide information at a detailed scale to the public and to direct Department actions. If one were to replace the word "objective" in § 87-1-323(2), MCA with the word "goal" or "aim" or "purpose," then Plaintiff would not be able to conflate the two different uses of the word "objective" in the 2005 elk plan and § 87-1-323(2), MCA. UPOM argues that because the elk population in certain hunting districts is over the "objective" set in the 2005 elk plan, Defendants have failed to comply with their mandatory duties under § 87-1-323(2), MCA. To make this argument, however, UPOM must rewrite the statute to say that the goals in individual HDs must be met and that the Commission must manage "at or below objective" as set by the 2005 plan. That is simply not what the statutory framework says or requires.

In practice, the Department has vigorously implemented its BMA, EHA, and PALA programs to boost hunter access to the degree it is able to, considering the number of elk contained in private land refuges. Again, it is undisputed that the

most effective tool to reduce a local elk population is hunting pressure. Additionally, the Department has repeatedly recommended liberalized harvest seasons for cow elk in over-objective districts. In fact, with few exceptions, over-objective districts include unlimited elk harvest opportunities. While UPOM focuses on increasing bull opportunity, the undisputed evidence, as agreed in UPOM's appeal brief is that increasing bull harvest *will not* meaningfully reduce population numbers. Cow elk drive population size, so harvest needs to target cow elk to be effective at population management. Thus, it is an undisputed fact that the Department has maximized and liberalized the most critical and effective population control tools in its belt (again considering the number of elk protected from public hunting on private property). Despite these efforts, the State has struggled to realize the cow elk harvest *needed* to reduce populations. Doc. 124.2. That UPOM disagrees, based on opinion and not science, does not undercut the Department's discretion in managing with the objective that the elk population remains at or below the sustainable population.

C. The State's consideration of a multitude of factors, including but not limited to landowner tolerance, in managing for sustainability comports with statutory responsibilities and management obligations.

UPOM argues that the "lodestar" of "sustainability" is the State's only appropriate management criteria. Op. Br. Pg. 6. Sustainability, according to UPOM, means management must occur in a manner that does not adversely impact

Montana land (citing § 87-1-321, MCA). Thus, UPOM asserts the State's season setting and management practices violate Montana law because other factors have been incorporated. The 'factors' UPOM takes issue with are social considerations UPOM alleges have led to over objective districts. These social considerations involve (unsurprisingly) limiting bull harvest opportunity.

The State has managed elk populations for sustainability *because* it has consistently liberalized cow elk opportunity. When statewide cow elk harvest increases, adverse effects to Montana's lands diminish. UPOM misunderstands, or ignores, what drives elk population, causing it to suggest futile management actions.

UPOM's assertion that the State cannot consider factors beyond its definition of "sustainability" when determining sustainable population numbers is an overly narrow reading of the State's broad game management powers and duties. In reality, landowner tolerance is but *one* of a multitude of factors the Commission and the Department must consider in executing their statutory mandates. The Department must also:

> supervise all the wildlife, fish, game, game and nongame birds, waterfowl, and the game and fur-bearing animals of the state and *may implement voluntary programs that encourage hunting access on private lands and that promote harmonious relations between landowners and the hunting public*.

Mont. Code Ann. § 87-1-201(1) (emphasis added).

Meanwhile, the Commission:

> (a) shall set the policies for the protection, preservation, management, and propagation of the wildlife, fish, game, furbearers, waterfowl, nongame species, and endangered species of the state and for the fulfillment of all other responsibilities of the department related to fish and wildlife as provided by law;
>
> (b) shall establish the hunting, fishing, and trapping rules of the department;
>
> (h) … *In developing or implementing an elk management plan, the commission shall consider landowner tolerance when deciding whether to restrict elk hunting on surrounding public land in a particular hunting district.* As used in this subsection (1)(h), "landowner tolerance" means the written or documented verbal opinion of an affected landowner regarding the impact upon the landowner's property within the particular hunting district where a restriction on elk hunting on public property is proposed.

Mont. Code Ann. § 87-1-301 (emphasis added).

Landowner tolerance, concern, and opinion must be considered when the State manages elk populations. But it is not the only consideration. The Commission and Department must also consider the general public perspective, including advocacy from the non-landowning community. As the law states and the record demonstrates, the State has consistently implemented programs and a regulatory structure that addresses population concerns, encourages harmonious relationships between non-landowners and landowners, and upholds the fundamental stewardship roles of each entity. This, as the district court concluded,

is managing for sustainability. Indeed, this balance is expressed in Montana's Constitution:

> The opportunity to harvest wild fish and wild game animals is a heritage that shall forever be preserved to the individual citizens of the state and does not create a right to trespass on private property or diminution of other private rights.

Mont. Const., Art. IX § 7.

In short, UPOM's criticism of the State's consideration of recreational hunting opportunities within its season setting recommendation and adoption process fails to accurately capture the breadth and scope of the Commission's and Department's obligations to the public. Additionally, UPOM ignores the consistent management actions the State has taken to reduce adverse effects on private land through season liberalization. Even so, the statutory requirement of "sustainability" is not the only factor the State should incorporate in managing elk as directed by Montana law and the Montana Constitution.

II: Requiring limited public hunting to qualify for game damage assistance does not violate the Unconstitutional Conditions Doctrine because the State's program is not coercive, and there is an essential nexus between allowing public hunting and moving elk off private property that is directly proportional to the State's important game-management interests.

Montana's game damage program is executed through two statutes. Section 87-1-225(1), MCA, conditions program eligibility on whether the landowner: "(a) allows public hunting during established hunting seasons; or (b) does not

significantly reduce public hunting through imposed restrictions." Section 87-1-225(2), MCA, allows the Department to

> provide game damage assistance when public hunting on a landowner's property has been denied because of unique or special circumstances that have rendered public hunting inappropriate.

Lastly, § 87-1-225(3), MCA, enables the Department to recommend special harvest seasons and issue kill permits to landowners:

> (3) Within 48 hours after receiving a request or complaint from any landholder or person in possession and having charge of any land in the state that wild animals of the state, protected by the fish and game laws and regulations, are doing damage to the property or crops on the property, the department shall investigate and arrange to study the situation with respect to damage and depredation. The department may then decide to open a special season on the game or, if the special season method is not feasible, the department may destroy the animals causing the damage. The department may authorize and grant the holders of the property permission to kill or destroy a specified number of the animals causing the damage. A wild, ferocious animal damaging property or endangering life is not covered by this section.

Under § 87-2-520, MCA, the Department may issue supplemental game damage licenses to landowners who meet the criteria listed in § 87-1-225, MCA. Supplemental game damage licenses must (1) be used for cow elk harvest, and (2) target the specific animals causing property damage.

In asserting that Montana's well-established game damage statutes are unconstitutional, UPOM advocates for an incorrect and overly strict standard

contrary to caselaw and misconstrues the State's interest. Once these errors are corrected, the State's game damage program easily passes constitutional muster.

A. Legal Standard

"Under the well-settled doctrine of unconstitutional conditions, the government may not *require* a person to give up a constitutional right," including the right to receive just compensation when property is taken for a public use, "in exchange for a discretionary benefit conferred by the government where the benefit sought has *little or no relationship* to the property." *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (emphasis added). This doctrine, however, is not as rigid or formulaic as UPOM suggests.

If this doctrine were taken to its extreme, it would prohibit any governmental requirement that touches on a constitutional right. *See Dolan*, 512 U.S. at 384-85 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.") (citation omitted). To cabin the doctrine, the Supreme Court requires three factors be met. First, in the Takings context (the only constitutional right at issue here), the condition must be "coercive" and must qualify as a taking if the government were to directly require it. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (the doctrine "prevent[s] the government from coercing people into giving [constitutional rights] up").

Second, even if the condition is coercive as to a constitutional right, the condition is nevertheless constitutional if there is an "essential nexus" between the requirement on the landowner and a "legitimate state interest." *Dolan*, 512 U.S. at 386. For example, a sufficient "nexus exists between preventing flooding along [a creek] and limiting development within the creek's 100-year floodplain." *Id.* at 387.

Third, there must be a "rough proportionality" between the requirement and the legitimate state interest. *Id.* at 391. This analysis addresses the "required degree of connection between" the requirement and the state interest being addressed. *Id.* at 377, 388. The Supreme Court made clear that this standard *does not* require "exacting scrutiny," "direct proportionality, or a "specific and unique" relationship. *Id.* at 389-90 (rejecting exacting scrutiny standard).

Instead, the required degree of the nexus is a "reasonable relationship." *Id.* at 390-91. This intermediate standard does not require a "precise mathematical calculation," but instead is an "individualized determination" that the requirement "is related both in nature and extent to the" state interest. *Id.* at 391. Phrased another way, the test is whether the requirement is "sufficiently related" to the interest. *Id.* at 393. While allowing a public easement is not sufficiently related to a "city's legitimate interest in reducing flooding problems," requiring a petitioner "dedicate the portion of her property lying within the 100-year floodplain for

improvement of a storm drainage system" was reasonably related. *Id.* at 380, 387, 393. Likewise, a requirement that a landowner "provide a [public] viewing spot [of the ocean] on their property" is reasonably related to addressing the issue of the proposed larger house interfering with public viewing of the ocean. *Id.* at 387 (*citing Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836 (1987)).

B. Requiring limited public hunting to qualify for some, but not all, game damage assistance is not coercive.

Conditioning game damage assistance[2] on allowing some public hunting is not coercive for two reasons. First, the degree of public hunting required is *qualified*, and is often the result of property specific negotiations between the Department and the landowner. Through this process landowners can customize who hunts on their property, the area of property where public hunting can occur, and public hunting timing. A landowner, for example, can choose to have broad public hunting through the Department's BMA, or limited hunting through the EHA program. Contrary to UPOM's representations, the Department does not uniformly reject landowners who want more limited opportunities, nor does the

[2] UPOM's brief construes "Game Damage Permits" as the entire game damage program. That is not true. Game damage permits represent one tool available to landowners who allow public hunting. A plethora of non-lethal tools are also available to landowners, regardless of whether they allow public hunting or not. To clarify, kill permits are issued under § 87-1-225(3), MCA, and can be used *by the landowner* on cow and bull elk. Conversely, supplemental game damage licenses are issued under § 87-2-520, MCA, and can be used by the public to target specific elk. However, those elk can only be cow elk.

Department pressure or force landowners into entering into access agreements. *See* §§ 87-1-265 and 87-2-513, MCA.

Consequently, the type and degree of public hunting on a property participating in a game management program varies from unlimited walk-in hunting opportunities to formally restricted access wherein public hunters are assigned, with discrete hunting time slots. *Id.* This is starkly different from the land-use concessions required in *Nollan*, *Dolan*, and *Koontz*, where "land-use permit applicants" were "especially vulnerable" because "the government [had] broad discretion to deny a permit that [was] worth far more than property it would like to take." *Koontz*, 570 U.S. at 604-05. In other words, the conditions addressed in the land-use context cases were an offer the landowner couldn't refuse, because if rejected, the applicant would be unable to use their land in a beneficial manner. *See id.* Moreover, the landowner in the land-use condition cases received no benefit from the public-access condition. That is far from the case here. As the district court explained, the game damage assistance program, is "an available remedy that is willfully unused by UPOM's members," and is "entirely voluntary." *See* Doc. 164 at 2-4. If a landowner does not wish to allow public hunting, they can still use their property in the exact same manner. Thus, UPOM's coercion argument falls flat (as does its implied per se takings argument).

Second, there are a myriad of additional non-lethal options available to a landowner, including fencing, propane cannons, stackyards, multiple hazing methods (including with dogs, planes, and drones), etc., "whether or not they allow public hunting." *See* Doc. 164 at 3 (citing §§ 87-3-126; 87-6-107; 87-6-404(3)(g)). In contrast, the landowners in *Nollan*, *Dolan*, and *Koontz* had only one option to obtain the benefit of improving their property as desired: agree to a coercive, non-negotiable condition that was disconnected from their proposed land use. As noted by the district court, UPOM has failed to show that its members have attempted any of these alternative options, all of which are effective elk management tools. *Id.* at 3. Further, unlike the land use cases, the requirement itself carries a benefit for the landowner: moving elk off their land.

C. There is a directly proportional nexus between the requirement to allow limited public hunting for game damage assistance and the state's interest in managing elk by moving them off private land.

The state interests at issue here are layered and reinforce each other. In the broadest sense, the State has a long-recognized interest in managing wildlife under its police power, including wildlife located on private property, and the State has great latitude in determining how to manage and protect wildlife. *See, e.g.*, *State v. Egdorf*, 2003 MT 264, ¶ 26, 317 Mont. 436, 77 P.3d 517 (2003) (citing *Baldwin v. Fish and Game Commission of Montana* 436 U.S. 371, 391 (1978)). The State also has a general interest in managing elk. More specifically, the state has an expressed

interest in moving elk off private lands with restricted access to publicly accessible areas.

Whether these state interests are reasonably related to the requirement here—allowing limited public hunting—is not a close call. In stark contrast to the land use cases, the interest in relocating problem elk is not just "roughly proportional," but directly related to the requirement. Indeed, it is hard to think of a more direct link: the landowner is requesting game damage assistance and the requirement that they allow limited public hunting for some of the (lethal) assistance provided by the Department will, itself, help to address the need. Specifically, public hunting will pressure elk off the private property at issue, limiting the elk's ability to cause damage. As such, the requirement to allow public hunting *itself* serves as an additional game management tool, directly addressing UPOM's concerns in this lawsuit (elk population management).

Allowing public hunting on landlocked public property, as noted, also effectuates the state's specific interest in "relocation of [elk] away from a conflict." Doc. 110.01 (Kujala Decl., ¶ 4). It is undisputed that hunting pressures elk to move, and that the primary barrier the State faces in managing the elk population is a decline in public-hunting access caused by elk moving to private property that is

inaccessible to public. [3] *Id.* (Kujala Decl., ¶ 8). Furthermore, the game damage program is one available mechanism allowing the Department to prioritize the take of cow elk, the undisputed most effective way to control elk population. *See* UPOM Op. Br. at 39-40; Doc. 165 at 6. Thus, the game damage program enables the Department to mitigate the problems caused by private-land refuges, by dispersing elk through targeted Department response.

UPOM tries to avoid this result by suggesting a higher standard of scrutiny, which they refer to as an "exacting burden" that must be "tightly tailored to address the government's interest." UPOM Op. Br. at 39-42. This creative standard is unmoored from case law. Instead, as discussed, the Supreme Court is explicit that rough proportionality, as the name implies, does not require "exacting scrutiny," "direct proportionality," or a showing of a "specific and unique" relationship. *Dolan*, 512 U.S. at 389-90 (rejecting exacting scrutiny standard). Instead, the state must show a reasonable relationship, "both in nature and extent," between the state interest and the requirement on the landowner. *Id.* at 391. Here, while the direct relationship between allowing public hunting and redistributing problem elk would meet UPOM's proposed higher standard of "exacting scrutiny," it need not, and easily passes muster under rough proportionality, as explained.

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[3] Encouraging additional public hunting opportunities by landowner agreement also helps meet the State's duties under Mont. Const. art. IX, § 7, to preserve the public's opportunity to harvest wild game without trespassing on private property.

UPOM also misstates the rough proportionality test itself, phrasing it as a nexus "between the condition and the burden caused by the Game Damage Permits on [the state's] legitimate governmental interest." Again, game damage permits are a tool available *to address* the interest, and do not reflect the program as a whole. More accurately, the test is whether there is a reasonable relationship between the condition and the state's interest in imposing the condition - not the burden caused by providing game damage assistance. UPOM's confusing mishmash of a test is apparently derived from the development cases (*Nollan*, *Dolan*, etc.), where the Court looked to whether the condition addressed "the impact of the proposed development," because addressing the development's impact is itself the state's interest in those cases. *See Dolan*, 512 U.S. at 391. But this is not a development case, and this Court need not consider the "burden" of any proposed development, or otherwise.

UPOM then misconstrues the State's interest, mistaking it as the general interest involved in the State's elk management plan. UPOM Op. Br. at 39. While "reducing elk to sustainable populations," is, of course, of general interest of the State, falling within its duty to manage wildlife, it is not the specific interest related to requiring limited public hunting in the context of game damage assistance. Instead, the state's specific interest is in "relocation of [elk] away from a conflict," i.e., moving elk from landlocked private land where damage is occurring to public

areas where the elk are more easily accessed, and hunted, by the public. Doc. 110.01 (Kujala Decl. ¶¶ 4, 8).

Even assuming that "reducing elk to sustainable populations" is one of the State interests at issue, this interest is reasonably related to requiring limited public hunting, because allowing public hunting on otherwise landlocked property helps reduce elk population—both on and off the private property. The game damage program also allows the State to emphasize cow elk take, the most effective way to control elk populations.

In sum, the State has a strong interest in moving elk away from conflict on private property to public lands. This undisputed interest is at least reasonably related to requiring limited, negotiated, public hunting in exchange for game damage assistance.

CONCLUSION

UPOM's elk management and game damage legal theories threaten the State's ability to steward and conserve Montana's elk population. If the Court strikes down Montana's management and game damage programs, the Department may be forced to give public hunter license dollars to landowners who (1) willfully disregard non-lethal self-help dispersal measures, and (2) foreclose the public from accessing a public resource, further eroding the State's management capacity.

UPOM's property damage concerns are nebulous and unsupported, but its aspirations are clear: unlimited bull elk harvest in Department identified over-objective districts. UPOM conflates these over-objective districts with the State's *statewide* management obligations. But there is no legal duty for the Commission or the Department to manage *to* an objective in a specific district. Instead, the Commission, based on Department analysis and recommendation, sets the sustainable elk population number during the season-setting process, which is then implemented by the Department. As determined by the district court, this meets statutory requirements.

Landowners are not helpless: they can exercise non-lethal self-help or use public hunters to move elk. If they do so, certain tools funded by public hunting revenues become available, and elk management is more effective. This collaboration and compromise between the public and landowners is at the heart of Montana's game-management system and upholds constitutional requirements.

Biologically, the record is clear: cow elk drive elk population growth or decline, and their harvest represents the best way to maintain sustainable numbers. Without adequate cow elk harvest, elk populations have increased. The Department has designed and implemented management programs with the explicit aim of boosting public cow elk harvest. As demonstrated by the record, and as determined by the district court, the State has utilized the best available elk management

science and maximized meaningful harvest opportunities in areas with excessive elk populations. Moreover, an essential tool in increasing harvest is landowner partnerships to open otherwise landlocked private property to some level of public hunting.

UPOM's attempt to dismantle Montana's game management system to the benefit of a select landowning community is not required by statute or the Constitution and should be rejected by this Court. Instead, this Court should affirm the district court's well-reasoned opinion.

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11 and 14 of the Montana Rules of Appellate Procedure, I certify that this Response Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double-spaced except for footnotes and for quoted and indented material and the word count calculated by Microsoft Word for Windows is 9913 words, excluding caption, certificate of service, and certificate of compliance.

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CERTIFICATE OF SERVICE

I, Kevin Barnett Rechkoff, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-17-2025:

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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
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Service Method: eService

Electronically signed by Kara Thompson on behalf of Kevin Barnett Rechkoff
Dated: 07-17-2025