

MONTANA TENTH JUDICIAL DISTRICT COURT, FERGUS COUNTY

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

Plaintiff,

vs.

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

Defendants,

and

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

Cause No.: DV-14-2022-0000036-DK

Judge: Gregory R. Todd

**ORDER DENYING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT RE: COUNT I OF THE
AMENDED COMPLAINT**

In Count I of the First Amended Complaint (Dkt. #13), Plaintiff, United Property Owners of Montana (UPOM), allege that Defendants, Montana Fish and Wildlife Commission and Montana Fish Wildlife and Parks (FWP), failed to implement necessary actions to comply with Mont. Code Ann. § 87-1-323.

UPOM states the Court should issue a Declaratory Judgment that FWP violated Mont. Code Ann. § 87-1-323 and provide a remedy “to bring Defendants into compliance with the law.”

UPOM argues that FWP has not followed the requirements of Mont. Code Ann. § 87-1-322 and § 87-1-323. The first statute reads:

“When determining the total acreage that serves as habitat for elk, deer and antelope the Commission shall consider public land and private land for wildlife management or habitat enforcement purposes.”

Mont. Code Ann. 87-1-323 reads:

“(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. 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, deer, and antelope 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.”

UPOM also uses but mischaracterizes the deposition testimony of Quentin Kujala (Kujala), FWP’s 30(b)(6) designee.

According to UPOM, FWP has not determined “the total acreage that serves habitat for elk...87-1-322”. Additionally, according to UPOM, without the total acreage number of Mont. Code Ann. § 87-1-322, FWP cannot determine the “habitat acreage” that can be viably sustained found in Mont. Code Ann. § 87-1-323(1).

But FWP counters that it has always complied with the above statutes and specifically points to the voluminous exhibits attached to its Brief in Support of Motion for Partial Summary Judgment for all Remaining Counts of Plaintiff’s First Amended Complaint (Dkt. #110-110.07). Each year FWP publishes a map showing elk habitat in Montana. To be useful the map does not show land that elk could inhabit as theoretically elk could live virtually anywhere. To be useful in the establishment of sustainable population numbers, the map demonstrates where elk currently reside. The Commission then weaves the map’s data into its analysis when establishing sustainable population numbers. The Commission, in other words, considers available acreage when reviewing the Department’s proposals, and adopting season setting regulations and the quotas, permits, and licenses. By doing so, Defendants have executed their statutory management obligations found in Mont. Code Ann. § 87-1-322 and § 87-1-323.

UPOM cherry picks deposition testimony of Kujala to argue that Defendants have not complied with the statutes regarding establishing a sustainable elk population number. In a highly combative and lengthy deposition of Kujala by UPOM’s counsel, Jack. G. Connors, Kujala tried to clarify the process used by Defendants in elk management:

“Mr. Connors: The Commission made the determination?

Mr. Kujala: The Department has been lead in determining what the sustainable number is. We’ve seen the Commission recognize that and endorse those or challenge them.

Mr. Connors: But the Commission has never made the determination?

Mr. Kujala: That's correct. The Department has identified – has proposed, has identified and has manifested the sustainable number in its management recommendations to the Commission.

Mr. Connors: So are these recommendations from the Department based on habitat acreage determined under 322?

Mr. Kujala: Habitat is a piece, as referenced in the statute. We see the reference to carrying capacity. Our experience tells us that the carrying capacity is larger than – larger than other considerations the statute tells us to make.

Mr. Connors: Could you help me understand that?

Mr. Kujala: Elk are a successful species in Montana and they make – they make very efficient use, they're very good across all habitat types that are present in Montana. And given – left to their own population dynamics, the carrying capacity of the physical habitat we believe is consistently over the social tolerance. And so the sustainable number that the statute talks about, starting with habitat carrying capacity, is something here and when we bring in the rest of the considerations to the degree we can measure them, the sustainable number is something less than that." (Deposition of Kujala 12/20/2023, beginning p. 72, line 4 – p. 73, line 10)

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.

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”.

“Mr. Kujala: 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.

Mr. Connors: So that’s a no, the Commission has never determined the appropriate elk numbers that can be viably sustained.

Ms. Clerget: Objection, misstates prior testimony.

Mr. Kujala: 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.

Mr. Connors: But that’s different than determining.

Mr. Kujala: The task of determining those on behalf of the Commission is the Department. That’s how those are developed.

Mr. Connors: So you’re saying the Commission has not done so directly but it’s allowed the Department to make the determination?

Ms. Clerget: Objection, misstates prior testimony.

Mr. Kujala: 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, beginning p. 69, line 12 – p. 70, line 32)

UPOM also contends that FWP has failed to implement the necessary actions to ensure the elk population remains at or below sustainable population numbers. Four options from a non-inclusive list of programs that the Department could implement: liberalized harvests, game damage hunts, landowner permits, or animal relocation. Mont. Code Ann. § 87-1-323(2)(a-d).

UPOM asserts FWP has not implemented Mont. Code Ann. 87-1-323 with the objective of reducing elk populations. By selectively taking fragments of Kujala's deposition with a gotcha yes or no form of questioning, UPOM states FWP has not authorized game damage hunts with the objective of elk populations.

When discussing game damage hunts, UPOM states on page 7 of its Corrected Reply Brief (Dkt. #142) that FWP concedes that "game damage hunts are not utilized as a population management tool." While it is true that UPOM's quote above reflects the words from Defendants' Brief in Support of Motion for Partial Summary Judgment for all Remaining Counts of Plaintiff's First Amended Complaint (Dkt. #110), UPOM ignores the full paragraph and, as it frequently does, misconstrues the meaning of FWP. The paragraph from Defendants' Brief says:

"As explained in Defendants' Motion for Summary Judgment on Count VI of Plaintiff's First Amended Complaint (Dkt. #55) game damage eligibility is *largely* limited to those landowners who provide public hunting. See Dkt. 55. Even so, game damage hunts are not utilized as a population management tool. Rather, game damage hunts locally relocate animals away from conflict. Ex D.p.130:01-130.09. Thus, by relocating the animals (through lethal dispersal) off private land, the elk are available for public harvest at more suitable locations." (Dkt. #110 p. 20-21).

A review of Defendants' Brief for Summary Judgment as to Count VI (Dkt. #55) provides more context and shows how game damage assistance programs are utilized. (Dkt. #55, p. 4-8). Likewise, UPOM takes a small portion of Kujala's deposition (p. 131:24-132:1) to argue that FWP does not utilize game damage hunts "with the objective of ensuring elk populations remain at or below sustainable levels." (The issue as framed by UPOM in its corrected reply brief – Dkt. #142 p.6)

But UPOM's attempt to use one sentence of Kujala's answer in his deposition but ignore what he said before and after refutes UPOM's argument that FWP has not utilized game damage programs with the objective of reducing elk numbers to sustainable levels.

"Mr. Connors: So the Department has not used game damage hunts to – with the objective that populations of elk remain at or below the sustainable population objective?"

Mr. Kujala: They have been part – they have been for a long time part of the Department's management program and they continue to be implemented where those – where game damage occurs and where that program tool is the answer to that circumstance. So they've continued to be part of the array of management tools throughout all of this time period that we've been talking.

Mr. Connors: Has the Department ever done it with the sole objective of ensuring populations remain at or below the sustainable population?

Mr. Kujala: Under the auspices of game damage, an expansion has been management hunts. Management hunts happen at a larger scale and they include response to game damage, so you're trying to address game damage conflicts. But the larger scale does at least leave open the opportunity for population – harvest that's potentially large enough to impact population trajectory, or at least local abundance of those elk. That has been a piece of management evolution over this timeline, and, again, that's under the auspices of game damage.

Mr. Connors: But not reducing populations?

Mr. Kujala: It has a potential to reduce local populations. The scale is such that it could potentially do that.

Mr. Connors: So it may be a result but that's not the objective?

Mr. Kujala: The objective of tools under the game damage program are to address game damage. That's the first primary objective.

Mr. Connors: So FWP has not implemented any programs of game damage hunts with the objective of reducing populations?

Ms. Clerget: Objection, asked and answered.

Mr. Kujala: Again, they have been implemented as part of the management approach, management continuum, management spectrum of tools that are available.

Mr. Connors: Can you give me one example of when this happened?

Mr. Kujala: You know there is game damage almost – there is game damage across the calendar year, across the state that happens – there is an instance of game damage in our response every year. I can't point to any specific example right here in this moment.” (Deposition of Kujala 12/20/2023, beginning p. 130, line 17 – p. 132, line 17)

UPOM also uses a reference to Kujala's deposition without the exact words of Kujala but with a different question. UPOM argues that “it is also undisputed that the Defendants have never issued landowner permits with the objective of reducing elk populations in over-populated areas.” (UPOM Corrected Reply Brief Dkt. #142 p. 7) To support its argument reference is made to Kujala's Deposition at 134:1 – 135:8. A reading starting at 132:18 gives greater context and does say landowner permits have been issued as part of FWP's efforts at elk management.

“Mr. Connors: Okay. What about landowner permits? Has FWP ever implemented a program of landowner permits?

Mr. Kujala: Yeah –

Mr. Connors: With the objective that the population of elk remain at or below sustainable population?

Mr. Kujala: There are a couple of instances of landowner permits being applied as part of the management sweep. A piece that gets to it is there is – in this bucket would be landowner preference, which is an enhanced opportunity for a landowner to draw a permit out of the drawing. And then there is also – and we talked about it earlier – the elk hunting access agreements. And so in exchange for access, which undeniably is part of the Department's search for more solution, more on-the-ground management application to the point of reducing elk populations, in exchange for access to hunters in that elk hunting access, there is an allocation of a landowner permit. So for sure that second piece has come to be a very real piece of the management approach to population management.

Mr. Connors: So tying access to landowner permits?

Mr. Kujala: That's what the EHA program does, as identified in statute in exchange for public access. There is an agreement and it's guided by statutory language, you know, what the terms or the guidelines of those agreements are as far as number of permits to landowner, number of – access opportunities to public. And so – but that is fundamentally the exchange, access for hunters to harvest in exchange for landowner – it's actually a licensed end permit in those cases where there is a permit in addition to the license that the landowner is interested in.

Mr. Connors: Well, how about programs not tied to access? Has FWP implemented any programs of landowner permits to reduce elk populations that are not tied to access?

Mr. Kujala: We have – I would point to the liberalized harvest opportunities available, number of authorizations available to everybody, including landowners, with respect to population control through antlerless harvest. So that's not just private landowners but certainly those opportunities include private landowners in their scope.

Mr. Connors: So FWP has not done any programs related to just landowner permits that are not tied to access?

Ms. Clerget: Objection, misstates prior testimony, asked and answered.

Mr. Kujala: There – when you say FWP has – I'm sorry, could you ask the question again?

Mr. Connors: Well, the phrase of the question is has FWP implemented any programs with the objective that population of elk remain at or below the sustainable population based on landowner permits that are not tied to access?

Mr. Kujala: Yeah, and because that – by that description it would have to include the liberalized opportunities represented just by the hunting season definitions.

Mr. Connors: But not just landowner permits?

Mr. Kujala: They're not just landowner permits, but certainly they're available for landowners to take advantage and in some cases in enhanced ways with the landowner preference through the drawing.” (Deposition of Kujala 12/20/2023, beginning p. 132, line 18 – p. 135, line 8)

A more basic argument made by FWP and Intervenors is that Mont. Code Ann. § 87-1-301(h) does not obligate FWP to actually reduce elk populations to a sustainable number. Rather, FWP is required to manage elk, deer, and antelope populations and maintain their numbers at or below population estimates provided in Mont. Code Ann. § 87-1-323. The mandatory reduction of elk populations is not specified.

With the reference to Mont. Code Ann. § 87-1-322 and § 87-1-323 in Mont. Code Ann. § 87-1-301, the Department is directed to implement wildlife management programs “*with the objective* elk population ‘remains at or below the sustainable population.’” Mont. Code Ann. § 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. Temple Deposition 19:8 – 20:7 and Kujala Deposition 58:1-6. “We have done that in earnest to... with that intent, yes, Sir.”

Even though the language of the statutes is clear, UPOM argues that the “Statute is not permissive” but that the word “shall” creates a mandatory duty for FWP to reduce elk population. The words following “shall” in Mont. Code Ann. § 87-1-323 are “implement... with the objective “to meet certain numbers and ‘manage with the objective’ of reaching numbers. Because FWP has followed said statutes, UPOM’s Motion must fail.

FWP has taken a number of actions to manage elk with the objective of reducing elk populations in over-objective districts. The Department has regularly tried to liberalize antlerless elk harvests (Kujala Deposition 58:24 - 62:5); prioritized public access through block management, elk hunting access agreements, and public access land agreements (Kujala Deposition 53:14 66:17 and 142:8 – 148:21); and increased landowner access to licenses or permits and allowing game damage hunts. (Kujala Deposition 131:23 – 136:23 and 139:20 – 141:16). FWP has made changes in 2012, 2015, 2017, and 2021. (Kujala Deposition 103:2-14, 106:4 – 110:1, 204:20 – 208:13). New regulations

are adopted every other year in an effort to reach the objective levels for each district. (Kujala Deposition 60:12-23).

It is universally accepted that the most effective way to reduce elk populations is to reduce antlerless elk populations through hunting. FWP has liberalized antlerless licenses with the goal of reducing elk populations. But licenses alone cannot reduce populations – the harvest of an elk must result. Without harvest, the elk population is not reduced. The biggest impediment to harvest is lack of public access to the elk. Because many hunters in Montana cannot get to land where elk live, elk numbers are difficult to reduce. UPOM members have a substantial number of elk on their property, and they have the right to exclude the public and FWP cannot force public access on them. But by failing to utilize existing programs and harvest opportunities and failing to allow public hunting, UPOM has not prevailed on Count I.

IT IS HEREBY ORDERED that Plaintiff's Motion for Partial Summary Judgment Regarding Count I is DENIED.

ELECTRONICALLY SIGNED AND DATED BELOW.

Cc: Hon. Gregory R. Todd
Jack G. Connors/Jacqueline R. Papez, *Counsel for Plaintiff*
Jeffrey Hindoien/Kevin Rechko, *Counsel for Defendants*
David Wilson/Graham Coppes/Robert Farris Olsen, *Counsel for Intervenor*s