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STATE OF MONTANA
By: Hannah Pallas
DV-14-2022-0000036-DK
Todd, Gregory R.
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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 GRANTING DEFENDANTS' AND INTEREVENOR'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT VI AND DENYING PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT AS TO COUNT VI**

The First Amended Complaint of Plaintiff, United Property Owners of Montana, INC. (UPOM) was filed on June 17, 2022 (Dkt. #13). Count VI asks the Court to declare Mont. Code Ann. § 87-1-225 and § 87-2-520, and Admin.

R. Mont. 12.9.803(1) unconstitutional and to strike and declare unlawful Admin R. Mont. 12.9.802, 12.9.803, 12.9.804A, and 12.9.1101.

UPOM's Response Brief opposing Defendants' Montana Fish and Wildlife Commission and Montana Department of Fish, Wildlife and Parks (FWP) Motion for Summary Judgment (Dkt. #54) also served as UPOM's Brief in Support of UPOM's Cross-Motion for Summary Judgment as to Count VI (Dkt. #62). UPOM set forth what it labeled as undisputed facts on pages 3 to 7.

FWP responded that its "factual assertions" are not questions of fact, but well-known and well-accepted facts including restatements of legislative history, self-authenticated documents, and public record documents. Additionally, FWP submitted an Affidavit of Quentin Kujala (Dkt. #64.1), along with FWP's Response and Reply (Dkt. #64), which spoke to the truth all the listed "assertions".

UPOM argues that Mont. Code Ann. § 87-1-225 and § 87-2-520 unconstitutionally prevent "landowners from protecting private property from damage without surrendering their right to limit access to private property." (Dkt. #62 p.13). According to UPOM, landowners that experience property damage caused by elk have three "regretful options": (1) give up their constitutional right to exclude people from their property and "potentially" obtain game damage assistance from FWP, (2) do nothing which will result in "ruinous financial consequences", or (3) exercise self-help which may result in criminal prosecution (Dkt. #62 p.13).

Glaringly absent from UPOM's "regretful options" above is an option of a private property owner to implement non-lethal means to protect his or her property. The game damage statutory structure challenged by UPOM is not an unconstitutional taking because it does not prevent landowners from protecting their property.

Mont. Code Ann. 87-1-225 and § 87-2-520 encourage landowners to use many available non-lethal options like fencing, propane cannons, strobe lights, or contractor hazers, whether or not they allow public hunting. Not only do UPOM members have non-lethal measures to defend their property, but game damage assistance is not a blank check stamp of approval from FWP for lethal take.

FWP states that Montana fish and wildlife law unambiguously requires a landowner to exhaust all remedies provided by law before using lethal methods to remove elk. Landowners can haze game animals by the use of dogs (Mont. Code Ann. § 87-6-404(3)(g)); by using airplanes or drones (Mont. Code Ann. § 87-3-126); and even an exception to game animal harassment prohibition with the use of non-lethal tools (Mont. Code Ann. § 87-6-107). There is no dispute that shooting elk is not the only tool available to push elk off of private property.

This Court views game damage assistance as an available remedy that is willfully unused by UPOM's members. The clear intent of the 1989 Game Damage Amendments was to build a compromise between the concerns of private landowners and the reality that wildlife, including elk, belongs to all Montanans. UPOM's members were given the option to receive game damage assistance in exchange for increasing public access and hunting opportunities for their wildlife.

If this Court interprets that UPOM bases its unconstitutionality argument on an alleged violation of the Fifth Amendment right to not have property taken without just compensation, UPOM loses as eligibility for game damage assistance is not a taking. To constitute a *per se* taking, a regulation must either (1) deny an owner all economic or productive use of his or her land or (2) constitute a permanent physical invasion of property. *Lingle v. Chevron U.S.A. Inc,* 544 U.S. 528, 5125 S.CT. 2074 (2005) (citing *Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1019). A landowner in Montana is not deprived of all the economic use of his or her land by the game damage assistance statutes.

Likewise, a landowner is not compelled by the Statutes to take an action that is a permanent invasion of his or her property – it is entirely voluntary. There is no Fifth Amendment taking by the game damage statutes, nor is there a constitutional right being infringed by the denial of game damage assistance.

UPOM faces a high burden to find Montana's game damage statutes and rules unconstitutional. "The constitutionality of a statute is presumed, 'unless it conflicts with the constitution, in the judgment of the Court, beyond a reasonable doubt.'" *Mont. Cannabis Indus. Ass'n. v. State,* 2016 MT 44, ¶12, 382 Mont. 256, 368 P.3d 1131. The party challenging the constitutionality of a statute bears the burden of proof. Id. To prevail on its facial challenge, UPOM must show "that 'no set of circumstances exists under which the [challenged statute] would be valid, i.e., that the law is unconstitutional in all of its applications' or that the statute lacks any 'plainly legitimate sweep.'" *State v. Jensen,* 2020 MT 309m ¶12, 402 Mont. 231, 477 P.3d 335, *quoting Wash. State Grange v. Wash State Republican Party,* 552 U.S. 442, 449 (2008).

All statutes are presumed constitutional. Statutes are narrowly construed to avoid a finding of unconstitutionality, with "any questions of constitutionality" being resolved in favor of the statute. *Disability Rights Mont. v. State,* 2009 MT 100, ¶18, 350 Mont. 101, 207 P.3d 1092. UPOM can point to no specific enumerated constitutional right to kill elk or to receive game damage assistance absent public access.

UPOM in its Response Brief (Dkt. #65) at p.4-5 states that it is not asserting a violation of Fifth and Fourteenth Amendments nor is asserting an equal protection claim. Rather, UPOM asserts the statutes are "unconstitutional because they require a property owner to choose between surrendering his fundamental right to exclude the public from private property and his constitutional right to protect his property from game damage."

All parties discuss the case of *State v. Rathbone*, 110 Mont. 225, 100 P.2d 860 (1940). Rathbone was convicted in Justice Court and in a trial *de novo* in District Court of killing an elk out of season. He argued that he had the right to kill elk in defense of his property. 110 Mont. at 233. Rathbone's defense was that Article III of the Montana Constitution guaranteed the right to protect and defend his property – "including the right to kill a game animal out of season if it is reasonably necessary to do so." 110 Mont. at 237. The conviction was reversed and remanded for a new trial.

The *Rathbone* Court posed the question:

> "Did defendant exhaust the remedy provided by section 3729.1, supra, before killing the elk in question? The section reads: 'That whenever elk, imported within the state of Montana, or any portion thereof, have increased in numbers to such an extent that *in the judgment of the state fish and game commission* their number should be reduced, and special or private property is being actually or materially damaged or destroyed by said elk, and a written complaint of such damage has been filed by the owners or lessees of said property with the state fish and game commission, the said commission shall have the power and authority *whenever, in its opinion, conditions warrant it*, to take, kill, remove or dispose of such elk, or to permit the same to be taken, killed, removed, or disposed of under such rules, regulations and conditions as it may prescribe and promulgate." (Italics ours)." *Rathbone,* 100 Mont. at 243.

UPOM wants the Court to reaffirm a narrow part of the larger *Rathbone* holding. *Rathbone* does not declare the right to kill elk in any circumstances, only that landowners have the right to kill elk causing property damage if it is reasonably necessary to do so. Reasonableness should be decided on a case-by-case basis. *Rathbone* at 242. Before resorting "to force in protecting his property from wild animals, (1) he must have exhausted all other remedies provided by law". Id.

When animals "trespass" on a person's property there is usually no protection for landowners against such trespass or deprivation of a property right. "Montana's case law affirming the State's property interest in wild game is consistent with case law from other jurisdictions, including Washington, Colorado, Oregon, Indiana, Texas, Michigan and Alabama." *State v. Fertterer.* 255 Mont. 73, 80, 841 P.3d 467, 471 (1992) *overruled on other grounds.* Regulation of wildlife is part of Montana's police power. 255 Mont. at 79, 841 P.2d at 471. "The State may prohibit the killing of wild game and regulate killing of the same" without violating a landowner's constitutional private property rights, even if there is damage to property. 255 Mont. at 80-81, 842 P.2d at 471.

The *Rathbone* case recognized that the State's regulation of wildlife, and the related limitation on the "right to kill", is reaffirmed by Montana's longstanding tradition that landowners buy wildlife inhabited land at their own risk.

> "Montana is one of the few areas in the nation where wild game abounds. It is regarded as one 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 posses 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.)

UPOM has not and cannot show that in Montana there is a constitutional right to kill elk, even if that right is redefined as one of

protecting property. *Rathbone* and subsequent cases do state that a person has a defense to criminal prosecution for illegally killing elk if the killing was done to defend their property from wildlife. *Rathbone* 110 Mont. at 248-249, 100 P.2d at 96; *State ex rel. Sackman v. State Fish & Game Comm'n*, 151 Mont. 45, 47, 438 P.2d at 667. UPOM has not shown that its members are facing criminal prosecution or that any alleged damage is significant. Therefore, UPOM's reliance on *Rathbone* to establish a constitutional right to kill elk is not persuasive.

In this Count Montana's statutory and regulatory system for game damage assistance is constitutionally challenged facially and as applied. Because there is no criminal prosecution of UPOM or its members, the question before this Court is in part distinguishable from *Rathbone* and *Sackman.* Neither Mont. Code Ann. § 87-1-225 nor Mont. Code Ann § 87-2-520 alter the holding in *Rathbone*. In fact, they work together. *Rathbone* stands for the proposition that if UPOM wants to avail itself at some future date of the affirmative defense to criminal charges for illegally killing elk, it must have exhausted its administrative remedies as a prerequisite.

In Montana property owners cannot claim that the State, through its Game Damage Assistance program, is effectuating an unconstitutional taking of private property because they have no vested right when: (a) they are not actually trying to exclude wildlife from their property; and (b) when they do not wish to avail themselves of the opportunities provided by the State to resolve the issue of which they complain. Similarly, because property owners in Montana have assumed the risk of damage to their property, and there is no recourse for that damage against the State.

The Intervenors argue in their Joinder with Defendants (Dkt. #58 p.14) that UPOM comes to this Court "with unclean hands – harboring elk to boost their private property values, while also complaining that they have no options available to abate the problem." This Court agrees with Intervenors that while

the State cannot force landowners endure public access on private land, it is also true that UPOM cannot claim that public involvement in game management deprives it of a vested property right. Because UPOM's members never owned a property right that allowed them an absolute freedom to kill, nothing has been taken from them by the statutes and regulations at issue.

UPOM also argues in Count VI that there is no statutory authority that allows Defendants to adopt administrative rules implementing Mont. Code Ann. § 87-1-225 and five administrative rules are unlawful and must be stricken. But in 2006 the Montana Fish and Wildlife Commission adopted ARM 12.9.802, 12.9.803, 12.9.804, 12.9.804a, and 12.9.1101, (the five ARMs challenged in Count VI) pursuant to the Commission's authority. Under Mont. Code Ann. § 87-1-301 the Commission has the authority to "set the policies for the protection, preservation, management, and propagation of the wildlife, fish, game, furbearers, waterfowl, nongame species, and endangered species of the state and for the *fulfillment of all other responsibilities of the Department* related to fish and wildlife as provided by law." Mont. Code Ann. § 87-1-301(1)(a) (emphasis added).

Judge Heather Perry in this case has ruled that Mont. Code Ann. § 87-1-301(1)(a) is not facially unconstitutional, denied UPOM's Motion for Summary Judgment as to Count IV and denied FWP's Cross Motion for Summary Judgment as to Count IV (Dkt. #31). The statute is "presumed to be constitutional and does not need further order of this Court to be lawful." (Dkt. #47 p.8). This Court clarified Judge Perry's Order regarding Count IV by an Amended Order Granting FWP's Cross Motion for Summary Judgment. The challenged administrative rules in Count VI were adopted within the Commission's power and duty to set policies for the protection, preservation, and management of fish and wildlife.

For all of the reasons stated above IT IS ORDERED THAT FWP's Motion for Summary Judgment is GRANTED and UPOM's Cross-Motion for Summary Judgment regarding Count VI is DENIED.

ELECTRONICALLY SIGNED AND DATED BELOW.

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

Electronically Signed By:
Hon. Judge Gregory R. Todd
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