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MONTANA TENTH JUDICIAL DISTRICT COURT, FERGUS COUNTY

UNITED PROPERTY OWNERS OF MONTANA, INC., a Montana non-profit corporation, Plaintiff, v. MONTANA FISH AND WILDLIFE COMMISSION and MONTANA DEPARTMENT OF FISH, WILDLIFE & PARKS, Defendant.	Cause No. DV-22-36 Judge: Jon. A. Oldenburg **Defendants' Response in Opposition to Motion to Intervene**

Montana Wildlife Federation, Montana Backcountry Hunters and Anglers, Montana Bowhunters Association, Hellgate Hunters and Anglers, Helena Hunters and Anglers, Skyline Sportsmen's Association and the Public Land and Water

Access Association (collectively "Applicants") seek to intervene as defendants in this litigation. While Defendants Montana Department of Fish, Wildlife and Parks ("FWP") and the Montana Fish and Wildlife Commission ("Commission"), through their counsel, do not dispute Applicants' interest in this matter, intervention as a party is improper. Defendants intend to vigorously defend their lawful actions. Defendants oppose Applicants' motion and ask the Court to deny their Motion to Intervene. Defendants also ask the Court to permit Applicants to participate as *amici curiae* in this matter.

Background

On April 6, 2022, United Property Owners of Montana ("UPOM") filed this suit alleging that Defendants have failed to appropriately managed Montana's elk population. UPOM requests:

- Count I: a declaratory judgment that Defendants have violated Mont. Code Ann. § 87-1-323(2) and asks the Court to fashion "a remedy to bring the Defendants into compliance with the law as soon as practicable;"
- Count II: issuance of an alternate writ of mandate requiring Defendants to either adopt regulations designed to reduce elk populations in over-objective districts within 90 days, or show cause why Defendants have not;
- Count III: issuance of a preliminary injunction requiring Defendant to adopt

regulations to reduce the elk population as soon as practicable;

- Count IV: a declaratory judgment that Mont. Code Ann. § 87-1-301(1)(a) is unconstitutional;
- Count V: a declaratory judgment that Defendants violated Mont. Code Ann. § 2-4-314(1) when they did not amend Admin. R. Mont. 12.9.101(1);
- Count VI: a declaratory judgment that Mont. Code Ann. § 27-1-225 and Admin. R. Mont. 12.9.803(1) are unconstitutional.

Defendants' Answer was filed May 27, 2022. On June 1, 2022, Applicants filed their Motion to Intervene, seeking to join Defendants as parties in defending this action. As shown below, such participation is improper. However, Defendants welcome Applicants' participation as *amici curiae* in these proceedings.

I. Standard of Review

Mont. R. Civ. P 24(a) sets out the standard for intervention of right. It provides:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by statute; or
>
> (2) claims an interest relating to the property or transaction which is the subject of the action and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless the existing parties adequately represent that interest.

The Montana Supreme Court has stated that, pursuant to Rule 24, the application must: "(1) be timely; (2) show an interest in the subject matter of the action; (3) show that the protection of the interest may be impaired by the disposition of the action; and (4) show that the interest is not adequately represented by an existing party." *Sportsmen for I-143 v. Mont. Fifteenth Judicial Dist. Court*, 2002 MT 18, ¶ 7, 308 Mont. 189, 40 P.3d 400. Montana's rule is essentially identical to the federal rule and is interpreted liberally. *Id.* Because Applicants cannot satisfy the fourth requirement, the Court should deny their Motion to Intervene.

A. Applicants' Intervention of Right is improper.

Applicants likely met the first three requirements for intervention as right: their motion is timely, they are substantively interested in this case as active participants in elk management development and processes, and those interests are likely to be impacted by the outcome of this litigation. However, Applicants' motion fails to satisfy the final prong of the intervention requirements, that is, the adequacy of representation of their interests.

Applicants must show that Defendants may not adequately represent their interests. *Sportsmen for I-143 v. Mont. Fifteenth Judicial Dist. Court*, 2002 MT 18 ¶ 14. In support of this claim, Applicants assert two grounds: 1)

the FWP director is a political appointee; and 2) Defendants' past resolutions of claims suggest inadequate representation.

Regarding the first ground, Applicants claim that *Sportsmen for I-143* stands for the proposition that intervention here is appropriate simply because the FWP director is a political appointee. This is incorrect. In *Sportsmen for I-143*, the Montana Supreme Court noted this argument by the applicants for intervention. *Id.* at ¶ 16. However, the Court did not make its ruling because of this argument. *Id.* at ¶ 17. Indeed, this argument has been rejected by the Ninth Circuit, which has stated: "the mere change from one presidential administration to another, a recurrent event in our system of government, should not give rise to intervention as of right in ongoing lawsuits." *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983). It was determinative in *Sagebrush Rebellion* that the defendant, Secretary of the Interior James Watt, had previously worked for the organization representing plaintiff Sagebrush Rebellion. There is no similar conflict in this case. Indeed, the director of FWP is a long-time department employee. Political appointee status is not, in and of itself, compelling evidence of inadequate representation. *See PPL Mont., L.L.C. v. Mont.,* 2005 ML 905, ¶ 26 ("…the Applicants argue the State is suspect because the attorney general is a political appointee. However, neither [this] argument, nor the implications that flow from

[it], create the necessary showing that the State will somehow fail to vigorously defend and prosecute this action.").

On the second ground, Applicants collect several previous, unrelated actions to argue that Defendants will not adequately represent their interests. For example, Applicants argue that the agency-backed HB 505 (2021), which provided incentives for landowners to provide public access, demonstrates that Plaintiff and Defendants are aligned. This ignores that UPOM, the Plaintiff, also opposed HB 505 and joined Applicants' opposition. Introduction of HB 505 (2021) provides no support for the Applicants' argument that Defendants will not adequately represent their interests.

Similarly, Applicants' citation to *Gardipee v. Montana* is inappropriate. The lawsuit was filed by plaintiffs when revisions to the archery season were already being considered by the Commission that would not (and could not lawfully) be addressed by the Commission in time for the 2021 archery-only season. While Defendants had no interest in conceding (and did not concede) the ultimate merits of the case, they also did not want to prejudice the *Gardipee* plaintiffs' chance to hunt during the 2021 archery-only season when revisions were forthcoming. Defendants ultimately contested the preliminary injunction and prevailed.

Applicants also claim that 454 agreements demonstrate that Defendants are

incapable of protecting their interests because they allow incentives to landowners offering hunter access to property. The Defendants were first authorized by statute to enter into 454 agreements in 2001. Again, these agreements allow for liberalized access to private land, which support Applicants' interest in public access to Montana's wildlife.

Finally, Applicants claim that FWP cannot adequately represent their interests because FWP made concessions regarding its proposed bison management plan in *UPOM v. Mont. Dept. Fish, Wildlife and Parks*, Cause No. DV-2020-30(10th Judicial Dist. Ct., Fergus County, March 9, 2020). However, prior, unrelated litigation strategy is insufficient evidence to show inadequate representation here. *See e.g., PPL Mont., L.L.C. v. Mont.,* 2005 ML 905, ¶ 26 ("The Applicants argue the State will inadequately represent their claims because the State has failed to fully prosecute such cases in the past…. However, neither [this] argument [], nor the implications that flow from [it], create the necessary showing that the State will somehow fail to vigorously defend and prosecute this action.").

B. Applicants' Permissive Intervention should be denied.

Applicants also argue that if the Court finds that they cannot intervene as a matter of right, they should be granted permissive intervention. The Court may

permit anyone to intervene "has a claim or defense that shares with the main action by a common question of law or fact" Mont. R. Civ. P 24(b). Applicants argue that their intervention will have an "almost-non-existent effect on proceedings." This is simply not true. The addition of another party to litigation adds layers of complexity for parties and the court. It imposes another theory of the case on the matter, even if parties are aligned in the result. Most importantly, it places intervenors in the position where they take not only the rights of a party, but also the responsibilities. Applicants will be required to share costs and fees with the Defendants. This is an unnecessary burden on Applicants, who have other, less onerous means of participating in this case. For example, Defendants do not object to Applicants participating as *amici* in this case and would encourage their participation in that manner. In that way, the Applicants can focus their resources on expressing their concerns without involving themselves directly in the litigation.

Conclusion

Applicants have timely filed their Motion to Intervene and have made a showing of an interest in this litigation and its outcome. However, Applicants have failed to show that the Defendants will not adequately protect their interests. Defendants are ready, willing, and able to defend this litigation. Neither political appointment nor the examples provided by the Applicants demonstrate the

Defendants' inability to represent their interests in Montana wildlife. For the Court to find otherwise would mean that third parties are always entitled to intervene in every case involving State of Montana agencies. Applicants have not demonstrated they are entitled to intervention of right.

Nor should Applicants be granted permissive intervention. Such intervention adds an unnecessary level of complexity by adding additional parties. This, in turn, adds complexity that unnecessarily wastes resources, including those of the Court. Applicants can participate as *amici curiae*, which Defendants will not oppose. This approach preserves the resources of the Applicants by limiting their exposure as parties, while also allowing them to be heard.

For the reasons set forth herein, the Defendants respectfully request that the Court deny Applicants' Motion to Intervene.

Dated this 15 day of June, 2022.

Zach Zipfel
Acting Chief Legal Counsel
Montana Department of Fish, Wildlife and Parks

CERTIFICATE OF SERVICE

I, Crissy Bell, do hereby certify that on the 15 day of June 2022, I served a copy of the foregoing by mailing it first-class, postage prepaid to the following:

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