

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
AND PARKS,

Defendants.

CAUSE NO. DV-2022-36

Hon. Heather Perry

**ORDER GRANTING
MOTION TO INTERVENE**

BACKGROUND AND PROCEDURAL HISTORY

Pending before the Court is a Motion to Intervene filed June 1, 2022 (Dkt. #8). Procedurally, Plaintiff filed a First Amended Complaint on June 17, 2022 (Dkt. #13), and Defendants filed an Answer to First Amended Complaint on July 1, 2022 (Dkt. #15) without asserting counter or third-party claims. The Motion to Intervene seeks leave to intervene and identifies one intervenor group consisting of seven (7) organizations, with each providing an affidavit of a member or representative in support of the general Motion to Intervene, which is fully briefed. No Amended Motion to Intervene was filed following the filing of the First Amended Complaint. No hearing was requested.

At the outset, the Court notes that the Introduction paragraph of Intervenors' Reply Brief (Dkt. #16, filed on July 5, 2022 after the First Amended Complaint) does not recognize the amended allegations and therefore completely misstates the actual issues now before the Court. Consequently, Intervenors spent most of their time asserting they generally need to intervene to protect and increase the elk herds without addressing the overpopulation and overgrazing allegations, which are both specific and repetitive in the First Amended Complaint.

The issues pending before the Court can be generalized as whether Defendants are following the law with respect to the management of elk, deer, and antelope populations. More specific to this motion is the issue of whether one of the statutes pertaining to management and the corresponding administrative rule are facially unconstitutional.

Despite lengthy briefs and affidavits, Intervenors failed to address their standing to intervene as to effective management criteria—including animal science, range management, land stewardship, and soil science—as applied to breeding and calving success, overpopulation/AUMs, overgrazing resulting in a loss of forage quality, herd health, and drought. All these matters are at issue here through the First Amended Complaint, as well as whether Defendant Commissioners may pick and choose which statutes or administrative rules they follow, or in the alternative, whether it is impossible for them to follow all the statutes and rules because they are internally inconsistent. Also at issue is whether or not the one of the management and policy statutes allows for the unconstitutional delegation of legislative power to the Commission.

Because Intervenors did address their standing with respect to intervening for purposes of determining constitutionality of one of the management statutes and administrative rules which directly affect hunting, the Court issues the following:

FINDINGS OF FACT

1. Plaintiff's First Amended Complaint requests relief through five (5) counts for declaratory judgment relief, writ of mandamus, and injunctive relief for a total of seven (7) counts.
2. More specifically, Count VI requests declaratory judgment that Mont. Code Ann. § 87-1-225 and Admin. R. Mont. 12.9-803(1) are facially unconstitutional.
3. Mont. Code Ann. § 87-1-225 generally deals with the ability of Defendant Department of Fish Wildlife and Parks to provide timely assistance to landowners on a local level for wildlife damage to property or crops. This statute appears designed to address immediate and ongoing damage to property (excluding federal property but not limited to private property) rather than part of the state-wide long-term management plan administered from Helena under Mont. Code Ann. § 87-1-301(4)(b). The damage statute by its own terms limits or eliminates the Department's response based on how the landowner handles public access hunting. Plaintiff asserts this statute is unconstitutional and on its face conflicts with Mont. Const. Art. IX §7. Plaintiff further asserts the administrative rule is invalid.
4. On page 10 of Intervenors' Brief in Support of Motion to Intervene (Dkt. #9), Intervenors assert and the Court agrees that Intervenors, including those citizens who hunt, are part of the public trust under Mont. Const. Art. IX §7. (See generally the affidavit of Walker Conyngham for Hellgate Hunters and Anglers, Ex. 3, which actually addresses specific references on page 2 concerning "science-based management" and "biological carrying capacity" and also confirms he hunts elk; and the affidavit of Glenn Elison for Public Land Water Access Association, Ex. 7, which also addresses concerns regarding the Commission's duties as well as concerns about how to best "ensure Montana is home to robust, viable, and huntable populations of elk and other wildlife statewide." Mr. Elison is also an elk hunter.)
5. Intervenors' interests are not represented by Plaintiffs, as stipulated by both parties.

6. Plaintiff and Defendants assert Intervenor's interests are represented by Defendants (See Plaintiff's Response in Opposition (Dkt. #12) and Defs. Response opposing intervention (Dkt. #11).)
7. Intervenor's assert they are in favor of the current management and statutory scheme but are still not adequately represented by Defendants. (See Reply Br. In Support of Mot. To Intervene, Dkt. #16, pp. 17-18). Intervenor's raise the issue of third-party beneficiary status as members of the public who are members of the public trust since the State manages game for their benefit. They are concerned Plaintiff and Defendants may reach a resolution that fails to adequately represent the interests conferred upon them by Mont. Const. Art, IX §7 as hunters and conservationists.
8. In paragraph 15 of Defendants' Answer to the First Amended Complaint (Dkt. #15, Defendants admit they are "charged with 'management of game'." In paragraphs 21 and 22, they admit twenty-nine districts are at twice the objective elk population and that HD 417 is 3,042 (*emphasis added*) head of elk over the objective range of 350-400 elk.
9. In paragraph 52 of Defendants' Answer, Defendant Commission does not deny they have failed to resolve the overpopulation issue in HD 417 but avers that by somehow changing the boundary lines between HD 426 and HD 417, they reduced or addressed overpopulation in HD 417.
10. In addition, Defendants' Answer does not appear to deny that Defendant Commission may not be following legal advice as to complying with the statutory scheme for elk management (See Answer Dkt. #15, ¶ 56).

LEGAL ANALYSIS

Intervention by Right under M.R.Civ.P. 24(a)(2) generally requires the Court to permit anyone to intervene who 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.

Under *Sportsmen for I-43 v. Mont. Fifteenth Judicial District*, 2002 MT 18, ¶7, 308 Mont. 189, ¶7, 40 P.3d 400, ¶7, there are four criteria that must be met to establish an intervention by right: the motion 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.

Further “a district court must determine whether the party seeking intervention has made a prima facie showing of a ‘direct, substantial, legally protectable interest in the proceedings.’” (*Id.* ¶ 9.)

As Plaintiff argues on page 7 of its Response to Motion to Intervene (Dkt. #12), an “intervenor is not permitted to inject new, unrelated issues into pending litigation.” (internal citations omitted.)

The Court issues the following **CONCLUSIONS OF LAW**:

1. The Court has jurisdiction over this matter and venue is proper.
2. Under Mont. Const. Art. IX §7, Intervenors as Montana citizens and members of hunting, fishing and conservation groups established through affidavits that they are the “beneficiaries of the State’s obligations as trustee for the management and protection of game animals.” (*See Sportsmen for I-43* at ¶¶11-12.) This meets the requirement of a prima facie showing of a direct, substantial, legally protectable interest in the proceedings.
3. The motion to intervene is timely.
4. Under Mont. Const. Art. IX §7, Intervenors are constitutional third-party beneficiaries and part of the public trust which confers a direct, legally protectable interest in management decisions concerning procedure and participation in damage hunts or other management methods of reducing overpopulation and overgrazing.
5. Plaintiff requests that Mont. Code. Ann. § 87-1-225 and Admin. Rule 12.9-803(1) be found facially unconstitutional. This statute and rule deal with the reduction or elimination of game animals for damage control. The statute allows the Department

to utilize special seasons, landholder permits, or Department destruction of animals to address damage-causing animals. Intervenor have met the standard for establishing that, in the absence of their participation as a party herein, their constitutionally conferred rights may be impaired by the disposition of this action. Specifically, that they may not have a voice in advocating for or exercising their participation rights in damage hunts.

6. As Plaintiff alleges and Defendants' answers appear to confirm, the Defendants Commission and/or Department may not follow the statutes or their own administrative rules. The Court concludes if this course of conduct is in fact true, Defendants cannot adequately represent third-party Intervenor whose constitutionally conferred interests may not be being managed lawfully.

IT IS HEREBY ORDERED:

1. The Motion to Intervene is GRANTED as follows:
 - a. The Intervenor shall function together as one additional party unless amended by further order of this Court.
 - b. The Intervenor are limited to only the allegations and requests for relief set forth in the First Amended Complaint. Defendants did not assert counter or third-party claims.
2. By prior order, all deadlines were stayed. That order is RESCINDED. Intervenor shall file an Answer to the First Amended Complaint within twenty-one (21) days.
3. Also pending are Plaintiff's Motion for Partial Summary Judgment and Defendants' Motion for a Scheduling Conference. Defendants' Motion for a Scheduling Conference is GRANTED. The response deadline to the Motion for Partial Summary Judgment and all other deadlines shall be set at a Formal Scheduling Conference on the record, which shall be held on Tuesday, October 11, 2022 at 3:00 p.m. in the Fergus County Courtroom.

The parties may appear at the scheduling conference by Zoom using the following information:

Join Zoom Meeting:

<https://mt-gov.zoom.us/j/87508340114?pwd=SUtTanI0SXREOVM5dFBtM0NiZpUT09>

Meeting ID: 875 0834 0114

Password: 213261

Dial by Telephone:

+1 646 558 8656 or +1 406 444 9999

Join by H.323 (Polycom):

162.255.37.11##87508340114