

existing wildlife management programs, necessary actions *with the objective* that the population of elk, deer, and antelope remains at or below the sustainable population.” (Emphasis added). The entirety of Mont. Code Ann. § 87-1-323 is a statute that speaks for itself and to which no response is required. Defendants deny sentences two and three of Paragraph 1. FWP has implemented programs such as: liberalized hunting; game damage hunts; and landowner permits, with the objective the population remain at or below the sustainable level. Mont. Code Ann. § 87-1-323(2). Defendants lack sufficient information to form a belief as to the veracity of the allegations that one Commission member stated that landowners “need to work with the Department [by allowing public hunting] or the Department will not work with them” and to whether FWP’s Director said that Defendants will not address depredation from elk “if a landowner doesn’t allow at least some public hunting.” FWP is statutorily prohibited from providing game damage assistance if the landowner does not allow or significantly limits public hunting. Mont. Code Ann. § 87-1-225(1). An exception exists for situations in which unique or special circumstances make public hunting inappropriate. Mont. Code Ann. § 87-1-225(2).

2. Paragraph 2 contains legal assertions to which no response is required. If a response is required, the allegations are denied.
3. Paragraph 3 contains legal assertions to which no response is required. If a response is required, the allegations are denied.
4. Paragraph 4 contains legal assertions to which no response is required. If a response is required, the allegations are denied.

5. Admit that elk were nearly extinct in the Missouri River Breaks (“Breaks”) by the 1890s and that the federal government patented parcels of land to private homesteaders. As to the remainder of Paragraph 5, Defendants lack sufficient knowledge or information to form a belief as to the veracity of the allegations and therefore deny the same.
6. Admit.
7. Defendants lack sufficient knowledge or information to form a belief as to the veracity of the allegations in sentence 1. Defendants deny the remainder of Paragraph 7.
8. Defendants lack sufficient knowledge or information to form a belief as to the veracity of the allegations and therefore deny the same.
9. Admit that reintroduction of elk was a success.
10. Defendants deny they were not responsive to landowners’ concerns. Defendants admit the remainder of Paragraph 10.
11. HB 42 (2003) and the subsequent statutes within which it was codified speak for themselves and require no response. To the extent a response is required, the allegations are denied.
12. HB 42 (2003) and the subsequent statutes within which it was codified, speak for themselves.
13. Deny Plaintiff’s characterization of Defendant’s “mandate.”
14. Admit.
15. HB 42 (2003), and the subsequent statutes within which it was codified, speak for themselves and require no response. To the extent that a response is required, Defendants admit that, among other duties, the department is charged with “management” of game. Defendants deny the remainder of the allegations in Paragraph 15.

16. Paragraph 16 contains legal assertions that do not require a response. If a response is required, the allegations are denied. Mont. Code Ann. § 81-1-301 speaks for itself.
17. Deny. Defendants are required to “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.” Mont. Code Ann. § 87-1-323(2).
18. Defendants lack sufficient knowledge or information to form a belief as to the veracity of the allegations and therefore deny the same.
19. Deny.
20. Deny. There are 44 Elk Management Units (EMUs) set out in the Elk Management Plan. Some EMUs have multiple hunting districts, some of which are over objective, some of which are under objective, and some of which are at objective. As of 2021, in 20 EMUs every hunting district is over objective. In three EMUs every hunting district is under objective. In six EMUs, every hunting district is at objective. In 12 EMUs, results vary by hunting district with nine hunting districts below objective, 18 district at objective and 19 districts over objective. Defendants have no data for the remaining 28 hunting districts because there are either no stated objectives, aerial surveys were not conducted because of difficulty in observation or altitude constraints, or because there were no overwintering elk located in the districts.
21. Admit that according to the 2021 Elk Count there are 3,442 elk in HD 417 and that this is 3,042 over the objective range of 350-400 elk. Defendants admit that the population in HD 417 is divided nearly equally between bulls and cows, and that approximately 1,000

births would be expected this calving season. Defendants deny the remainder of Paragraph 21.

22. The 2005 Elk Management Plan is a document which speaks for itself.
23. Deny.
24. Defendants lack sufficient knowledge or information to form a belief as to the veracity of the allegations and therefore deny the same.
25. Defendants lack sufficient knowledge or information to form a belief as to the veracity of the allegations and therefore deny the same.
26. Admit that in 2012, not 2016, FWP sent a letter to the landowners in the Breaks which stated that:

Montana has many special places to hunt elk, as a result of the landscape, elk numbers and, in some cases, the opportunity to take a trophy bull. These circumstances can also represent challenges relative to: equity of opportunity **between archery and rifle hunters**; quality of experience, with some hunters frustrated by increasing numbers of hunters and others willing to tolerate those increases in return for the opportunity to hunt each year; and difficulty managing elk numbers, in some instances the result of private lands being open for only limited or no hunter access including limited access opportunities to harvest cow elk. We appreciate that these special opportunities also result in hunter management challenges for landowners. (Emphasis added.)

The 2012 letter further states that as a part of the 2012 Commission debate on regulations, the regulations were adjusted to increase:

[B]ull elk archery permits. That change was partly in response to requests for landowners and outfitters with the reciprocal request for FWP and the FWP Commission that landowners would in turn allow additional public access to bull and cow elk hunters, especially during the rifle season. In particular, the opportunity to harvest cow elk is necessary if elk numbers are to be managed to population objectives.

Admit that in 2016, FWP reached out to landowners to advise them of the shoulder season. Defendants deny the remainder of Paragraph 26.

27. Admit that in its 2012 letter, FWP advised: “The Commission also adopted the cow elk annual harvest prescription listed below in an effort to reach population objective in not more than six years.” The 2012 letter from FWP also provided that “additional archery bull elk permits were increased as an incentive to allow additional cow harvest.”

Defendants deny the remainder of Paragraph 27.

28. Defendants lack sufficient knowledge or information to form a belief as to the veracity of the allegations and therefore deny the same.
29. Defendants lack sufficient knowledge or information to form a belief as to the veracity of the allegations and therefore deny the same.
30. Admit.

31. Admit that in an opinion published on March 23, 2022 in the Three Forks Voice, FWP Director Hank Worsech stated “[u]nder state statutes, FWP can’t help reduce depredation, such as by fencing haystacks, if a landowner doesn’t allow at least some public hunting.” Deny any allegation that Director Worsech “back-tracked” on his February opinion or that his opinions were inconsistent. Absent special or unique circumstances, FWP is precluded from providing game damage assistance if the landowner disallows or significantly reduces public hunting pursuant to Mont. Code Ann. § 87-1-225. This has been the state of the law since 1989.
32. Paragraph 32 contains legal assertions that do not require a response. If a response is required, the allegations are denied.
33. Deny.
34. Deny.
35. Admit that UPOM advocated for liberalized hunting regulations in some circumstances. The Defendants deny the remainder of Paragraph 35.
36. Admit that in 2007 FWP proposed reducing hunting opportunities in the Breaks from unlimited archery permits to a limited permit system in HDs 410, 417, 620, 621, 622, 630, 631, 632, 700. Defendants deny the remainder of Paragraph 36.
37. Deny.
38. Admit that UPOM members voiced concern about the growing elk population in the Breaks. Admit that that the Commission passed tentative hunting regulations in 2007 that created limited archery permits in the Breaks. Defendants deny the remainder of Paragraph 38.

39. Admit that of 405 emailed and mailed comments in 2007, 150 comments favored limited archery permits in the Breaks, 102 comments opposed limited archery permits in the Breaks and 153 comments did not fit into “for” or “against” the limited archery permit proposal. Admit that Commission voted unanimously to adopt the limited permit system in the Breaks starting for the 2007/2008 season. Defendants deny the remainder of Paragraph 39.
40. Admit that in 2020 a group of landowners in HD 417 requested that the Commission adopt a general archery either-sex elk season in HD 417.
41. Admit that FWP did not adopt the petitioner’s request for general either-sex archery permits for HD 417 but issued 125 additional either-sex elk archery permits. Defendants deny the remainder of Paragraph 41.
42. Admit.
43. Defendants lack sufficient knowledge or information to form a belief as to the veracity of the allegations and therefore deny the same.
44. Admit. The December 2021 press release referenced in Paragraph 44 speaks for itself and no response is required.
45. Admit that on December 14, 2021, the Commission adopted proposed changes to elk season regulations including unlimited archery-only either sex permits for several hunting districts and a 50% increase in either-sex rifle permits in HD 411/ new proposed HD 535, 417, 426, 590, 702, 704, 705. Defendants deny the remainder of Paragraph 45.
46. Deny.
47. Admit that on February 4, 2022, the Commission adopted hunting regulations for the 2022/2023 season. Defendants deny remainder of Paragraph 47.

48. Admit that February 4, 2022, Commissioner Cebull moved to eliminate unlimited permits. Deny that 417-21 permits (which include HD 417 & 426) were reduced by the motion.
49. Statements made by Commissioner Cebull at the February 4, 2022, Commission meeting are video-recorded and that recording speaks for itself and requires no response. Defendants deny the remainder of Paragraph 49.
50. Statements made by Commissioner Tabor at the February 3, 2022, Commission work session are video-recorded and that recording speaks for itself and requires no response. The 2005 Elk Management Plan is a document which speaks for itself, and which requires no response. Defendants deny the remainder of Paragraph 50.
51. Admit that on February 4, 2022 Commissioner Walsh moved to eliminate the proposed 50% increase in rifle permits in HDs 411, 417 and 426. Admit that on February 2, 2022 the Commission changed the boundaries of HD 417 to simplify district boundaries. Part of HD 426 was included in HD 417. While HD 417 has fewer permits per elk than allocated in prior years, the boundary change resulted in an increased number of permits per elk in HD 426.
52. Admit.
53. Deny.
54. Statements made by Director Worsech at the February 4, 2022 Commission meeting are video recorded and that recording speaks for itself. The Defendants deny the remainder of Paragraph 54.

55. Statements made by FWP's Chief Legal Counsel at the February 4, 2022, Commission meeting are video recorded and that recording speaks for itself. The Defendants deny the remainder of Paragraph 55.
56. Admit that the Commission approved Commissioner Walsh's motion. Defendants deny the remainder of the paragraph.
57. Paragraph 57 contains legal assertions that do not require a response. If a response is required, the allegations are denied.
58. Deny.
59. Paragraph 59 incorporates all prior allegations and requires no response. If a response is required, the allegations are denied.
60. Paragraph 60 contains legal assertions that do not require a response. If a response is required, the allegations are denied.
61. Paragraph 61 contains legal assertions that do not require a response. If a response is required, the allegations are denied.
62. Paragraph 62 contains legal assertions and a partial restatement of Mont. Code Ann. § 87-1-323, neither of which require a response. If a response is required, the allegations are denied.
63. Paragraph 63 contains legal assertions that do not require a response. If a response is required, the allegations are denied.
64. Paragraph 64 contains legal assertions that do not require a response. If a response is required, the allegations are denied. Defendants have engaged in significant management activities and specifically undertaken those listed in Mont. Code Ann. § 87-1-323.

65. Paragraph 65 contains legal assertions that do not require a response. If a response is required, the allegations are denied.
66. Paragraph 66 contains legal assertions that do not require a response. If a response is required, the allegations are denied.
67. Paragraph 67 contains legal assertions that do not require a response. If a response is required, the allegations are denied.
68. Paragraph 68 contains legal assertions that do not require a response. If a response is required, the allegations are denied.
69. Paragraph 69 contains legal assertions that do not require a response. If a response is required, the allegations are denied.
70. Paragraph 70 incorporates all prior allegations and requires no response. If a response is required, the allegations are denied.
71. Paragraph 71 contains legal assertions that do not require a response. If a response is required, the allegations are denied. Mandamus is appropriate only when there is no plain, speedy or adequate remedy. Mont. Code Ann. § 26-27-102(2). Plaintiff requests the same relief in Count III (Injunctive Relief). Therefore, its Complaint demonstrates that there is a plain, speedy, and adequate remedy for Count II. Additionally, Plaintiffs have failed to properly request a writ of mandamus in accordance with Title 27 Chapter 26 Mont. Code Ann., and this count should be dismissed pursuant to Mont. Code Ann. § 27-26-201.
72. Paragraph 72 contains legal assertions that do not require a response. If a response is required, the allegations are denied.

73. Paragraph 73 contains legal assertions that do not require a response. If a response is required, the allegations are denied.
74. Paragraph 74 incorporates all prior allegations and requires no response. If a response is required, the allegations are denied.
75. Defendants deny the first sentence in Paragraph 75. Defendants lack sufficient knowledge or information to form a belief as to the veracity of the remaining allegations and therefore deny the same.
76. Defendants lack sufficient knowledge or information to form a belief as to the veracity of these allegations and therefore deny the same.
77. Defendants deny the allegation that they have not taken management actions to reduce the population of elk in the Breaks. Defendant also deny any allegations that they caused an economic crisis for landowners. Defendants lack sufficient knowledge or information to form a belief as to the remaining allegations and therefore deny the same. To the extent the remainder of Paragraph 77 contains legal assertions, those assertions do not require a response. If a response is required, the allegations are denied.
78. Paragraph 78 contains legal assertions that do not require a response. If a response is required, the allegations are denied.
79. Paragraph 79 contains legal assertions that do not require a response. If a response is required, the allegations are denied. Continuing judicial oversight is not a remedy for preliminary injunction.
80. Paragraph 80 contains legal assertions that do not require a response. If a response is required, the allegations are denied.

81. Paragraph 81 incorporates all prior allegations and requires no response. If a response is required, the allegations are denied.
82. Mont. Code Ann. § 87-1-301 is a statute that speaks for itself and no response is required.
83. Paragraph 83 contains legal assertions that do not require a response. To the extent a response is required the allegations are denied.
84. Paragraph 84 contains legal assertions that do not require a response. To the extent a response is required the allegations are denied.
85. Paragraph 85 incorporates all prior allegations and requires no response. If a response is required, the allegations are denied.
86. Admin. R. Mont. 12.9.101(1) is a rule which speaks for itself, and no response is required.
87. Paragraph 87 contains a partial restatement of Admin. R. Mont. 12.9.101. That rule speaks for itself and no response is required.
88. Mont. Code Ann. § 2-4-314 is a statute which speaks for itself, and no response is required. Defendants admit the remainder of Paragraph 88.
89. Paragraph 89 contains legal assertions that do not require a response. To the extent a response is required the allegations are denied.
90. Paragraph 90 contains partial restatements of Mont. Code Ann. § 87-1-323 and Admin. R. Mont. 12.9.101, which speak for themselves and require no response. The extent that Paragraph 90 contains an allegation, Defendants deny the same.
91. Paragraph 91 contains legal assertions that do not require a response. To the extent a response is required the allegations are denied.

92. Paragraph 92 contains legal assertions that do not require a response. To the extent a response is required the allegations are denied.
93. Paragraph 93 contains legal assertions that do not require a response. To the extent a response is required the allegations are denied.
94. Paragraph 94 contains legal assertions that do not require a response. To the extent a response is required the allegations are denied.
95. Paragraph 95 incorporates all prior allegations and requires no response. If a response is required, the allegations are denied.
96. Paragraph 96 contains a partial restatement of Mont. Code Ann. § 87-1-225, which is a statute that speaks for itself and for which no response is required.
97. Paragraph 97 contains a partial restatement of Admin. R. Mont. 12.9.803, which is a rule that speaks for itself and for which no response is required.
98. Paragraph 98 contains a partial restatement of Mont. Code Ann. § 87-1-225¹, which is a statute that speaks for itself and for which no response is required.
99. Paragraph 99 contains legal assertions that do not require a response. To the extent a response is required the allegations are denied. The third sentence is a partial restatement of Mont. Const. Art. IX, § 7, which speaks for itself and to which no response is required.
100. Paragraph 100 contains legal assertions that do not require a response. To the extent a response is required the allegations are denied.
101. Paragraph 101 contains legal assertions that do not require a response. To the extent a response is required the allegations are denied.

¹ Plaintiff appears to have mistakenly cited to Mont. Code Ann. § 27-1-225 in association with this paragraph.

|

GENERAL DENIAL

To the extent that Defendants have failed to respond to any allegation in the Complaint, Defendants deny those allegations. Defendants deny that the Plaintiff is entitled to the relief requested or any relief whatsoever.

AFFIRMATIVE DEFENSES

1. Plaintiff fails to state a claim upon which relief may be granted.
2. Plaintiff failed to exhaust administrative remedies.
3. Defendants reserve the right to assert additional affirmative defenses as they become evident.

Respectfully submitted this 27th day of May 2022.



Zach Zipfel
Kathleen Jensen
Kevin Rechkoff
Agency Legal Counsel
Department of Fish, Wildlife and Parks

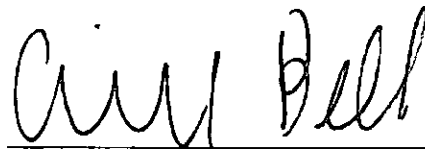
1

CERTIFICATE OF SERVICE

I hereby certify that, this 27th day of May 2022, a true and correct copy of the foregoing was emailed and mailed postage prepaid to the following:

Jack G. Connors
Jacqueline R. Papez
Doney Crowley P.C.
Guardian Building
PO Box 1185
Helena, MT 59624-1185

jconnors@doneylaw.com
jpapez@doneylaw.com



Crissy Bell
Paralegal