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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.	Cause No.: DV-22-36 Judge: Jon A. Oldenburg **PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION TO INTERVENE** COPY

Plaintiff United Property Owners of Montana, Inc. ("UPOM"), by and through undersigned counsel, files its *Response in Opposition to Motion to Intervene* as follows:

I. INTRODUCTION

UPOM filed its Complaint on April 26, 2022, against the Montana Fish and Wildlife Commission ("Commission") and the Montana Department of Fish, Wildlife & Parks ("FWP")

(collectively "Defendants"). On June 1, 2022, a collection of seven special interest groups, (collectively "Applicants") filed a Motion to Intervene in this lawsuit.

Applicants, however, fail to carry their burden entitling them to intervention as a matter of right as they do not demonstrate a legally cognizable interest in the lawsuit. Rather, Applicants merely proffer generalized interests in the subject matter of the lawsuit and their opinions regarding UPOM. A lawsuit, however, is not a free for all and the Court should not permit everyone claiming a general interest in elk management in Montana to intervene.

There are over 200,000 hunters in Montana who have the same interest in this lawsuit as Applicants. This Court cannot allow every hunter to intervene, however. The law requires more than Applicant's generalized interest in elk management issues: it requires the applicant to have a concrete, demonstrable, and legally protectable interest that would be adversely affected by the outcome. Applicants cannot identify a single legally protected interest that they possess that might be affected by this lawsuit because it is not about them. This case is about the actions of FWP and the Commission and Applicants' generalized interest in proper elk management will be adequately represented by the named Defendants.

Given that intervention makes litigation more complex and places additional burdens on the judicial system and the named parties, the Montana Supreme Court has expressed a preference for interested groups to participate as amicus instead of as intervenor-defendants. Therefore, the Court should deny Applicants' motion to intervene but allow the special interest groups to participate as amicus instead.

II. DISCUSSION

A. Applicants have failed to demonstrate that their claimed interest in the lawsuit would not be adequately represented by participating as amicus.

The Montana Supreme Court has stated that a proposed intervenor should "explain why . . . participation [as an amicus] would provide insufficient opportunity to [Applicants] to present its position to the District Court." *Montana Shooting Sports Association v. First Judicial District*, Order at 4, OP 21-0377 (Sept. 28, 2021); *see also*, *Montana Quality Education Coalition v. Eleventh Judicial District*, Order OP 16-0494 (Oct. 27, 2016) (denying a petition for a writ of supervisory control in part because "the [proposed intervenor] has not demonstrated that its interests in the constitutional issues could not be adequately represented by the Department and through its own amicus filing.").

Here, Applicants only seek the "dismissal of the UPOM suit." As such, there is no conceivable reason the Applicants need to conduct discovery, take depositions, participate in the mediation, appear at trial, or otherwise participate as intervenor-defendants. To the extent Applicants' opinions regarding elk management are relevant to the case before this Court, appearing and participating as an amicus is more than adequate to protect the Applicants' tangential interests. But because Applicants have not explained why they need to participate as intervenor-defendants, their motion to intervene should be denied.

B. Applicants are not entitled to intervene as a matter of right under Rule 24(a) as they do not meet the required criteria.

Intervention "is designed to protect nonparties from having their interests adversely affected by litigation conducted without their participation." *Clark Fork Coalition v. Mont. Dep't of Envtl. Quality*, 2007 MT 176, ¶ 10, 338 Mont. 205, 164 P.3d 902 (quoting *Gruman v.*

Hendrickson, 416 N.W.2d 497, 500 (Minn. App. 1987)). Conversely, if a party does not have an interest that will be adversely affected, they should not be allowed to intervene. The issue of intervention should not be taken lightly as adding additional parties adds to the complexity of the litigation for the named parties and a corresponding increased burden on the Court. *See Stuart v. Huff*, 706 F.3d 345, 350 (4th Cir. 2013). ("It is incontrovertible that motions to intervene can have profound implications for district courts' trial management functions. Additional parties can complicate routine scheduling order, prolong and increase the burdens of discovery and motion practice, thwart settlement, and delay trial."). This is especially true here as Applicants seek to add seven new parties to the case, who make end up serving seven sets of depositions, filing seven different briefs, requiring the deposition of seven additional corporate representatives and the Applicants may end up being represented by seven different attorneys or law firms at trial.

Rule 24(a)(2), M. R. Civ. P.[1] provides that an applicant may be permitted to intervene when the person

> Claims an interest relating to the property or transaction which is the subject of the action, and is so situated that the 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 said an applicant must satisfy four criteria before they may intervene as a matter of right:

> (1) that the application is timely; (2) that the applicant has an interest in the subject matter of the action; (3) that the protection of that interest may be impaired by the disposition of the action; and (4) that the interest is not adequately represented by an existing party.

[1] Applicants do not claim a "unconditional right to intervene by statute" under Rule 24(a)(1).

Loftis v. Loftis, 2010 MT 49, ¶ 9, 355 Mont. 316, 227 P.3d 1030. "Failure to satisfy any one of the requirements is fatal to the application." *Perry v. Prop. 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009).

UPOM agrees that Applicants timely filed their application to intervene, but they fail to establish the other three criteria.

1. **Applicants fail to demonstrate an interest in the subject matter as it stands, or that any such interest would be impaired by disposition of the lawsuit.**

To satisfy the second criteria from *Loftis*, "[a] party seeking intervention as a matter of right must make a prima facie showing of a direct, substantial, legally-protectable interest in the proceedings as a mere claim of interest is insufficient to support intervention as a matter of right." *Loftis*, ¶ 13 (quotation omitted).

The Applicants argue they satisfy this condition based *Sportsmen for I-143 v. Mont. Fifteenth Jud. Dist. Court*, 2002 MT 18, 308 Mont. 189, 40 P.3d 400. A closer reading of *the* Court's Opinion reveals that it is inapposite to Applicants' position. In *Sportsmen for I-143* the Montana Supreme Court held that interested parties had a direct, substantial, legally protectable interest in a ballot initiative when the groups "were the authors, sponsors, active supporters and defenders of [the ballot initiative]." *Id.*, ¶ 12. Here, Applicants were not the "authors or sponsors" of a ballot initiative, let alone the statutory provisions at issue, but only generally indicate "engage[ment] in the wildlife management process." Br. at 10. This general participation does not constitute a "direct, substantial, legally-protectable" interest necessary for intervention under Montana law.

Further, the Montana Supreme Court has narrowed the application of *Sportsmen for I-143* by stating there is a legal "distinction between the role of primary proponent of a ballot initiative versus the role of lobbyist." *Montana Shooting Sports Association v. First Judicial District*,

Order at 4, OP 21-0377 (Sept. 28, 2021). The primary proponent of a ballot initiative has the right to intervene in a lawsuit to defend their interpretation of the resulting legislation, *Sportsmen for I-143*, ¶ 6, while groups that were "merely a lobbyist" in support of a challenged statute do not have the same right. *Montana Shooting Sports Association*, at 3-4. Again, Applicants here were not the primary proponent of a ballot initiative for any of the statutes mentioned in UPOM's complaint, and even though they have advocated for certain elk management policies, that puts them in the camp of mere lobbyists for their opinions regarding proper elk management, which does not mandate intervention.

Perhaps recognizing the more rigorous intervention standard applied in Montana disqualifies Applicants here. Applicants cite to a dated decision from the Ninth Circuit Court of Appeals, *U.S. v. Carpenter,* 526 F.3d 1237 (9th Cir. 2008), to claim that they have satisfied the "interest" requirement for intervention. Indeed, in *Carpenter* the disputed issue was the status of a road near a wilderness area. The proposed intervenor's did not have "a property interest in the subject matter of the dispute", but the Ninth Circuit found the proposed intervenor's "use and enjoyment of the unique aesthetic environment of this wilderness area" was sufficient to warrant intervention in the dispute regarding the status of the road. *Carpenter,* 526 F.3d at 1240. The Montana Supreme Court, however, has never said that concerns about the potential for secondary effects of a lawsuit is sufficient to support intervention; instead, the Court has applied the more rigorous "direct, substantial, legally-protectable interest in the proceedings" standard. *See, e.g., Loftis,* ¶ 18.

Not only do Applicants gloss over the standard for intervention recognized in Montana, they further attempt to manufacture an interest in the present lawsuit by misrepresenting the nature of this lawsuit and the relief UPOM is seeking. Based on these strawman arguments of

what this lawsuit is purportedly about, Applicants then claim they have a protectable interest in defeating the claims for relief they invented and which are not found in UPOM's complaint. In actuality, Applicants are unable to articulate a single legally protectable interest that would be affected by the outcome of this lawsuit. For example, Applicants start the relevant section of their brief by making the conclusory statement, "The Intervenors have an interest in the disposition of this matter," Opening Brief at 9, but never identify the interest they are referring to. Their brief continues by asserting Applicants' "collective desire is to ensure that all Montanans have access to public land and public wildlife . . . is a sufficient to establish a protectable interest warranting intervention." *Id.* 10. But this "collective desire" is exactly the "mere claim of interest" in the subject matter of a lawsuit that the Montana Supreme Court has said is insufficient for intervention. *Loftis*, ¶ 10; *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015) ("ideological, economic, or precedential reasons" are not sufficient to support intervention).

Applicants raise issues related to "access to public land," their belief that UPOM is seeking to limit Applicants' "right to harvest wild elk," or that UPOM is asking the Court to undermine the North American Model of Wildlife Conservation. Opening Brief at 11. As evidenced by the Complaint, however, these issues are not part of this lawsuit. Rather, this lawsuit is only about ensuring that the Defendants comply with the laws regarding elk management as written by the Legislature and to challenge certain unconstitutional provisions. And it is well established that a proposed intervenor "is not permitted to inject new, unrelated issues into the pending litigation." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003); *Vinson v. Wash. Gas Light Co.*, 321 U.S. 489, 498, 64 (1944) ("one of the most usual procedural rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending

issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding.").

As District Court Judge McMahon recently explained, "A prospective intervenor must show more than an interest in the broad colloquial use of the term to indicate one's preference or even a 'stake' in the outcome (e.g., I am interested in the Yankees prevailing tonight, I've bet $50 on them.) with the much narrower term of art: 'legally-protectable interest' (e.g., The Steinbrenner family has a [legally protectable ownership] interest in the Yankees.)." *Board of Regents v. State*, Order Denying Intervention Motions and Briefing Schedule, Mont. First Judicial District Court, Lewis and Clark County Cause No. BDV-2021-598 (July 16, 2021) (brackets and quotations in original), Exhibit A.[2] Applying the analogy here, Applicants are the Yankees fans and not the Steinbrenner family. While Applicants may have supported their team for decades by advocating for certain policies related to elk management, the elk are owned by the state of Montana, and the State's interests in elk management is represented by the named Defendants — not the Applicants.

Ultimately, Applicants demonstrate only a generalized interest in the outcome of the lawsuit. But "the inquiry [on intervention] turns on whether the intervenor has a stake in the matter that goes beyond a generalized preference that the case come out a certain way. So, an intervenor fails to show a sufficient interest when he seeks to intervene solely for ideological, economic, or precedential reasons; that would-be intervenor merely *prefers* one outcome to the other." *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015) (emphasis in original). The Affidavits offered by the Applicants are full of ideological, economic, and precedential reasons

[2] The proposed intervenors filed a Petition for a Writ of Supervisory Control to challenge Judge McMahon's Order denying intervention and the Montana Supreme Court issued a substantive order denying the Petition and largely agreeing with Judge McMahon's reasoning. Order, OP-210377 (Sept. 28, 2021)

the special interest groups oppose UPOM's lawsuit, but these are just generalized grievances and do not rise to the level of a protectable interest.

Applicants fail to demonstrate anything more than an ancillary and general interest in the present litigation, since their failure to establish a substantial, legally protected interest that could be affected by the outcome of the lawsuit, the Court should deny Applicant's Motion.

2. Applicants fail to demonstrate that their purported interests in the lawsuit may be impaired by the disposition of the action.

Applicants must also show that "the disposition of the action may as a practical matter impair or impede the applicant's ability to protect [their] interest[s]." *Kansas Pub. Employees Retirement Sys. v. Reimer & Koger Assocs., Inc.*, 60 F. 3d 1304, 1306 (8th Cir. 1995). Applicants assert that their interests would be impaired if UPOM succeeds in the lawsuit because "their right to harvest wild elk will be limited," the "State's ability to manage a public resource for the benefit of the [Applicants] and the public" will be interfered with, and "politically-based" rather than "science-based" wildlife management practices will be instituted. Br. at 12-13. Applicants' conclusory assertions are entirely speculative and wholly-collateral to the present action.

Applicants claim that "their right to harvest wild elk will be limited" is false as UPOM is asking for more opportunity to harvest elk, not less. The same is true for the Applicant's claim that as a result of the lawsuit, Defendants will be forced to make "politically-based" elk management decisions rather than the "science-based" decisions. Indeed, it is the politically-based decision the Defendants have made in the past and their decision to ignore the science-based population levels in the state Elk plan that forced UPOM to file this lawsuit. All UPOM is asking for as a return to the statutory criteria and science-based management decisions to keep populations at the objective population levels. Nor is there any conceivable way Applicants' interests will be impaired by the Court requiring the Defendants to comply with state law, as

Defendants were required to comply with the law before the lawsuit was filed. UPOM is merely asking the Court to bring the Defendants back into compliance with already-existing law.

Because Applicants cannot demonstrate that a disposition of the lawsuit will impair their purported interests, Applicants' motion should be denied.

3. **Applicants purported interest in this litigation is adequately represented by FWP and the Commission.**

Finally, Applicants fail to demonstrate that the existing Defendants to the litigation do not "adequately" represent their interests. Three factors are evaluated in determining adequacy of representation: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003).

There is an assumption of adequacy when the government and the applicant are on the same side. *Id.* "Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention." *Id.*; *U.S. v. City of New York*, 198 F.3d 360, 367 (2nd Cir. 1999) ("The proponent of intervention must make a particularly strong showing of inadequacy in a case where the government is acting as *parens patriae*."). To overcome this presumption, Applicants must show "that its interest is in fact different from that of the [governmental entity] and that the interest will not be represented by [it]." *Enviro. Defense Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979).

Tellingly, Applicants do not bother to address the heightened burden of intervening to defend a lawsuit when a state agency is the named defendant, and Applicants do not demonstrate a "particularly strong showing" of inadequacy by Defendants' representations. As indicated by

FWP's Answer to the Complaint, Defendants and Applicants share the same ultimate objective — having this lawsuit dismissed. Instead, Applicants state that they are "concerned that the politics of today will sway Defendants in their decision-making," as the "Director of the FWP and the Commission are political appointees, subject to the intense politics of the elk management issue." Br. at 13. Applicants' purported concerns are not germane to this inquiry, however, as Montana law requires FWP and the Commission to act for the benefit of the public at large and independent of political control or manipulation. *See, e.g.*, Mont. Code Ann. §§ 2-2-103, -121(3), 87-1-204, -402; *see also Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) ("[T]he 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.").

Applicants' reference to Defendants' advocacy for policies that Applicants do not agree with does not overcome the presumption that the state will not adequately represent Applicants' interests in this case. Applicants cite to a federal court case where it says FWP made a "concession [that] was inappropriate." Br. at 14. This claim, too, is a red herring, as it does not impact resolution of the questions before this Court, or the adequacy of representation Defendants will offer in addressing those questions. Moreover, litigation tactics do not make representation by the state inadequate. *Arakaki*, 324 F.3d at 1086. And while the judge in the *Gardipee* case disagreed with a litigation position taken by FWP, the resolution of any disputed legal matter requires a judge to rule for one side and that does not make FWP's position "inappropriate," nor, more pertinently, does it imply that FWP is not fit to defend the present lawsuit.

FWP and the Commission need not adopt Applicants' demands in full for representation to be considered "adequate" under the heightened burden. *See City of New York*, 198 F.3d at 367 (stating that representation is not inadequate simply because the applicant would insist on more "elaborate pre-settlement procedures," "press for more drastic relief," or where "the applicant and the existing party have different views on the facts, the applicable law, or the likelihood of success of a particular litigation strategy.") (internal citations and omitted). Applicants fail to indicate any facts with regard to the present lawsuit to suggest that Applicants' and Defendants' interests are not aligned.

Because FWP and the Commission will more than adequately represent Applicants' interests in the lawsuit, the Court should find that Applicants are not entitled to intervene as a matter of right.

C. Applicants Are Not Entitled to Permissive Intervention Under Rule 24(b), M. R. Civ. P., Because No Common Question of Law and Fact Exists Between Their Claim or Defense and the Main Action, and Additional Factors Militate Against Granting Intervention.

Alternatively, Applicants seek permissive intervention. Rule 24(b), M. R. Civ. P., provides that "[o]n timely motion, the court may permit anyone to intervene who is given a conditional right to intervene by statute or has a claim or defense that shares with the main action a common question of law or fact." Non-parties seeking permissive intervention under Rule 24(b) must generally show: (1) an independent ground for jurisdiction; (2) a timely motion, and (3) a common question of law and fact between the movant's claim or defense and the main action. *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992). A court's decision to grant or deny a motion for permissive intervention is wholly discretionary, even if a common question of law or fact exists, or the requirements of Rule 24(b) are otherwise satisfied. *Bush v. Viterna*, 740 F.2d 350, 359 (5th Cir. 1984).

Applicants do not address the third element, that this lawsuit presents a common question of law and fact between movant's claim or defense and the main action. In fact, Applicants fail to even adhere to the basic requirements of Rule 24, M.R. Civ. P., as they do not provide a "pleading that sets out the claim or defense for which intervention is sought." Rule 24(c), M. R. Civ. P. Instead, Applicants claim they "seek to defend the quality and quantity of its members' interests in Montana's free-range wildlife across the state and their individual hunting heritage," that "[t]hese defenses therefore will address questions of law and fact in common with those raised by the already-named individual Parties," and that "[t]he organizations and their members seek to defend their constitutional, statutory, and regulatory rights and privileges from the unbridled allocation of wildlife solely to Montana's wealthiest and largest land-owning corporations and families." Br. at 16.

Applicants fail to identify *what* issue of fact or law are shared with those alleged by the named parties; to be sure, mischaracterizing the claims in this lawsuit to provide a juxtaposition to its members' mission statements does not count. "[A] proposed intervenor may not inject itself into a lawsuit under Rule 24(b) where, like here, it has no interest in a factual or legal dispute between the parties, but instead is merely concerned that resolution of the parties' claims might have collateral consequences for the proposed intervenor's independent interests." *Kirsch v. Dean*, 733 Fed.Appx. 268, 279 (6th Cir. 2018). Indeed, as described above, neither the claims nor defenses concern public access, the hunting of elk on public land, the validity of Defendants from relying on the public to regulate elk, the public's interest in elk as part of the public trust, nor Applicants' efforts to comment on, participate in, or otherwise engage in the legislative process are at issue in this case. Rather, UPOM's claims concern only Defendants' responsibilities to comply with elk management as set forth in the existing statutory scheme.

The anticipated effects or consequences to Applicants, if any, to hunt on private property, is wholly peripheral to the law or facts at issue in this case.

Further, while a more central inquiry with regard to intervention of right, court have recognized that identity of interest and the fact that a proposed intervenor's position is already represented counsels against granting permissive intervention. *League of Women Voters of Michigan v. Johnson*, 902 F.3d 572, 579 (6th Cir. 2018) (internal citations omitted). Because Applicants' interests, even if "direct, substantial, and legally protected," are already represented by Defendants, it is further reason for the Court to exercise its broad discretion and deny Applicants' request for permissive intervention.

III. CONCLUSION

Applicants have failed to establish a "direct, substantial, and legally protectable" interest in the current litigation, such that any decision on UPOM's request for declaratory relief will not affect Applicant's rights as a practical matter. And, to the extent Applicants' interests are at issue, a burden which they have failed to clarify with any specificity, these interests are already represented by the named Defendants.

Were the Court to accept Applicants' conclusory statements as sufficient for an interest to intervene in the present lawsuit, it sets a precedent whereby virtually any citizen would have equal grounds to intervene in this lawsuit or future lawsuits regarding wildlife management. Further, with respect to the instant action, if the Court permits Applicants to intervene, it will only garner further attempts by Applicants to politicize this lawsuit, waste the Court's time and judicial resources litigating Applicants' generalized grievances decidedly not at issue in the case, and open the door for dozens of other hunting groups in the state to intervene.

To the extent Applicants wish to participate in the present lawsuit, permitting their appearance as an amicus party is adequate for Applicants to represent their generalized and collateral interests. But Applicants have failed to meet their burdens warranting intervention as a matter of right and permissively. The Court should therefore deny Applicants' motion to intervene.

DATED this 17th day of June, 2022.

DONEY CROWLEY P.C.

/s/ Jack G. Connors

Jack G. Connors
Attorneys for Plaintiff United Property Owners of Montana

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Plaintiff's Response in Opposition to Motion to Intervene* was served via U.S. mail, first-class postage prepaid, on this 17th day of June, 2022, upon the following:

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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

BOARD OF REGENTS OF HIGHER EDUCATION OF THE STATE OF MONTANA, Petitioner, v. THE STATE OF MONTANA, by and through Austin Knudsen, Attorney General of the State of Montana in his official capacity, Respondent.	Cause No.: BDV-2021-598 **ORDER DENYING INTERVENTION MOTIONS AND BRIEFING SCHEDULE**

Before the Court are Montana Shooting Sports Association (MSSA) and David W. Diacon's (Diacon) respective intervention motions. The Board of Regents (Regents) opposes both motions. The State supports both motions. The motions are fully briefed. No party requested oral argument. For the reasons stated below, Diacon and MSSA's intervention motions are **DENIED**.

DISCUSSION

MSSA and Diacon both claim that they have a right to intervene in this case. Diacon argues he "has an intervention of right and must be allowed to intervene." MSSA contends it has "a right to intervene in a civil action 'of right' [sic]").

A. Permissive Intervention

Although neither MSSA nor Diacon relied upon permissive intervention, the State supports their permissive intervention because they "bring valuable perspectives to the litigation," citing *Kitzmiller v. Dover Area Sch. Dist.*, 229 F.R.D. 463, 471 (M.D. Pa. 2005). That case involved permissive intervention. Since MSSA and Diacon do not rely upon permissive intervention, it is inapposite, as is the State's brief.

The standard for having a *right* to intervene in litigation is not the mere possession of "valuable perspectives to the litigation." If it were, a virtually limitless number of individuals and organizations would have an absolute right to intervene in this proceeding: local and national groups both supporting and opposing guns, law enforcement, community organizations, students, parents of students, visiting collegiate athletes, staff, faculty, employee unions, public or private partners in any University project, vendors, customers, and more. Rule 24 "is a discretionary judicial efficiency rule used to avoid delay, circuity and multiplicity of suits," *Grenfell v. Duffy*, 198 Mont. 90, 95, 643 P.2d 1184, 1187 (1982). Therefore, any conclusion that Rule 24 binds a Court to accept virtually unlimited intervenors on the basis of "valuable perspectives to the litigation" would not only vitiate the rule but flip it on its head.

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EXHIBIT 1

Accordingly, this Court shall not consider the State's permissive intervention position.

B. Intervention by Right

Mont. R. Civ. P. 24(a) governs intervention by right. It provides, in relevant part:

> (a) *Intervention of Right*. On timely motion, the court must permit anyone to intervene who: [...]
> (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.

Mont. R. Civ. P. 24(a) (emphasis added).

> [I]n order to intervene as a matter of right under M. R. Civ. P. 24(a), an applicant must satisfy the following four criteria: (1) the application must be timely; (2) it must show an interest in the subject matter of the action; (3) it must show that the protection of that interest may be impaired by the disposition of the action; and (4) it must show that that interest is not adequately represented by an existing party.

Loftis v. Loftis, 2010 MT 49, ¶ 9, 355 Mont. 316, 227 P.3d 1030.

There should be no dispute that MSSA and Diacon's respective motions are timely.

"an interest in the subject matter of the action"

"[O]ne of the most usual procedural rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding." *Vinson v. Wash. Gas Light Co.*, 321 U.S. 489, 498, 64 S. Ct. 731, 735 (1944). A prospective intervenor "is not permitted to inject new, unrelated

EXHIBIT 1

issues into the pending litigation." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003).

The Regents' petition asserts that "the Legislature exercised control over the MUS and impermissibly infringed on [the Regents]' authority under the constitutional directive of Article X, Section 9." The Regents seek a determination on the "pure legal question of whether the enactment of HB102 'conformed to Montana's constitutional requirements, and directives regarding the authority of [the Regents]." The Regents claim "HB102 is unenforceable against [the Regents] and [Montana University System]" and "requests a judicial declaration that HB102 is unconstitutional as applied to [the Regents], [Montana University System], and [Montana University System] campuses and locations."

MSSA argues that its members "have a right to keep and bear arms under the challenged statutory scheme, which, if implemented as drafted, they intend to exercise." Diacon argues extensively regarding his Second Amendment rights and claims in his unsolicited "Petition of Intervenor" that the Court should "dissolve the temporary [sic] injunction" and "stay and enjoin enforcement" of Regents Policy 1006. Such arguments reiterate the Legislature's majority's "partisan political stripe, agenda, [and] divide" stance while ignoring the "existence and integrity of rule of law under the supreme law of this State for the mutual benefit of all and posterity." *McLaughlin v. Montana Legislature et al.*, 2021 MT 178, ¶ 81, __ Mont. __, __ P.3d __ (J. Sandefur, concurring.) This case is merely about whether the Legislature or the Executive[1] branch, via the Regents, has the exclusive constitutional authority to regulate firearms on MUS campuses and other locations.

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[1] "The Board of Regents and its members, as well as the entire MUS, is an independent board within the executive branch." *Sheehy v. Commissioner of Political Practices*, 2020 MT 37, ¶ 11, 399 Mont. 26, 458 P.3d 309 (fn 1).

EXHIBIT 1

Even if MSSA and/or Diacon were permitted to intervene, they may not "enlarge those issues or compel an alteration of the nature of the proceeding" from one about which governmental branch decides MUS campus firearm policy to a fundamentally unrelated question of whether Regents' Policy 1006 is constitutional. Neither MSSA nor Diacon shall be permitted to inject these new, unrelated issues into this declaratory relief proceeding, or redefine the "subject matter of the action" to fit their respective legal theories or claims. Despite their vociferous briefing to the contrary, this is not a case about the constitutionality of Regents' Policy 1006 or the right to bear arms under the Montana or United States Constitutions.

A lawsuit is not a general clearinghouse for all collateral and tangential issues, but rather a determination of specific raised claims. It would be improper for this Court to allow either MSSA or Diacon to inject new, unrelated issues into the pending litigation or alter the nature of the proceeding. The Court must, and shall, analyze MSSA and Diacon's purported interest in the subject matter of the action *as it stands*, and in respect to the *pending* issues.

"the subject matter of the action"

It is clear from the Regents' petition that the subject of this lawsuit, as it stands, is whether the Legislature or the Executive Branch, by and through the Regents, hold general police power to regulate firearms on MUS property. It is a suit between two equal governmental branches where the third equal branch will determine which of them has the exclusive constitutional authority to regulate firearms on MUS campuses and other locations.

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"a direct, substantial, legally-protectable interest"

"A party seeking intervention as a matter of right 'must make a prima facie showing of a direct, substantial, legally-protectable interest in the proceedings' as a 'mere claim of interest is insufficient to support intervention as a matter of right.'" *Loftis v. Loftis*, 2010 MT 49, ¶ 13, 355 Mont. 316, 319, 227 P.3d 1030, 1032.

Diacon argues that his "rights guaranteed under the federal and State constitutions are a direct, substantial, legally protectable interest in this matter...." Diacon's federal and state gun rights have nothing whatsoever to do with the subject matter of this declaratory relief proceeding.

Diacon misunderstands the nature of the "interest" he must possess to intervene by right. A prospective intervenor must show more than an interest in the broad colloquial use of the term to indicate one's preference or even a "stake" in the outcome (e.g., I am interested in the Yankees prevailing tonight, I've bet $50 on them.) with the much narrower term of art: "*legally-protectable* interest" (e.g., The Steinbrenner family has a [legally protectable ownership] interest in the Yankees.)

> [T]he inquiry turns on whether the intervenor has a stake in the matter that goes beyond a generalized preference that the case come out a certain way. So, an intervenor fails to show a sufficient interest when he seeks to intervene solely for ideological, economic, or precedential reasons; that would-be intervenor merely prefers one outcome to the other. For example, in NOPSI, a private utility company filed suit against a seller of natural gas in a contractual dispute concerning fuel prices. Officials from the city of New Orleans attempted to intervene on the ground that the electricity rates paid by the city would increase if the fuel-pricing dispute was decided against the utility company. Sitting *en* banc, we held that the

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> officials' generalized, "purely economic interest" was insufficient to justify intervention. "After all, every electricity consumer . . . and every person who does business with any electricity consumer yearns for lower electric rates." Similarly, a Sixth Circuit panel determined that an advocacy organization opposing abortion was not entitled to intervene in an action challenging the constitutionality of Michigan's Legal Birth Definition Act because the organization had "only an ideological interest in the litigation, and the lawsuit does not involve the regulation of [the organization's] conduct in any respect.

Texas v. United States, 805 F.3d 653, 657-58 (5th Cir. 2015).

In *Donaldson v. United States*, 400 U.S. 517, 530-31 (1971), the United States Supreme Court affirmed denial of a motion to intervene filed by a taxpayer seeking to participate in a suit by tax authorities seeking records from the taxpayer's employer and accountant.

> Donaldson's only interest -- and of course it looms large in his eyes -- lies in the fact that those records presumably contain details of Acme-to-Donaldson payments possessing significance for federal income tax purposes. This asserted interest, however, is nothing more than a desire by Donaldson to counter and overcome Mercurio's and Acme's willingness, under summons, to comply and to produce records. .... This interest cannot be the kind contemplated by Rule 24 (a)(2) when it speaks in general terms of 'an interest relating to the property or transaction which is the subject of the action.' What is obviously meant there is a significantly protectable interest.

Donaldson v. United States, 400 U.S. 517, 530-31 (1971).

Donaldson preferred that those entities not release his records, but he held no legally protectable interest in the records. MSSA and Diacon prefer that the Montana Constitution reserves campus firearm policy to the Legislature,

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but they have no legally protectable interest in that question, only the Executive branch via the Regents does in this declaratory relief proceeding.

A particularly instructive case on the limits of private party intervention in intergovernmental cases is *Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir. 1982):

> None of the actions taken, nor the statutory authority called into question in this case, involves the proposed intervenors who seek to intervene as defendants. The only interest involved is of the named defendants, governmental bodies. As we emphasized in Part II the only focus that the ongoing litigation in the district court can have is whether the governmental bodies charged with compliance, defendants, have satisfied the federal statutory procedural requirements in making the administrative decisions regarding the construction which would directly affect plaintiffs' property. In a suit such as this, brought to require compliance with federal statutes regulating governmental projects, the governmental bodies charged with compliance can be the only defendants. As to the determination involved in this suit, all other entities have no right to intervene as defendants. Thus we hold that the proposed intervenors' interests do not relate 'to the property or transaction which is the subject of the action' and they have therefore failed to assert an interest in the lawsuit sufficient to warrant intervention as of right.

Id.

The constitutional authority in question in this case (art. X, § 9) involves only the Executive and the Legislative branches, it does not involve the prospective intervenors. Since this declaratory relief proceeding was brought to compel the Legislature's compliance with art. X, § 9, only governmental bodies limited by that provision (i.e., the Legislature) can be proper defendants.

Finally, Rule 24 seeks to prevent, among other things, "multiplicity of suits." It functions as a sort of preemptive joinder. Implicit in this is a

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requirement that the prospective intervenor has standing to bring this suit on their own. If not, there would be no concern for a multiplicity of suits. Neither Diacon nor MSSA have explained how they would have standing, as private individual and group, to file a constitutional claim on behalf of one part of the government against another. In this dispute between equal governmental branches, neither Diacon nor MSSA can even show standing under the subject matter of the action as it stands.

Because this lawsuit concerns the delineation of power between two equal governmental branches, Diacon and MSSA's respective purported interest is already suspect. The subject of this action is who is constitutionally empowered to determine firearm policy on MUS campus and other locations. It might be the Legislature; it might be the Executive branch via the Regents. Most certainly, however, it is not MSSA or Diacon. While they may have an interest (i.e., prefer) one outcome in this lawsuit to another, that is not a *legally protectable* interest. Neither Diacon nor MSSA have a legally protected interest in the scope of Mont. Const., art. X, § 9(2)(a) which is the subject matter of this case.

MSSA additionally argues that it has a right to intervene "[d]ue to MSSA's extensive involvement as an HB102 proponent," citing *Sportsmen for I-143 v. Mont. Fifteenth Judicial Dist. Court*, 2002 MT 18, 308 Mont. 189, 40 P.3d 400. MSSA's reliance on *Sportsmen* is misplaced.

MSSA states that "the Court held: '[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported.'" The language quoted by MSSA is not a *Sportsmen* Court holding, but rather a quotation from *Idaho Farm Bureau Fed'n v. Babbitt*,

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58 F.3d 1392, 1397 (9th Cir. 1995). Indeed, the *Sportsmen* Court introduced the quote saying "[o]n this issue, the Ninth Circuit has stated..." The Court's quotation of Ninth Circuit persuasive language in that case does not incorporate into Montana law a blackletter rule that "[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported" as MSSA argues.

Furthermore, MSSA ignores the preceding two paragraphs of analysis on the validity of the claimed legal interest. The district court denied intervention because the prospective intervenors "did not have a legally protectable interest in either the property (alternative livestock) or the lawful business transactions between two alternative livestock owners." *Sportsmen*, ¶ 10. There, however, the prospective intervenors were not merely interested in the outcome. Indeed, they had argued that they "as Montana citizens, are the beneficiaries of the State's obligations as trustee for the management and protection of game animals." *Sportsmen*, ¶ 11; See *Hughes v. Oklahoma*, 441 U.S. 322, 341-42, 99 S. Ct. 1727, 1739 (1979) (affirming long recognition of states' interest "in preserving and regulating the exploitation of the fish and game and other natural resources within its boundaries for the benefit of its citizens.") Neither MSSA nor Diacon have pointed to no such legally protectable interests especially since the Legislature has already admitted, and the Court agrees, Second Amendment rights are not unlimited.

MSSA argues that it "played identical roles" to the prospective *Sportsmen* intervenors. The *Sportsmen* Court allowed intervention of those prospective intervenors as "the authors, sponsors, active supporters and defenders of I-143," the issue was "intervention by ballot supporters." *Sportsmen*, ¶ 12.

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(emphasis added). Ballot initiatives like I-143 are constitutionally unique in that they allow the people to directly enact law outside the normal legislative process. *See* Mont. Const.art. III, § 4; art. V., §§ 1, 11. When the Legislature passes a bill that is subsequently challenged in court, it makes sense for the Legislature to defend a law that it created through its legislative powers. Mont. Const. art. V, §§ 1, 11. But a citizen initiative, on the other hand, has nothing to do with the Legislature, as the people have reserved this power for themselves. Mont. Const. art. V, § 1. Therefore, when citizens pass an initiative that is subsequently challenged in court, it makes no sense for the Legislature—and perfect sense for those citizens—to defend that law because the normal defendant Legislature had no role, constitutional or otherwise, in its enactment. Mont. Const. art. V, §§ 1, 11. MSSA's support of HB 102 does not give it an absolute right to intervene in this matter.

The Court concludes that neither Diacon nor MSSA have "a direct, substantial, *legally-protectable* interest in," "the subject of [this declaratory relief] action," namely whether the Legislature or the Executive branch via the Regents are the constitutionally proper promulgator of MUS campus firearm policy. While prospective intervenors may have legally protectable interests in firearm ownership and possession, they do not have a legally protectable interest in a suit determining which governmental branch makes MUS campus firearm policy.

"protection of that interest may be impaired by the disposition of the action"

Because neither MSSA nor Diacon have a legally protectable interest in the subject of this lawsuit, neither's rights will be impaired by the disposition of this action. Nevertheless, they focus on the collateral issue of

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whether firearms may be carried on MUS campuses, even though this declaratory proceeding is about who decides MUS property firearm policy, not whether such policy is constitutional.

MSSA argues that "BOR's petition seeks to strip MSSA members who attend [the Montana University System] of their statutory rights." This is a mischaracterization at best. The Regents contend it, not the Legislature, has sole authority to "supervise, coordinate, manage and control [MUS]." Mont. Const., art. X, §9(2)(a) ("the Legislature exercised control over the MUS and impermissibly infringed on [the Regents]'s authority under the constitutional directive of Article X, Section 9," and Regent seek an "injunction precluding application of HB 102" to places controlled by the Regents.) The Regents have not sought enforcement of anything against university attendees.

There are two possible outcomes to this case: (1) the Legislature prevails at the expense of alleged Regent power, or (2) the Regents prevail at the expense of alleged Legislature power. No part of this lawsuit will decide the scope of Diacon or MSSA members' respective rights. Consequently, neither Diacon nor MSSA's members alleged legally enforceable right are threatened whatsoever in this declaratory relief proceeding.

"that interest is not adequately represented by an existing party"

Because neither MSSA nor Diacon possess a legally protectable interest in this dueling governmental branch dispute, they cannot claim inadequate representation. The Legislature cannot be said to be an inadequate representative in a dispute solely about the extent of that Legislature's power. "There is also an assumption of adequacy when the government and the applicant are on the same side." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003).

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"When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises." *Id.*

Finally, the Montana Attorney General has publicly indicated his commitment to precisely seeking the outcome prospective intervenors desire: successfully defending the statute. "Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention." *Id.*

CONCLUSION

Neither MSSA nor Diacon have established that they possess legally protectable interests in this intra-governmental dispute about the scope of art. X, § 9. None of their respective interests can be impaired because none are at issue. Moreover, the Legislature adequately represents the only such interests at stake, the Legislature's. A lawsuit "is a limited affair, and not everyone with an opinion is invited to attend." *Curry v. Regents of the Univ.*, 167 F.3d 420, 423 (8th Cir. 1999). Accordingly, MSSA and Diacon's respective intervention motions must, and shall be, **DENIED**.

Finally, Diacon did not seek leave of the Court to file his June 7, 2021 Petition, and none has or shall be given. His request that this Court dissolve its temporary injunction is nothing more than "a 'motion for reconsideration' [which] does not exist under the Montana Rules of Civil Procedure." *Horton v. Horton*, 2007 MT 181, ¶ 14, 338 Mont. 236, 165 P.3d 1076 (citing *Jones v. Montana University System*, 2007 MT 82, ¶ 13, 337 Mont. 1, 155 P.3d 1247; *ABC Collectors, Inc. v. Birnel*, 2006 MT 148, ¶14, 332 Mont. 410, 138 P.3d 802; *Martz v. Beneficial Montana, Inc.*, 2006 MT 94, ¶ 24, 332 Mont. 93, 135 P.3d 790; *Nelson v. Driscoll*, 285 Mont. 355, 359, 948 P.2d 256 (1997); *Shields v.*

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Helena School Dist. No. 1, 284 Mont. 138, 143, 943 P.2d 999 (1997); *Taylor v. Honnerlaw*, 242 Mont. 365, 367, 790 P.2d 996 (1990); *Anderson v. Bashey*, 241 Mont. 252, 787 P.2d 304 (1990).) Consequently, Diacon's Petition must be **STRICKEN** from the record.

ORDER

Based on the above, the Court hereby **ORDERS, ADJUDGES, AND DECREES** as follows:

1. MSSA's intervention motion is **DENIED**;
2. Diacon's intervention motion is **DENIED**;
3. The Lewis and Clark County Clerk of Court shall strike and remove Diacon's June 7, 2021 Petition from the court record;
4. The Regent's initial brief shall be filed on or before **September 30, 2021**;
5. The Montana State Legislature's response brief shall be filed on or before **November 1, 2021**;
6. MSSA and Diacon's respective *amicus* briefs, if any, shall be filed on or before **November 1, 2021**. In this regard, however, any *amicus* brief shall be strictly limited to the scope of Article X, Section 9 as it relates to HB 102. Argument seeking to redefine or enlarge the issues of this declaratory relief proceeding, arguing the breadth of federal or state firearm rights, or arguing the validity of Regents Policy 1006 will not be considered or tolerated by this Court;
7. The Regents reply brief shall be filed on or **before December 3, 2021**;

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8. The Regents shall file a submittal notice when it files its reply brief or upon the expiration of this briefing schedule;

9. Oral argument will only be set at the request the Regents or the Legislature's respective counsel and must be included in their opening briefs; and

10. If oral argument is held, Regents and the Legislature shall be allowed thirty minutes to argue their respective positions.

DATED this 16th day of July 2021.

MICHAEL F. McMAHON
District Court Judge

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