David K.W. Wilson, Jr.
Robert Farris-Olsen
Morrison, Sherwood, Wilson & Deola
401 North Last Chance Gulch
P.O. Box 557
Helena, MT 59624-0557
(406) 442-3261 Phone
(406) 443-7294 Fax
kwilson@mswdlaw.com
rfolsen@mswdlaw.com

Graham J. Coppes
Ferguson & Coppes, PLLC
A Natural Resource Law Firm
P.O. Box 8359
Missoula, Montana 59807
Telephone: (406) 532-2664
Fax: (406) 532-2663
grahamc@fergusonlawmt.com

Attorneys for Intervenors

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-22-36 Judge: Jon A. Oldenburg **REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE**

Comes now, proposed Intervenors, and submit this combined reply brief in support of motion to intervene. It addresses the arguments raised by the Montana Fish and Wildlife Commission (the "Commission") and Montana Department of Fish Wildlife and Parks ("FWP") (collectively the "State"), and the Plaintiffs United Property Owners of Montana ("UPOM").

INTRODUCTION

The goal of UPOM's lawsuit is clear. This year, they want 50,000 elk killed and they want their members (and others similarly situated) to be the individuals charged with keeping the population at a low level for all subsequent years. *See, First Amended Complaint* ("FAC"), ¶ 3. They want to reduce the elk populations, not through any involvement of the public, but by increasing private licenses. *Id.*, Request for Relief at ¶ 1.a, c, d, f, g. They want to privatize the elk population by eliminating "equitable allocations" of licenses – or said another way – eliminating the consideration of the public from the equation. And, they want to overturn decades of collaborative and science-based elk management by removing managerial authority vested in FWP and transferring all decision making to the whims of the legislature. *See, e.g.,* FAC, ¶¶ 84-87. If UPOM is successful it will impair not just the constitutional right of the proposed intervenors and their members to harvest wild game, but Plaintiff will also fundamentally shift a public trust resource into private property. It is because of these monumental requests and significant potential repercussions that the proposed intervenors must be allowed to participate.

ARGUMENT

Any analysis under Rule 24, M. R. Civ. P., starts with the basic premise: in order to avoid doing an injustice, interested non-parties should be allowed to intervene. *State ex rel. Thelen v. Dist. Court*, 93 Mont. 149, 155, 17 P.2d 57, 58 (1932). This right is liberally construed and is based on practical considerations, not technical distinctions. *Id.*; *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). Utilizing this standard, and those articulated in the Proposed Intervenors' opening brief, compulsory and/or permissive intervention is appropriate.

The State and UPOM do not dispute that the motion to intervene is timely, thus, the only questions before this court are whether the Proposed Intervenors have an interest in the litigation, whether the disposition of this suit may affect that interest, and whether their interest may not be adequately represented by an existing party. *See, e.g.*, *Sportsmen for I-143 v. Mont. Fifteenth Judicial Dist. Court,* 2002 MT 18, ¶ 7, 308 Mont. 189, 40 P.3d 400. Despite the

State and UPOM's arguments to the contrary, the Proposed Intervenors satisfy each of these elements.

A. Proposed Intervenors have substantial, direct and legally protected interests that may be impaired by the disposition of this matter.

At the outset, the State agrees that the Proposed Intervenors satisfy the interest requirement. It specifically admits, the Proposed Intervenors are "substantively interested in this case as active in elk management development and processes and those interests are likely to be impacted by the outcome of this litigation." *State Response Br.* at p. 4. To the extent the State is the entity that is responsible for elk management, it has significant knowledge of the Proposed Intervenor's past involvement in management decisions, and their hunting heritage. This Court should, therefore, adopt its concessions.

In contrast, UPOM disagrees and wildly asserts that the Proposed Intervenors have no legally protected interest, let alone one that may be impaired. To that end, UPOM argues that the Movants have "the same interest in this lawsuit" as every other hunter in the state and apparently, that none of those hunters "have a concrete, demonstrable, and legally protectable interest … because [this suit] is not about them." Pl.'s Br. at 2. These arguments, though, are unsupported by the facts and the law.

The fallacy upon which UPOM rests its position is foundational and flawed. For its position against Applicants to be correct, the general hunting public must have no identifiable or concrete interest in the management and preservation of wildlife, game, or fish species in Montana. Such an argument not only belies Montana's established trust relationship between the state, wildlife resources, and the public, but also ignores a plain language reading of the Montana Constitution.

In a recent publication FWP titled "The Public Trust", FWP expounded on the origins and virtues and history of Montana's trust relationship with natural resources and detailed the specific interest of Applicants in the case at hand. *Montana's Public Trust Responsibility*, Montana Fish Wildlife and Parks, 12/21/2020, available at https://issuu.com/montanaoutdoors/docs/thepublictrust, (last accessed 7/5/2022). More specifically, FWP wrote,

> Floating down in scenic River. Hiking along the forested trail. Hunting mule deer or pronghorn on the Prairie. Fishing for trout or walleye on a sunny afternoon with your friends or family.
>
> Everyone who lives in visits Montana is fortunate to have such treasured places and experiences. But as Montana conservation giant Jim Posewitz used to say "it didn't happen by accident." Yes, Montana has been blessed with mountains, grasslands, Rivers and wildlife. But it's only thanks to the foresight and dedication of conservation leaders like "Poz"[1], along with landowners, other individuals, non-governmental organizations, and federal, state, and tribal leaders and agencies, that so many of those resources still exist for us to enjoy.
>
> Over the past century, individuals, groups, and agencies have produced and supported a framework of laws and regulations safeguarding Montana's clean and scenic outdoors … At the heart of these efforts to successfully steward Montana's national resources is a concept known as the public trust.

FWP goes on to state that, "[a]s this public private reconciliation continues in the 21st-century, Montana's natural resources faced unprecedented threats … The biggest threat of all may be indifference. Too few people understand that maintaining clean water, accessible land, and healthy wildlife requires public dedication and involvement." *Id.* at 17.

The public involvement described by FWP is exactly that which is sought by Applicants here. For decades, Applicants have instigated and promoted the wise and sustainable management of Montana's wildlife resources. In relation to elk management, the membership of these organizations has been involved in commenting, testifying, and collaborating on the issue in such a manner and magnitude that their combined influence is starkly disproportionate to the general public. As appropriately recognized by FWP, this distinguishment of Applicants' involvement is imprinted in bold across Montana's history of elk management. UPOM's summary denial of the same – and its categorical denial that Applicants possess more than a "generalized interest" in elk management" - is *prima facie* evidence of lengths to which it will go to mislead this Court about the remedies it seeks and the impacts those remedies will have on the stakeholders represented by Applicants here.

[1] Andrew Posewitz was a highly involved member and advisor of several of the Applicant organizations.

Contrary to UPOM's bald assertions, there is nothing "manufactured" about the Applicants - and their members' - cognizable constitutional interest in the subject matter of this case. UPOM asks this Court to authorize the immediate and emergency slaughter of tens of thousands of elk – the killing of which they ask to occur without input from or in consideration of the public's interest in those elk. In doing so, UPOM asks the Court to deny and denounce the Public Trust. Although the specific origins of the doctrine are sometimes difficult to discern, the idea that the Montana holds certain natural resources in trust for the benefit of all people cannot be, with candor to the tribunal, the subject of legitimate controversy. See *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371 (1977) (upholding a state system for the issuance of hunting licenses for nonresidents, in face of challenges under the Privileges and Immunities Clause and the Equal Protection Clause).

In essence, UPOM asks the Court to eliminate the "public" from the concept of "public resources", instead moving to a managerial system where "he who owns the land owns the wildlife thereon." This harkens back to the old English concept of the "Kings deer," with UPOM viewing its membership as the King. However, Montana does not have a King. Rather, it has well-established and legally protectable constitutional rights for its citizens that include the right of preservation of their harvest heritage. See Mont. Const. Art. 9, § 7.

Ultimately, there are only two options available to remedy the harm UPOM alleges: (1) have FWP fly around in helicopters and aerially gun down 50,0000 elk – something they know will never happen; or (2) give private landowners licenses to kill the elk on their property – licenses they can sell to the highest bidder. Either option assails the constitutional rights of Applicants' members. For these and the following reasons, this Court should allow Applicants to intervene in the case at hand and defend their members' most sacred right of citizenship.

1. UPOM's reading of *Sportsmen for I-143* is wrong.

Sportsmen for I-143 is much broader than UPOM admits. In its brief, UPOM claims that the only reason the Sportsmen's Groups had standing to intervene was because they were the authors, sponsors, active supporters and defenders of the ballot initiative. *UPOM Br.* at 5. This argument, though, ignores the bulk of the Montana Supreme Court's analysis in *Sportsmen for I-143*.

The Montana Supreme Court decision was broader than this. It adopted the rational of the Ninth Circuit. The Court agreed that "a public interest groups is *entitled as a matter of right* to intervene in an action challenging the legality of a measure it supported." *Sportsmen for I-143*, ¶ 12 (emphasis added) *citing Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1397.

That scenario is analogous to the fact here. While this case is about regulations, not a ballot, the same logic applies here. The Proposed Intervenors support the existing management system that is based on science and that provides equitable hunting access and opportunities for all of their members. In other words, they are seeking to intervene in an action that challenges the legality of a regulatory system – as opposed to a ballot measure – that it has supported and has been involved with for decades.

Similarly, the Sportsmen's Groups in *Sportsmen for I-143,* supported the existing regulatory framework that disallowed game farms. In making this argument, the Sportsmen's Groups asserted that their interest was more than the ballot issue, but also included the interests of their members "as beneficiaries of the State's obligations as trustee for the management and protection of game animals." *Sportsmen for I-143*, ¶ 11. The Court accepted this argument and held that the Sportsmen's Groups protectable interest included "the management and protection of Montana's Game animals." *Id.*, ¶ 13. So for the same reason the Court required intervention in *Sportsmen for I-143*, the Proposed Intervenors may intervene, here, as a matter of right.

The Montana Supreme Court's has not deviated from this holding. UPOM argues that *Montana Shooting Sports Association v. First Judicial District*, 405 Mont. 541, 495 P.3d 424 (2021) ("*MSSA*"), increased the standards required for intervention, but that argument is based on a misreading of the case is inapplicable to the present matter. In *MSSA*, the Montana Shooting Sports Association (MSSA) attempted to intervene in case challenging a specific piece of legislation that it had lobbied for. After losing at the District Court, MSSA sought a writ of supervisory control. The Montana Supreme Court denied the writ because the order was "discretionary and not susceptible to [supervisory control]" it was not denied for the reasons asserted by UPOM.

Unlike *MSSA*, the issue here is not a single piece of legislation, but rather a challenge to Montana's elk management system as a whole. It seeks to privatize Montana's wildlife systems, substantially reduce long term elk populations, and exclude public input on elk management decisions. The Proposed Intervenors have been fighting against each of these proposals for decades. *See, e.g. Sportsmen for I-143* (MWF was an intervenor); *See also*, *Skyline Sportsmen's Association* v. *Bd. Of Land Comm.*, 1999 Mont. Dist. LEXIS 1052 (Sept. 16, 1999) (proposed intervenor Skyline Sportsmen litigating impacts of timber sale on elk population).

2. **Montana's intervention standards are no more rigorous that its federal counterpart.**

Initially, UPOM claims Montana has a heightened standard for intervention, but that is patently untrue. For nearly 90 years Montana Courts have adopted a liberal policy of allowing intervention. *Thelen*,93 Mont. at 155, 17 P.2d at 58 (1932). In those 90 years, Court has not deviated from its reliance on, or comparison with, the federal standards for intervention. *See*, *e.g.*, *Sportsmen for I-143*, ¶ 7 ("Montana's rule is essentially identical to the federal rule which is interpreted liberally.").

In spite of the clear case law, UPOM improperly relies on *Loftis v. Loftis*, 2010 MT 49, 355 Mont. 316, 227 P.3d 1030, for the proposition that "secondary effects of a lawsuit" are insufficient to support intervention. *UPOM Br.* at 6. Yet, *Loftis* says no such thing. *Loftis* and the cases it relies on, concerns annulments and/or dissolution. In *Loftis*, the intervenor, a former spouse who owed maintenance to one party, sought to intervene to enforce some right not related the validity of the marriage at issue. The court denied his intervention, noting, the "*only proper parties to the invalidity proceeding*" are the parties to the marriage. *Id.*, ¶ 18 (emphasis added). As such, a former spouse had no legal interest the invalidity proceeding, even if it affected his spousal maintenance. *Id.*, ¶ 18. Moreover, intervention was improper because the court that oversaw the proposed intervenor's dissolution had continuing jurisdiction to resolve the issue presented by the proposed intervenor.

This matter is incomparable to *Loftis*. First, it is not a dissolution. Second, there is no other court with continuing jurisdiction to resolve the dispute. And, last, this is not a case of secondary impacts. Instead, whatever this Court decides will have a direct impact on the

proposed intervenors and their members. For example, UPOM asks the Court to liberalize elk harvest, game damage hunts, landowner permits, and animal relocation. *See, FAC,* Request for Relief ¶¶ 1-3. Each of these actions would impact the Proposed Intervenors ability exercise their constitutional right to harvest wildlife held for the public trust.

UPOM next asks this court to declare Montana's historical elk management system unconstitutional. This directly impacts the proposed intervenors' past and present actions to be involved in elk management decision-making in Montana. UPOM asks the court to strike Admin. R. Mont. 12.9.101(1)(a), (f), and (i), which are all geared towards ensuring publicly available hunting opportunities. If the Court invalidates 12.9.101(1)(i), which sets a policy of encouraging sport hunting and recreational use of big game resource and public access to hunting areas, the State will no longer take into account the interests of the proposed intervenors.

These are the direct, not secondary, impacts. Finding otherwise would be contrary to nearly every case allowing intervention. *See, e.g., U.S. v. Carpentar*, 526 F.3d 1237 (9th Cir. 2008) (intervention allowed in quiet title action, which would not give property rights to intervenor, but simply ensure access to land).

3. The Proposed Intervenors' interests are more than those of the general public.

UPOM asserts that the Proposed Intervenors have not identified a specific, protected interest. Its argument is based, almost exclusively on Judge McMahon's order, which is non-binding and contrary to established Montana law. Instead of relying on this non-precedential ruling, this Court should look to well-established Montana and federal case law. In doing so, the court should liberally construe the rights at stake: "Whether an applicant for intervention demonstrates sufficient interest in an action is a practical, threshold inquiry. No specific legal or equitable interest need be established." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001).

At the outset, the Proposed Intervenors interest in protecting Montana's wildlife, access to equitable public hunting opportunities, and conserving public land, predates the 1972 Montana Constitution, and UPOM's creation. For example, MWF has existed for nearly 90

years, Skyline Sportsmen has existed since the 60s, Helena Hunters and Anglers was created in 2001, Backcountry Hunters and Anglers in 2004, and Hellgate Hunters and Anglers was created in 2006. Each of these proposed intervenors interests in elk management predates the creation of UPOM in 2007. *See*, UPOM, about us, http://upom.org/about-us/ (last accessed June 27, 2022). So, if these groups do not have a protectable interest in elk management, than neither does UPOM.

For the last century, these groups have worked to address "the loss of Montana's natural lands, health waters and abundant wildlife." *See* Ex. 1, attached to opening brief, Servheen Decl., ¶ 4. That advocacy has taken the form of engaging with the State in management decision making, litigating when necessary, and engaging legislatively. *See, generally*, affidavits and declarations attached to opening brief. Their members also have a protectable interest in the elk themselves. Each of the proposed intervenors has members that hunt elk on public land. Those members have also engaged with the State, at the legislature, and through public opinion pieces.

Put simply, the proposed intervenors and their members have a unique interest based on their history, the engagement in the elk management process, and their actual elk hunting. In contrast, the general public does not engage in these processes, or hunt elk. And if they do, they are likely one of the thousands of members represented by the Proposed Intervenors. Thus, the proposed intervenors have a unique protectable interest.

Moreover, UPOM fails to address the proposed intervenors protectable constitutional right. Article IX, § 7, protects the "opportunity to harvest wild fish and wild game animals", which "shall forever be preserved to the individual citizens of the state." This right is a protectable interest. *See, e.g.*, *Hecox v. Little*, 479 F. Supp. 3d 930, 951 (D. Idaho 2020) (Interest is a right protected under some law). As hunters, the proposed intervenors right to harvest wild game is directly at issue. UPOM does not dispute that this interest exists or that it belongs to the Proposed Intervenors.

Federal law supports recognition of these interests. UPOM's argument[2] with respect to *U.S. v. Carpentar*, 526 F.3d 1237 (9th Cir. 2008), is inapposite. Because Montana follows federal intervention law, reliance on *Carpentar* is appropriate. and the Proposed Intervenors' cognizable right does not need to relate to a property interest, but rather can be simply their rights to "use and enjoyment" of public land. *Carpentar*, 526 F. 3d at 1241; *see also*, *Citizens for Balanced Use*, 647 F.3d at 897 ("applicants have a significant protectable interest in conserving and enjoying the wilderness character of the [wilderness] Study Area); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) (holding that the National Audubon Society had the right to intervene in a suit challenging the actions of the Interior Secretary in connection with the development of a bird conservation area based on the Audubon Society's interest in the preservation of birds and their habitats). This interpretation is also consistent with *Sportsmen for I-143* – Sportsmen's Groups have an "interest in the management and protection of Montana's game animals."

In addition, UPOM amended their complaint to a new claim looking to strip Proposed Intervenors of their rights to participate. The FAC added claims that directly implicate the Proposed Intervenors. In the new Count VII, UPOM asks the Court to strike Admin. R. Mont. 12.2.306(1), which requires the state to provide a liaison for citizen groups, including the intervenor "Montana Wildlife Federation" and other "local unaffiliated rod and gun clubs, or any other citizen organization expressing an interest in wildlife and outdoor recreation in the state of Montana." Admin. R. Mont. 12.2.306(1); *FAC*, ¶¶ 109-118, Requested Relief ¶ 1.m. Thus, the FAC specifically identifies the Proposed Intervenors regulatory rights and asks the court to declare them void. This is certainly a protectable interest.

In all, the Proposed Intervenors have a protectable interest. Whether that interest is classified as an "interest in management and protection of Montana's game animals", *Sportsmen I-143*; their constitutional right to harvest public game animals; their interest in ensuring the

[2] Even the 5th circuit case cited by UPOM, *Texas v. United States*, 805 F.3d 653, 659 (5th Cir. 2015), supports intervention: "An interest is sufficient if it is of the type that the law deems worthy of protection, even if the intervenor does not have an enforceable legal entitlement or would not have standing to pursue her own claim."

state fulfills its public trust obligations; or their rights under Admin. R. Mont. 12.2.306(1), they have a protectable interest.

4. The outcome of this suit will impact the proposed intervenors' right.

The Proposed Intervenors ability to protect their interests may be impeded by the disposition of this suit. UPOM's argument to the contrary is two-fold: (1) that the general public has no interest in the subject matter of this suit (and thus neither do Applicants); and (2) even if they did, that interest will not be impacted because UPOM asks the Court to enjoin greater killing of elk, not less.[3] Both of these argument fall flat.

First, as described above, Applicants have worked tirelessly for decades to promote science-driven elk management in accordance with the fiduciary relationship of the state as trustee of the wildlife trust resource. UPOM's second argument fails because this exact argument was rejected in *Sportsmen for I-143*. There, the goal of the lawsuit was to overturn an initiative banning private elk hunting for a fee, i.e., increasing harvest opportunity. In approving intervention, the court noted that an adverse decision – i.e. more harvest, would nonetheless, "impair the Sportsmen's Group's interest in the management and protection of Montana game animals." *Sportsmen for I-143*, ¶ 13. Just as in *Sportsmen for I-143*, this "increased harvest" may nonetheless impair the Proposed Intervenors rights to harvest elk or participate in the management system.

Beyond the impaired ability to manage, UPOM's case has the potential to drastically reduce long term elk numbers and hunting opportunities in Montana. Thereby impairing the Proposed Intervenors rights to hunt and harvest elk. UPOM attempts to cover up the long-term elk population losses by claiming there will be increased elk harvest. But, based on the complaint, that elk harvest will not be available to any member of the public as an "equitable allocation" because the elk UPOM complains of are on private land owned by UPOM's members. UPOM wants the state to kill 50,000 more elk in the 2022/23 hunting season, and manage to that severely reduced number in perpetuity. *See Amended Complaint*, ¶ 3. So, while there may be a short-term increase in opportunity for private landowners, the long-term effects

[3] As noted, the State concedes that the disposition of this suit will affect the proposed intervenors interests.

will drastically reduce the Proposed Intervenors ability to exercise their constitutional right to harvest elk on public lands, or otherwise accessible property.

This reduction would be exacerbated if the Court grants UPOM's request to "adopt liberalized hunting regulations" and disallow "limited permits." It is here that UPOM underlying motive shines through. The limited permits about which UPOM complains are only for "bull" or male elk. UPOM's members ask the court to directly liberalize the harvest of bull elk so that they can sell more guided hunts or otherwise engage in their own trophy efforts. However, basic biological science tells us that it is female elk ("cows") who drive the population dynamic, not male. Thus, if UPOM really wanted less elk, they would ask this Court to require FWP to liberalize only cow harvest, not limited permit bull harvest. These actions, coupled with UPOM's other request to no longer incentivize public access, will result in fewer and less publicly available elk, in particular bull elk. Meaning, the proposed intervenors constitutional right to access and harvest wild elk will be impaired, both in number and specific opportunity.

The other relief requested by UPOM would also impair the rights of the proposed intervenors. For example, UPOM asks the court to eliminate public input and hunting options. Specifically, UPOM requests a declaration that the State "lack[s] authority to regulate hunting based on 'equitable allocation of resource,' perceived notions of 'wealth' of hunters, 'privatization of public resource' or similar political arguments and memes. And UPOM asks the Court declare Admin. R. Mont. 12.9.101(a), (f), and (i) void. These provisions provide for long-term elk populations and encourage public access for hunting.

These request directly and facially attack the public trust principles with form the foundation of Montana's fish and wildlife management. In fact, the statutory and regulatory provisions that UPOM seeks to strike down are not specific to elk at all, instead detailing management of "fish, game, Ferber's, waterfall, non-games pieces, and endangered species of the state …" *First Amended Complaint*, ¶ 85. If the Court grants the requested relief, proposed intervenors rights to participate in the management system will be impaired. The same is true if the Court eliminates the Commission' ability to regulate elk.

The new claim at Count VII, of the FAC, also explicitly asks the court to limit the Intervenors rights. If the Court voids Admin. R. Mont. 12.2.306(1), the proposed intervenors will no longer have a liaison at FWP. To the extent that the regulation names one proposed intervenor by name – Montana Wildlife Federation – clearly shows the impairment of the proposed intervenor's rights.

UPOM complains about the Proposed Intervenors allegation that this suit is about privatizing a public resource, but that is exactly what UPOMs suit seeks to do. Its goal is in plain sight. UPOM asks the court to issue a declaratory judgment that the current statutory system is "an unconstitutional attempt to force landowners to give up their private property rights" and that reliance on "public hunting" as a tool for elk over population is not justified. Simply put, UPOM wants to reduce elk populations, reduce public access, and reduce public input. Each of these actions uniquely affects the Proposed Intervenors interests.

B. The existing parties do not adequately represent the interests of the Proposed Intervenors.

So far, the State has appeared in this suit, and represented that it will vigorously defend UPOM's suit. And while it may be appealing to believe the State, history has shown that this trust should only go so far with respect to public wildlife.

The burden to establish inadequacy is minimal. *Sportsmen for I-143*, ¶ 14; *Trbovich v. UMW*, 404 U.S. 528, 538 n.10 (1972). The Proposed Intervenors do not need to establish that the representation will be inadequate, but rather that it "may be" inadequate. *Sportsmen for I-143*, ¶ 14. Like the other elements, this element is construed liberally in favor of intervention.

UPOM disregards this clear Montana law and asserts that when the government is the defendant, there is a heightened standard for intervention. Notably, that conflicts with *Sportsmen for I-143*, which applied the same standards for intervention when, as here, FWP provided a defense to the suit. And the heightened standards on which UPOM relies are based federal law dating back as far as 1979. Had the Montana Supreme Court wished to rely on these cases, it certainly could have done so in *Sportsmen for I-143*.

Neither UPOM nor the State can adequately represent the interests of Montana's hunting community. The State is required to balance the issues, and listen to all sides, including

both private property owners and public elk hunters. The state is also subject to the political whims of today, which may change tomorrow. UPOM on the other hand represents private landowners, who are often in conflict with the Proposed Intervenors. Thus, no one is solely representing Montana's sportsmen and women. The only remedy is to allow those voices to be heard through intervention.

UPOM and the State both argue that past examples of the State's complicity in lawsuits or legislative action are in applicable here. Notably, neither party disputes that the State and UPOM have recently agreed that private landowners should be compensated for "damage"[4], that FWP functionally conceded in *Gardipee* that the State and UPOM collaborated on limiting bison management for ten years; that the State offered landowners tags through its 454 agreements (15% of all available); or that the Commission and FWP director are political appointees. Each of these claims on its own may have limited import, but when combined, there is a legitimate concern that the parties may craft a solution that excludes the input of Montana's elk hunters. If that happens, the Proposed Intervenors interests may be impacted for several years, if not decades. *See, e.g., ee UPOM v. Mont. Dept. Fish Wildlife and Parks*, Cause No. DV-2020-30, 10th Judicial Dist. Ct., Fergus County

Moreover, FWPs current beliefs regarding elk management conflict with the Proposed Intervenors interests. For example, FWP director Worsech claims that the State's current management of over objective elk populations doesn't pass the "red faced test" and that the State must harvest more elk. *Complaint*, ¶ 31; *Answer,* ¶ 30 (misnumbered in original). Based on that comment, and Director Worsech's testimony on HB 505, his goal is clear – increase hunting and/or licenses on private land, regardless of public access. In fact, FWP's proposed and supported House Bill 505 is a direct analog to that which UPOM is requesting as a remedy here. During the last legislative session, FWP did not support a single other bill other than as an "informational witness", but did testify in support of increased landowner bull license giveaways under HB 505. Both Applicants and their members individually appeared and

[4] This is a position that the Montana Supreme Court roundly rejected in *State v. Rathbone*, 110 Mont. 225, 100 P.2d 86, 92–93 (1940). "[A] property owner in this state must recognize the fact that there may be some injury to property or inconvenience from wild game for which there is no recourse." *Id.*

testified against the Department and against that legislative proposal – a proposal they ultimately defeated. However, without Applicants involvement, this case may nto have been necessary as HB 505 would be law. As a result, there is a legitimate and very real possibility that with Applicants' intervention in this matter, Defendants will reach a settlement agreement with UPOM that mirrors the exact terms over which Applicants and FWP already battled.

As a result, it is not surprising that neither party wants Applicants granted full party status in this case, as doing so will ensure there is accountability and transparency of Montana's wildlife managers to the constituency. More specifically, without Applicant's involvement as intervenors here, it is highly probable, if not a foregone conclusion, that just like in the recent bison management case, Plaintiff and Defendants will enter into a settlement which directly conflicts with the Proposed Intervenors belief and constitutional rights in public access, public hunting opportunities, and equitable elk management under the public trust doctrine.

Historically, elk hunting regulations are crafted by the State in consultation with public hunters or non-profit advocates, private property owners, and state wildlife management officials. This lawsuit is an attempt to regulate, or de-regulate, elk hunting between only two of those parties. Without intervention, none of the present parties is representing Montana hunters, who have the unique right to harvest wild game. That right does not attach to the State, or to UPOM, but it does attach to the members of the proposed intervenors' groups.

Based on the State's answer, it is clear that the State will not make the same arguments as the Proposed Intervenors. Indeed, their answer does not raise the constitutional right to harvest game, or the right to a clean and healthful environment. Mont. Const. Art. II, § 3 (clean and healthful), Art. IX, § 7 (harvest heritage). The State and UPOM's past actions, indicate there is a substantial risk that this suit may be resolved without the input of public hunters, and that the State may not raise the same hunting heritage, or public access arguments. Last, the input of public hunters is critical to this matter as they are the only party with that particular view.

Neither the State nor UPOM solely represent public hunters and conservationists.

C. If the court denies intervention as a matter of right, permissive intervention is nonetheless appropriate.

Proposed intervenors identified the claims on which they wish to intervene: all of the claims asserted by UPOM. This satisfies Rule 24(c)'s, M. R. Civ. P., notice requirement.

The remainder of UPOM's argument is misleading. UPOM's Request for Relief is to kill 50,000 Montana elk and maintain the reduced population in perpetuity. And once that's achieved, UPOM asks the court to essentially strip consideration of the public's voice in management decisions and increase permits for private landowners. *See FAC*, Request for Relief. These are not "mischaracterizations," but rather allegations in UPOM's complaint and its preferred relief. The consequences of granting this relief will be a permanent reduction of Montana's elk herds and a direct limitation on the ability of the proposed intervenors to participate in management decisions, their ability to harvest elk, and a violation of their constitutional right to harvest wild game.

Because the proposed intervenors are the only advocates working for Montana's elk hunters and conservationist, and they have a legally protected interest, and permissive intervention is wholly appropriate.

D. Granting the proposed intervenors motion will not significantly add to the complexity.

Both the state and UPOM argue that allowing UPOM to intervene will add significant burden. UPOM's argument is, at best an exaggeration, and the State's argument should be rejected.

UPOM argues that if intervention is allowed the proposed intervenors will take seven sets of depositions, file seven briefs, seven corporate representatives, and seven different firms. This is untrue and contradicted by the present motion. Had each of the parties intended to act independently, they would have filed seven different motions to intervene, not **one.** The proposed intervenors intend to function together, so there will not be seven briefs, seven corporate representatives, seven sets of discovery, or seven sets of attorneys. The only risk of increased work is if UPOM chooses to depose seven corporate representatives, serve seven

sets of discovery, or file separate motions based on each intervenor. So any increased work would be directly related to UPOM's own actions.

The state makes a more realistic argument, but it also does not justify excluding the Proposed Intervenors. Adding the Proposed Intervenors will potentially add some discovery, and an additional brief. But, it will not be significant and any burden will be placed on the Proposed Intervenors. This motion provides a good example, each party filed a response brief, and the Proposed Intervenors had to answer both. The only additional work, then, was on the Proposed Intervenors. Ultimately, if there is any additional burden, it is justified in light of the proposed intervenors need for adequate representation and the rights at stake.

CONCLUSION

If the Court denies the motion for intervention, Montana's sportsmen and women will be left without any representation regarding the future of elk management in Montana. To that end, the Proposed Intervenors respectfully request that the court permit them to intervene.

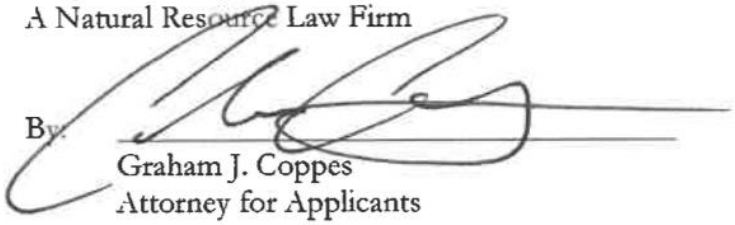
DATED this 5th day of July 2022.

MORRISON SHERWOOD WILSON & DEOLA PLLP

By: 

Robert Farris-Olsen
Attorney for Applicants

Ferguson & Coppes, PLLC
A Natural Resource Law Firm

By: 

Graham J. Coppes
Attorney for Applicants

CERTIFICATE OF SERVICE

This is to certify that on this 5th Day of July 2022, the foregoing document was served via US Mail and email to the following:

Jack G. Connors
Jacqueline R. Papez
Doney Crowley P.C.
Guardian Building, 3rd Floor
50 South Last Chance Gulch
P.O. Box 1185
Helena, MT 59624-1185
jconnors@doneylaw.com
jpapez@doneylaw.com
Attorneys for Plaintiff United Property Owners of Montana, Inc.,