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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

WILDEARTH GUARDIANS and PROJECT COYOTE, a project of the Earth Island Institute, Plaintiffs, vs. STATE OF MONTANA, by and through the MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS; and the MONTANA FISH AND WILDLIFE COMMISSION, Defendants.	Case No.: DDV 2022-896 **DEFENDANTS MOTION TO DISMISS**

Defendants, Montana Department of Fish, Wildlife & Parks ("FWP") and the Montana Fish and Wildlife Commission ("Commission"), by and through their legal counsel, hereby request that this Court dismiss this case pursuant to Mont. R. Civ. P. 12(b)(6). FWP and the Commission outline their argument supporting the motion in the accompanying Brief in Support of Motion to Dismiss.

For the reasons outlined in the Brief in Support, FWP and The Commission respectfully request that this Court grant the Motion to Dismiss with prejudice.

RESPECTFULLY SUBMITTED this 23rd day of January, 2023.

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DATED this 23 day of January, 2023.

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Defendants, Montana Department of Fish, Wildlife and Parks ("FWP") and the Montana Fish and Wildlife Commission (the "Commission"), by and through their legal counsel, hereby request that this Court dismiss this case pursuant to Mont. R. Civ. P. 12(b)(6). For the reasons stated herein, Plaintiffs cannot prove any set of facts that substantiates the claims alleged.

BACKGROUND

On October 27, 2022, the Plaintiffs filed their Complaint for Declaratory and Injunctive Relief. On November 10, 2022, Plaintiffs filed a Motion for a Temporary Restraining Order and Preliminary Injunction. On November 15, 2022, the Court granted and denied in part the

Plaintiffs' request for a Temporary Restraining Order ("TRO"). On November 28, 2022, this Court held a hearing, and the following day issued an order dissolving the TRO and denying the Plaintiffs' motion for preliminary injunction.

STANDARD OF REVIEW

A. Motion to Dismiss

A motion to dismiss pursuant to Mont. R. Civ. P. 12(b)(6) "requires a district court to determine whether a claim has been adequately stated in the pleadings." *Woods v. Shannon*, 2015 MT 76, ¶ 9, 378 Mont. 365, 344 P.3d 413 (citing *Meagher v. Butte-Silver Bow City-County*, 2007 MT 129, ¶ 15, 337 Mont. 339, 160 P.3d 552). A complaint should be dismissed when it is apparent that the plaintiff cannot prove any "set of facts" that establish her claim and entitle her to relief. *Swart v. Swan*, 2004 ML 2449, *3, No. BDV 2004-290, 2004 Mont. Dis. LEXIS 2496 (1st Jud. Dist. Ct. Sept. 3, 2004).

B. Mootness

Mootness is a threshold issue which must be addressed prior to resolving an underlying dispute. *Shamrock Motors, Inc. v. Ford Motor Co.,* 1999 MT 21 ¶ 17, 293 Mont. 188, 974 P.2d 1150. An issue "is moot when, due to an event or happening, the issue has ceased to exist and no longer presented an actual controversy." *Id.* at ¶ 19. Courts have granted a narrow exception to the mootness doctrine for issue which are capable of repetition yet avoid review. *See generally Havre Daily News v. City of Havre*, 2006 MT 215, 333 Mont. 331, 142 P.3d 864, *see also Shamrock Motors v. Ford Motor Co.*, 1999 MT 21. The party invoking the above exception faces a two-part burden: (1) that the challenged action must be too short in duration to be fully litigated prior to cessation, **and** (2) there must be a reasonable expectation that the same complaining party would be subject to the same action again. *Id.* at ¶ 34 (emphasis added). This standard is not disjunctive, and both prongs must be met to be capable of repetition yet evading

review.

ARGUMENT

I. Counts I and II of the Plaintiffs Complaint Are Moot and Should be Dismissed.

On January 12, 2023, Governor Greg Gianforte directed FWP to "collaborate with the citizens of Montana to form a new Wolf Plan." *See* Ex. 1. To develop the new Wolf Plan, FWP will provide all Montanans the opportunity to comment on FWP's wolf management strategies, including the integrated patch occupancy model ("iPOM"). Accordingly, the Plaintiffs will get the public participation process they seek regarding FWP's use of iPOM.

Count II is also mooted by virtue of the directive issued by Governor Gianforte. These planning efforts will satisfy any duty FWP has to review the Wolf Plan. Further, the new plan will inform the Commission's decisions when it, also through a public process, adopts any new hunting and trapping regulations regarding wolves for seasons to come. The Plaintiffs, thus, will get the opportunities they seek through Counts I and II and the Court need not address those issues any further. They are now moot.

II. Plaintiffs' Arguments Concerning The 2021 Wolf Hunting And Trapping Regulations in Count III Are Moot, and Should be Dismissed.

FWP and the Commission can no longer take any action on the 2021 wolf hunting and trapping regulations, and thus the Court cannot grant Plaintiffs effective relief regarding a season that has ended and is wholly in the past. Because the regulations expired by their own terms, the notion that the Commission and FWP still continue to violate the "public trust doctrine," via those 2021 regulations, is incorrect. *See* Pl. Compl. ¶ 84. There is no possibility that the 2021 wolf hunting and trapping regulations could recur, as they have already been replaced by the 2022 wolf hunting and trapping regulations.

III. Count III Should be Dismissed, as Neither the Commission Nor FWP Have

Violated The Public Trust Doctrine ("PTD")

Plaintiffs allege that the 2021 wolf bills and 2021 and 2022 wolf regulations are a violation of "the [PTD] enshrined in the Montana Constitution." Pl. Compl. at 21. Neither the Commission nor FWP have violated the PTD by instituting the 2021 and 2022 wolf trapping and hunting authorities. In conflating the PTD and the State's duty to manage wildlife for public benefit, Plaintiffs improperly bootstrap an inapplicable body of law to the case at issue. Even if the PTD applied, the hunting and trapping regulations, of which Plaintiffs complain, have not divested the State of its authority to manage wolves for the public interest. Indeed, the State, through these laws, has advanced the public interest and sustainably maintained the resource.

A. PTD is a Specific Legal Doctrine That Does Not Apply to Wolf Management.

Plaintiffs state that "cultural and natural resources subject to the [PTD] are referred to as "public trust resources" or "trust resources," and the government entities with responsibility for managing trust resources are referred to as "'trustees.'" Pl. Compl. at 7. Plaintiffs allege that the 2021 wolf laws and regulations, as well as the 2022 wolf quota, "violate the [PTD] as *enshrined* in the Montana Constitution by prohibiting Respondents from exercising the discretion conferred upon them" and violate Respondents "constitutional and statutory responsibility to conserve and manage state wildlife for current and future generations...." *Id.* at 21. In arguing for this novel and unsupported application of the PTD to wolf management, Plaintiffs recklessly blur distinct legal concepts such as the PTD, the prior appropriation doctrine for water right appropriation, the wildlife trust, and general trust law. The result advocated is an unprecedented expansion of the PTD which, to date, Montana has not adopted.

1. ***Both the history of the PTD and its application in Montana are specific to public use of waterways.***

Plaintiffs cite *Barkley v. Tieleke* and *Mettler v. Ames Realty Co.*, for the proposition that

"[d]uring Montana's territorial period (1864-1889), the territorial courts recognized the Montana water is public property, and therefore a trust resource, under common law." Pl. Compl. at 7. While the State does not dispute the established application of the PTD to State waters, neither *Barkley* or *Mettler* addressed the PTD or its application to State waters. Each of those cases deals specifically with the prior appropriation doctrine and the usufructuary nature of water rights in Montana. More specifically, each case examined when waters are appropriated and thereby constitute a ***private property*** right. *Barkley*, 2 Mont. 59, 64 (1874)[1] *Mettler*, 61 Mont. 152, 161-62 (1921).[2]

The first Montana case to extensively explore the PTD was *Mont. Coalition for Stream Access v. Curran*, 210 Mont. 38, 682 P.2d 163 (1984).[3] There, the Montana Supreme Court reviewed both the "equal-footing" doctrine and the PTD in analyzing the Coalition's claims of public access on the Dearborn River. *Id.* at 44.

Under English common law, the crown owned only the beds of waters which were 1) below the high-water mark, 2) navigable, and 3) subject to the ebb and flow of the tides. *Id.* at 45. After the American Revolution, each state became, itself, a sovereign, holding absolute right to their navigable waters and the soils thereunder. *Id.* (citing *Martin v. Waddell*, 41 U.S. 367 (1842)). States admitted to the Union after the original thirteen succeeded to the same rights as

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[1] "The water is but an incident to the ditches, and the right acquired to use it may be lost by abandonment, and when so lost, it becomes (*publici juris*) public property again, and subject to be recaptured, and when so recaptured, the original appropriators are estopped from reasserting their claim to it; and if they are estopped, wherein can a stranger assert or claim any right to such property?"

[2] "Under either doctrine the *corpus* of running water in a natural stream is not the subject of private ownership, though this elementary principle is apparently overlooked in some of the decided cases. Such water is classed with light and the air in the atmosphere. It is *publici juris* or belongs to the public. A usufructuary right or right to use it exists, and the *corpus* of any portion taken from the stream and reduced to possession is private property so long only as the possession continues."

[3] The Montana Supreme Court began to explore the PTD in *Herrin v. Sutherland*, 74 Mont. 587, 241 P.328 (1925) and the origins of public use of navigable waters, stating that Montana is the owner of all land below the low-water mark of navigable streams and the waters above such lands are public waters available to public fishing (as restrained by general law).

those original states. Indeed, those lands acquired by the United States from the colonies or foreign governments "were held in trust for the new states in order that they might be admitted on an equal footing with the original states." *Id.*

> The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; ***but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union***, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; ***in short, shall not be disposed of piecemeal to individuals as private property***, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community.

Id. at 46 (quoting *Shively v. Bowlby*, 152 U.S. 1, 48-50 (1894)) (emphasis in original).

The PTD was first clearly articulated in *Illinois Central Railroad v. Illinois*, where the United States Supreme Court found that the State of Illinois could not convey a portion of the Chicago harbor, a navigable water, to Illinois Central Railroad. 146 U.S. 387 (1892).

> It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties . . . The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining . . . ***The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of***

the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace.

Id. at 47-48 (quoting *Illinois Central Railroad v. Illinois*, at 452-453 (1892)) (emphasis in original).

In assessing the relationship between these two doctrines, the Court held that the ownership of a streambed is immaterial when determining navigability for recreational use. *Curran*, at 52. The true test for recreational use is whether the waters are capable of public recreational use. *Id.* If such use is possible, then the PTD and Mont. Const. Art. IX, § 3(3)[4] prohibit interference with that right of use. To that end, *Curran* found that the public had the right to use any surface waters capable of recreational use up to the high-water marks and could portage around any barriers. *Id.* at 56; *see also, Montana Coalition for Stream Access v. Hildreth*, 211 Mont. 29, 39, 684 P.2d 1088, 1093 (1984) (Upholding the public's right to access the Beaverhead River pursuant to the PTD and the Mont. Const. Art. IX, § 3(3)).

In response to *Curran* and *Hildreth,* the Montana legislature enacted Mont. Code Ann. § 23-2-301, *et seq.,* which addressed recreational use of streams. Those statutes addressed, among other things, overnight camping within 500 yards of an occupied dwelling, duck blind construction, boat moorage, and big game hunting. In *Galt v. State*, the Montana Supreme Court examined whether these statutes permitted uses of the bed and banks of adjoining lands beyond the scope of the PTD. *See generally*, 225 Mont. 142, 731 P.2d 912 (1987). The Court held that "[t]he public has a right to use up to the high-water mark, but ***only such use as is necessary to utilization of the water itself.*** We hold that any use of the bed and banks must be of minimal impact." *Id.* at 147 (emphasis added).

The [PTD] in Montana's Constitution grants public ownership in water not in

[4] "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."

> beds and banks of streams. While the public has the right to use the water for recreational purposes and minimal use of underlying and adjoining real estate essential to enjoyment of its ownership in water, there is no attendant right that such use be as convenient, productive, and comfortable as possible.

Id. The Court recognized that while the PTD enshrined in Mont. Const. Art. IX, §3 protected the public's property interest in water, the real property interests of private landowners had similar constitutional protection. *Id.* at 148.

While cases subsequent to *Galt* have discussed PTD and its application to State waters,[5] *Curran, Hildreth,* and *Galt* are the seminal cases discussing the PTD development in Montana. These cases address the doctrine's development from Statehood to its incorporation in Mont. Const. Art. IX, § 3. Plaintiffs' assertion that the PTD has been "recognized by several provisions of the Montana Constitution," including the Constitution's "Clean and Healthful Environment" Provision in Art. IX, § 1(1) is false. The Montana Supreme Court has only found the PTD to be included in Mont. Const. Art. IX, § 3(3), which makes sense given the doctrine's historic underpinnings in water and streambed law and the equal-footing doctrine. No Court has found the PTD in Mont. Const. Art. IX, §1(1), or ever pondered the expansion Plaintiffs posit in their complaint, namely, application to terrestrial wildlife. This is because the specific evolution of

[5] *In re Adjudication of Existing Rights to the Use of All Water*, 2002 MT 216, ¶¶ 29-30, 311 Mont. 327, 55P.3d 396 (In determining that a water right appropriation for instream or in lake use need not be diverted to be perfected, the Court noted that while the PTD is enshrined in Mont. Const. Art. IX, § 3(3) (1972), the doctrine actually dates back to Montana's statehood.); *Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist.*, 2008 MT 377, ¶¶ 48-52, 346 Mont. 507, 198 P.3d 219 (The Court found that the Stream Access Law did not create the same juxtaposition between private property and the PTD as was present in *Galt.*); *PPL Mont, LLC v. St.*, 2010 MT 64, 355 Mont. 402, 229 P.3d 421; *PPL Mont., LLC v. Mont.*, 565 US 576, 603-604 (2012) (In addressing the State's concern that denying title to riverbeds would undermine the PTD, the Court said, "[w]hile equal footing cases have noted that the State takes title to the navigable waters and their beds in trust for the public, the contours of that public trust do not depend upon the Constitution. Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine."); *Mont. Dep't of Natural Res. & Conservation v. ABBCO Invs., LLC*, 2012 MT 187, 366 Mont. 120, 285 P.3d 532; *Public Lands Access Ass'n v. Bd. of Cty Comm'rs*, 2014 MT 10, ¶¶ 63-70, 373 Mont. 277, 321 P.3d 38 (Public use of State-owned waters is not a taking).

the PTD, from Justinian law to the 1972 Montana Constitution, pertains only to the use of State waters.

Plaintiffs can present no set of facts that support their claim, namely the application of the PTD to management of a terrestrial wildlife species like wolves. For this reason, Count III of their Complaint is properly dismissed.

2. ***Montana's roles and responsibilities in managing wildlife for the benefit of Montanans is not subject to the PTD.***

Montana manages its wildlife in trust for all Montanans, but that trust is not the same as, or subject to, the PTD.

> The wild game within a State belongs to the people in their collective sovereign capacity. It is not the subject of private ownership except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good.

Geer v. Connecticut, 161 U.S. 519, 529 (1896) (citations omitted) (overruled on other grounds). Numerous cases recognize "the right of the States to control and regulate the common property in game...," including Montana. *Id.* at 528; *see, Rosenfeld v. Jakways*, 67 Mont. 558, 562-563, 216 P. 776, 777 (1923) (The ownership of wild animals is in the State, held in its sovereign capacity for the use and benefit of the people. The State may prohibit or regulate harvest, grant or withhold the right to hunt, and if granted, do so upon the terms and conditions it sees fit to impose. The State exercises these rights "in virtue of its police power.") To that end, FWP takes seriously its duty to supervise the wildlife in the State and enforce those State laws that protect, preserve, manage, and propagate wildlife. Mont. Code Ann. § 87-1-201; *see also*, Mont. Code Ann. § 87-5-107. Similarly, the Commission works diligently to set the policies and regulations for the same. Mont. Code Ann. § 87-1-301.

Plaintiffs offer *Rosenfeld v. Jakways*, *Galt*, *Curran*, and *Mont. Trout Unlimited v.*

Beaverhead Water Co., for the assertion that the PTD has expanded past "navigable waters, to include a responsibility to preserve and protect fish, wildlife, and habitat." Pl. Compl. at 8. As was made clear in *Curran, Hildreth, and Galt*, the PTD is not limited to waters "navigable for title," but pertains to those waters capable of recreational use. *See Galt*, 225 Mont. 142, 147; *Curran*, 210 Mont. 38, 52; *Hildreth*, 211 Mont. 29, 39. To date, *Galt* has been the only expansion of the PTD, and even then, the expansion was tightly constrained to activities 1) below the high-water mark that are necessary to utilization of the water itself and 2) above the high-water mark as necessary for portage around barriers. That is as far as the doctrine extends. None of the cases cited by Plaintiffs extend the PTD to wildlife management. Indeed, *Rosenfeld* says nothing of the PTD, and *Mont. Trout Unlimited* simply recognized that the PTD and Mont. Const. Art. IX, § 3, created an instream right to the recreational use of the State's surface waters. *Mont. Trout Unlimited*, 2011 MT 151, ¶ 29.

The PTD is a matter of state law, and only the states have the authority to define the limits of the PTD. *PPL Mont., LLC v. Mont.*, 565 U.S. at 603-604. To that end, several other State courts have considered, and ultimately denied, claims that the PTD extends beyond public water use to other natural resources. In *Chernaik v. Brown*, the Oregon Supreme Court considered the plaintiffs' contention that the state was required to act as a trustee under the PTD to protect various natural resources from impairment due to greenhouse gas emissions. *Chernaik v. Brown*, 367 Ore. 143, 147 (Ore. 2020). Specifically, plaintiffs argued that the PTD extended to wildlife. *Id.* at 157. The Oregon Supreme Court rejected this claim, as the PTD was not synonymous with the state's sovereign interest in managing wildlife for the public.

> Although we have "long used the metaphor of a trust to describe the state's sovereign interest in wildlife," *id.*, and some similarities exist between the "wildlife trust" and the public trust doctrine, plaintiffs erroneously conflate the use of the trust metaphor with a conclusion that fish and wildlife are natural

> resources that are protected by the public trust doctrine. The two doctrines are currently separate and distinct doctrines. In contrast to the public trust doctrine, which provides that the general public has a right to use navigable waters for certain purposes—subject to objectively reasonable restrictions on that right—and which we later describe in more detail, the wildlife trust doctrine describes the state's broad authority over wild fish and animals in Oregon. The wildlife trust doctrine provides that the state has "the authority to manage and preserve wildlife resources," and that the legislature may restrict, prohibit, or condition the taking of game or fish in Oregon "as the law-making power may see fit[.]"

Id. at 158 (internal citations omitted); *see also, Envtl. Protec. Info. Ctr. v. Cal. Dept. of Forestry & Fire Protec.*, 187 P.3d 888, 926 (Cal. 2008) (The State's public trust duties associated with wildlife are distinct from the PTD and are primarily statutory. Breaches of that trust stem from breaches of statutory obligation, rather than some general common law doctrine.)

The expansion of the PTD proposed by Plaintiffs is unprecedented and would upend an entire body of law. This Court should, as other states have, reject this inappropriate application of incompatible legal concepts. Dismissal of Count III is appropriate.

B. Assuming, *arguendo*, that the PTD Applied, Neither the 2021 Nor 2022 Wolf Laws Are in Violation.

Even if the PTD applied to wolf management, the State has not violated the doctrine. As to resources governed by the PTD, the U.S. Supreme Court stated in *Illinois Central*,

> The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace.

Illinois Central, 146 U.S. 387, 453 (1892). The State's adoption of the 2021 and 2022 wolf laws was not an abdication, but rather an exercise of its management authority. Similarly, the 2021 and 2022 wolf regulations advanced the public benefit and did not create substantial impairment to the resource. As such, the State has not violated the PTD.

1. ***In passing the 2021 bills and adopting the 2021 and 2022 wolf regulations, the State of Montana properly exercised its authority to manage wolves for the benefit of the public.***

While Plaintiffs may not approve of the 2021 and 2022 wolf laws, the State of Montana did not abdicate any authority in their passage and implementation. To the contrary, said statutes and regulations were an exercise of the State's sovereignty over wolf management.

Any duty to manage wolves in accordance with the PTD devolves onto the State as a whole, not any particular entity or agency within the State. *Responsible Wildlife Mgmt.v. St.*, 103 P.3d 203, 206 (2004 Wash. App.) (citations omitted). In *Responsible Wildlife Mgmt.*, nonprofit organizations challenged initiatives prohibiting various hunting and trapping practices on the basis that they interfered with Washington's authority and duty to manage wildlife in accordance with the PTD. *Id.* at 204. The Washington Court of Appeals denied the challenge, finding that Washington had not relinquished control of the public's interest. *Id.* Acknowledging that individual states have the authority to define the limits of the PTD as they see fit, that court concluded that the power of initiative is a legislative power reserved to the people and exercises the same sovereignty powers as the legislature does when enacting a statute. *Id.* at 206. Because the legislature and citizens of Washington retained the power to amend or repeal the statutes codifying the initiatives, and because the prohibitions contained important exceptions that still allowed State management, the challenged laws did not interfere with the PTD. *Id.*at 206-208. "If anything, there [was] an assumption of greater rather than lesser control" by the State. *Id.* at 208.

The 2021 and 2022 legal authorities Plaintiff's challenge here are not dissimilar from those assessed in *Responsible Wildlife Mgmt.* The 2021 statutes of which Plaintiffs complain were enacted to 1) authorize a wolf trapping season (House Bill 225), 2) provide for use of snares during trapping season (House Bill 224), 3) direct the Commission to reduce wolf

populations "to a sustainable level" and identify regulatory tools the Commission could utilize in said effort (Senate Bill 314), and 4) provide for hunting and trapping reimbursement (Senate Bill 267). *See* Ex. 2 – 4. With the exception of House Bill 224 and the amendment to Mont. Code Ann. § 87-1-901(1), in Senate Bill 314, each statutory change gives the Commission significant discretion. Even Senate Bill 314 allows the Commission to decide which of the tools identified it wishes to implement. Like the initiatives in *Responsible Wildlife Mgmt.*, these statutes allow the Commission to exercise discretion and the citizens of Montana retain the power to amend or repeal these statutes whenever they see fit.

In August 2021, after significant opportunity for public comment, the Commission advanced the legislature's directive in Mont. Code Ann. § 87-1-901(1) by adopting the 2021 regulations. The regulations allowed trappers to use snares, allowed night-hunting on private lands, and introduced a statewide quota of 450 wolves (removing quotas in wolf management units ("WMUs") 110, 313 and 316 and establishing regional quotas). Critically, if quotas were met, the Commission was required to initiate a Commission review for rapid in-season adjustments.

In August 2022, after public comment, the Commission adopted the 2022 regulations. FWP and the Commission continued the statewide quota of 450 wolves, but combined WMU 313 and 316 and established a quota of six wolves for that area. Montana's remaining WMUs were eliminated. Similar to 2021, if either a regional quota or statewide quota were met, the Commission was required to convene and review for rapid in-season adjustments. Again, like *Responsible Wildlife Mgmt.*, the 2021 and 2022 regulations were an exercise of the State's sovereign management authority, not a restriction of the same, and included meaningful opportunity for Commission review if quotas were met.

While Montana's laws facilitate, as opposed to prohibit, public harvest of wolves there exist the same discretion, exceptions, and mechanisms for the State to assert control as existed in *Responsible Wildlife Mgmt.* The Commission exercised these authorities to identify methods of harvest, WMUs, and quotas. The Commission further exercised its discretion between 2021 and 2022, where it changed the WMUs and quotas, even reducing the quota in WMU 313, north of Yellowstone National Park.

While Plaintiffs may not like the 2021 and 2022 statutes and rules they challenge in this action, Montana has not abdicated any trust duties it owes to the public in implementing said laws. To the contrary, Montana, through its elected representatives, has set forth a management regime, which it can change as necessary for the public benefit. As such, there has been no violation of the PTD.

2. ***Even if the State had abdicated its trust in adopting the 2021 and 2022 wolf regulations, those regulations have been implemented to the benefit of the public and have not substantially impaired wolf populations.***

While the 2021 and 2022 authorities may differ from that of previous years, FWP and the Commission have adhered to the same public processes, assuring the public is provided a voice. Wolf management draws diverse interests, including hikers, hunters, trappers, wildlife watchers, ranchers, and outdoor enthusiasts. In one respect, certain individuals or groups see wolves for the aesthetic value that they bring, while others see wolves as a threat to their livestock, but, more importantly, their livelihood.

The 2021 and 2022 wolf hunting and trapping regulations embody the fact that the Montana Legislature, FWP, and the Commission have balanced those competing interests to the best of their ability. In fact, FWP and the Commission balanced those very interests when re-examining how many wolves should or should not be harvested in WMU 313 during the 2022 season. While many groups advocated for a harvest of zero to two wolves to be taken, many

other groups, specifically ranchers in Paradise Valley and near West Yellowstone, advocated for more wolves to be harvested. The Commission heard these viewpoints, as well as the testimony of Yellowstone National Park's Senior Biologist, Doug Smith, who informed the Commission that a quota of six wolves would not negatively impact the gray wolf population in Yellowstone National Park.

Despite the new methods of harvest and the statewide quota of 450 wolves, the Montana gray wolf population has not been substantially impaired. Montana has successfully managed the gray wolf for the past 14 years. In 2009, Montana's wolf population was 524, and in 2022, Montana's wolf population was 1,144. This is all due to the efforts of FWP and the Commission properly balancing the interests of all, but also assuring that the gray wolf is managed properly and effectively. Given the fact that the wolf population has significantly increased over the past 14 years, it is clear that the gray wolf has not been substantially impaired. The State has, and continues to, manage the species for the public's benefit.

IV. The State's Actions are Not Preempted by the National Park Service Organic Act, the National Forest Management Act, the Federal Land Policy & Management Act, or The Multiple-Use Sustained-Yield Act, and Counts IV and V Should Be Dismissed Accordingly.

Preemption is not applicable here because the state's management efforts do not impede the federal government's own management policies or efforts.

"Federal law may preempt state law under the Supremacy Clause in three ways – by express preemption, by field preemption, or by conflict preemption." *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 191 (4th Cir. 2007) (citation omitted). Express preemption occurs when a federal statute or regulation contains language explicitly stating that the law preempts state law. *Arizona v. United States*, 567 U.S. 387, 398-99 (2012). Field preemption occurs when Congress, without expressly declaring that state laws are preempted, legislates in a way that is so

comprehensive that it occupies the field. *Id.* at 399. Lastly, conflict preemption arises where state law actually conflicts with federal laws and compliance with both laws is physically impossible. *Id.* at 399.

Obstacle preemption, a subset of conflict preemption, occurs "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Freightliner Corp. v. Myrick,* 514 U.S. 280, 287 (1995) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Plaintiffs claim that the state's management efforts stand as an obstacle to the purpose and objectives of the National Park Service Organic Act ("Organic Act"), the National Forest Management Act ("NFMA"), the Federal Land Policy and Management Act ("FLPMA"), and the Multiple-Use Sustained Yield Act ("MUSYA"). Their argument is incorrect.

Nearly every preemption case is governed by "the two cornerstones of...preemption jurisprudence." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). First, "[p]re-emption fundamentally is a question of congressional intent, and when Congress has made its intent through explicit statutory language, the courts' task is an easy one." *English v. General Elec. Co.,* 496 U.S. 72, 78-79 (1990). Second, respect for the states as "'independent sovereigns in our federal system' leads us to assume that 'Congress does not cavalierly pre-empt state-law causes of action.'" *Wyeth*, 555 U.S. at 565 n.3; (quoting *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996) (confirming that the presumption against pre-emption applied in all pre-emption cases, including to claims of implied conflict pre-emption). "[A] high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n,* 505 U.S. 88, 110 (1992) (Kennedy, J., concurring in part and concurring in judgment)).

Both the United States Supreme Court and the Montana Supreme Court disfavor

preemption of state law. "'Because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.'" *Sleath v. West Mont Home Health Services*, 2000 MT 381, ¶ 23, 304 Mont. 1, ¶ 23, 16 P.3d 1042, ¶ 23 (citing *Medtronic, Inc.*, 518 U.S. 470, 485 and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)). A preemption analysis must begin "with the assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The presumption "can only be overcome by evidence of a 'clear and manifest' intent of Congress to preempt state law." *Sleath*, ¶ 61 (citing *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 610 (1991)).[6]

As noted in the State's response to the Plaintiffs' motion for a TRO, the United States Supreme Court has recognized that wildlife is "peculiarly within the police power" of the State, and the State has great latitude in determining what is appropriate for its management. *See* Defs. Resp. to Pl. Mtn. for P.I. and TRO, Pg. 6 (discussing *Baldwin v. Fish and Game Commission of Mont.*, 436 US 371, 391 (1978)). In fact, there are many Montana cases that have additionally recognized the State's power to protect public wildlife resources through regulations designed for that purpose. *State v. Boyer*, 2002 MT 33, ¶ 22, 308 Mont. 276, P 22, 42 P.3d 771, P 22; *State v. Huebner* (1992), 252 Mont. 184, 188, 827 P.2d 1260, 1263; *Nepstad v. Danielson* (1967), 149 Mont. 438, 440, 427 P.2d 689, 691. Accordingly, had Congress *clearly and manifestly* chosen to implicate any state's management efforts, via the four acts, they would have done so. Here, they did not. Thus, the presumption against preemption is applicable, and this Court should ignore the Plaintiffs' far-sweeping assertion that would not only concern

[6] The presumption against preemption also applies to claims that federal law displaces "the historic police powers of the States." *Rice*, 331 U.S. at 230.

Montana, but also many other states. Dismissal of Counts IV and V is required.

a. The Organic Act Does Not Preempt the State's 2021 or 2022 Laws.

Even if this Court were to disregard the presumption against preemption, the congressional intent of the Organic Act is clear, and not in conflict with the State's 2021 or 2022 laws.

The Organic Act was implemented as a means to protect existing and future parks' resources, including wildlife within said parks. The Organic Act, creating the National Park Service within the Department of Interior, states that,

> the Service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments and reservations...by such means and measures as conform to the fundamental purpose of the said parks, monuments and reservations, which purpose is to conserve the scenery and the natural and historic objects and the ***wild life therein*** and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

54 U.S.C. § 100101(a) (amending and replacing 16 U.S.C. § 1 (repealed 2014)) (emphasis added).

Notably, the provisions and protections of the Organic Act are geographically limited by the express language of the act, applying only to those areas and animals within park boundaries. The language of the Organic Act is clear on its face and does not require interpretation beyond the clear legislative intent of the drafters. Had the drafters intended to apply the Organic Act beyond National Park boundaries, or had Congress realized the need to implement the Organic Act beyond National Park boundaries at a date thereafter its enactment, they would have clearly stated such or done so. They did not here.

b. NFMA, FLPMA, nor MUSYA Preempt the State's 2021 and 2022 Laws.

The NFMA and the MUSYA are acts specifically pertaining to United States Forest Service (USFS) lands within the United States. The FLPMA specifically pertains to United

States Bureau of Land Management (BLM) lands in the United States. While all three were adopted at different times, their purpose remains similar – to guide the use of those federal lands to which they apply.

Adopted in 1976, the NFMA permits the Secretary of Agriculture to evaluate forest lands, develop a management program based on multiple-use, sustained-yield principles, and implement resource management plans for each unit of the National Forest System.

In attempting to assert preemption of state wildlife management, the Plaintiffs point to 16 U.S.C. § 1604. That section refers to the NFMA and states the following:

> **(a) Development, Maintenance, and Revision by Secretary as part of program; coordination.** As a part of the Program provided for by Section 4 of this Act [16 U.S.C. § 1602], the Secretary shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, *coordinated with the land and resource management planning processes of State and local governments* and other Federal agencies.

See NFMA, 16 U.S.C. § 1604. (emphasis added). Despite the limited reference to wildlife management, this section demonstrates the Secretary's responsibility to coordinate with the State and local government in developing management plans.

While NFMA clearly contemplates a space for Montana's wildlife management, MUSYA goes even further, delineating the state's primacy over wildlife.

> It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes...***Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests....***

16 U.S.C. § 528. (emphasis added). Contrary to the Complaint's selective quotation, Congress expressly states that MUSYA cannot be interpreted to preempt the states with respect to wildlife and fish management.

Finally, the FLPMA broadly and explicitly affirms the state's authority over wildlife on

any BLM lands at issue. The FLPMA begins by directing that the Secretary shall regulate "the use, occupancy, and development of the public lands." It then continues to state:

> Provided further, ***That nothing in this Act shall be construed*** as authorizing the Secretary concerned to require Federal permits to hunt and fish on public lands or on lands in the National Forest System and adjacent waters or ***as enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife.***

43 U.S.C. § 1732(b) (emphasis added).

As noted by the District of Columbia Circuit Court of Appeals, the language of the FLPMA "places the responsibility and authority for state wildlife management precisely where Congress has traditionally placed it," which is "in the hands of the states." *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1249-50 (D.C. Cir. 1980). "Indeed, a state has 'historical powers to manage wildlife on federal lands within its borders' unless Congress manifests a contrary purpose." *W. Watersheds Project v. Salazar*, 766 F. Supp. 2d 1095, 1113 (2011); (quoting *Wyoming v. United States*, 279 F.3d 1214, 1231 (10th Cir. 2002) (citing *Rice*, 331 U.S. at 230).

Here, Congress has not manifested a contrary purpose, nor intended to preempt state wildlife management through the enactment of the three acts mentioned above. The language clearly places the control of wildlife on federal lands within the state's authority. Had they intended otherwise, they would have explicitly included language permitting preemption. Dismissal of count IV and V is required.

CONCLUSION

For the foregoing reasons the Defendants' Motion to Dismiss should be granted.

CERTIFICATE OF SERVICE

I hereby certify that, this 17 day of January, 2023, a true and correct copy of the foregoing document was emailed upon the following:

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OFFICE OF THE GOVERNOR
STATE OF MONTANA

GREG GIANFORTE
GOVERNOR

KRISTEN JURAS
LT. GOVERNOR

January 12, 2023

Director Hank Worsech
Montana Fish, Wildlife and Parks
1420 East Sixth Avenue
P.O. Box 200701
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Director Worsech,

Montana's efforts toward gray wolf recovery date back to the 1980s. Recovery efforts quickened when gray wolves were reintroduced to Yellowstone National Park and the wilderness areas of central Idaho. In 2002, the federal recovery goal was met. Since that conservation victory, the people of Montana, with significant interest and earnest participation, have engaged in wolf management.

In 2002, Montana Fish, Wildlife and Parks ("FWP") opened the public scoping period for its wolf management environmental impact statement. At the conclusion of a comprehensive public process, the Wolf Conservation and Management Plan (the "Wolf Plan") was finalized and approved by the United States Fish and Wildlife Service in 2004. Congress delisted wolves in 2011, and since that time, Montana has retained statewide management authority.

Given the public and legislature's engagement in wolf management, it is an appropriate time to revisit the Wolf Plan. Accordingly, I am directing FWP to collaborate with the citizens of Montana to form a new Wolf Plan.

I understand this task is not simple, especially given FWP's current efforts to re-examine the elk management plan and complete the grizzly bear management plan. Your ongoing leadership and public engagement on these initiatives, however, leaves me confident that this directive is timely. I remain certain that as we engage in this new planning endeavor, the Montana gray wolf population will continue to be managed effectively as a viable population far into the future.

Sincerely,

Greg Gianforte
Governor

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AN ACT GENERALLY REVISING WOLF TRAPPING SEASON LAWS; ESTABLISHING THE OPEN AND CLOSE OF WOLF TRAPPING SEASON; PROVIDING EXCEPTIONS; PROVIDING RULEMAKING AUTHORITY; AND AMENDING SECTION 87-1-304, MCA.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 87-1-304, MCA, is amended to read:

"**87-1-304. Fixing of seasons and bag and possession limits.** (1) Subject to the provisions of 87-5-302 and ~~subsection~~ subsections (7) and (8) of this section, the commission may:

(a) fix seasons, bag limits, possession limits, and season limits;

(b) open or close or shorten or lengthen seasons on any species of game, bird, fish, or fur-bearing animal as defined by 87-2-101;

(c) declare areas open to the hunting of deer, antelope, elk, moose, sheep, goat, mountain lion, bear, wild buffalo or bison, and wolf by persons holding an archery stamp and the required license, permit, or tag and designate times when only bows and arrows may be used to hunt deer, antelope, elk, moose, sheep, goat, mountain lion, bear, wild buffalo or bison, and wolf in those areas;

(d) subject to the provisions of 87-1-301(6), restrict areas and species to hunting with only specified hunting arms, including bow and arrow, for the reasons of safety or of providing diverse hunting opportunities and experiences; and

(e) declare areas open to special license holders only and issue special licenses in a limited number when the commission determines, after proper investigation, that a special season is necessary to ensure the maintenance of an adequate supply of game birds, fish, or animals or fur-bearing animals. The commission may declare a special season and issue special licenses when game birds, animals, or fur-bearing animals are causing damage to private property or when a written complaint of damage has been filed with the commission

by the owner of that property. In determining to whom special licenses must be issued, the commission may, when more applications are received than the number of animals to be killed, award permits to those chosen under a drawing system. The procedures used for awarding the permits from the drawing system must be determined by the commission.

(2) The commission may adopt rules governing the use of livestock and vehicles by archers during special archery seasons.

(3) Subject to the provisions of 87-5-302 and subsection (7) of this section, the commission may divide the state into fish and game districts and create fish, game, or fur-bearing animal districts throughout the state. The commission may declare a closed season for hunting, fishing, or trapping in any of those districts and later may open those districts to hunting, fishing, or trapping.

(4) The commission may declare a closed season on any species of game, fish, game birds, or fur-bearing animals threatened with undue depletion from any cause. The commission may close any area or district of any stream, public lake, or public water or portions thereof to hunting, trapping, or fishing for limited periods of time when necessary to protect a recently stocked area, district, water, spawning waters, spawn-taking waters, or spawn-taking stations or to prevent the undue depletion of fish, game, fur-bearing animals, game birds, and nongame birds. The commission may open the area or district upon consent of a majority of the property owners affected.

(5) The commission may authorize the director to open or close any special season upon 12 hours' notice to the public.

(6) The commission may declare certain fishing waters closed to fishing except by persons under 15 years of age. The purpose of this subsection is to provide suitable fishing waters for the exclusive use and enjoyment of juveniles under 15 years of age, at times and in areas the commission in its discretion considers advisable and consistent with its policies relating to fishing.

(7) In an area immediately adjacent to a national park, the commission may not:

(a) prohibit the hunting or trapping of wolves; or

(b) close the area to wolf hunting or trapping unless a wolf harvest quota established by the commission for that area has been met.

(8) The commission may authorize a wolf trapping season that opens the first Monday after

Thanksgiving and closes March 15 of the following calendar year, except that the commission may adjust the dates for specific wolf management units based on regional recommendations."

- END -

AN ACT ALLOWING THE SNARING OF WOLVES BY LICENSED TRAPPERS; AND AMENDING SECTION 87-1-901, MCA.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 87-1-901, MCA, is amended to read:

"**87-1-901. Gray wolf management -- rulemaking -- reporting.** (1) Except as provided in subsection (2), the commission shall establish by rule hunting and trapping seasons for wolves. Trapping seasons must allow for the use of snares by the holder of a trapping license. For game management purposes, the commission may authorize:

(a) the issuance of more than one Class E-1 or Class E-2 wolf hunting license to an applicant; and

(b) the trapping or snaring of more than one wolf by the holder of a trapping license.

(2) The commission shall adopt rules to allow a landowner or the landowner's agent to take a wolf on the landowner's property at any time without the purchase of a Class E-1 or Class E-2 wolf license when the wolf is a potential threat to human safety, livestock, or dogs. The rules must:

(a) be consistent with the Montana gray wolf conservation and management plan and the adaptive management principles of the commission and the department for the Montana gray wolf population;

(b) require a landowner or the landowner's agent who takes a wolf pursuant to this subsection (2) to promptly report the taking to the department and to preserve the carcass of the wolf;

(c) establish a quota each year for the total number of wolves that may be taken pursuant to this subsection (2); and

(d) allow the commission to issue a moratorium on the taking of wolves pursuant to this subsection (2) before a quota is reached if the commission determines that circumstances require a limitation of the total number of wolves taken.

(3) Public land permittees who have experienced livestock depredation must obtain a special kill permit authorized in 87-5-131(3)(b) to take a wolf on public land without the purchase of a Class E-1 or Class E-2 license.

(4) The department shall report annually to the environmental quality council regarding the implementation of 87-5-131, 87-5-132, and this section."

- END -

AN ACT REVISING LAWS RELATED TO THE HARVEST OF WOLVES; PROVIDING LEGISLATIVE INTENT; REVISING RULEMAKING AUTHORITY; AND AMENDING SECTION 87-1-901, MCA.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 87-1-901, MCA, is amended to read:

"**87-1-901. Gray wolf management -- rulemaking -- reporting.** (1) Except as provided in subsection ~~(2)~~ (3), the commission shall establish by rule hunting and trapping seasons for wolves with the intent to reduce the wolf population in this state to a sustainable level, but not less than the number of wolves necessary to support at least 15 breeding pairs.

(2) For game management purposes, the commission may apply different management techniques depending on the conditions in each administrative region with the most liberal harvest regulations applied in regions with the greatest number of wolves. In doing so, the commission may authorize:

(a) the issuance of more than one Class E-1 or Class E-2 wolf hunting license to an applicant; ~~and~~

(b) the trapping of more than one wolf by the holder of a trapping license;

(c) the harvest of an unlimited number of wolves by the holder of a single wolf hunting or wolf trapping license;

(d) during the wolf trapping season, the use of bait while hunting or trapping wolves as long as no trap or snare trap is set within 30 feet of exposed bait visible from above; and

(e) the hunting of wolves on private lands outside of daylight hours with the use of artificial light or night vision scopes.

~~(2)~~(3) The commission shall adopt rules to allow a landowner or the landowner's agent to take a wolf on the landowner's property at any time without the purchase of a Class E-1 or Class E-2 wolf license when the wolf is a potential threat to human safety, livestock, or dogs. The rules must:

(a) be consistent with the Montana gray wolf conservation and management plan and the adaptive management principles of the commission and the department for the Montana gray wolf population;

(b) require a landowner or the landowner's agent who takes a wolf pursuant to this subsection ~~(2)~~ (3) to promptly report the taking to the department and to preserve the carcass of the wolf;

(c) establish a quota each year for the total number of wolves that may be taken pursuant to this subsection ~~(2)~~ (3); and

(d) allow the commission to issue a moratorium on the taking of wolves pursuant to this subsection ~~(2)~~ (3) before a quota is reached if the commission determines that circumstances require a limitation of the total number of wolves taken.

~~(3)~~(4) Public land permittees who have experienced livestock depredation must obtain a special kill permit authorized in 87-5-131(3)(b) to take a wolf on public land without the purchase of a Class E-1 or Class E-2 license.

~~(4)~~(5) The department shall report annually to the environmental quality council regarding the implementation of 87-5-131, 87-5-132, and this section."

- END -

AN ACT ALLOWING FOR THE REIMBURSEMENT OF COSTS INCURRED WHILE HARVESTING WOLVES; AND AMENDING SECTION 87-6-214, MCA.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 87-6-214, MCA, is amended to read:

"**87-6-214. Unlawful contest or prize.** (1) (a) Except as provided in subsections (1)(b) ~~and (1)(c)~~ through (1)(d), a person, firm, or club may not offer or give a prize, gift, or anything of value in connection with or as a bag limit prize for the taking, capturing, killing, or in any manner acquiring any game, fowl, or fur-bearing animal or any bird or animal protected by law.

(b) A prize may be awarded for any one game bird or fur-bearing animal on the basis of size, quality, or rarity.

(c) A person may conduct or sponsor a contest for which the monetary prize, certificate, or award does not exceed $50 for a person who kills a game animal possessing the largest antlers or horns, carrying the greatest weight, or having the longest body or any similar contest based upon the size or weight of a game animal or part of a game animal. The monetary restriction provided in this subsection (1)(c) does not apply to recognition given by a nationally established and recognized Boone and Crockett trophy institute.

(d) Reimbursements for receipts of costs incurred related to the hunting or trapping of wolves may be given to persons licensed to hunt or trap wolves pursuant to Title 87, chapter 2.

(2) A person convicted of a violation of this section shall be fined not less than $50 or more than $1,000 or be imprisoned in the county detention center for not more than 6 months, or both. In addition, the person, upon conviction or forfeiture of bond or bail, may be subject to forfeiture of any current hunting, fishing, or trapping license issued by this state and the privilege to hunt, fish, or trap in this state or to use state lands, as defined in 77-1-101, for recreational purposes for a period of time set by the court."

- END -