

1 HON. BRENDA R. GILBERT
2 District Judge
3 Sixth Judicial District
4 414 East Callender
5 Livingston, Montana 59047
6 (406) 222-4130

PARK COUNTY CLERK
OF DISTRICT COURT
JUNE LITTLE

2013 JAN 18 PM 3 21

FILED
BY June Little
DEPUTY

MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

7 CITIZENS FOR BALANCED USE; BIG)
8 GAME FOREVER, LLC; MONTANA)
9 OUTFITTERS AND GUIDES ASSN.;)
MONTANA SPORSTMEN FOR FISH)
AND WILDLIFE; and REP. ALAN)
REDFIELD,)

10 Plaintiffs,)

Cause No. DV- 2013-1

11 vs.)

12 MONTANA FISH, WILDLIFE & PARKS)
13 COMMISSION,)

14 Defendant.)
15

16 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND**
17 **ORDER ISSUING PRELIMINARY INJUNCTION**

18 The Plaintiffs filed their Complaint for Declaratory and Injunctive Relieve in this
19 cause on January 2, 2013. On that same date, the Plaintiffs filed an Application for Tempo-
20 rary Restraining Order and Preliminary Injunction and Brief in Support. The Court, Honor-
21 able Wm. Nels Swandal presiding, issued a Temporary Restraining Order on January 2, 2013,
22 which set a hearing for January 14, for the Defendant to appear and show cause why a prelimi-
23 nary injunction should not be entered in the case.

24 Defendant's Brief in Opposition to Motion for Preliminary Injunction was filed on
25 January 14, 2013.

26 The Court conducted the show cause hearing on January 14, 2013. Hon. Brenda R.
27 Gilbert presiding. At the hearing, each party was afforded the opportunity to present affida-
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1 vits, testimony and evidence regarding the requested preliminary injunction. The Court, hav-
2 ing considered the affidavits, testimony and evidence presented, now makes the following
3 findings of fact:
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5 **FINDINGS OF FACT**

6 1. The Plaintiffs filed their Application for Temporary Restraining Order and Preliminary
7 Injunction and Brief in Support on January 2, 2013. The Application sought an order requir-
8 ing Defendants to immediately reinstitute and allow hunting of and trapping of wolves in all
9 areas of Park County, Montana in a manner that was authorized prior to the defendants' deci-
10 sion of December 10, 2012. The Application further sought an order temporarily restraining
11 Defendants from enforcing their decision of December 10, 2012, preventing wolf hunting and
12 trapping from occurring in parts of Park County, Montana.

13 2. The Application further sought an order setting aside and declaring null and void the
14 Commission's decision of December 10, 2012, closing areas of Park County to wolf hunting
15 and trapping and an order restraining Defendant from penalizing those who hunt or trap wolv-
16 es in the areas closed by Defendant on December 10, 2012.

17 3. Finally, the Application sought the issuance of a preliminary injunction prohibiting
18 Defendant from further implementing the December 10, 2012 decision and prohibiting Defen-
19 dant from making further closures of or changes to wildlife seasons unless Defendant compli-
20 es with Montana law and the Montana Constitution, requiring Defendant to hold public meet-
21 ings and to make proper public notice before making final Decisions.

22 4. The matter before the Court arises from a December 10, 2012 meeting of the Defen-
23 dant Commission. At this meeting, the Commission made the decision to close wolf hunting
24 and trapping in Hunting District 313 and part of Wolf Management Unit 390. The Plaintiffs
25 allege that said decision was made by Commission without proper advance notice to the pub-
26 lic.

27 5. At the hearing before the Court on January 14, 2013, the testimony and evidence were
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1 undisputed to the effect that hunting, trapping and fishing regulations, and, in particular, the
2 opening and closing of hunting districts for wolves are matters of significant interest to the
3 public.

4 6. Plaintiffs allege that Defendant failed to give notice to the public of the matter of clo-
5 sure of wolf hunting districts being a matter addressed at the December 10, 2012 meeting of
6 the Commission, pursuant to Montana Code Section 2-3-103(1).

7 7. The Defendant asserts that information stemming from the July 12, 2012 Commission
8 meeting to the effect that the wolf hunting seasons or districts would be addressed further at
9 the December, 2012 meeting, along with notice being in other media, was sufficient compli-
10 ance with the notice requirements of Montana Code Section 2-3-103(1).

11 8. The Commission Meeting Agenda for the December 10, 2012 meeting, as it concerned
12 the topic of wolves, stated, "Wolf Harvest Update – Informational". It did not state that wolf
13 hunting district closures would be a matter for agency decisions at the December 10, 2012
14 meeting. (See Exhibit 2 to Plaintiff's Application for Declaratory and Injunctive Relief)

15 9. In addition, the FWP Commission Agenda Item Cover Sheet states that the agenda
16 item was "Review of 2012 Wolf Harvest" and "Action Needed: Informational" (See Exhibit
17 3 to Plaintiff's Application for Declaratory and Injunctive Relief).

18 10. The Court did not receive any testimony or evidence showing that the matter of clos-
19 ing wolf hunting districts in Park County was advertised as a matter of action on the agenda of
20 the December 10, 2012 Commission meeting in any newspaper of general circulation within
21 Park County, Montana.

22 11. At the commencement of that portion of the December 10, 2012 Commission address-
23 ing wolves, some members of the Commission expressed concern about proceeding with ac-
24 tion that would close wolf hunting districts since the notice had stated that the wolf update
25 would be informational.

26 12. The Commission did go forward with the closure of some portions of Park County to
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1 wolf hunting and trapping.

2 13. The number of members of the public who commented at the December 10, 2012
3 meeting regarding the wolf issue was fifteen, according to Defendant's counsel. At the July
4 12, 2012 meeting where wolf hunting was discussed, thirty-four members of the public pro-
5 vided comment to the Commission.

6 From the foregoing Findings of Fact the Court makes the following:

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8 **CONCLUSIONS OF LAW**

9 1. This Court has jurisdiction over the subject matter of this proceeding and the parties
10 hereto. Venue is proper in Park County pursuant to Mont. Code Ann. §25-2-126.

11 2. Defendant, Montana Fish Wildlife & Parks Commission establishes "the hunting trap-
12 ping, and fishing regulations of the department," as authorized by Mont. Code Ann. §87-1-
13 301(1)(b).

14 3. The Commission's authority to make such regulations and decisions is subject to the
15 provisions of Montana Code Ann. Section 2-3-101 et. seq., which provide for public partici-
16 pation in governmental operations, as well as the Montana Constitution, Article II, §8 and 9.

17 4. More specifically, Montana Code Ann. Section 2-3-103(1) requires that, "each agen-
18 cy shall develop procedures for permitting and encouraging the public to participate in agen-
19 cy decisions that are of significant interest to the public. The procedures must ensure ade-
20 quate notice and assist public participation before a final agency action is taken that is of
21 significant interest to the public".

22 5. The agency may not take action on any matter discussed unless specific notice of that
23 matter is included on an agenda and public comment has been allowed on that matter. Monta-
24 na Code Ann. §2-3-103(1).

25 6. Hunting, trapping and fishing regulations, and, in particular, the opening and closing
26 of hunting districts for wolves are matters of significant interest to the public. The evidence is
27 undisputed on this point.

1 7. The Court concludes that the Plaintiffs have made a prima facie showing that Defen-
2 dant failed to give notice to the public of the matter of closure of wolf hunting districts being
3 a matter addressed at the December 10, 2012 meeting of the Commission.

4 8. The Court concludes that Plaintiffs have made a prima facie showing that the informa-
5 tion stemming from the July 12, 2012 meeting to the effect that the wolf hunting seasons or
6 districts would be addressed further at the December, 2012 meeting is insufficient compliance
7 with the specific notice requirements of M.C.A. §2-3-103(1), and related guarantees of the
8 Montana Constitution.

9 9. The Court further concludes that the Plaintiffs have made a prima facie showing that
10 the Commission Meeting Agenda for the December 10, 2012 meeting, stating, “Wolf Harvest
11 Update – Informational” did not provide notice to the public of wolf hunting district closures
12 being a matter for agency decisions at the December 10, 2012 meeting. (See Exhibit 12 to
13 Plaintiff’s Application for Declaratory and Injunctive Relief)

14 10. In addition, the FWP Commission Agenda Item Cover Sheet states that the agenda
15 item was “ Review of 2012 Wolf Harvest” and, significantly “Action Needed: Informational”
16 (See Exhibit 3 to Plaintiff’s Application for Declaratory and Injunctive Relief) The Court
17 concludes that Plaintiffs have made a prima facie showing that this document would lead the
18 average reader to conclude that action regarding the wolf hunting districts would not be de-
19 cided at the December 10, 2012 meeting of the Commission.

20 11. The Court concludes that the Plaintiffs have made a prima facie showing that the mat-
21 ter of closing wolf hunting districts in Park County was not advertised as a matter of action on
22 the agenda of the December 10, 2012 Commission meeting in any newspaper of general circu-
23 lation within Park County, Montana.

24 12. When the provisions of M.C.A. §2-3-103 are violated, the district courts of the state
25 have jurisdiction to set aside an agency decision upon the petition of any
26 person whose rights have been prejudiced. See M.C.A. §2-3-114. The Court concludes that
27 this provision of the code alone, as applied to the facts of this case, warrants granting of the
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1 injunctive relief sought by the Plaintiffs.

2 13. Preliminary injunctions are governed by §27-19-201, M.C.A., which provides that an
3 injunction may be granted in the following cases:

4 (1) when it appears that the applicant is entitled to the relief demanded and the
5 relief or any part of the relief consists in restraining the commission or continuance
6 of the act complained of, either for a limited period or perpetually;

7 (2) when it appears that the commission or continuance of some act during the liti-
8 gation would produce a great or irreparable injury to the applicant;

9 (3) when it appears during the litigation that the adverse party is doing or threatens
10 or is about to do or is procuring or suffering to be done some act in violation of the
11 applicant's rights, respecting the subject of the action, and tending to render the
12 judgment ineffectual;

13 (4) when it appears that the adverse party, ;during the pendency of the action,
14 threatens or is about to remove or to dispose of the adverse party's property with in-
15 tent to defraud the applicant, an injunction order may be granted to restrain the real
16 or disposition;

17 (5) when it appears that the applicant has applied for an order under the provisions
18 of 40- 4-121 or an order of protection under title 40, chapter 15.

19 14. As a matter of law, the Plaintiffs have Constitutionally protected rights to be able to
20 participate in the operation of agencies prior to a final decision being made and to be able to
21 examine documents used by public bodies and agencies and to observe the deliberations of
22 public bodies and agencies prior to a final decision being made. Mont. Const. Art. II, §§ 8- 9.
23 The Court concludes that it appears that Defendant violated these rights in making its deci-
24 sions to close wolf hunting areas in Park County without requisite notice.

25 15. As a matter of law, violation of Plaintiff's constitutional rights establishes irreparable
26 injury sufficient to invoke the protections of M.C.A. §27-19-201. See also *Elrod v. Burns*,
27 427 U.S. 347 (1976). The use of a preliminary injunction where constitutional rights are at
28 issue is not uncommon, given that injunctive relief is appropriate where a money judgment
will be ineffectual or the moving party will be irreparably injured. *Van Loan v. Van
Loan*, 271 Mont.. 176, 895 P.2d 614,(1995).

16. The Court concludes that the Plaintiff has established a prima facie case and has
shown that it is at least doubtful whether or not irreparable injury will be suffered before

1 Plaintiffs' rights can be fully litigated. In deciding that the Plaintiff has established a prima
2 facie case, the Court has determined that a sufficient case has been made out to warrant the
3 preservation of the rights in the status quo until trial, without expressing a final opinion as to
4 the rights. Status quo has been defined as the last actual peaceable, non-contested condition
5 that preceded the pending controversy.

6 17. It appears that failing to continue in effect the Temporary Restraining Order entered
7 by Judge Wm. Nels Swandal would produce irreparable injury to the Plaintiffs by exposing
8 Plaintiffs to a decision apparently made in violation of processes required by the Montana
9 Constitution, by a loss of ability to hunt and trap wolves in certain portions of Park County, by
10 a loss of ability to guide persons on said hunts; by a loss of use and enjoyment of private prop-
11 erty, and by increased risks of livestock predation by wolves.

12 18. Actions taken by the Commission, as described above, appear to have violated the
13 Plaintiffs' rights such that delaying the injunctive relief sought would render the judgment
14 ultimately sought ineffectual.

15 19. The Defendant has the ongoing right and obligation to establish the hunting, trapping,
16 and fishing regulations of the Department. The Defendant represented to the Court at the Jan-
17 uary 14 hearing, and Commissioner Dan Vermillion testified that the Commission intends to
18 re-notice a commission meeting with regard to wolf hunting issues at a later date. The Court
19 concludes that this representation does not render moot the matter before the Court at this
20 time.

21 20. However, if the Defendant takes such subsequent actions, and provides proof to the
22 Court that requisite notice is given, the Defendant would be entitled to apply to the Court for
23 an order dissolving this Preliminary Injunction in whole or in part.

24 21. The Court concludes that, pursuant to M.C.A. §27-19-306(1)(b)(ii), a written under-
25 taking by the Plaintiff should be waived in the interests of justice. Neither party has made any
26 request of this Court regarding such an undertaking, nor submitted any proof concerning this
27 issue.

1 Based upon the foregoing Findings of Fact and Conclusions of Law the Court now
2 enters the following:

3
4 **PRELIMINARY INJUNCTION**

5 A. The Defendant is prohibited from further implementing and enforcing the December
6 10, 2012 decision to close wolf hunting and trapping in areas of Park County.

7 B. The Defendant is prohibited from making further decisions closing or changing any
8 wildlife seasons, including making changes to wolf hunting or trapping in Montana, unless
9 Defendants comply with Montana law.

10 C. In the event that the Defendant takes action, subsequent to the January 14, 2013 hear-
11 ing to conduct a Commission meeting with regard to Park County wolf hunting or trapping
12 issues at a later date, and provides proof to the Court that requisite notice is given for the ac-
13 tion taken, the Defendant will be entitled to apply to the Court for an order dissolving this Pre-
14 liminary Injunction in whole or in part.

15 ISSUED THIS 10th DAY OF JANUARY, 2012 AT 3:20 P.M., MOUNTAIN
16 STANDARD TIME.

17 
18 BRENDA R. GILBERT, District Judge

19 cc: James Brown
20 Ryan Benson
21 Rebecca Dockter

} MW
1-18-13
JL