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December 6, 2013

Senator Christine Kaufmann  
825 Breckenridge St.  
Helena, MT 59601

Dear Senator Kaufmann:

I am writing in response to your request for information regarding the statutory authority for the Department of Fish, Wildlife, and Parks (Department) to engage in activities to prevent elk from coming into contact with domestic livestock for disease control purposes. Specifically, you have asked for information regarding on going hunts, hazing, and financial assistance to private individuals to isolate wild elk populations from livestock due to the threat of disease transmission.

Under Title 87 of the Montana Code Annotated (MCA), the Department has broad powers to regulate the state's fish and game populations. According to 87-1-201(1), MCA, the Department "possesses all powers necessary to fulfill the duties prescribed by law". This includes the power to adopt administrative rules to implement the provisions of Title 87. With respect to elk management specifically, the Department is required to implement programs that "manage elk, deer, and antelope populations based on habitat estimates determined as provided in 87-1-322 and maintain elk, deer, and antelope population numbers at or below population estimates as provided in 87-1-323". Section 87-1-201(9)(a)(iii), MCA.

The powers and duties of the Fish and Wildlife Commission (Commission) are set forth in 87-1-301, MCA. In addition to setting the "policies for the protection, preservation, management, and propagation" of the state's wildlife, the Commission is also responsible for managing elk populations based on the habitat estimates that are determined pursuant to 87-1-322, MCA, and for maintaining the numbers at or below the population estimates in 87-1-323, MCA. Section 87-1-301(1)(h), MCA.

Section 87-1-323, MCA, which addresses viable elk, deer, and antelope populations, provides as follows:

**87-1-323. Viable elk, deer, and antelope populations based on habitat acreage -- reduction of populations as necessary.** (1) Based on the habitat acreage that is determined pursuant to 87-1-322, the commission shall determine the appropriate elk, deer, and antelope numbers that can be viably sustained. The department shall consider the specific concerns of private landowners when determining sustainable numbers pursuant to this section.

(2) Once the sustainable population numbers are determined as provided in subsection (1), the department shall implement, through existing wildlife management programs, necessary actions with the objective that the population of elk, deer, and antelope remains at or below the sustainable population. The programs may include but are not limited to:

- (a) liberalized harvests;
- (b) game damage hunts;
- (c) landowner permits; or
- (d) animal relocation.
- (3) The department shall:
  - (a) manage with the objective that populations of elk, deer, and antelope are at or below the sustainable population number by January 1, 2009; and
  - (b) evaluate the elk, deer, and antelope populations on an annual basis and provide that information to the public.

Section 87-1-323, MCA, was enacted by House Bill 42 (Chapter 553, Laws of 2003) and took effect on May 5, 2003. In addition to requiring the Commission to consider the specific concerns of private landowners, 87-1-323, MCA, authorizes the Commission to implement programs for liberalized harvests, game damage hunts, and animal relocations. Because the list of potential programs is not exclusive, the Commission may also consider other programs to maintain elk populations at or below the sustainable population.

Game damage assistance is addressed in 87-1-225, MCA. Under this code section, the Department is required to respond to landowner complaints about damage to property or crops caused by game animals. Pursuant to the Department's administrative rules, the Department may herd the animals, use airplanes, snowmobiles, cracker shells, and scareguns to disperse the animals from the property, employ repellents, erect fencing, or authorize kill permits to landowners. ARM 12.9.802. The Department may also "open a special season" or "destroy the animals causing the damage". Section 87-1-225(3), MCA. Specific procedures and policies for game damage hunts are set forth in administrative rule 12.9.804. According to the Department, "the primary intent of a damage hunt is to reduce crop and property damage by re-distributing game animals with only minimal harvest".<sup>1</sup>

Beyond the game damage assistance program, Montana law also authorizes specific management season hunts to address private property damage caused by game animals. Pursuant to 87-1-304, MCA:

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 Department has stated that management season hunts "typically occur on a larger scale than

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<sup>1</sup> Department of Fish, Wildlife and Parks, <http://fwp.mt.gov/hunting/seasons/huntRoster.html>.

game damage hunts and may take place across multiple ownerships".<sup>2</sup>

As you may be aware, the Department also utilizes specific management tools to address concerns about the transmission of disease between elk and livestock. In response to concerns about the spread of brucellosis between elk and livestock in areas north of Yellowstone National Park, the Department initiated the Elk Management Guidelines in Areas with Brucellosis Working Group (Working Group). The study area for the Working Group mirrored the Designated Surveillance Area (DSA) established by the Department of Livestock (DOL). The DSA was established by DOL through the adoption of order 10-01-D on January, 13, 2010. The primary purpose of the DSA was to establish surveillance and testing of livestock in areas where brucellosis-infected wild ungulates such as elk and bison pose a threat to livestock.

In January 2013, the Working Group issued a final report that included a recommendation for the development of local "working groups to assist FWP in identifying, implementing and evaluating specific management actions".<sup>3</sup> The final report stated that the working groups "could potentially be watershed groups, sporting groups or livestock industry groups" and that all the meetings would be open to the public.<sup>4</sup> During the summer of 2013, the Department developed a 2014 work plan that was ultimately adopted by the Commission during a public meeting on October 10, 2013. Public comment was accepted on the plan through September 13, 2013.<sup>5</sup>

The 2014 work plan included hazing, fencing, and "dispersal hunts" as available management options. According to the 2014 work plan, "each dispersal hunt may not harvest more than 10 elk and would be individually described . . . by FWP regional staff working directly with the landowner(s) involved. Dispersal hunts will be used to adjust elk distribution and not for population control." The Department stated that it would "continue to coordinate local groups open to all interested parties," but that "those efforts should not be confused with necessary conversations between landowners and FWP about the literal implementation details of approved management actions that include hazing, fencing and dispersal hunts". According to the Department, "these smaller and very site-specific conversations are essential to identifying logistics that may include fence material definitions and open/closed areas for a dispersal hunt on a specific ranch".

Dispersal hunts are evidently used by the Department to respond to the risk of brucellosis transmission between elk and livestock. According to the Department, "these small scale hunts reduce commingling events between elk and livestock using very limited hunter presence and

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<sup>2</sup> *Id.*

<sup>3</sup> Elk Management Guidelines in Areas with Brucellosis Working Group, Proposed Final Recommendations, January 10, 2013.

<sup>4</sup> *Id.*

<sup>5</sup> Fish and Wildlife Commission Meeting Minutes, October 10, 2013.

harvest to adjust elk distribution in an area. By design, the hunt areas exclude habitat where elk presence does not represent transmission risk. These dispersal hunts may take place throughout the winter and early spring and are applied only in those areas with brucellosis. Dispersal hunts are not used to control elk population size."<sup>6</sup>

Based on a review of the foregoing information, it appears that there is no specific reference in the Montana Code Annotated regarding the Department's authority to manage elk for purposes of reducing or preventing the transmission of brucellosis between elk and livestock. However, the Legislature has granted the Department broad authority to manage the state's wildlife populations, including elk (see 87-1-201, stating that the department "shall supervise all the wildlife, fish, game, game and nongame birds, waterfowl, and the game and fur-bearing animals of the state"). In addition, the Department "possesses all powers necessary to fulfill the duties prescribed by law" and "has the exclusive power to spend for the protection, preservation, management, and propagation of fish, game, fur-bearing animals, and game and nongame birds all state funds collected or acquired for that purpose, whether arising from state appropriation, licenses, fines, gifts, or otherwise". Section 87-1-201(1) and (3), MCA).

The Montana Supreme Court has on several occasions reiterated the Department's broad authority to manage wildlife. In 2003, the Supreme Court stated that "the protection and preservation of the state's wildlife is peculiarly within its police power and the state has great latitude in determining by what means are appropriate for protecting wildlife". See *St. v. Egdorf*, 2003 MT 264, quoting *Baldwin v. Fish and Game Comm. of Montana*, 436 U.S. 371 (1978). In addition, please note that nothing in the state's fish and game statutes appears to specifically prohibit the Department or the Commission from engaging in activities to manage elk for purposes of controlling the spread of disease between elk populations and livestock. The Department's authority to do so could certainly be challenged in a court of law, but to my knowledge, this has not yet occurred.

As a separate matter, keep in mind that any management plan from either the Department or the Commission is subject to environmental review pursuant to the Montana Environmental Policy Act under Title 75, chapter 1, part 1. It is my understanding that the Department adopted its most recent comprehensive statewide elk management plan in 2004 and that an environmental review for that plan was completed. The 2004 comprehensive plan mentions disease threats and brucellosis specifically, but does not appear to mention the specific activities that are outlined in the later work plan that was ultimately adopted by the Commission in October 2013. It is unclear to me at this point whether the Department conducted a separate environmental review for the elk management guidelines in areas with brucellosis. Because you have asked for an analysis of the statutory authority for brucellosis management in general, and not whether an environmental review was required for the brucellosis work plan, this memorandum does not address the question further.

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<sup>6</sup> Department of Fish, Wildlife and Parks, <http://fwp.mt.gov/hunting/seasons/huntRoster.html>.

I hope that I have adequately addressed your question. Please let me know if you would like additional information.

Sincerely,

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Staff Attorney

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