MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

WILDEARTH GUARDIANS and PROJECT COYOTE, a project of the Earth Island Institute, FOOTLOOSE MONTANA, and the GALLATIN WILDLIFE ASSOCIATION, Plaintiffs, v. STATE OF MONTANA, by and through the MONTANA DEPARTMENT OF FISH, WILDLIFE, AND PARKS and the MONTANA FISH AND WILDLIFE COMMISSION, Defendants, and OUTDOOR HERITAGE COALITION and MONTANA SPORTSMEN FOR FISH AND WILDLIFE, Putative Defendant-Intervenors.	Cause No.: DDV-2022-896 **ORDER ON MOTIONS**

Before the Court are the following motions:

1. Defendant State of Montana's Motion to Dismiss (Dkt. 33), filed January 27, 2023;

2. State's Motion to Strike Plaintiffs' First Amended Complaint (Dkt. 41), filed April 10, 2023; and

3. Outdoor Heritage Coalition and Montana Sportsmen for Fish and Wildlife's Motion to Intervene (Dkt. 51), filed June 7, 2023.

Plaintiffs Wildearth Guardians and Project Coyote are represented by Rob Farris-Olsen, David K.W. Wilson, Jr., and Jessica L. Blome. Plaintiffs Footloose Montana and Gallatin Wildlife Association are represented by Brian K. Gallik and Henry J. Tesar. Defendant State of Montana is represented by Sarah M. Clerget and Alexander R. Scolavino. Putative Defendant-Intervenors Outdoor Heritage Coalition and Montana Sportsmen for Fish and Wildlife are represented by Matthew G. Monforton and Gary R. Leistico[1].

These motions are fully briefed and ready for decision. For the reasons that follow, the motions to strike and to dismiss will be denied, and the motion to intervene will be granted.

BACKGROUND

Plaintiffs are environmental organizations concerned about the welfare of the gray wolf in Montana. On October 27, 2022, Wildearth Guardians and Project Coyote initiated this case, seeking a writ of mandamus and declaratory and injunctive relief prohibiting the 2022-2023 wolf-hunting season from commencing. They also moved for a temporary restraining order and

[1] pending *pro hac vice* approval.

preliminary injunction. This Court initially granted a temporary restraining order, directing the State to revert to its 2020 hunting regulations, but after an evidentiary hearing, the Court dissolved the temporary restraining order and denied the motion for a preliminary injunction on November 29, 2022. (Dkt. 25.)

After several unopposed extensions, the State moved to dismiss the case in its entirety on January 27, 2023. Plaintiffs then sought two extensions of their own "to file their opposition to the Motion to Dismiss," both unopposed. Plaintiffs ultimately responded to the motion on March 27, 2023, but they also filed a First Amended Verified Petition and Application for Writ of Mandate and Complaint for Declaratory and Injunctive Relief ["First Amended Complaint" or "FAC"]. (Dkt. 38.) The FAC joined Footloose Montana and Gallatin Wildlife Association as Plaintiffs, modified some of the factual allegations, and added a sixth cause of action for denial of the right to participate predicated on Article II, section 8 of the Montana Constitution.

Plaintiffs did not move for leave to file an amended complaint. Thus, the State moved to strike the First Amended Complaint. These motions were fully briefed by May 12, 2023.

On June 7, 2023, Outdoor Heritage Coalition and Montana Sportsmen for Fish and Wildlife moved to intervene on the side of the Defendants. The State has taken no position, but Plaintiffs oppose. Although there has been substantial motions practice in this case, it remains at the pleadings stage and no answers have been filed or scheduling orders issued.

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DISCUSSION

1. Motion to Strike

The State contends that the First Amended Complaint should be stricken because it is untimely and was filed without leave of Court. The Court may "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Mont. R. Civ. P. 12(f). A motion to strike is the proper vehicle for challenging a pleading as improperly filed. *First Nat'l Bank & Trust v. Security Bank, N.A.*, 199 Mont. 168, 171, 648 P.2d 1166, 1167 (1982) (affirming order striking an amended pleading filed without leave of court).

Rule 15 provides that if a pleading is one—such as a complaint—to which a responsive pleading is required, the party may amend that pleading "once as a matter of course within. . . 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Mont. R. Civ. P. 16(a)(1). The State moved to dismiss the initial Complaint on January 27, 2023, meaning that Plaintiffs had until February 17, 2023, to amend the complaint without any need to obtain leave. Plaintiffs, however, obtained unopposed extensions of time to respond to the motion to dismiss until March 27, 2023. (Dkt. 44.) When they did respond, however, they also filed an amended complaint. The motions for extension of time said only that they were to "file their opposition to the Motion to Dismiss" and did not expressly include anything stating whether Plaintiffs sought an extension of the time to amend the complaint as a matter of course.

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The issue is thus whether the extension of time to respond to a 12(b) motion should also be construed as extending the time for amending the complaint as a matter of course. This Court could locate no Montana authority on the question, but federal courts have addressed this issue under the nearly identical Federal Rule 15. There, the authority is split: many courts allow what Plaintiffs have done here. *See, e.g., Doe v. Syracuse*, 335 F.R.D. 356, 359 (N.D.N.Y. 2020); *Gilman & Bedigian, LLC v. Sackett*, 337 F.R.D. 113, 115 n.1 (D. Md. 2020); *N.Y. Life Ins. Co. v. Grant*, 57 Supp. 3d 1401, 1408–1409 (M.D. Ga. 2014). Others do not. *See, e.g., Hayes v. Dist. of Columbia*, 275 F.R.D. 343, 345–346 (D.D.C. 2011); *Andrews v. Securus Techs., Inc.*, 629 F. Supp. 3d 751, 753 (N.D. Ohio 2022); *Gutierrez v. Johnson & Johnson Int'l, Inc.*, 601 F. Supp. 3d 1007, 1019 (D.N.M. 2022). Those courts that treat an extension of time to file a 12(b) motion as an extension of time to amend the complaint have generally construed a request for an extension of time to respond to a Rule 12(b) motion as implicitly embracing all permissible responses, including the filing of an amended pleading. *E.g. Gilman*, 337 F.R.D. at 115 n.1 ("[I]t would be impractical and overly technical to conclude that the only possible interpretation of 'to respond' is to file something in opposition to a motion" (citing *Potomac Riverboat Co., LLC v. Curtis Marine of N.Y., Inc.*, 2013 U.S. Dist. LEXIS 177741, 2013 WL 6718133 (D. Md. Dec. 18, 2013))). By contrast, cases treating the two as detached have reasoned that the two deadlines are separate and that one purpose of the 2009 amendments to the Rules of Civil Procedure governing timeliness of amendments as a matter, of course, was to avoid the "[s]ignificant problems [that] can arise when a party files an amended pleading as a matter of

right on the even of a court's ruling on a dispositive Rule 12 motion." *See Hayes*, 275 F.R.D. at 345 (quoting Fed. R. Civ. P. 15 Adivsory Committee's Note (2009 Amendments)).

The Court concludes that the position of *Doe* and *Gilman*—that ordinarily motions to extend the time to respond to a motion to dismiss should be construed as motions to extend the time to amend the complaint as a matter of course—is the better-reasoned view. Although reasonable minds could reach either conclusion, this Court is guided by the admonition that the Rules of Civil Procedure are to "be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Mont. R. Civ. P. 1. There is no question that Rule 15 would have permitted Plaintiffs to amend their complaint in response to the State's motion to dismiss had Plaintiffs not needed an extension of time. In busy practices and complex litigation, extensions of time are not uncommon. Like the courts cited in *Gilman*, it strikes the Court as needlessly formalistic and inefficient to close the door to amendment as a matter of course merely because it was not expressly stated in the motion for an extension of time. Even if it had been and the State had objected on those grounds, the Court would have likely found good cause for the extension, as it typically does. Nor does this raise the concern cited in *Hayes*, for the amendment does not happen on the "eve" of a ruling; rather, the amendment must still be interposed within the extended time granted by the Court, and no later.

Indeed, even the court in *Hayes* did not ultimately bar amendment. Recognizing the burden and inefficiency occasioned by its reading of Rule 15, the court granted a *nunc pro tunc* extension of time to file an amended pleading

as a matter of course, making the bottom-line result the same. *Hayes*, 275 F.R.D. at 346. Similarly, even if this Court were to find that Plaintiffs' requested extensions of time pertained only to the 12(b) motion, it would still likely grant a motion for the same relief afforded in *Hayes. See* Mont. R. Civ. P. 6(b)(1)(B).

Given these considerations, the Court does not find Plaintiffs' First Amended Complaint to be improperly filed. The motion to strike will be denied.

2. Motion to Dismiss

Because Plaintiffs' First Amended Complaint is not being stricken, it supersedes the original pleading. *See Cass v. Composite Indus. of Am.*, 2002 MT 226, ¶ 15, 311 Mont. 40, 56 P.3d 322. Thus, the Court will deny the motion to dismiss the original Complaint without prejudice as the Complaint is no longer an operative pleading. To avoid further unnecessary procedural wrangling and promote clarity about deadlines, the Court will give the State 21 days from the date of this Order to file an answer or other responsive filing to the FAC. *See* Mont. R. Civ. P. 15(a)(3) (the time for responding to an amended pleading is 14 days after service "[u]nless the court orders otherwise").

3. Intervention

The Outdoor Heritage Coalition and Montana Sportsmen for Fish and Wildlife will be permitted to intervene as defendants.

Rule 24 governs intervention. It provides that the Court must allow intervention if it is timely and the applicant for intervention "claims an interest relating to the property or transaction which is the subject of the action and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless the existing parties adequately

represent that interest." Mont. R. Civ. P. 24(a)(2). Thus, the applicant must satisfy four criteria:

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

In re Marriage of Loftis, 2010 MT 49, ¶ 9, 355 Mont. 316, 227 P.3d 1030. There appears to be little dispute that the motion to intervene is timely, particularly as the case remains at the pleading stage.

Often, the main fight in mandatory intervention is whether the applicant has a sufficient interest to confer on them a right to intervene. Intervenors must show more than a "mere claim of interest"; rather, they must make "a prima facie showing of a 'direct, substantial, legally protectable interest in the proceedings.'" *Sportsmen for I-143 v. Mont. 15th Jud. Dist. Ct.*, 2002 MT 18, ¶ 9, 308 Mont. 189, 40 P.3d 400 (quoting *DeVoe v. State*, 281 Mont. 356, 363, 935 P.2d 256, 260 (1997)). It cannot be an interest common to the public at large, because an "undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention." *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002).

Intervenors' members include outfitters, guides, hunters, and trappers, some of whom are hunters and trappers of wolves, and some of whom claim economic or recreational harm derived from the asserted impact of wolves on various game species populations. Plaintiffs request relief that, among other things, could result in substantial changes to wolf hunting and trapping quotas

and regulations. A non-speculative economic interest can suffice to support a right of intervention if it is "concrete and related to the underlying subject matter of the action." *See United states v. Alisal Water Corp.*, 370 F.3d 915, 919–920 (9th Cir. 2004). For instance, in *Alliance for the Wild Rockies v. Lannom*, 2021 U.S. Dist. LEXIS, 2021 WL 4710038 (D. Mont. June 25, 2021), the federal district court permitted the American Forest Resource Council to intervene in a lawsuit challenging a Forest Service project where it showed that its members regularly participated in the timber sales that stood to be halted by the litigation. Similarly, some of the Intervenors' members—who either hunt or trap wolves themselves or have businesses that are based at least partially on wolf hunting or trapping) (*See* Dkt. 54, ¶ 14; Dkt. 55, ¶ 5) —will be directly and materially impacted by the outcome of this litigation in a way that is distinguishable from the general public's interests in the debates over wolf management and amounts to more than a general policy preference. Thus, the second and third factors are satisfied.

Finally, the Court considers whether the State adequately represents Intervenors' interests. This is only a "minimal" burden and requires simply that the putative intervenors show that the existing parties' representation of their interests "may be" inadequate. *Sportsmen for I-143*, ¶ 14.

Intervenors' interest here is in preserving their ability to hunt and trap wolves and in controlling wolf populations in Montana. The State's interest goes much beyond that: the Fish and Wildlife Commission is charged not just with protecting opportunities to hunt, fish, and trap wildlife; rather, it must "set the policies for the protection, preservation, management, and propagation of the

wildlife. . . of the state." Mont. Code Ann. § 87-1-301(1)a). The State has a specific mandate to ensure that the wolf population in Montana remains at a "sustainable level." *Id.* § 87-1-901. And the State must "maintain and improve a clean and healthful environment in Montana for present and future generations" and implement laws "for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources," including the wildlife of the state. *See* Mont. Const. art. IX, § 1.

At the moment, Intervenors happen to support the existing wolf hunting regulations. But they will not necessarily align with the Fish and Wildlife Commission as it adjusts wolf regulations into 2023-2024 or during any questions about whether and how to adjust the State's wolf management plan or its population modeling methods. Moreover, Intervenors bring a perspective—whether it be couched in cultural, economic, or personal terms—that is not necessarily captured entirely by the State. The issues, in this case, do not appear at this juncture to be purely legal, and Intervenors may present information drawing on their own experience with issues touching on wolf management that the State does not. Intervenors have thus satisfied their burden of showing the State's interests may not be their own and their point of view may not be adequately represented by the State.

Under Rule 24(a)(2), this Court must permit intervention. Because intervenors are entitled to intervene as of right, the Court need not consider permissive intervention under Rule 24(b).

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Accordingly,

IT IS ORDERED:

1. The State's Motion to Dismiss (Dkt. 33), filed January 27, 2023, is **DENIED** without prejudice.

2. The State's Motion to Strike Plaintiffs' First Amended Complaint (Dkt. 41), filed April 10, 2023, is **DENIED**.

3. Intervenors' Motion to Intervene (Dkt. 51), filed June 7, 2023, is **GRANTED**.

4. The State shall file an answer or other responsive pleading to the First Amended Complaint within 21 days of the date of this Order.

/s/ Christopher D. Abbott
CHRISTOPHER D. ABBOTT
District Court Judge

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