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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

TIM ANDREW GARDIPEE, BRUNO FRIIA,
BRAD MOLNAR, and DAVID HELMERS,

Plaintiffs,

vs.

STATE OF MONTANA; MONTANA
DEPARTMENT OF FISH, WILDLIFE, and
PARKS; and MONTANA FISH &
WILDLIFE COMMISSION,

Defendants.

Civil Docket
No. CV-21-95-M-DLC

Transcript of Motion Hearing

Russell Smith Federal Courthouse
201 E. Broadway
Missoula, MT 59802
Tuesday, August 31, 2021
1:35 p.m. to 5:20 p.m.

BEFORE THE HONORABLE DANA L. CHRISTENSEN
UNITED STATES DISTRICT COURT JUDGE

Yvette Heinze, RPR, CSR
United States Court Reporter
Missouri River Federal Courthouse
125 Central Avenue West
Great Falls, MT 59404
yvette_heinze@mt.uscourts.gov
(406) 454-7805

Proceedings recorded by machine shorthand
Transcript produced by computer-assisted transcription

APPEARANCES

1
2 PRESENT ON BEHALF OF THE PLAINTIFFS:

3 Angela M LeDuc (in person)
4 Bruce A. Fredrickson (in person)
5 ROCKY MOUNTAIN LAW PARTNERS, PC
6 1830 3rd Avenue East, Suite 301
7 PO Box 1758
8 Kalispell, MT 59903-1678

9
10 PRESENT ON BEHALF OF THE DEFENDANT,
11 STATE OF MONTANA:

12 Derek J. Oestreicher (in person)
13 MONTANA ATTORNEY GENERAL
14 215 N Sanders
15 PO Box 201401
16 Helena, MT 59620-1401

17
18 PRESENT ON BEHALF OF THE DEFENDANT,
19 MONTANA DEPARTMENT OF FISH, WILDLIFE,
20 & PARKS:

21 Rebecca Dockter (in person)
22 Aimee L. Hawkaluk (in person)
23 MONTANA DEPARTMENT OF FISH WILDLIFE AND PARKS
24 1420 East 6th Avenue
25 PO Box 200701
 Helena, MT 59620-0701

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PROCEEDINGS

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2 (Open court.)

3 THE COURT: Amanda, would you please call the matter
4 on the Court's calendar this afternoon.

5 THE CLERK: This is the time set for a motion hearing
6 in Case Number CV-21-95-M-DLC, Gardipee, et al. versus State of
7 Montana, et al.

8 THE COURT: Counsel, good afternoon.

9 ALL: Good afternoon.

10 THE COURT: It appears on behalf of the plaintiffs I
11 have Mr. Fredrickson, Ms. LeDuc, and Mr. Gallus, and on behalf
12 of the defendants I have Ms. Dockter, Ms. Hawkaluk -- is that
13 correct?

14 MR. OESTREICHER: Yes, Your Honor.

15 THE COURT: -- and Mr. Olszewski; is that correct?

16 MS. HAWKALUK: Yes, Your Honor.

17 THE COURT: All right. I'm assuming,
18 Mr. Fredrickson, based on the most recent events that you are
19 renewing your client's request for a Temporary Restraining
20 Order; is that correct?

21 MR. FREDRICKSON: Indeed, Your Honor. I am -- I
22 guess, at the outset, I'm a bit perplexed as to why we are here
23 today and why we needed to file the motion that we filed last
24 night. But, certainly, that is what we are here for. And we
25 can proceed, I guess, in a couple of different ways. We have

1 with us today in person our clients, Colonel Tim Gardipee,
2 Bruno Friia, Brad Molnar, and thank you for allowing David
3 Helmers to appear by Zoom today.

4 I guess where we're at -- and maybe I start this
5 with -- first, Your Honor, would you prefer I be at the podium
6 or the table?

7 THE COURT: I prefer the podium.

8 MR. FREDRICKSON: Okay.

9 THE COURT: It's easier for all of us to hear.

10 MR. FREDRICKSON: Okay. I guess, from my standpoint,
11 maybe the first question that I need to address with the Court
12 is the question that the Court posed at the tail of its order
13 that was issued last night. And that question was, as I
14 recall, why do we need an order to allow these gentlemen to do
15 what they would like to do? And that is hunt this archery
16 season with a crossbow. We don't. We, frankly, do not.

17 I was more than a bit surprised yesterday, as were my
18 cocounsel and clients, that the state did an about-face. Over
19 the weekend, Your Honor issued an order vacating this hearing,
20 dismissing the application, because the parties had agreed. I
21 don't know if that's still the case. I don't know if that's
22 still the case.

23 The message we received yesterday from defense
24 counsel from the state, from FWP, and from the commission was
25 that while they apparently still agreed, they weren't going to

1 do it unless the Court told them to do it, and they view the
2 Court's order as something different than the Court telling
3 them to do it.

4 I think what the Court said in its order was it
5 appears -- and it not only appeared, I think it was very clear
6 from the record that was presented to the Court, that the state
7 had no objection to the issuance of the request that the
8 plaintiffs made.

9 So we called, you know, experts, witnesses, and told
10 everybody to stand down over the weekend because the hearing
11 was off and everybody agreed. And we found out yesterday at
12 the time these gentlemen went in to get their accommodation
13 that the state promised they were told no. They were told no.

14 That came as more than a bit of a surprise, led to
15 our emergency motion last night, led to us back in the
16 courtroom today for something I'm not -- for an issue I'm not
17 sure we need to be here for.

18 The position that we're taking has not been opposed
19 at all. There has been no objection, no evidence -- contrary
20 evidence to any of the declarations that were filed, including
21 the declarations of the expert witnesses. There's been no
22 indication whatsoever that the state disagrees that these
23 gentlemen are disabled and that the accommodation that they
24 request is reasonable. There's been no evidence and no
25 indication of a disagreement with that. None. And yet here we

1 are.

2 We've got all of our clients present today -- three
3 of them in person, one by Zoom -- one of our experts by Zoom,
4 one present today. None of whom thought they needed to be here
5 today. They are all prepared to testify, and we can
6 certainly -- we can certainly proceed down that path. Again,
7 I'm not sure it's necessary because there's been no opposition.
8 If there were opposition to any of those things, I would
9 suggest we go down that path. I don't think we need to. We're
10 happy to do that, but it's simply going to be repetition of the
11 testimony already given by declaration to which there has been
12 no objection. None.

13 So the answer to your question, again, is I don't
14 think it's necessary that the Court issue an order. There are
15 other reasons for that. And why might that be? These four
16 gentlemen came into this courtroom asking for nothing more than
17 a reasonable accommodation to deal with the disabilities that
18 they all suffer. That's it. That's what they came to the
19 courtroom for. They've jumped through the hoops. Standing
20 hasn't been raised here, but they all clearly have standing.
21 They are disabled. They are -- under the act they meet all of
22 the qualifications under the act. They've discussed -- at
23 least most, if not all, have had their discussions with FWP and
24 have been turned down. They've made their request for
25 accommodation and have been turned down. Why? Why?

1 The Americans with Disabilities Act requires --
2 doesn't suggest but requires the state to make reasonable
3 accommodation. And I say "reasonable." That's a requirement.
4 If a disabled individual comes into the state seeking to
5 participate in a state sanctioned event with a disability that
6 precludes them from doing that without an accommodation, the
7 state has to on a case-by-case basis, on an individual basis,
8 look at those individuals and evaluate and say, "yeah" or
9 "nay."

10 What the state cannot do -- and the only excuse that
11 the state has given for not accommodating is that, "Well, we're
12 going to talk about it in October because the rule says we
13 can't do it. The rule" -- and the rule is also interesting --
14 "The rule says we can't do it. The rule says crossbows are
15 just precluded across the board. So we can't do it. We'll
16 talk about it in October, and maybe we'll change, maybe we
17 won't."

18 Nowhere in Montana Code Annotated, nowhere, and
19 nowhere in the administrative rules of Montana is the word
20 "crossbow" even mentioned. Nowhere. Where does it come up?
21 The commission on wildlife and -- Fish & Wildlife, meets what?
22 Every other month, something like that, and is required by
23 statute to issue a proclamation, essentially, each year saying
24 these are our hunting rules for the year, you know, bag limits,
25 closed areas, and then what sneaks in there is crossbow. We

1 won't allow them. We do that every year. They are required.
2 That's the only place that it appears.

3 And if the Court looks at Exhibit 1 to the amended
4 complaint, you will see that very document. Page 22 and 25, I
5 think, of that document is where that prohibition occurs. And
6 the state says, "Well, we have gotta go through all of our
7 little procedures. We have to do that. We have to rely on
8 state law as it exists. And that is state law, so we can't do
9 it."

10 Well, what the supremacy clause of the United States
11 Constitution says that you can't do that. You have a federal
12 act here, and the federal act -- and an important one because
13 it's an antidiscrimination act -- state what you cannot do is
14 rely on some semblance of state law as an excuse for violating
15 the ADA. You can't do that.

16 And really an interesting case in the Ninth Circuit
17 that I don't believe was cited in our brief -- the name of the
18 case is *Crowder v Kitagawa*, K-I-T-A-G-A-W-A, found at 81 F.3d
19 1480. Interesting case. And it stands for the very
20 proposition that I just articulated or tried to articulate. In
21 *Kitagawa*, the state of Hawaii had an across the board rule,
22 much like Montana has with crossbows, an across the board rule
23 that says pets coming into the state, you know, you can't have
24 them for whatever reason right away. They need to be
25 quarantined or whatever. An ADA claim was brought by disabled

1 individuals who were then without access to their service
2 animals. And the Court said what I just said. Wait a minute.
3 You can't do that. You can't simply say there's a law here
4 that applies to everybody and that even though it's
5 discriminatory, it applies across the board, so that's okay.
6 But the Court said you can't do that. You cannot do that. You
7 can't rely on a state law if there is a violation of the ADA to
8 justify that. You can't rely on "We'll fix it maybe in the
9 legislature. We'll fix it maybe at the agency level. We'll
10 fix it maybe at the commission level." And that's what we've
11 got here. "We'll fix it maybe. We'll fix it maybe in
12 October."

13 But that precludes these gentlemen and others
14 similarly situated from doing what they love to do, a state
15 sanctioned hunting season that's closed to them simply because
16 they are unable to operate -- they're unable to operate the
17 equipment that the state allows. Reasonable accommodation.

18 You know, we can -- if we seriously need -- so,
19 again, my answer is no. The state has to do it. They should
20 not be -- they should not be relying on the Court to issue an
21 order telling them what they have to do under the ADA. They
22 shouldn't. They need to, when those accommodations are made,
23 give them consideration, give the suggested accommodation
24 consideration, and they have an obligation, and the *Crowder*
25 case says as much as well. They have an obligation to talk to

1 these guys. When someone makes a request for accommodation,
2 the state has an obligation to meet with, to discuss, to view
3 that request, and make a determination.

4 Nothing in this request changes anything or
5 impacts -- impacts the law that exists. I mean, it's a
6 nonissue really. You've got 53,000, approximately, archery
7 hunters that hit the field every year. We have four right now.
8 Likely there will be more applications for that accommodation,
9 but that's not much of an impact. Dr. Zink will testify as
10 much if he has to -- if he has to. He's already said it in his
11 declaration, an unchallenged declaration.

12 We've asked for a Temporary Restraining Order, TRO
13 initially, but I guess we're at the stage of a preliminary
14 injunction at this point. What do we have to show? Likelihood
15 of success on the merits.

16 THE COURT: Irreparable harm, balance of hardships,
17 and the public interest. Mr. Fredrickson --

18 MR. FREDRICKSON: You got it.

19 THE COURT: -- let me hear from the defendants and
20 see what their position is.

21 MR. FREDRICKSON: Thank you Your Honor.

22 THE COURT: Ms. Dockter, Ms. Hawkaluk, which one of
23 you is going to be speaking?

24 MS. DOCKTER: Your Honor, I will.

25 THE COURT: If you would come up to the podium,

1 please. What is the position of the defendants currently?

2 MS. DOCKTER: Thank you, Your Honor. My name is
3 Becky Dockter, as you mentioned, and I am here on behalf of
4 both the Fish, Wildlife, and Parks Department and the Fish &
5 Wildlife Commission.

6 Your order request discussion on, as plaintiffs'
7 counsel mentioned, why an order is necessary from this Court in
8 order to allow the plaintiffs to hunt in the manner in which
9 they've requested this year for the archery-only season?
10 First, the plaintiffs request, just to be clear, and I think
11 you heard this from plaintiffs' counsel, is to hunt during the
12 archery-only season with a crossbow. Currently, commission
13 rule prohibits the use of a crossbow during the archery-only
14 season. And so there is no permit to be issued currently in
15 law or otherwise for the plaintiffs to be issued at this time.

16 The commission is a five-member board appointed by
17 the governor, and they act pursuant to Title 87, and that
18 authority is found at 87-1-301(2) in Montana Code. That vests
19 the commission with the authority to make rules regarding the
20 use and type of archery equipment for purposes of hunting and
21 fishing. So this decision rests squarely with the Fish &
22 Wildlife Commission. It has not been passed yet and has in
23 fact been prohibited for the use of crossbows.

24 In order to change that -- and I think plaintiffs'
25 counsel mentioned this as well -- the commission must create a

1 permit by overturning its original rule through a process to
2 create this permit, and it does so through a meeting of a
3 quorum of constituent memberships, on an agenda, allows the
4 public notice, an opportunity to be heard during that meeting,
5 and that meeting has been set for October 28th, 2021.

6 Now, the season we're talking about is archery season
7 which starts this Saturday, September 4th, and runs through
8 October 17th of 2021. So really this is an issue of timing,
9 Your Honor.

10 After the commission then does its process on the
11 28th of October, depending on the decision it makes, it's also
12 subject to the Montana Administrative Procedures Act for
13 rulemaking, which is maximum six-month time frame for
14 implementing and adopting a new rule in place. And so in that
15 circumstance, it is likely this could take six months to get a
16 new rule on the books, but the process has started.

17 So with all due respect to the way counsel has
18 described this, in the department and the commission saying no
19 to the plaintiffs, I disagree with that. I think the process
20 has been started. And, in fact, Aimee Hawkaluk is here because
21 she has been the attorney who has met individually to do an
22 assessment with at least three of the four of these plaintiffs,
23 one of whom only recently made an application for accommodation
24 with the department. It might even be within the last three
25 weeks. I'm just not sure what that day is specifically.

1 So currently, Your Honor, there is no permit to allow
2 crossbow. In fact, it's actually specifically prohibited. So
3 the commission would have to create a permit, and that process
4 in play, or Your Honor could issue an order that requires the
5 department to give a permit to these four individuals. And so
6 to your question about why it's necessary for a Court order,
7 that is precisely why the department and commission responded
8 in the way it did to the request for TRO and didn't oppose it
9 because that is the way the issue could be resolved with regard
10 to these four plaintiffs.

11 And while we still dispute the merits of this case
12 and whether or not we have attempted to reasonably accommodate
13 these plaintiffs, we didn't see fit to stand in the their way
14 to hunt in this season, but we had an issue with the law not
15 being the way it needed to be and for that to happen.

16 Now, plaintiffs' counsel has mentioned that the
17 violation of an ADA -- you can't use an excuse for violation of
18 the ADA that there's a law in the books. The ADA does not
19 require for a reasonable accommodation to break the law or even
20 change the law or even change a process, Your Honor. What the
21 law does require is a reasonable accommodation after an
22 individual assessment with individual plaintiffs and a process
23 by which you can be considered.

24 It bears mentioning here that each of these
25 plaintiffs already have a permit to modify their archery tackle

1 in a way that they see fit, and that includes -- and I'm
2 quoting the actual permit -- "in a way that would support,
3 draw, hold, and release the bow to accommodate the disability."
4 And that's not a prescription for how to modify that archery
5 equipment. It's a permit for the permittee to modify in the
6 way they need in order to be able to hunt with an archery --
7 with archery tackle during the archery-only season.

8 In addition, there is the ability right now to use a
9 crossbow if indeed that is something that the plaintiffs need
10 to use in order to accommodate their disability. There are
11 shoulder seasons in the state of Montana right now that are
12 concurrently running, and they started August 15th, and the use
13 of a rifle and a crossbow is allowed during those shoulder
14 seasons. So that's one -- those are two opportunities for the
15 plaintiffs right now. And the third one then is also during
16 the general rifle season, starting in late October, that runs
17 sometimes through January and February depending on the area.
18 And that is also a place where crossbows can be used for
19 hunting in Montana. So there are a number of opportunities
20 already in place for the plaintiffs. And then specifically to
21 accommodate the disabilities, there's a permit to modify
22 archery equipment that each of these plaintiffs have been
23 issued.

24 In addition to that, the matter has been put on the
25 next available commission meeting, which is October 28th of

1 this year. And the agenda's already been set for this matter,
2 both individually for the plaintiffs to be heard and also more
3 programmatically to be heard by the commission in the event
4 that there are other persons who are in the same situation that
5 the plaintiffs are in this case.

6 The department and the agency, in conjunction with
7 the state of Montana and the governor's office, all read Your
8 Honor's court order to acknowledge that process already in
9 place and not to issue an order requiring the department to
10 issue a permit outside the already established prohibition, but
11 to dismiss the case and allow the process to move forward.

12 THE COURT: Ms. Dockter, I did that based on the
13 representation that was made in the defendant's pleading,
14 Document 23, which was your client's response, last sentence,
15 "Therefore, FWP is not opposed to the Court granting the
16 injunctive relief and Temporary Restraining Order which the
17 plaintiffs have requested." And without getting into basic
18 fundamental concepts of my jurisdiction, I did not see where
19 there was a case or controversy based on that representation.
20 And, therefore, I didn't have a dispute that I could lawfully
21 get in the middle of. And that's why I called this entire
22 matter off and dismissed the petition.

23 And just so that everybody understands, I have read
24 absolutely everything that's been filed in this case. I've
25 looked at all of the exhibits. I've read all of the

1 affidavits. I've -- or declarations. I've done a considerable
2 amount of research. I've been through the Montana Code
3 Annotated. I've looked at the guidelines as it relates to
4 archery hunting. And I cannot see for the life of me why the
5 defendants in this case simply cannot say to these four
6 individuals "you can hunt with a crossbow starting on
7 September 4th." Why you need me or Big Brother from the
8 federal government telling you, a state agency, to do something
9 that you have the power to do is not only ironic but mystifying
10 to me.

11 So why do I need to do that? Why don't you just tell
12 them they can go hunt with a crossbow?

13 MS. DOCKTER: Your Honor, we don't have the authority
14 to do that without calling a meeting.

15 THE COURT: I don't see anywhere in the statute that
16 says you do not have the authority to do that. Show me where
17 in all of Title 87 that you are prohibited from doing that.
18 You don't need to waive any rights that you have to have your
19 hearing in front of the Fish & Game Commission. You can make a
20 special exception here, grant a permit to these four
21 individuals, and let them hunt as near as I can tell. Is there
22 a statute that says you can't?

23 MS. DOCKTER: Your Honor, it would be reading a
24 number of statutes together, the first of which is that the
25 authority for making this type of decision is with the

1 commission. And I cited that one at 87-1-301(2), and that's
2 where the commission has the authority, set the rules for
3 determining the type and use of archery equipment. That's
4 where to start.

5 The way that a commission makes a decision is through
6 the public process, and that's protected through Montana
7 Constitution, Title 2, Chapter 3, and the provisions for notice
8 and opportunity to be heard.

9 THE COURT: Okay. I've read all of those statutes.
10 So if that is the department's position, the defendants'
11 position, then why did you file a pleading indicating that it
12 was okay for me to issue a Temporary Restraining Order, which
13 would accomplish exactly the opposite of what it is that you
14 really want to do? Why? Do you believe that you're in
15 violation of the ADA?

16 MS. DOCKTER: No, Your Honor. In fact, we do not
17 believe that we're in violation of the ADA. But in order to
18 avoid discussion about harm to plaintiffs and to get to the
19 actual decision on the merits with the body that has the
20 authority, we did not oppose a Temporary Restraining Order.

21 And, Your Honor, we also tried to work this out with
22 the plaintiffs in this matter, and that didn't work out either.
23 But it left us in this position with these unique set of
24 circumstances where we're in a rock and a hard place. We
25 either cannot issue because the commission has to get together

1 in a quorum and make that decision, which is as you can
2 probably guess not an easy issue to address given that there
3 are disabilities and medical issues that five members of a
4 board have to understand in order to make a decision.

5 THE COURT: Okay. Let me stop you right there.

6 MS. DOCKTER: Sure.

7 THE COURT: So you would like me, a federal judge,
8 without any basis in law whatsoever from your standpoint to
9 tell you to issue a Temporary Restraining Order compelling your
10 client, the department, to allow these four individuals to use
11 a crossbow during the archery hunting season, even though you
12 do not believe there's been any violation of federal law or
13 there's any legal basis whatsoever for me to do it. You simply
14 want me to do it to accommodate and avoid controversy. Is that
15 what we're doing here?

16 MS. DOCKTER: No, Your Honor. Please don't interpret
17 why I'm here as a request for you to do this. It is simply a
18 discussion with you about why it is that we denied these
19 plaintiffs a crossbow permit for this season and instead are
20 hoping to go to the commission in this matter.

21 THE COURT: Okay. But you filed a pleading where you
22 conceded, you agreed -- I've already referenced it -- that I
23 can issue a Temporary Restraining Order here. And I'm trying
24 to figure out for the life of me, Ms. Dockter, why you would
25 want me to do that.

1 MS. DOCKTER: Your Honor, in your order where you
2 requested response, you asked for a response on opposition to
3 the TRO. So the other option for us would have been to just
4 file a notice of appearance, like the State of Montana did.
5 Instead, we wanted to indicate to Your Honor that we do not
6 oppose this, and that's how we -- that's how we would have
7 showed up -- well, today, pursuant to your other order, and
8 just not opposed the issuance of the Temporary Restraining
9 Order.

10 THE COURT: Why wouldn't you want to oppose it? If
11 it is the position of your clients that they do not believe
12 that they have a lawful basis to do what is being asked here
13 because there is a process by which the Fish & Game Commission
14 needs to put this on the calendar, needs to consider it, needs
15 to get public comment, needs to comply with the Administrative
16 Procedures Act, et cetera, et cetera -- all of which, by the
17 way, does not strike me as being an unreasonable reading of
18 what governs what you're supposed to be doing or your clients
19 are supposed to be doing. Why then, if that is your position,
20 you would not come in here and defend that position by calling
21 witnesses, providing affidavits, instead of just simply saying,
22 "Oh, federal judge, just go ahead and do it. We don't want to
23 -- we don't want the hassle"? I don't get it.

24 MS. DOCKTER: Your Honor, I have attempted to explain
25 that the process is already ongoing, and it was an attempt to

1 avoid the circumstance where a harm -- we had to discuss harm
2 to the plaintiffs, and likelihood of success on the merits, and
3 then a decision, with all due respect, by a judge on a TRO and
4 a truncated process rather than just getting to a commission
5 process where a public is allowed to be a part of the process,
6 something that's protected by our Montana Constitution.

7 THE COURT: So when you were doing your analysis, did
8 you conclude that the four plaintiffs would be irreparably
9 harmed if they were not allowed to hunt with a crossbow during
10 the upcoming archery season and that there was a likelihood
11 that they would prevail on the merits?

12 MS. DOCKTER: No, your Honor. In fact, we see a
13 dispute on the substance of the merits of the claim, but did
14 not oppose the TRO for process reasons and policy reasons. And
15 that's simply.

16 If Your Honor -- if Your Honor would like us to say
17 on the record that we oppose the TRO, because of the situation
18 that you would have to find likelihood of success on the
19 merits, we would oppose that they will be successful on the
20 merits. Because we do believe that we have not violated the
21 ADA and that we have attempted through the process to
22 accommodate these individuals.

23 THE COURT: All right, Ms. Dockter. I think I
24 understand better what the defendants's position is.

25 Here's what we're going to do: Mr. Fredrickson, you

1 have the burden of proof on behalf of your clients to establish
2 that you are entitled to a TRO in this case, notwithstanding
3 what appears to be sort of a muddled position on the part of
4 the defendants. It appears as if they are now opposing your
5 request for a Temporary Restraining Order. So let's put your
6 evidence on, and then I'll see if there's any evidence that the
7 defendants wish to offer, and then I'll get a ruling out on
8 this.

9 MR. FREDRICKSON: Thank you, Your Honor.

10 MS. DOCKTER: Thank you, Your Honor.

11 THE COURT: All right. Mr. Fredrickson, you have a
12 couple of witnesses here in Zoomland. I don't know if you want
13 to call them first or how you wish to proceed, but I'm going to
14 leave that entirely up to you.

15 MR. FREDRICKSON: Thank you, Your Honor. And with
16 our party plaintiffs, Ms. LeDuc will be handling their
17 examination.

18 THE COURT: Sure.

19 MR. FREDRICKSON: We'll try to keep everything as
20 short and concise as we can.

21 THE COURT: Well, do whatever you need to do.

22 MR. FREDRICKSON: Thank you.

23 MS. LEDUC: Your Honor, I think it's a good idea to
24 do Mr. Helmers first. He's one of the party witnesses who is
25 on Zoom.

DAVID HELMERS - DIRECT EXAMINATION BY MS. LEDUC

1 THE COURT: Yeah. And, Ms. LeDuc, if you would come
2 up to the podium, pull out -- you will see on the right there
3 is a drawer, and in that drawer is a screen. And you can tilt
4 that screen up, and you should be able to see Mr. Helmers on
5 the screen. Do you see him?

6 MS. LEDUC: I do, Your Honor, yes.

7 THE COURT: All right. Mr. Helmers, could you raise
8 your right hand, please, and the clerk will administer an oath.

9 DAVID HELMERS,
10 called for examination by counsel for the plaintiffs, after
11 having been first duly sworn to testify the truth, the whole
12 truth, and nothing but the truth, testified as follows:

13 THE COURT: You may proceed.

14 DIRECT EXAMINATION

15 BY MS. LEDUC:

16 Q. Good afternoon, Mr. Helmers.

17 A. How are you?

18 Q. Can you hear me okay?

19 A. Yeah. I'm having a little problem with hearing. I have
20 hearing aids, but I'm doing the best I can.

21 Q. Okay. If anything that I ask you isn't clear, just let me
22 know, and I will do my best to ask it a bit louder. Sound
23 good?

24 A. Sure.

25 Q. Mr. Helmers, could you please state and spell your full

DAVID HELMERS - DIRECT EXAMINATION BY MS. LEDUC

1 name for the record?

2 A. Yeah, David Helmers, D-a-v-i-d, H-e-l-m-e-r-s.

3 Q. Thank you.

4 Mr. Helmers, how old are you?

5 A. 68.

6 Q. Why don't you tell us a little bit about your hunting
7 background.

8 A. I started hunting when I was ten years old. I was hunting
9 with a neighbor. Went from there to hunting on my own by the
10 time I was 13. I've hunted in four different states. Had
11 crossbow licenses in two.

12 Q. What states are those, Mr. Helmers?

13 A. I'm sorry?

14 Q. What states do you have crossbow licenses in, Mr. Helmers?

15 A. Indiana and Wisconsin.

16 Q. Okay. Thank you. Go on.

17 A. I have hunted all my life, mostly deer hunting. I live in
18 an area here in Montana in Northeastern Montana where we don't
19 have elk. We don't have shoulder seasons. And so, therefore,
20 we're limited to the archery season or the general season.

21 But as far as that's concerned, I mean, I have not
22 only hunted, but I've also been part of training individuals to
23 hunt, my five children, my wife. Have been involved in it all
24 of my life.

25 Q. Mr. Helmers, when did you first start having issues with

DAVID HELMERS - DIRECT EXAMINATION BY MS. LEDUC

1 using a regular or approved archery device during the regular
2 archery season?

3 A. Yeah, I received an elk bull tag in the Breaks by mistake.
4 I hit an archery tag and actually was awarded one. So I
5 purchased the archery equipment, and I archery hunted most of
6 my life until I couldn't archery hunt. In 2005, I got
7 basically a debilitating injury that allowed me -- or to stop
8 me archery hunting.

9 But I did have a compound bow. I went and purchased
10 the equipment. I contacted the supplier of the equipment. I
11 discussed with them what I needed to do. He decided at the
12 time -- which was Draw-Loc company, the corporation. He
13 decided at the time that I probably was not a good candidate
14 for his equipment, even though I had purchased it. I attempted
15 to go on that hunt, and it lasted a couple of hours, and I had
16 to go home. I can't draw the equipment. I can't hold the
17 equipment. I can't hold the equipment up. I have several
18 vertebrae fused in my neck. I have a left shoulder repair,
19 which is supposed to be replaced. And I have other back
20 injuries besides. So there's no way for me to be able to
21 handle that equipment.

22 Q. Mr. Helmers, because of that, have you submitted
23 accommodation requests to the Fish, Wildlife, and Parks here in
24 the state of Montana to allow you to use alternative measures?

25 A. Yeah. The first one I submitted was in 2011. Was denied

DAVID HELMERS - DIRECT EXAMINATION BY MS. LEDUC

1 without any recognition whatsoever. It was just denied. Said
2 that crossbows weren't allowed in the archery season. There
3 was no other accommodation offered other than the equipment
4 that is related to the PTMAE. And so I haven't been able to
5 hunt, as far as the archery season is concerned.

6 Q. Did you --

7 A. And for me to hunt during the general season, the
8 temperatures affecting someone that has a replaced knee, metal
9 plates in your neck -- I have a dorsal column stimulator
10 attached to my left hip and implanted in my thoracic area of my
11 spine, and that cold weather affects that drastically. That's
12 why I would like to hunt during the archery season.

13 Q. Understood.

14 Mr. Helmers, did you submit an accommodation request
15 this past year to Fish, Wildlife, and Parks to allow you to use
16 a crossbow during the regular archery season?

17 A. Yes, on May the 26th.

18 Q. Okay. And what happened after you submitted that request?

19 A. I received a letter from Fish, Wildlife, and Parks from
20 the lady that -- in the addressed letter it said that she was
21 the -- I'm trying to think. Her name is Kqyn -- I can't
22 remember what her last name is. But she was the diversity
23 coordinator, I believe is what she said in the letter. But
24 when I made an attempt contact her back, I received an
25 individual who made the appointment for July the 6th for me to

DAVID HELMERS - DIRECT EXAMINATION BY MS. LEDUC

1 talk with them.

2 Q. Tell me about what happened during that appointment.

3 A. During that appointment, Fish & Wildlife, when the call
4 came through I was notified that there were four people going
5 to be in the meeting: one of them being the doctor -- the
6 attorney for the defendant; another was the HR person for Fish,
7 Wildlife, and Parks; one was Kqyn, the diversity coordinator;
8 and another one was a paralegal.

9 Q. Okay. And what do you recall that transpired during that
10 meeting?

11 A. Well, I asked them in particular if any one of them could
12 grant me an accommodation, and they said no. And the rest to
13 me was a moot point. I just felt like it was a waste of time.

14 Q. Okay. Have you spoken with anyone at Fish, Wildlife, and
15 Parks since that meeting?

16 A. No.

17 Q. Okay. Mr. Helmers, do you happen to have the declaration
18 that you signed that was filed in this action on August 24th as
19 Document Number 7 nearby?

20 A. I do. Right here.

21 Q. Okay. Could you please turn to what's marked as Exhibit 1
22 of your declaration.

23 A. I don't believe my declaration has the --

24 Q. Should be second-to-last page.

25 A. -- the one that I have.

DAVID HELMERS - DIRECT EXAMINATION BY MS. LEDUC

1 Q. Should be the second-to-last page. It's a letter to you
2 from Fish, Wildlife, and Parks, the director, Hank Worsech.

3 A. No. I have up to page 10. I'm sorry. I don't have
4 the...

5 Q. Okay. I guess we'll just go from memory. Do you recall
6 receiving a letter from Mr. Worsech?

7 A. Yes.

8 Q. Do you recall what that letter stated to you?

9 A. Let's see. I may have it right here, the letter. Yes, I
10 have the letter right here.

11 Q. Okay. What's the date on the letter you're looking at?

12 A. May the 26th, 2021. Oh, this is the letter that I sent.
13 Let's see here. I'm sorry.

14 Q. You would be looking for a letter dated August 9, 2021,
15 and that date would be shown on the far right corner of the
16 letter.

17 A. Yeah. I don't have that letter in front of me. I do have
18 the letter from Ms. Kqyn Kuka, that you asked about prior.

19 Q. Do you just generally recall receiving a letter in August,
20 Mr. Helmers, from Mr. Worsech essentially denying officially
21 your request for a crossbow --

22 A. Yes.

23 Q. -- as a reasonable accommodation?

24 A. Yes.

25 Q. Okay.

DAVID HELMERS - DIRECT EXAMINATION BY MS. LEDUC

1 A. I do recall.

2 Q. Did you make any -- did you speak to or send them any
3 communication thereafter?

4 A. Sorry. What was that again?

5 Q. Did you send them any -- did you respond to them in any
6 way after receiving this letter?

7 A. No.

8 Q. Hired counsel, didn't you?

9 A. Yes.

10 Q. Mr. Helmers, if you're not granted the reasonable
11 accommodation that you've requested to use a crossbow for this
12 2021 archery season, what does that mean for you?

13 A. Well, due to the fact that I have been attempting to do
14 this since 2008, it means a lot to me, especially due to the
15 fact that I haven't been able to do it for many years. It
16 gives me an opportunity to hunt in a -- you know, in more
17 inclement weather for me. Like I said, I have issues that deal
18 with cold, and the general season takes me into extreme cold
19 weather. The northeast corner of Montana is not known for
20 being warm, and it just makes it that much easier for me.

21 Q. Is the crossbow just a preference for you?

22 A. No, I wouldn't think so at all. I've been a former
23 archery instructor in my past. I was trained by Purdue
24 University to work with children, and I've worked with disabled
25 children as well. So we knew basically in that training what

DAVID HELMERS - CROSS-EXAMINATION BY MS. DOCKTER

1 we needed or what would work for people in certain conditions.

2 This would work best for me.

3 MS. LEDUC: I have nothing further.

4 THE COURT: Ms. Dockter, any cross-examination?

5 MS. DOCKTER: Your Honor, may I just ask a couple of
6 questions?

7 THE COURT: You certainly may.

8 CROSS-EXAMINATION

9 BY MS. DOCKTER:

10 Q. Hi, Mr. Helmers. Is it "Helmers"?

11 A. Yes.

12 Q. Did I get that correct?

13 A. I'm good.

14 Q. Okay. Good. Nice to see you. Thanks for appearing
15 today. My name is Becky Dockter, and I work for the Department
16 for Fish, Wildlife, and Parks, and I'm an attorney there. And
17 I am just going to ask you a couple of questions.

18 So just the first one is were you issued a permit to
19 modify your archery equipment?

20 A. Yes.

21 Q. Yes, you were.

22 And did you attempt -- I heard you say that you
23 worked with a company called Draw-Loc to modify your archery
24 equipment; is that correct?

25 A. No. I purchased the equipment that was recommended by the

DAVID HELMERS - CROSS-EXAMINATION BY MS. DOCKTER

1 State of Montana. That is Draw-Loc. And I contacted the
2 Draw-Loc corporation to ask them how the equipment was supposed
3 to work, because once I installed it on my bow, I couldn't use
4 it. I had no way of drawing the bow in any way, shape, or
5 form.

6 Q. Did you --

7 A. I have no -- I had no way to hold the bow, and I had no
8 way to -- and each time that the bow was turned a certain way,
9 the safety kept kicking off which made it dangerous.

10 Q. Right. I understand.

11 So Dr. -- or sorry -- Mr. Helmers, did you also
12 attempt to adjust it in any other way to accommodate you, your
13 bow?

14 A. Yeah, I contacted Mr. Ron Aasheim, who used to be the
15 education director at Fish, Wildlife, and Parks. Mr. Aasheim
16 then forwarded me -- basically said that, you know, nothing can
17 be done. I need to look at it in a different manner other than
18 from the disability side and from requesting a crossbow for an
19 accommodation.

20 I also contacted his nephew who lives nearby where I
21 live who has a debilitating injury to his hand. He was told by
22 Mr. Aasheim -- because he contacted me back. He was told by
23 Mr. Aasheim that he should not send in a letter or
24 accommodation or request, even though he would like to have a
25 crossbow. He was called by his uncle, Mr. Ron Aasheim, that

DAVID HELMERS - CROSS-EXAMINATION BY MS. DOCKTER

1 they didn't want any crossbows in Montana as part of the
2 hunting season is concerned.

3 Q. Is that --

4 A. After I contacted Mr. Aasheim, he forwarded me to the
5 president of the Montana Bowhunters Association, which is a
6 non-state entity, and that individual forwarded me to a
7 physical therapist who is also with Montana Bowhunters
8 organization who asked me a bunch of questions about my
9 physical condition.

10 Now, the only reason why I did that was because I
11 felt like that it might help me in my quest to get an
12 accommodation for a crossbow or something that would meet my
13 need. Their physical therapist told me they would not be able
14 to help me; that no accommodation that they could make would
15 help me.

16 Q. Thank you. Thank you, Mr. Helmers. That's all the
17 questions I had for you.

18 Thank you, Your Honor.

19 THE COURT: Thank you.

20 I am assuming, Ms. Dockter, when you conduct your
21 cross-examination that you're doing so on behalf of both of the
22 defendants. Is that a safe assumption?

23 MR. OESTREICHER: That's fine, Your Honor.

24 THE COURT: All right. And let me know otherwise, if
25 you would, please.

DAVID HELMERS - EXAMINATION BY THE COURT

1 MR. OESTREICHER: Thank you, Your Honor.

2 THE COURT: Ms. LeDuc, any redirect?

3 MS. LEDUC: None, Your Honor.

4 EXAMINATION

5 BY THE COURT:

6 Q. Mr. Helmers, this is Judge Christensen. I've got just a
7 few questions for you. I want to make sure I understand.

8 So you first requested, in 2011, an accommodation to
9 be allowed to use a crossbow during the established archery
10 season; is that correct?

11 A. Yes.

12 Q. And that request was denied?

13 A. Right.

14 Q. And then the next time you made a request was this year in
15 2021; correct?

16 A. That's right.

17 Q. You did not make then any request between 2011 and 2021.
18 Am I safe in making that assumption?

19 A. Well, I also made an attempt in 2008. I didn't ask for an
20 accommodation because the state didn't have an accommodation
21 letter or request.

22 Q. Okay.

23 A. So I had to get the accommodation request letter from the
24 state of Colorado, a form that they allow in their state.

25 Q. All right. Understood.

DAVID HELMERS - EXAMINATION BY THE COURT

1 But I'm just focusing on the time period between 2011
2 and 2021.

3 A. Yes, sir.

4 Q. So did you hunt during the archery season between 2011 and
5 2021?

6 A. No, sir. I purchased an archery permit in February of
7 2020 because the commission was talking about permitting -- in
8 the new legislation that was offered, the commission was saying
9 that if you did not have an archery permit from the prior year,
10 you would have to wait another year before you could go to the
11 training that they would possibly be offering.

12 Q. Okay. And I read that when I reviewed the -- I believe it
13 is denominated as Senate Bill Number 111.

14 So what you did then is you made a sort of proactive
15 protective purchase of an archery season permit or license so
16 that you would qualify in the event that that bill passed;
17 correct?

18 A. Yes, sir.

19 Q. Okay. Now, do you --

20 A. I had ten days to do it.

21 Q. Have you hunted -- have you done any rifle hunting in the
22 last ten years?

23 A. Yes, I have.

24 Q. Okay. And which years have you hunted with a rifle?

25 A. Probably every year.

DAVID HELMERS - EXAMINATION BY THE COURT

1 Q. Okay. And do you concurrently possess all licenses and
2 permits required to bowhunt deer, elk, or antelope in Montana
3 in 2021?

4 A. Yes, I did. I applied for the permits. I also have -- I
5 applied for a bear permit that I've never used, and I've also
6 never used an elk permit other than the one that I used several
7 years back.

8 Q. Okay. But my question is --

9 A. But I never use them.

10 Q. My question was specific, whether you possess all licenses
11 and permits required to bowhunt for the year 2021?

12 A. No, I haven't -- no.

13 Q. And why not?

14 A. Why not? Because I didn't think it was going to happen.

15 Q. You didn't think you would be approved to hunt with a
16 crossbow, therefore, you did not incur the expense of acquiring
17 all of the permits and licenses required to bowhunt. Is that
18 what are you saying?

19 A. That's what I'm saying. That's why I haven't attempted to
20 bowhunt in several years.

21 Q. Okay. Your declaration -- do you have a copy of your
22 declaration there, Mr. Helmers?

23 A. Yes. Yes, sir.

24 Q. I see that -- I want to focus on paragraphs 21, 22, and
25 23. They are at pages 5 and 6 of your affidavit. And when I

DAVID HELMERS - EXAMINATION BY THE COURT

1 looked at the form, the permit to modify archery equipment, I
2 noted that it needed to include on the second page, Section 2
3 needs to be completed by a licensed physician, medical doctor.
4 I'm assuming when you submitted your permit to modify archery
5 equipment that that Section 2 was completed?

6 A. I did that in 2011. It's with the permit that I currently
7 have.

8 Q. Okay.

9 A. They don't require you to do it annually.

10 Q. I understand that.

11 All right. So you did that in 2011?

12 A. Yes, sir.

13 Q. And --

14 A. No, I didn't send in a doctor's note with my accommodation
15 because in my accommodation request I specified that I had the
16 permit to modify archery equipment, and they had that
17 information available to them at that time because my condition
18 has not improved.

19 Q. Yeah, okay. I understand that. And I don't question
20 that.

21 So looking at paragraphs 21, 22, and 23 it indicates
22 that you've investigated, modified, compound bows and
23 crossbows; paragraph 22, you discuss the requirements of each
24 and my physical capacities with my physician; and, 23, based
25 upon my doctor's physical examinations, understanding of my

DAVID HELMERS - EXAMINATION BY THE COURT

1 physical condition, capabilities, and restrictions, my doctor
2 concluded that I cannot operate even a modified compound bow
3 but that I could safely and effectively use a crossbow.

4 A. Yes, sir.

5 Q. All right. Did that consultation occur recently?

6 A. Has it -- no, I haven't needed to. My conditions haven't
7 really changed.

8 Q. So that was a consultation that you had with your doctor
9 back when you filed your first permit to modify archery
10 equipment back in 2008 or 2011?

11 A. Yes.

12 Q. Okay. So my question is is there other state-approved
13 archery equipment that you reviewed with your doctor and
14 whether or not other state-approved archery equipment would
15 work for you with your disabilities?

16 A. I'm sorry. What was that again?

17 Q. Is there other state-approved archery equipment for
18 somebody with a disability, such as yourself, that you reviewed
19 with your doctor to see if you would be able to utilize and
20 participate in the archery season?

21 A. I'm not sure I understand specifically what you're asking.
22 Are you asking me that, no, it's been that long since I've
23 discussed it with my doctor about the equipment?

24 Q. Well, no. I mean, my understanding is that -- and maybe
25 my understanding is faulty, Mr. Helmers. But my understanding

DAVID HELMERS - EXAMINATION BY THE COURT

1 is that there is -- that there exists modified archery
2 equipment that could be used depending upon the extent of a
3 disability. You talked about a Draw-Loc. But my understanding
4 is that there may be other things that are acceptable to the
5 department, permitted by the department, other than a Draw-Loc.
6 And my question is whether you considered using that other
7 equipment and whether you discussed with your doctor your
8 ability to use some of this other equipment?

9 A. I contacted every company that was on the requirement list
10 from the state. I made a contact with each one of those. Some
11 of those never responded back to me because they were no longer
12 in business.

13 So the document that the state hands out as of today
14 still has not changed since 2011, nor 2008. Actually, it's so
15 poorly readable because they make so many copies of it that you
16 can't even understand it. But I did make contact with every
17 one of the companies that would talk to me that had modified
18 equipment. That's the reason why I was forwarded to the
19 Montana Bowhunters Association.

20 My question is -- I think as far as the state's
21 concerned, my question is who gave the Montana Bowhunters
22 Association the right to modify equipment noncommercially? And
23 if that's the case, who is the engineer or who is the designer?
24 And why do they have permission to modify archery equipment
25 when it's not even included in the permit to modify archery

DAVID HELMERS - EXAMINATION BY THE COURT

1 equipment request?

2 Q. Okay. Well, let me ask you this, Mr. Helmers. The list
3 that you are referring to that you looked at that has on it
4 state-approved modified equipment, I'm not sure I have seen
5 that list. Can you tell me what it is or where it is or what
6 it looks like?

7 A. It's a handout that they give at the regional offices with
8 the permit to modify archery equipment application.

9 Q. Is that handout the one that has on it or appears to be a
10 publication of the Montana Bowhunters Association?

11 A. That's the one they hand out.

12 Q. Okay. I have seen that.

13 A. It's not a state-authorized issued thing, but that's where
14 they hand it out.

15 Q. Right. Okay. I've seen that. I think it's part of the
16 record in this case or I've seen it somewhere. I have a copy
17 of it here.

18 All right. Let me just ask one other question. In
19 paragraph 20 of your declaration at page 5, it says, "After
20 arching and trying to comply with the device modifications
21 allowed by FWP, I find they are insufficient to permit me to
22 use approved equipment. Because of my disability, I lack the
23 necessary physical strength and capacity to perform required
24 functions. After 50 years of hunting and instruction, I find
25 the commercial equipment available that is approved by FWP to

DAVID HELMERS - EXAMINATION BY THE COURT

1 be unsafe without extensive modifications that I cannot
2 afford."

3 What are the modifications that you're referring to?

4 A. Well, the modifications started with the Draw-Loc. The
5 Draw-Loc, to purchase it, is approximately about in the \$300
6 range. Then you have -- if you had a bow that -- let's say,
7 for instance, back when I was hunting, I could shoot a 72-pound
8 compound bow. And since then, I absolutely can't do it. I
9 can't modify that bow to this equipment to even make it -- to
10 even attempt to make it work. So I had to find a 50-pound bow.
11 So then I found a 50-pound bow, and that didn't work. So
12 there's more money out of my pocket.

13 Then I watched the last commission meeting, and there
14 was a gentleman that testified at the last commission meeting
15 said that he was charging \$60 an hour, and the last
16 modification he did was upwards of \$6,000. I can't hire a
17 private engineer to modify a bow for me for an accommodation
18 that I can justify to hunt with. It just doesn't have that
19 much value to me.

20 Q. What did you -- I think I didn't hear you. You said that
21 there was this gentleman who charges \$60 an hour last, and the
22 last modification was up to -- and I didn't hear the dollar
23 amount?

24 A. \$6,000.

25 Q. \$6,000. Okay. And just so that I've got some --

DAVID HELMERS - RECROSS-EXAMINATION BY MS. DOCKTER

1 A. That's on the -- I'm sorry.

2 Q. Just so that I have some context here, what did your
3 crossbow cost you?

4 A. I purchased mine on eBay for \$315 on sale.

5 Q. Okay.

6 A. And I've had it for several years, and I have never shot
7 it.

8 THE COURT: All right. Ms. LeDuc, did my questions
9 cause you to have any further redirect of Mr. Helmers?

10 MS. LEDUC: No, Your Honor.

11 THE COURT: Ms. Dockter?

12 MS. DOCKTER: Your Honor, just one question.

13 THE COURT: You may go ahead.

14 MS. DOCKTER: May I sit here, Your Honor?

15 THE COURT: Go ahead.

16 MS. DOCKTER: It's easier to see.

17 RECROSS-EXAMINATION

18 BY MS. DOCKTER:

19 Q. Mr. Helmers, it's Becky Dockter again. I have a question
20 for you about the companion required with the permit to modify
21 archery equipment. Have you used a companion in the field when
22 you have hunted?

23 A. I'm sorry. For some reason I can't hear you at all.

24 Q. I'll move to the other one. You heard me better, I think.

25 I asked, Mr. Helmers, if you have hunted in the field

DAVID HELMERS - RECROSS-EXAMINATION BY MS. DOCKTER

1 with a companion as the permit to modify archery equipment
2 requires?

3 A. Yes. There is a companion required.

4 Q. And have you hunted in the field with a companion?

5 A. I hunted with my son in the Breaks for elk in '11, '12,
6 something like that. I can't remember.

7 Q. And --

8 A. For about four hours. We camped. I spent about four
9 hours in the field and had to quit.

10 Q. And was the companion helpful to you in allowing you to
11 use your bow?

12 A. Was my companion helpful to me? So are you -- are you
13 saying that my son draw my bow for me?

14 Q. Or however they may have been helpful to you. The permit
15 to modify archery equipment allows for the use of a companion
16 to allow for your disability, and I was just wondering if that
17 was a way to accommodate your use of your archery equipment in
18 the field?

19 A. It doesn't allow for it, ma'am. It's mandatory.

20 Q. Sure. It is mandatory. You're right. But it is intended
21 for accommodating your disability, and I wondered if that was
22 helpful?

23 A. My son drew my bow for me.

24 Q. Okay.

25 A. The problem --

DAVID HELMERS - FURTHER EXAMINATION BY MS. LEDUC

1 Q. No further questions.

2 A. The problem that we had is the safety kept going off on
3 it. And if you draw the bow, it puts it in an unsafe manner.
4 It's like a loaded gun without the safety on, or worse.

5 Q. Okay.

6 THE COURT: Okay.

7 MS. DOCKTER: Thank you.

8 THE COURT: All right. Ms. LeDuc, may Mr. Helmers be
9 excused?

10 MS. LEDUC: Just one more question.

11 THE COURT: Go ahead.

12 FURTHER EXAMINATION

13 BY MS. LEDUC:

14 Q. Mr. Helmers, if I understood the testimony you just
15 provided regarding the companion, am I understanding your
16 testimony to say you didn't even draw the bow on your own
17 archery equipment?

18 A. You can't.

19 Q. Okay.

20 A. In my condition, you can't. You have to put your foot
21 through a stirup, and there's no mechanical drawing system that
22 you can use for a compound bow. There is for a crossbow but
23 not for a compound bow.

24 Q. So, in essence, it's not you doing the hunting?

25 A. That's right.

DAVID HELMERS - FURTHER EXAMINATION BY MS. LEDUC

1 Q. No further questions.

2 THE COURT: All right. May this witness be excused,
3 Ms. LeDuc?

4 MS. LEDUC: Yes, Your Honor.

5 THE COURT: Any objection, Ms. Dockter?

6 MS. DOCKTER: No objection, Your Honor.

7 THE COURT: Mr. Helmers, you are excused. If you
8 wish to listen in, you may do so. But, otherwise, your
9 obligation here this afternoon has been discharged. Thank you,
10 sir.

11 THE WITNESS: Thank you, sir.

12 THE COURT: Okay. Ms. LeDuc, you may call your next
13 witness.

14 MS. LEDUC: Your Honor, we're actually going to pass
15 this one over to Mr. Fredrickson.

16 THE COURT: Okay. Mr. Fredrickson.

17 MR. FREDRICKSON: Thank you, Your Honor.

18 Since we have Dr. Zink on Zoom, let's get him out of
19 the way. So we'd call Dr. Robert Zink.

20 THE COURT: Dr. Zink, if you would raise your right
21 hand, please, and the clerk will administer an oath.

22 DR. ROBERT ZINK,
23 called for examination by counsel for the plaintiffs, after
24 having been first duly sworn to testify the truth, the whole
25 truth, and nothing but the truth, testified as follows:

ROBERT ZINK - DIRECT EXAMINATION BY MR. FREDRICKSON

1 DIRECT EXAMINATION

2 BY MR. FREDRICKSON:

3 Q. Professor, how are you this afternoon?

4 A. I'm fine. Thank you.

5 Q. You look like you are with palm trees behind you.

6 Would you please state your full name and actually
7 your university affiliation for the Court?

8 A. My name is Robert M. Zink, Z-i-n-k. I'm currently a
9 Professor of Nature Resources and Biological Sciences at the
10 University of Nebraska at Lincoln. And I was the previously
11 Breckenridge Chair in Ornithology at the University of
12 Minnesota, Twin Cities.

13 Q. All right. What degrees do you hold?

14 A. I have a bachelor's degree and a doctorate degree from
15 Berkeley.

16 Q. And the Ph.D. is in? I might have missed it. You may
17 have already said this.

18 A. It was in Zoology.

19 Q. All right. Are you a hunter?

20 A. Yes, sir, I am.

21 Q. Hunter with a crossbow?

22 A. Yes, sir.

23 Q. Do you have, Doctor -- or Professor, any affiliation with
24 any of the plaintiffs or their attorneys aside from your
25 retention in this case?

ROBERT ZINK - DIRECT EXAMINATION BY MR. FREDRICKSON

1 A. No, sir, I don't. I don't have a dog in your fight, but
2 I'm a very strong advocate of crossbow, and I have an injury
3 myself. So I'm forced to use one.

4 Q. All right. Are you member of the any crossbow advocacy
5 groups?

6 A. No, sir, I'm not.

7 Q. Okay. I guess I want to cut to the chase as quickly as we
8 can with you. With your background in biology/zoology, what is
9 your interest in hunting as it relates to those biology
10 backgrounds?

11 A. Well, I hunt a lot of things. And I'm also at my lake
12 home where we fish a lot. I'm interested in having sustainable
13 populations of things like deer, turkeys, ducks, ruffed grouse.
14 And in order to do that, harvest limits have to be properly
15 done with a science-based approach. And so as I transitioned
16 from a compound bow which I shot for 20 years to a crossbow, I
17 became aware of the angst in the community about this. And so
18 I did some research and wrote a little review of the effects of
19 crossbow hunting on deer population and came to the conclusion
20 that, as did the state of Wisconsin in their review, that the
21 addition of crossbow didn't have any measurable biological
22 impact on the deer herd.

23 Q. All right. And when you say there was no biological
24 impact, explain a little bit if you would.

25 A. Well, there was not a heightened harvest of does,

ROBERT ZINK - DIRECT EXAMINATION BY MR. FREDRICKSON

1 yearlings, bucks. And I personally am not a big buck hunter.
2 I don't have a recipe for antlers. But those that were very
3 concerned about crossbows starting early in the archery season
4 were afraid that all of the big bucks would be gone by the time
5 everybody else got out, and that turned out not to be true in
6 any state that's looked at it.

7 Q. And have you followed not only your own research on the
8 topic but research of others?

9 A. Oh, yeah. Let's be clear. I do research on chronic
10 wasting disease and its spread in deer. I don't do research on
11 deer harvest and populations.

12 But, yeah, I follow the literature because I find it
13 very interesting. Because, to me, I hunt in a state -- in
14 Nebraska where anybody can use a crossbow at any time during
15 the archery season no matter your age or disability. So I look
16 at it like Nebraska kind of looks at crossbow hunting like the
17 measles. We all get it, but we get over it. So Nebraska has a
18 very liberal crossbow season, and it hasn't changed their
19 harvest one iota since they instituted a crossbow season
20 throughout the entire archery season for everyone.

21 Q. Are you familiar with the legislation that was proposed in
22 2021 in Montana, Senate Bill 111?

23 A. Yes. I have been made aware of it by Brad Molnar.

24 Q. Okay. Did you do anything with respect to that bill at
25 all; in other words, testify for or against or anything of that

ROBERT ZINK - DIRECT EXAMINATION BY MR. FREDRICKSON

1 nature?

2 A. I believe I gave some Zoom testimony a couple of months
3 ago. I don't quite remember the dates.

4 Q. Do you -- are you aware of the opponent's position of
5 crossbow accommodation and use in Montana?

6 A. Yes. Like I said, I hunted with a compound bow for
7 probably 20 years. Dearly loved it. But there is sort of a
8 movement in compound bowhunters that they sort of seem like
9 they want to impart their view of what's ethical on everybody
10 else. And now that I have switched to a crossbow out of
11 necessity, out of a physical necessity, I've found it a
12 wonderful way to be outside the entire archery season. I've
13 harvested my share of deer, and I wouldn't be able to bowhunt
14 if I weren't able to use a crossbow.

15 Q. Okay. Do you believe, based on your interest in the
16 biological aspects or the biological impacts of crossbow
17 versus -- frankly, versus rifle versus other archery equipment,
18 that the utilization of a crossbow for those unable to use
19 other approved archery equipment would be a reasonable
20 accommodation?

21 A. Yeah. I mean, there's no reason, other than some kind of
22 arrogance on one group of hunters to tell somebody else they
23 can't use a crossbow.

24 MR. FREDRICKSON: Okay. I have no further questions,
25 Your Honor.

ROBERT ZINK - CROSS-EXAMINATION BY MS. DOCKER

1 THE COURT: Ms. Dockter, any cross-examination?

2 MS. DOCKTER: Yes, Your Honor. Thank you.

3 CROSS-EXAMINATION

4 BY MS. DOCKTER:

5 Q. Good afternoon, Mr. Zink. My name is Becky Dockter. I
6 just have a couple of questions for you, one of which is what
7 are the advantages of using a crossbow?

8 A. Well, I've done a lot of hunting with both now, and the
9 advantages of using a crossbow are, obviously, the first and
10 foremost, you don't pull back when a deer is coming in and risk
11 being busted. But the decided advantages, I think you can make
12 more accurate shots, and you have a lower wounding rate, and I
13 think it's just a cleaner way to hunt for me.

14 Q. Is there a longer range for an accurate shot from a
15 crossbow?

16 A. Oh, the crossbow web pages are full of arguments, and some
17 companies are bragging about 100 yards. But no reasonable
18 crossbow hunter is going to shoot past 40, which was my limit
19 on my compound bow because even though the bolt -- they call
20 the bolts -- go a little bit faster than the compound, if a
21 deer is that far away, too many things can happen. It can
22 move, and your shot placement will be bad, and then the outcome
23 would be bad. So, no, I would say 40 yards -- I mean, there's
24 a fringe that will shoot 50, 60. But most crossbow hunters
25 kind of keep it in a little closer.

ROBERT ZINK - CROSS-EXAMINATION BY MS. DOCKER

1 Q. And what is the comparison to a traditional bow or a
2 compound bow, just for context?

3 A. Well, a traditional bow, you would be talking about a long
4 bow or a recurve bow. And those are much harder to shoot than
5 a compound bow. In fact, during the transition from long bows
6 and recurve bows to the compound bows, there was the same sort
7 of angst that went on that's going on now. And it's way harder
8 to shoot a recurve. It's way easier to shoot a compound. And
9 with a crossbow, you still have to be in the right place. You
10 have to be aware of the wind. You can't make noise. You have
11 to be camoed up. You know, nothing that's not hunting about
12 using your crossbow.

13 Q. So I didn't mean to infer that there wasn't -- it wasn't
14 still hunting. I was just comparing the range. And so the
15 range for an accurate shot for a traditional bow or a compound
16 bow, how does that compare to a crossbow?

17 A. It's not -- you have to leave -- a traditional bow is a
18 long bow or a recurve. And they are not -- they are 15- to
19 20-yard shots. So a compound and crossbow, I have more or less
20 the equivalent, 40 to 50 yards.

21 Q. Okay. And so you mentioned that you have not done studies
22 on population effects, deer population, antelope population.
23 Is that what I heard you say, Mr. Zink?

24 A. Yeah, I don't do research on trends in deer herds, but I
25 write lots of popular articles about it, and I read a lot of

ROBERT ZINK - EXAMINATION BY THE COURT

1 scientific articles about how deer herds -- in fact, in one of
2 my books I published a graph showing the history of deer
3 populations in North American. So I keep up with the
4 literature, but I don't have an active research program in deer
5 management and population biology.

6 Q. So you're just interested in what happens with crossbow.
7 Is that what I'm hearing? Is that fair?

8 A. Yeah. When I did the transition, maybe eight, nine years
9 ago, I heard all of the criticism. And so I wanted to know,
10 well, does this have a biological effect? And, you know, it
11 doesn't. And, in fact, if you had a thousand handicap hunters
12 use a crossbow in Montana, they would kill about a fourth of
13 the number of deer less than are killed by vehicles on your
14 highways. You have the second highest collision rate of any
15 state in the union.

16 Q. Understood. Yeah. Well, that's all I had for you,
17 Mr. Zink. Thank you.

18 A. Thank you.

19 THE COURT: Any redirect, Mr. Fredrickson?

20 MR. FREDRICKSON: None, Your Honor.

21 EXAMINATION

22 BY THE COURT:

23 Q. Dr. Zink, this is Judge Christensen. I read your two
24 affidavits in the case, and I also read the article, the
25 commentary that was included in Outdoor News Minnesota, which

ROBERT ZINK - EXAMINATION BY THE COURT

1 was attached I believe to your second declaration. And in
2 paragraph 12 of your declaration it says that -- you talk about
3 the proposed devices to allow handicap hunters to use a
4 vertical bow are like putting the stamp on the inside of the
5 envelope, et cetera.

6 What are those proposed devices that you are
7 referring to?

8 A. They are the ones exactly described by the previous
9 person, Draw-Locs, things like that, that could make a compound
10 bow -- it could hold -- the strength can be held back without
11 the power of the bowhunter. But I've seen some of them in -- I
12 have never used one. I don't have to. But they just seem to
13 me like -- they are just -- it's punitive, if anything else.

14 Q. Okay. I'm just curious in the states that you reference
15 in your commentary and in your affidavit, I believe you
16 reference a couple of states, Wisconsin, Virginia. Do you know
17 whether or not in any of those states or in your state, in the
18 state of Nebraska, do those states institute a separate
19 crossbow season, or do they have a mixed archery and crossbow
20 season?

21 A. Yeah, those states were interested in the effects of
22 crossbows because Wisconsin and Virginia and Nebraska went and
23 said that archery was a compound bow, a long bow, a recurve
24 bow, or a crossbow. So you could use a crossbow the entire
25 season. But when you register, when you -- at least when you

ROBERT ZINK - EXAMINATION BY THE COURT

1 send in your harvest, you check whether it was with a vertical
2 bow or a crossbow. So they were able to compare numbers and
3 see if, you know, there were any drastic changes that happened
4 with the addition of crossbows to the archery season, and the
5 answer was no.

6 Q. And in which states was that result seen?

7 A. I'm sorry? I didn't hear. Which states were what?

8 Q. The results that you just described where there was no
9 difference, in which states was that -- were that?

10 A. Well, the ones that I looked at in particular were
11 Virginia and Wisconsin. But, in 2019, the state of Wisconsin
12 undertook a study where they looked at lots of different
13 states. And on page 61 of their report, I can read this, "Most
14 states said the addition of crossbows did not have any
15 measurable biological impact on the states' deer herd." That
16 was after I published my review article, and they came to the
17 exact same conclusion only it was a broader based one because
18 they surveyed as many states, if not all the states, that had a
19 crossbow provision.

20 Q. And were those studies that they surveyed, those results
21 that they surveyed, were those exclusive to deer, or did they
22 include any other game such as elk or antelope?

23 A. I believe they were exclusive to deer. I don't think --
24 Wisconsin doesn't have an elk herd that's huntable. I think
25 Virginia just introduced one.

ROBERT ZINK - EXAMINATION BY THE COURT

1 Q. Okay.

2 A. Those are white-tails and mule deer.

3 THE COURT: Okay. Did my questions precipitate any
4 additional questions, Mr. Fredrickson?

5 MR. FREDRICKSON: None from me, Your Honor.

6 THE COURT: Ms. Dockter?

7 MS. DOCKTER: No, thank you. Your Honor.

8 THE COURT: May Dr. Zink be excused?

9 MR. FREDRICKSON: He may.

10 THE COURT: And objection?

11 MS. DOCKTER: Not at all. Thanks.

12 THE COURT: Dr. Zink, you are excused. Thank you,
13 sir.

14 THE WITNESS: Thank you for your time.

15 THE COURT: All right. Mr. Fredrickson, Ms. LeDuc,
16 you may call your next witness.

17 MS. LEDUC: We'll call Bruno Friia our next witness.

18 THE COURT: Mr. Friia, if you would come forward and
19 the clerk will administer an oath.

20 BRUNO FRIIA,

21 called for examination by counsel for the plaintiffs, after
22 having been first duly sworn to testify the truth, the whole
23 truth, and nothing but the truth, testified as follows:

24 THE COURT: Mr. Friia, make yourself comfortable up
25 here in the witness stand and adjust that microphone so you can

BRUNO FRIIA - DIRECT EXAMINATION BY MS. LEDUC

1 speak directly into it so we can all hear you.

2 Ms. LeDuc.

3 DIRECT EXAMINATION

4 BY MS. LEDUC:

5 Q. Good afternoon, Mr. Friia.

6 A. Good afternoon.

7 Q. Would you please state and spell your full name for the
8 record?

9 A. My name is Bruno Friia, B-r-u-n-o, last name is F-r-i-i-a.

10 Q. How old are you, Mr. Friia?

11 A. I'm 80.

12 Q. And where do you reside?

13 A. In Missoula, Montana.

14 Q. Tell us a little bit about your hunting background.

15 A. I also started hunting at a very young age. I did not
16 start bowhunting until I moved to Colorado, and that was in 19-
17 -- I think it was '67, something like that. I moved to
18 Colorado in '61, but didn't start bowhunting until around '67.
19 And at that time I was using a recurve bow. And from there I
20 progressed to a compound bow. And because of recent surgeries
21 that occurred in 2018, I could no longer pull a compound bow.

22 Q. Mr. Friia, tell us a little bit about what physical
23 disabilities you are referring to with the surgeries?

24 A. I've had three surgeries on my rotator cuff, one on the
25 left and two on my right, and I have had back surgery.

BRUNO FRIIA - DIRECT EXAMINATION BY MS. LEDUC

1 Q. Okay. All of this has been since 2018?

2 A. Yes.

3 Q. Okay. And so these disabilities obviously affect your
4 ability to hunt during the regular archery season?

5 A. Yes, they do.

6 Q. In your -- in the process for you requesting this
7 reasonable accommodation to use a crossbow, did you, along with
8 your doctor, evaluate the other state-approved equipment to see
9 if there was any other alternative aside from a crossbow that
10 might be a viable option for you?

11 A. Yes. I went through a similar procedure that Mr. Helmers
12 went through. And I purchased the equipment, and I even
13 visited with the owner of that company. And he concluded, if I
14 can't pull 30 pounds or more, I couldn't use his equipment. So
15 there was another -- it was an investment made. As a matter of
16 fact, I asked the Montana Bowhunters Association if they wanted
17 that equipment because I couldn't make use of it.

18 Q. Couldn't get a refund?

19 A. No.

20 Q. Mr. Friia, why do you want to hunt during the regular
21 archery season?

22 A. Well, the climate is a lot more acceptable to hunt during
23 that season. And since I have also been bowhunting, I don't
24 have the concern about the multitude of hunters that are out
25 there with rifles and black powder and everything else that

BRUNO FRIIA - DIRECT EXAMINATION BY MS. LEDUC

1 happens at that time. And I believe that I -- you cannot hunt
2 in archery only areas with a rifle or any other weapon like
3 that.

4 Q. Okay. So tell me about the accommodation request that you
5 have made to Fish, Wildlife, and Parks. When did you first
6 reach out to them about an accommodation for a crossbow?

7 A. You have the date. I don't remember the exact date.

8 Q. Maybe I can help you. Let me --

9 Permission to approach, Your Honor?

10 THE COURT: You may.

11 (Handing document.)

12 BY MS. LEDUC:

13 Q. Mr. Friia, I'm handing you what's identified on the bottom
14 as -- or what's identified at the top as Document Number 5
15 filed on August 24th, 2021. It's your declaration.

16 A. Yes.

17 Q. Does that look familiar to you?

18 A. Yes.

19 Q. Do you recognize that document?

20 A. Yes, I do.

21 Q. Could you please turn to Exhibit 1, page 1 --

22 A. Yes, I have it.

23 Q. -- of your declaration.

24 A. May 13th, to answer your question, that's when I first
25 made out a request for a reasonable accommodation to Fish,

BRUNO FRIIA - DIRECT EXAMINATION BY MS. LEDUC

1 Wildlife, and Parks.

2 Q. You recognize this document?

3 A. Yes.

4 Q. And just could you please state what exactly it is?

5 A. Well, it's asking for accommodation from Fish, Wildlife,
6 and Parks and explaining to them that I recently received, and
7 which I thought would help me, was the permit to adjust -- let
8 me see -- adjust or adjust equipment to my existing bow. And I
9 tell them in here that I tried this and looked over all of the
10 recommendations that the state makes to use this permit, and
11 none of them will work. And I also have a -- my doctor,
12 Dr. Stayner, also looked at these items, and he said, "None of
13 these will work for you."

14 MS. LEDUC: Okay. I'd like to move for admission of
15 this Exhibit 1 attached to the Friia declaration.

16 THE COURT: Any objection?

17 MR. OESTREICHER: No objection, Your Honor.

18 THE COURT: It's admitted, Exhibit 1 to the Friia
19 declaration, which I've got here in front of me.

20 (Friia Exhibit 1 admitted into evidence.)

21 MS. LEDUC: Thank you, Your Honor.

22 BY MS. LEDUC:

23 Q. Mr. Friia, what happened after you sent Fish, Wildlife,
24 and Parks this letter?

25 A. I did not receive a response from them for probably five

BRUNO FRIIA - DIRECT EXAMINATION BY MS. LEDUC

1 or six weeks after I sent them this letter. And I received a
2 letter from -- I received a letter from the diversity officer
3 or whatever she is. Kqyn is the first name I could remember.
4 And she said she received the application and she would like to
5 have a meeting with me. And we set up a date to have the
6 meeting to discuss my disability. When the time came for the
7 meeting, the meeting opened, I was kind of surprised that it
8 wasn't just that person asking me the questions. There was an
9 HR person there, there was a paralegal there, and there was an
10 attorney representing Fish, Wildlife, and Parks. It kind of
11 set me back. There was no notification that I would -- if I
12 had to, to have representation for myself.

13 Q. Tell me about what happened at that meeting.

14 A. Well, they were asking questions, like, why do you want to
15 hunt during archery season? And I responded with -- I said,
16 "You have my letter in front of you. You have my doctor's
17 script and the application my doctor filled out." And they had
18 none of that in front of them.

19 Q. So you provided them with communication from your doctor
20 confirming what you're talking about in this letter?

21 A. Right. They had access through Fish, Wildlife, and Parks
22 because that was all registered and hopefully recorded and
23 documented when I applied for my permit.

24 Q. What else happened at that meeting?

25 A. Well, I guess it wasn't a very pleasant meeting. I just

BRUNO FRIIA - DIRECT EXAMINATION BY MS. LEDUC

1 felt that it was more of an interrogation versus a meeting to
2 find out what was wrong with me. The questions asked of me
3 probably should have never been asked just because of HIPAA
4 more than anything else. And I explained to them. I went
5 through everything with them. I said, "If you had my letter in
6 front of you, you would see why I'm making this application."
7 And it just proceeded from there.

8 Q. How did that meeting conclude?

9 A. It didn't last very long, and it was thank you and
10 goodbye.

11 Q. Did they make any kind of determination at that time --

12 A. No.

13 Q. -- about what they were willing to do?

14 A. No. There was no determination. They said they would be
15 in contact with me. They also supplied me with the notes with
16 the paralegal was taking at that time, and I think that was it,
17 yeah.

18 Q. Okay. What happened after that?

19 A. I sent the letter -- as a matter of fact, I made a phone
20 call requesting if they had any more information on whether the
21 hearing would take place. And I believe it was August 20th at
22 that point in time that my case would come before Fish,
23 Wildlife, and Parks.

24 Q. You're referring to the commission hearing?

25 A. Commission hearing. Because at the end of their letter

BRUNO FRIIA - DIRECT EXAMINATION BY MS. LEDUC

1 that they sent back to me with their notes said, "Please feel
2 free to contact all of us. Here's the email. Here's the phone
3 numbers." I emailed them all. I called them all and did not
4 have a response back from them.

5 Q. Okay. Why don't you go ahead and turn to Exhibit 2 of
6 your declaration.

7 A. Yes.

8 Q. Are you looking at Exhibit 2 that's attached to your
9 declaration?

10 A. Yes.

11 Q. Take a moment to review that.

12 A. (Complying.)

13 Q. Do you recognize it?

14 A. Yes, I do.

15 Q. Could you please identify it?

16 A. It's a letter from the director of Fish, Wildlife, and
17 Parks basically saying to me that "We need to further review
18 your application." They have to look into it deeper. They
19 will not take this up before the October commission meeting.
20 And, consequently, I will not be able to fish -- hunt with a
21 crossbow during archery season of this year.

22 Q. And what's the date on this?

23 A. This is -- the date on this is August 9th.

24 Q. So this is several months after your May 13th letter?

25 A. Yes.

BRUNO FRIIA - DIRECT EXAMINATION BY MS. LEDUC

1 Q. And how long after your meeting with them?

2 A. Oh, my meeting with them occurred, jeez, I think it was --
3 let's see. This was -- sometime in mid-June I had the meeting
4 with Fish, Wildlife, and Parks.

5 Q. Okay. So they waited about two months before providing
6 you with a response?

7 A. Right.

8 Q. And your testimony where you're discussing calling them
9 and emailing them, was that in between the meeting and the
10 receipt of this letter?

11 A. Yes.

12 MS. LEDUC: Okay. I'd like to move for admission of
13 Exhibit 2 attached to Mr. Friia's declaration.

14 THE COURT: Any objection?

15 MS. DOCKTER: No objection, Your Honor.

16 THE COURT: Exhibit 2 is admitted.

17 (Friia Exhibit 2 admitted into evidence.)

18 BY MS. LEDUC:

19 Q. Mr. Friia, prior to submitting your reasonable
20 accommodation request in May, did you take any other action
21 associated with attempting to secure ADA protection?

22 A. Yes. I initially contacted the Department of Justice
23 when -- I didn't go down to Fish, Wildlife, and Parks, but I
24 called them and asked them if I could have an accommodation for
25 crossbow because of my injuries, and they said, "No, it's not

BRUNO FRIIA - DIRECT EXAMINATION BY MS. LEDUC

1 allowed." So I figured I'd go to the ADA itself and submit an
2 application for my accommodation to the Department of Justice,
3 and that's what we have in Exhibit 3.

4 Q. Sure. Why don't you go ahead and identify what Exhibit 3
5 to your declaration is.

6 A. It's a letter from the Department of Justice, basically
7 saying, "You contacted the Department of Justice on
8 February 2nd, 2021. After careful review, we decided not to
9 take any further action on your complaint." What they did is
10 they reviewed it. And what I can do is hire an attorney. They
11 gave me some legal services, American Bar Association. "While
12 we don't have the capacity to take each individual report, your
13 report can help find issues affecting multiple people or
14 communities. It also helps understand emerging trends and
15 topics." After that, I received, which is Exhibit 4 --

16 Q. Let's stay on Exhibit 3. I want to ask you just a couple
17 of questions about this. So if I'm understanding your
18 testimony correctly, Mr. Friia, long before you submitted your
19 reasonable accommodation request, you reached out to Fish,
20 Wildlife, and Parks and asked them about using a crossbow. And
21 because they told you no, you reached out to the DOJ?

22 A. You're right.

23 Q. Okay. This date on this letter, April 29th, 2021, did you
24 mark that date?

25 A. Yes.

BRUNO FRIIA - DIRECT EXAMINATION BY MS. LEDUC

1 Q. Is that the date you received it?

2 A. Yes.

3 Q. All right. Go ahead and turn to Exhibit 4.

4 Have you had a chance to review it?

5 A. Yes, I have.

6 Q. Please identify that exhibit.

7 A. This is a letter from Department of Justice also, Civil
8 Rights Division, notifying me that "After further review, they
9 are moving my request from their department to the Department
10 of Interior." And that's the last I heard from them.

11 MS. LEDUC: Okay. Backing up. I'd like to move to
12 admit Number 3 to the Mr. Friia declaration.

13 THE COURT: Any objection?

14 MR. OESTREICHER: No objection, Your Honor.

15 THE COURT: Exhibit 3 is admitted.

16 And Exhibit 4, any objection?

17 MS. HAWKALUK: No objection, Your Honor.

18 THE COURT: Exhibit 4 is admitted.

19 (Friia Exhibits 3 and 4 admitted into evidence.)

20 BY MS. LEDUC:

21 Q. After you received the August 9th denial, Mr. Friia, what
22 steps did you take thereafter to deal with this issue?

23 A. Well, I participated as a plaintiff in this case we have
24 here right now.

25 Q. Okay. If you're not granted a reasonable accommodation to

BRUNO FRIIA - CROSS-EXAMINATION BY MS. DOCKTER

1 use a crossbow during the archery season for 2021, what does
2 that mean for you, Mr. Friia?

3 A. I don't hunt in archery season.

4 Q. How does that affect your life?

5 A. Well, it's something that I have been doing regularly up
6 through 2018. And because of the surgeries and injuries that I
7 have incurred, I just cannot hunt during archery season. So it
8 interrupts a lifestyle that I have been accustomed to for many
9 years.

10 And as a matter of fact, I even took a crossbow
11 education certification program, a national one, to try to
12 accommodate this.

13 MS. LEDUC: Okay. No further questions.

14 THE COURT: Thank you.

15 Ms. Dockter?

16 MS. DOCKTER: Thank you, Your Honor.

17 CROSS-EXAMINATION

18 BY MS. DOCKTER:

19 Q. Good afternoon, Mr. Friia. I have a couple of questions.
20 Let's start with do you have a permit to modify archery
21 equipment?

22 A. Yes, I do.

23 Q. And have you also hunted with the permit to modify archery
24 equipment?

25 A. No.

BRUNO FRIIA - CROSS-EXAMINATION BY MS. DOCKTER

1 Q. And so you have not attempted to hunt with archery
2 equipment in the field as modified?

3 A. As I further testified is that when I tried installing
4 that equipment on my compound bow, it just did not work. It
5 was clumsy. It was dangerous. And I also experienced similar
6 problems Mr. Helmers talked about and that it just went off
7 erratically. The safety was not -- not a sound safety. And it
8 added extra weight to the bow, which exaggerated -- I guess it
9 made it even harder for me to hold the bow at a vertical
10 position.

11 Q. And by "that equipment," are you referring to the
12 Draw-Loc?

13 A. Yes, I am.

14 Q. Is that the only modification you attempted with your
15 archery equipment?

16 A. That's the only one that would potentially I thought would
17 help me.

18 Q. And have you looked at the list that's part of the record
19 for all of the options for modification?

20 A. Yes, I did something similar to what Mr. Helmers did. I
21 contacted each one. Half of them are not in business. And the
22 ones that I did make contact with, they recommended, "If you
23 can use anything, use the Draw-Loc."

24 Q. And that one didn't work for you?

25 A. Right.

BRUNO FRIIA - CROSS-EXAMINATION BY MS. DOCKTER

1 Q. Okay. You mentioned that you did an application to the
2 Department of Justice, and it was referred to the Department of
3 the Interior. Is that what I'm understanding?

4 A. Yes.

5 Q. Are you aware that there is a decision from the Department
6 of the Interior on this issue?

7 A. Not that I've received.

8 Q. Okay. Would it be a surprise to you to learn that in
9 2004, the Department of the Interior dealt with the same
10 question and a complaint from an individual where they allege
11 that Fish, Wildlife, and Parks discriminate against you on
12 the -- the complainant against the person on the basis of
13 disability? And you're not aware of that same opinion?

14 A. I would have no reason to be aware of it in 2004.

15 Q. Okay.

16 A. A lot has changed since 2004.

17 Q. Sure.

18 A. Yeah.

19 MS. DOCKTER: I have no further questions, Your
20 Honor. Thank you.

21 THE COURT: Ms. LeDuc, any redirect?

22 MS. LEDUC: None, Your Honor.

23 ///

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BRUNO FRIIA - EXAMINATION BY THE COURT

EXAMINATION

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BY THE COURT:

Q. Mr. Friia, I have just a few follow-up questions just so that I understand. What was the last archery season that you were able to participate? In 2018?

A. I didn't participate in 2018. That's when I realized I couldn't use the equipment. 2018, I didn't participate.

Q. When was the last time you were able to participate?

A. That would be the year prior.

Q. 2017?

A. Yeah.

Q. Okay. And same question I asked Mr. Helmers. Do you currently possess all of the licenses and permits required to bowhunt in the State of Montana for the 2021 season?

A. Yes, I do.

Q. Excuse me?

A. Yes, I do.

Q. Okay. So my understanding is that after you conducted your investigation that you came to the conclusion that the one modification device that was allowed by FWP that may work for you was the Draw-Loc; correct?

A. Correct.

Q. And did you actually -- you purchased one?

A. I purchased one. I installed it on my bow. And I just could not get it to work properly.

BRUNO FRIIA - EXAMINATION BY THE COURT

1 Q. Okay. And what was the problem in getting it to work?

2 A. Well, first, it -- the way the Draw-Loc works, the theory
3 behind it, is once you install this equipment on it, you are
4 supposed to pull the bow string up to it and hook it onto a
5 device which is supposed to have a safety that locks it in
6 place. Well, the first thing that happened to me is that
7 drawing the 60-pound bow, I'm still drawing it whether it's
8 vertically or horizontally. I couldn't pull more than 30
9 pounds. So that was the first thing.

10 The other thing is that once I had a friend of mine
11 help me with this. Going through the field or trying to hunt
12 with that bow would be dangerous, just dangerous.

13 Q. Why?

14 A. Well, again, you're walking through the field with a
15 cocked bow. Okay? The safety wasn't that secure. And I would
16 be concerned about brush, trees, limbs, whatever you're
17 hitting. You have a drawn bow, okay, waiting to be released,
18 when you set that bow.

19 Q. You indicate in your declaration in paragraph 25 that your
20 doctor concluded that you cannot operate a modified compound
21 bow. I assume that's Dr. Stayner?

22 A. Yes.

23 Q. Did he provide you with an opinion on any other of the
24 state-approved equipment?

25 A. He reviewed the pamphlet that I gave him that we talked

BRUNO FRIIA - EXAMINATION BY THE COURT

1 about previously and said none of this will work. He said, you
2 know, the closest one was the Draw-Loc, and that doesn't work.

3 Q. So I want to make sure, Mr. Friia, that this pamphlet that
4 you and Mr. Helmers referred to is the same one that I'm
5 looking at. And I'm just going to show you a pamphlet
6 entitled, "Montana Bowhunters Association." Is that it?

7 A. Yes. And there should be a brochure behind it showing
8 various devices. That's correct.

9 Q. Okay. And when did you receive a copy of this document?

10 A. When I applied for my permit.

11 Q. And when was that?

12 A. I think it was late 2020.

13 THE COURT: Okay. So I'm going to mark as Court's
14 Exhibit 1, just so we have a clear record, the Montana
15 Bowhunters Association document that I have been referring to.

16 Do either of you -- Mr. Fredrickson, Ms. Dockter, are
17 you familiar with this?

18 MR. FREDRICKSON: Yes.

19 MS. DOCKTER: Yes, Your Honor.

20 THE COURT: And if you want to look at it and make
21 sure it's complete, please do so. But I'm going to go ahead
22 and mark this as Court's Exhibit 1.

23 (Court's Exhibit 1 admitted into evidence.)

24 THE COURT: And unless there's any addition questions
25 of Mr. Friia, we'll take a brief recess.

BRUNO FRIIA - FURTHER EXAMINATION BY MS. DOCKER

1 Ms. LeDuc?

2 MS. LEDUC: No further questions, Your Honor.

3 THE COURT: Ms. Dockter?

4 MS. DOCKTER: May I ask?

5 THE COURT: Yes, you may.

6 FURTHER EXAMINATION

7 BY MS. DOCKTER:

8 Q. Mr. Friia, forgive me. I should have asked you this
9 before when we talked about the permit to modify archery
10 equipment. If a companion could pull back the bow for you,
11 would the Draw-Loc hold it for you, if it were functioning?

12 A. It's a couple big ifs there. From trying it with the
13 friend I had help me put it together, it was erratic whether
14 that safety was going to hold or not. And what's interesting
15 about that, if you turn that Draw-Loc horizontally, you have a
16 crossbow, but you can't operate it that way, which would make
17 it easier to carry and use.

18 Q. And so your answer is yes to my question. If it were
19 operating properly and a companion pulled it back for you, the
20 Draw-Loc would hold it so you don't have to hold the bow in
21 that position; Is that correct.

22 A. Possibly, yes.

23 Q. Okay. The second question I have is have you attempted or
24 contemplated hunting during a shoulder season with a crossbow?

25 A. No.

BRUNO FRIIA - FURTHER EXAMINATION BY MS. DOCKER

1 Q. No. Okay.

2 No further questions, Your Honor.

3 THE COURT: May this witness be excused?

4 MS. LEDUC: Yes, Your Honor.

5 THE COURT: Any objection, Ms. Dockter?

6 MS. DOCKTER: None, thank you.

7 THE COURT: Mr. Friia, you are excused.

8 THE WITNESS: Thank you.

9 THE COURT: We'll take a brief recess, 10,
10 15 minutes.

11 (Proceedings in recess from 3:30 p.m. until 3:45 p.m.)

12 (Open court.)

13 THE COURT: All right. Let the record reflect that
14 the Court's Exhibit 1, Amanda pointed out to me that some of my
15 compulsive highlighting is upon it in yellow. I'm not going to
16 substitute this. But if you see yellow highlighting on it, it
17 was placed there by me. I would not attach any particular
18 significance to it.

19 Mr. Fredrickson, Ms. LeDuc, you may call your next
20 witness.

21 MS. LEDUC: Thank you, Your Honor. We'd call
22 Mr. Brad Molnar.

23 THE COURT: If you would just stop there for a
24 moment, raise your right hand, and the clerk will administer an
25 oath.

BRAD MOLNAR - DIRECT EXAMINATION BY MS. LEDUC

1 BRAD MOLNAR,
2 called for examination by counsel for the plaintiffs, after
3 having been first duly sworn to testify the truth, the whole
4 truth, and nothing but the truth, testified as follows:

5 DIRECT EXAMINATION

6 BY MS. LEDUC:

7 Q. Good afternoon, Mr. Molnar.

8 A. Good afternoon.

9 Q. Would you please state your full name and spell it for the
10 record?11 A. Bradley Allen Molnar, B-r-a-d-l-e-y, A-l-l-e-n,
12 M-o-l-n-a-r.

13 Q. Where are you from, Mr. Molnar?

14 A. I live in Laurel, Montana. I have for a little over 40
15 years.

16 Q. And how old are you?

17 A. I'm 71.

18 Q. Would you tell us a little bit about your hunting
19 background?20 A. My earliest memories in life are hunting. I was born and
21 raised in Northern Indiana. My father hunted rabbits like a
22 religion and ducks. With a cork gun, I went with him. I
23 always wanted a bee bee gun as I got older. My father said no.
24 My mother said no. So my grandmother bought it for me. And
25 after that it was by the door. There wasn't a starling or

BRAD MOLNAR - DIRECT EXAMINATION BY MS. LEDUC

1 sparrow. I went down to the dump behind my grandparents' house
2 and hunted mice and rats. And at about age ten, my next-door
3 neighbor -- we lived out in the country. I worked out with the
4 dairy farmers. At about age ten, my neighbor threw out a
5 broken long bow. So I brought it home, and I glued it together
6 and pressed it and made it good again. About age 12 I started
7 hunting deer with that, small game. About age 15 I got a Ted
8 Williams recurve bow, 30 pounder. I kept hunting deer and
9 small game. About age 20 I got a Fred Bear 50-pound recurve.
10 Hunted with that my whole life until I got injured.

11 Q. Mr. Molnar, when did you get injured?

12 A. I don't know, about four or five years ago now.

13 Q. And what happened?

14 A. I tried to ride the horse that couldn't be rode, and he
15 found out I was the cowboy that could be throwed. I spent five
16 days in trauma. I broke my shoulder blade, which they tell me
17 is the hardest bone in the body to break. Seven ribs went into
18 my lung. Tore my knee out. And what I didn't know at the time
19 was, it took about two years, I went out to practice with my
20 recurve for turkey season, and I always fired ten in the
21 morning and ten at night because they are hard to pull. And I
22 built my muscles up so I could hold it steady.

23 And the year before I was hitting low, and I didn't
24 know. Well, what I didn't know was I was compensating. And I
25 picked it up, and I pulled it back. It went back about six

BRAD MOLNAR - DIRECT EXAMINATION BY MS. LEDUC

1 inches and nearly fell out of it. I picked it up, braced
2 myself, gave it everything I had, and it dropped.

3 So I went to the surgeon that did my knee, the first
4 operation on my knee. And I said, "I think I've got a torn
5 something in here. Arthritis. I don't know what. There's no
6 pain. Can't feel anything. But I can't pull a bow back. I
7 think I pulled a tendon or ligament or something." And he did
8 an MRI, and he did different things, and he came back and said,
9 "The good news is you didn't tear any tendons. The bad news is
10 it's probably from your wreck on the horse, blunt force trauma.
11 You've killed all the nerves in the muscles. The big white
12 dots you see are fat deposits where muscles would be. That's
13 why you can't hold it up."

14 So my son who has been an archer since forever went
15 to a pawnshop. He's not a big spender. And for Father's Day
16 he bought me a compound, a little 150 pounder that you can
17 crank down to 25. We cranked it down to 25, and I couldn't
18 hold it out. You know, I can curl weight. I can throw a
19 saddle on a horse, but I can't bear weight because of this.

20 And it just kept dropping down. So I tried to shoot
21 it by snapping it, and I just couldn't do it. So I got the
22 permit to modify, and they told me -- and looking at the same
23 thing you were looking at, the only thing that works for my
24 problem is a Draw-Loc. If you take a six-pound bow you can't
25 hold up and your solution is to make a seven-and-a-half-pound

BRAD MOLNAR - DIRECT EXAMINATION BY MS. LEDUC

1 bow because of a Draw-Loc, you don't have a solution.

2 So, in 2018, the end of 2018, I was a former
3 legislator. I had been a legislator for eight years. And I
4 was out, and I called some friend of mine, and I said, "Other
5 states have allowed a crossbow to be used by disabled people.
6 Almost all states allow it, and Montana doesn't. I need
7 somebody that can carry a bill that will do that." And they
8 said, "We've gotten a lot of requests on that. Senator Kary
9 out of Billings is carrying the bill. Talk to him."

10 We got together. He said, "This is what I want to
11 do." I said, "This is what I want to do." We built a bill out
12 of it. I became his technical advisor. I researched the other
13 states. I learned about crossbows and drops and drop
14 compensators and speeds and kinetic energy. And if anybody had
15 a question, I was going to be the guy to handle that and to
16 educate him. And got the bill out of the senate Fish and Game
17 Committee. It died on the senate floor.

18 THE COURT: Mr. Molnar, let's hold up for a moment.
19 Can we proceed by question and answer? The question was when
20 were you injured.

21 THE WITNESS: Okay.

22 THE COURT: And ten minutes later, it's
23 nonresponsive.

24 THE WITNESS: I apologize for that.

25 BY MS. LEDUC:

BRAD MOLNAR - DIRECT EXAMINATION BY MS. LEDUC

1 Q. That was going to be the easiest direct I've ever had. I
2 asked about three questions.

3 But, Mr. Molnar, since we've deviated a bit, I want
4 to stay on topic.

5 Permission to approach the witness, Your Honor?

6 THE COURT: You may.

7 (Handing documents.)

8 BY MS. LEDUC:

9 Q. Mr. Molnar, I'm handing you what's been filed in this
10 matter your declaration --

11 A. Uh-huh.

12 Q. -- filed on August 24th. It's Document Number 8. Do you
13 see that at the top? Do you recognize this document?

14 A. Yes, I do.

15 Q. Why don't you go ahead and turn to Exhibit 1 of this
16 document.

17 A. Okay.

18 Q. Take a moment to look at that.

19 A. Okay. Exhibit 1 is --

20 Q. Let me ask you a question first.

21 A. Yeah. Do you have a page number?

22 Q. Do you recognize -- it would be page 10. It's right at
23 the end after page 9, which is the last page of your
24 declaration.

25 A. I have it.

BRAD MOLNAR - DIRECT EXAMINATION BY MS. LEDUC

1 Q. Okay. Take a moment to look at that, please.

2 A. Uh-huh.

3 Q. Do you recognize this document?

4 A. Yes, I do.

5 Q. Please identify it.

6 A. This was the bill that I introduced into the senate Fish
7 and Game Committee to allow the permitation of crossbow hunting
8 in the state of Montana with people with specific disabilities.

9 MS. LEDUC: I'd like to move to admit Mr. Molnar's
10 declaration, Exhibit 1.

11 THE COURT: Any objection?

12 MS. DOCKTER: None. Thank you.

13 THE COURT: It is admitted.

14 (Molnar Exhibit 1 admitted into evidence.)

15 BY MS. LEDUC:

16 Q. So what happened with this bill after you submitted it?

17 A. It came out of the senate committee. It came off -- it
18 passed the senate. Went -- I had it changed from the Fish and
19 Game Committee to Human Services, Health and Human Services.
20 Leadership agreed that it was not really a hunting bill. It
21 was a disability bill, and that would be the proper. So we had
22 a hearing there. It was a long hearing, probably an hour and a
23 half. And I don't know. About two weeks later they voted on
24 it, and it got tabled. Shortly thereafter, they tried again.
25 It got tabled.

BRAD MOLNAR - DIRECT EXAMINATION BY MS. LEDUC

1 And so I, along with others, veterans organizations,
2 hunting organizations, talked to people on the floor explaining
3 the bill to them. What it did; what it did not do. And we had
4 a legislature make what's called a blast motion. So you take
5 it off the table. It's an adverse motion. And allow the floor
6 to vote whether or not to hear it. And on, like, the Senate
7 you need a 60 percent vote to do. And the senate is just the
8 majority vote. So that would be 26. We got 54 votes. So we
9 had a majority vote to bring it to the floor for a vote. We
10 had more than enough votes to pass it after that because people
11 just don't vote for blasts. We had 54. We didn't have 60, and
12 like a day or two before the end of the session, and that was
13 the end of Senate Bill 111.

14 Q. Got it.

15 Mr. Molnar, what kind of work did you put into
16 preparing this bill?

17 A. About three years' worth.

18 Q. Tell me what you did.

19 A. I did what I did for Kary's bill. I read all of the
20 reports. I talked to the wildlife managers in Wyoming, Idaho,
21 Wisconsin, Ohio, read the reports, asked them, studied the -- a
22 lot of the objections had to do with trajectory and arrow speed
23 and all of that. And all of that is really not part of the
24 ADA. I was ready to handle it. So I kind of became an expert
25 in the lowest form of the word on crossbow, crossbow effects,

BRAD MOLNAR - DIRECT EXAMINATION BY MS. LEDUC

1 and the ADA, and how it was being applied in other states and
2 what other states allowed and what their legislation or
3 administrative actions looked like when they allowed it.

4 Q. Just generally, overall, with those things that you're
5 discussing that you learned, what did you learn?

6 A. What I learned was -- and the most recent would be 2020.
7 That would be Wisconsin that was referred to by Dr. Zink. They
8 asked many states, including Montana, to take part in the
9 study. And Montana, like about half of the states didn't. So
10 about 22 states answered, and none found any damage to the
11 wildfire, even though they were hot potatoes when they went to
12 their legislatures, there was no ongoing animosity between any
13 particular group, vertical versus cross versus traditional bow.
14 The buck harvest stayed the same.

15 The only real difference was -- and it's pretty easy
16 to explain away -- is that the crossbow appeared to be about
17 3 percent more accurate. You had 3 percent less wound loss.
18 And every report said that it's really up to how often the
19 archer practices because some are better than others, but that
20 the average kill shot was about 35 yards or less, whether it be
21 a compound or a crossbow. And if it's traditional, it would be
22 about 20 yards or less.

23 So the demographics, who used them, most -- like in
24 Wisconsin, you can buy an archery tag or crossbow tag and a
25 rifle tag. And in a lot of cases the seasons are actually

BRAD MOLNAR - DIRECT EXAMINATION BY MS. LEDUC

1 mixed up. You still get one tag, even though you've got three
2 permits for three different weapons. So it's still one deer,
3 and there's just no social or biological reason.

4 No state is looking at reducing crossbow use. Most
5 are looking at increasing it. Currently, what I found was --
6 and I was able to verify this -- 47 states allow disabled use
7 of a crossbow during archery season. Two of them are so
8 restrictive, I should really say 45. Montana is one of three
9 states -- Montana, Nevada, and Oregon -- that will not allow
10 for any reason a disabled person to use a crossbow during
11 archery season.

12 Q. This bill that you introduced, what legislative session
13 did this all go down?

14 A. Last year, 2021.

15 Q. Going back to when you first discovered that you were
16 unable to use anything other than a crossbow, did you sit down
17 with your physician and review the other state-approved
18 equipment to see if any other options other than a crossbow
19 would work for you?

20 A. I contacted the state, and they sent me the same brochure.
21 So I was going in for a checkup on my second knee operation,
22 and I just called Montana Ortho and said, "In about two weeks
23 the surgeon is going to look at my knee again. I'd like him to
24 review my shoulder, x-rays, and everything. Because if he's
25 comfortable that I can't hold a bow up, I would like to have

1 him sign the PTMAE permit."

2 And he came in and he said, "I looked at it. Let me
3 guess. You want to hunt with a crossbow."

4 And I said, "Yes."

5 He said, "Not a problem." He signed it.

6 But when you look at that, my problem is I can't hold
7 it up. You know, the fact that there's track wheel chairs,
8 they can put a brace on the bottom and hold it that way, which
9 means, I guess, if a deer is walking uphill, you crouch down;
10 if he's going downhill, you'd stand on a stump. The only
11 option to hunt normally would be the Draw-Loc, which the permit
12 was -- it says right on the permit. It says you can use
13 modified archery tackle that supports and draws and holds --

14 THE COURT: Hold on.

15 THE WITNESS: I apologize. The permit -- and this
16 was entered into a little bit ago. It says that the
17 individual, me, is authorized to use modified archery equipment
18 that supports the bow and draws and holds and releases the
19 string to accommodate the individual disability. There's no
20 preclusion to a crossbow on the permit itself. What it
21 describes is a crossbow. What it describes is a Draw-Loc. A
22 Draw-Loc and a crossbow are the same permit in most states
23 because it's the same implement.

24 I can explain that if you want me to, but to hold it
25 up, I can't do this with a Draw-Loc. I can't. I have tried.

BRAD MOLNAR - DIRECT EXAMINATION BY MS. LEDUC

1 However, with a crossbow I can put my elbow here, shorten the
2 stock, and if they're going this way, I can use this eye. And
3 if they're going that way, I can use this eye. And I can hunt.

4 I just bought a used crossbow from my brother. It
5 has the crank. To put my foot in the stirup of my crossbow or
6 a Draw-Loc when there's snow out, the possibility of that
7 slipping off my toe with 140 pounds of pressure on it and
8 hurting myself are serious. But I can crank it. This is
9 progressive. Some day all I can do is crank it. You can't
10 crank a Draw-Loc. You can only crank a crossbow.

11 Q. Why do you want to hunt during the regular archery season?
12 Why don't you just want to go use the crossbow during the
13 regular season like they allow?

14 A. I do. I just can't do it during archery season.

15 Q. And why do you want to do it during archery season,
16 Mr. Molnar?

17 A. Well, my son is an archer. His son is an archer. His
18 daughter is an archer. We go up to the Breaks. He gets
19 permits. We have always done this. You know, we go hunting
20 bow and arrow style. But now I can't. The state of Montana
21 says I can't hunt with my son.

22 Q. Mr. Molnar, go ahead. Sorry.

23 A. I'm 71.

24 Q. You've got Kleenex right up there, Mr. Molnar. Take a
25 moment.

BRAD MOLNAR - DIRECT EXAMINATION BY MS. LEDUC

1 A. That's the other thing. I cry a lot easier since I hit my
2 head that hard.

3 Q. Mr. Molnar --

4 A. I want to be able to teach my...

5 Q. You say you want to be able to teach your grandkids how to
6 hunt?

7 A. (Nodding.)

8 Q. Okay.

9 A. I don't want to be the guy that cooks breakfast and says,
10 "Have a good day."

11 Q. Understood, Mr. Molnar.

12 You submitted a reasonable accommodation request to
13 Fish, Wildlife, and Parks this past year; correct?

14 A. Yes.

15 Q. Okay. Go ahead and turn to -- it's labeled on the bottom
16 in your declaration as Exhibit 2.

17 A. Uh-huh.

18 Q. Take a moment to review that.

19 A. (Complying.)

20 Q. Do you recognize that document?

21 A. I do.

22 Q. Would you please identify it?

23 A. This is a letter I wrote requesting use of a bow style
24 that addresses my handicap, which of course is crossbow. And I
25 asked the commissioners to allow me to issue a permit to allow

BRAD MOLNAR - DIRECT EXAMINATION BY MS. LEDUC

1 me to use a crossbow. I really don't think it requires a
2 special permit. If you have a PTMAE, you're in. The wording
3 is clear?

4 Q. And you have a P --

5 A. Yes.

6 MS. LEDUC: Okay. I'd like to move to admit the
7 Molnar declaration, Exhibit 2.

8 THE COURT: Any objection?

9 MS. DOCKTER: None.

10 THE COURT: It's admitted.

11 (Molnar Exhibit 2 admitted into evidence.)

12 BY MS. LEDUC:

13 Q. What happened after you sent this letter, Mr. Molnar?

14 A. Several people, including some that are here, joined me on
15 Zoom, and they assured me this was not a hostile meeting. They
16 just want to know what my disability was if I felt like talking
17 about it and just what I wanted to do and what I thought. It
18 was a fairly cordial conversation, and they told me there's no
19 way I could testify before the commission on this until I went
20 through this vetting process. I told them it was very
21 important that the commission allow me to hunt and all others
22 similarly situated because they had give me a -- I'd drawn a
23 special elk archery tag for the Breaks to go up.

24 Q. So you expressed to them that it was a time-sensitive
25 issue?

BRAD MOLNAR - DIRECT EXAMINATION BY MS. LEDUC

1 A. Not only time sensitive. It was personal property. To
2 issue me that and say you can't use it is a bit different. And
3 they said they understood and that they would be in touch as to
4 whether or not we would be -- we would be on the docket for the
5 meeting on the 20th.

6 Q. 20th of what?

7 A. August.

8 Q. Okay. What happened after that?

9 A. A lot of time passed. I kept calling and asking if we're
10 going to be on the docket. Eventually, I got a letter that
11 told me we would not be; that they didn't have time. And I
12 asked to be put in touch with the chairman, lady chairman, to
13 tell her specifically that the time is of the essence and that
14 the two rationales they gave for not doing it -- which was they
15 wanted to look at the medical oversight that went with this and
16 the definition of a disability. And I let her know those are
17 in statute, and the commission can't change those. They can
18 write rules. They can't change law. And I thought that half
19 an hour for opponents and a half an hour for proponents, just
20 like they do for everything else, would be more than
21 sufficient. And I never heard back. So I called, and I wrote
22 them, and I got an email back. I said, "What happened to my
23 request?" And it came back. The answer was "It has been
24 properly filed." So I assume they never received it.

25 Q. Okay. Go ahead and turn to Exhibit 3 of your declaration.

BRAD MOLNAR - DIRECT EXAMINATION BY MS. LEDUC

1 It's the next page. Take a moment to review that.

2 A. Yes.

3 Q. Do you recognize this document?

4 A. Yes, I do.

5 Q. Could you please identify it?

6 A. This is the letter back from the director of Fish,
7 Wildlife, and Parks, Hank Worsech.

8 Q. What's the date on this?

9 A. Let's me see. I don't know.

10 Q. How about you look at the top right-hand corner. That
11 might help.

12 A. Okay. 8-24-21. That was when it was filed.

13 Q. Going down to the black, you see where it says August 9th,
14 2021?

15 A. Yes, I'm sorry.

16 Q. Do you recall --

17 A. August 9.

18 Q. Do you recall receiving this right around then?

19 A. Right around then.

20 Q. Just a few weeks ago?

21 A. A day or two after this was mailed I got it.

22 Q. And this is essentially denying your request?

23 A. Well, more than that. You know, it's not a form letter.

24 It's personal. "I realized that means you will not be able to
25 use your crossbow during the archery season for 2021." And it

BRAD MOLNAR - DIRECT EXAMINATION BY MS. LEDUC

1 goes on to say that, therefore, my permit won't be any good.

2 So, basically, they canceled my permit.

3 MS. LEDUC: I'd like to admit the Molnar declaration,
4 Exhibit 3, please.

5 THE COURT: Any objection?

6 MS. HAWKALUK: None, Your Honor.

7 THE COURT: It is admitted.

8 (Molnar Exhibit 3 admitted into evidence.)

9 BY MS. LEDUC:

10 Q. Go ahead, Mr. Molnar, and turn to the next page,
11 Exhibit 4.

12 A. Yes.

13 Q. Can you tell me what this is?

14 A. Yeah, this is -- yes, this is from the Disability Rights
15 Division of the Department of Justice.

16 Q. What's the date on this?

17 A. July 28th of 2021.

18 Q. Okay. And when did you receive this?

19 A. Probably a few days after that.

20 Q. Why did you receive it?

21 A. Oh, I had written to them -- "them" being the
22 US Department of Justice -- and brought forward my complaint
23 that -- I had to talk to the person stationed in Billings on
24 this, and he said to send a letter to these guys, and he sent
25 me all of the information on who and to just lay out my story

BRAD MOLNAR - DIRECT EXAMINATION BY MS. LEDUC

1 and to start the ball rolling. To start it rolling, that was
2 the way you started it.

3 MS. LEDUC: Okay. I'd like to move to admit
4 Exhibit 4.

5 THE COURT: Any objection?

6 MS. HAWKALUK: None.

7 THE COURT: It is admitted.

8 (Molnar Exhibit 4 admitted into evidence.)

9 BY MS. LEDUC:

10 Q. Mr. Molnar, did you go on a field trip yesterday to Fish,
11 Wildlife & Parks?

12 A. Yesterday.

13 Q. Yes, yesterday.

14 A. No.

15 Q. To the regional officer in Billings?

16 A. I did. I did. I wouldn't call it a field trip. Yes, I
17 did.

18 Q. Tell me about what happened when you went to go to the
19 office.

20 A. I took a friend of mine, Tyler Hintler, who wanted to get
21 a PTMAE permit, and he showed them the documentation from the
22 VA that his back injury was such that he could not draw a bow.
23 And so it took us about a half an hour. They gave him his
24 PTMAE, and I presented my PTMAE, a letter from the -- or the
25 document from the department, the commission stating that they

BRAD MOLNAR - DIRECT EXAMINATION BY MS. LEDUC

1 had no problem with our restraining order. And I said, "I'd
2 like to have some sort of documentation, note or something,
3 that says my PTMAE is good enough, and I can use a crossbow, or
4 something that says I can use a crossbow." And the lady
5 handling it went and got a upper -- a higher echelon person,
6 who went and made a phone call to Helena. Came back and said,
7 "I'm to inform you that we're not going to do that. That will
8 happen on October 28th. They will address this issue."

9 And I said, "The season will be over with."

10 And she said, "I'm sorry, sir. I cannot help you.
11 Please step aside. There's a man behind you."

12 And that was the end of that.

13 Q. Okay. Member of the Montana Bowhunters Association?

14 A. No, ma'am, I am not.

15 Q. Why not?

16 A. When I was in the legislation the first time, I was on
17 Fish & Game eight years, and they came before us, and I agreed
18 with a lot of things they had to say. But since then, I've had
19 no real reason to join them. I didn't have any real problems
20 that they wanted, you know, to solve. And I had written to
21 them a couple of times about some things, and they wrote back
22 and we just became distant. I don't belong -- there's a lot of
23 things I don't belong to. I'm just not a joiner.

24 Q. Understood.

25 I have no further questions.

BRAD MOLNAR - CROSS-EXAMINATION BY MS. DOCKTER

1 THE COURT: Thank you.

2 Ms. Dockter?

3 MS. DOCKTER: Thank you.

4 CROSS-EXAMINATION

5 BY MS. DOCKTER:

6 Q. Good afternoon, Senator. How are you?

7 A. I'm fine. And you?

8 Q. I'm good. Thank you.

9 So did I understand that you purchased an
10 archery-only license this season?

11 A. I did.

12 Q. And so isn't it true that you could go use your crossbow
13 right now in the shoulder season and hunt right now with the
14 crossbow?

15 A. It's true. There's a small problem. At 108 degrees, I
16 can't imagine going out with a crossbow and finding an elk
17 three hours later that I tracked down and thinking it's not
18 going to be spoiled. I wouldn't go out with a rifle this time
19 of year.

20 Q. Okay. So it's not your preference to go this early?

21 A. I do not see it as any probability, no.

22 Q. And I heard you had -- I heard you mention the permit to
23 modify archery equipment as well. And you attempted to modify
24 your arch tackle as well. Is that what I heard? Is that
25 correct?

BRAD MOLNAR - CROSS-EXAMINATION BY MS. DOCKTER

1 A. No. You did not hear that correctly. My son bought me a
2 compound to see if he could make it work for me, and I couldn't
3 hold up the weight of the compound, and I couldn't draw it even
4 at 25 pounds. So it certainly wasn't a hunting bow. And a
5 Draw-Loc weighs about a pound and a half. So to take a
6 six-pound bow you can't hold up and spend money to make it a
7 seven-and-a-half pound bow which you certainly won't be able to
8 hold up, why would I do that?

9 Q. Understood.

10 So you haven't tried to modify your archery equipment
11 to help you hold the bow up?

12 A. In order to hunt, you have to be able to move. I can't
13 carry something to hold my bow up.

14 Q. It's too heavy? Is that what you're --

15 A. No, I'm saying, you know, I can't get a tripod or
16 something. Nothing like that exists. I can't carry an
17 additional thing. That additional thing doesn't exist, to hold
18 the -- if have the sprockets down there, and you can't put that
19 on something and think you are going to draw it back and keep
20 the weight on that and release it and have it work. It's not
21 functional for my disability.

22 Q. So have you attempted to hunt with a companion in order to
23 help you hold the bow?

24 A. I can't imagine -- okay. The simple answer is no.

25 Q. No?

BRAD MOLNAR - CROSS-EXAMINATION BY MS. DOCKTER

1 A. How do you ask your son to help you hold your bow when an
2 elk is at 30 yards? You're supposed to be trying to hide, not
3 have two people there.

4 Q. Understood.

5 A. To tell him to give up a day of hunting to babysit me?

6 Q. The last question I have is similar to what -- you
7 mentioned a complaint to the Department of Justice. Did you
8 hear back from the Department of Justice on that?

9 A. I did. They referred it to -- I don't understand this,
10 but I'm sure there's a lot of things about this that I don't
11 understand. They referred it to the Department of Interior.

12 Q. And have the Department of Interior issued a decision on
13 it?

14 A. I have not filed the information with them. It took like
15 six months. I am pretty sure I have time. And I don't know
16 how that would work anyway. The Department of Interior is BLM.
17 So does that mean that I can hunt on BLM, but I can't hunt
18 Forest Service? I can't hunt private land? I can't hunt state
19 land? You know, to me it's pretty murky. I'm willing to do it
20 if this fails. But I have not gone through the process of
21 trying to write a legal document on my own. I'm not wealthy
22 enough to hire these guys to write it for me, so...

23 Q. I take it from your answer you're not aware of a decision
24 from the Department of Interior in 2004, on the issues much
25 like your claims in this lawsuit?

BRAD MOLNAR - CROSS-EXAMINATION BY MS. DOCKTER

1 A. I am.

2 Q. You are? Can you tell us what that decision is?

3 A. Oh, a lady from the department -- I forget the exact
4 division, but it was within the Department of Interior -- wrote
5 back to a guy and said, "Because you can hunt during rifle
6 season with your bow, your claim is denied. If you don't like
7 it, I am not a judge. Take it to a judge."

8 I asked the department what was the question?
9 Where's the first part of the document? And the department
10 employee said, "We don't have that. We don't know."

11 Because the question isn't I want to hunt with a
12 crossbow. Nobody wants to hunt with a crossbow. They're
13 heavy. They're clunky. They're noisy. You can't get a second
14 shot. You have to use it. It's not I want to hunt with a
15 crossbow. It's I need to hunt with a crossbow during archery
16 season. I have a disability. So whatever their answer was
17 eluding to, it didn't address my question.

18 Q. I just want to make sure we're talking about the same
19 decision. Was this a decision in 2004?

20 A. It was 2004.

21 Q. And was it to Mr. Cuffaro?

22 A. I think so.

23 MS. DOCKTER: Okay. Your Honor, may I approach the
24 witness?

25 THE COURT: You may.

BRAD MOLNAR - CROSS-EXAMINATION BY MS. DOCKTER

1 BY MS. DOCKTER:

2 Q. Handing you what has not yet been issued as an exhibit,
3 can you tell me if that's the decision you are talking about?

4 A. Glancing at it, I would say yes.

5 Q. Okay. And can you read to the Court the first sentence of
6 that decision?

7 MS. LEDUC: Can we see a copy so we can follow along?

8 THE COURT: Before you read it, Mr. Molnar, can we
9 show a copy of it to counsel?

10 (Complying.)

11 THE WITNESS: Are we ready? Am I back on?

12 MS. LEDUC: Just a moment.

13 THE COURT: Mr. Molnar, is that the letter you were
14 referring to?

15 THE WITNESS: Yes, it is.

16 THE COURT: All right. And does it appear to be a
17 true and accurate copy of that letter?

18 THE WITNESS: It does.

19 THE COURT: Any objection to its admission?

20 MS. LEDUC: No.

21 THE COURT: It is admitted as Defendant's Exhibit 1.

22 (Defendant's Exhibit 1 admitted into evidence.)

23 THE COURT: Go ahead.

24 BY MS. DOCKTER:

25 Q. Senator Molnar, would you please read the first sentence

BRAD MOLNAR - CROSS-EXAMINATION BY MS. DOCKTER

1 of that in order to -- you mentioned you didn't know what the
2 context of the question was. Would you read the first sentence
3 and see if that answers it for you?

4 A. "You filed a complaint dated October 24th, wherein you
5 allege that the Montana Fish, Wildlife, and Parks Department
6 discriminated against you on the basis of disability when it
7 denied your request to use a crossbow during archery season."

8 Q. Does that sound similar to the situation you have here?

9 A. It does.

10 Q. It does.

11 Can you tell me -- I think it's on the first
12 paragraph on the second page. It talks about the reasons why
13 the decision was made, that the department did not discriminate
14 against the complainant here. Can you tell me what that says?

15 A. You want me to read the whole paragraph?

16 Q. Sure.

17 A. It says, "Hunting with a crossbow in the state is not
18 prohibited entirely; the weapon's use is merely restricted.
19 During the general hunting season and in most weapons
20 restricted areas any person, with an appropriate permit, may
21 hunt with a crossbow. Additionally, in Montana, qualified
22 disabled persons are eligible to secure a special permit that
23 allows them to use modified archery tackle. Since it is
24 illegal to use a crossbow in the state's archery season, you
25 are not authorized to use a crossbow as requested in your

BRAD MOLNAR - REDIRECT EXAMINATION BY MS. LEDUC

1 complaint."

2 Q. Thank you, Mr. Molnar.

3 I have no further questions for the witness.

4 THE COURT: All right.

5 MS. DOCKTER: Thank you.

6 THE COURT: Any redirect?

7 MS. LEDUC: Just a couple questions, Your Honor.

8 THE COURT: Sure.

9 REDIRECT EXAMINATION

10 BY MS. LEDUC:

11 Q. Mr. Molnar, since we're reading some language from this
12 document into the record, I'd like to draw your attention to
13 the second page, third paragraph. Could you please read that
14 first sentence?

15 A. Second paragraph?

16 Q. Third paragraph.

17 A. Third paragraph. "The department recognizes that states
18 have taken different positions on providing the crossbow as an
19 accommodation for bowhunters with disabilities."

20 Q. Go ahead and keep going.

21 A. "However, the department cannot mandate that a recipient
22 or state agency provide a crossbow as an accommodation where
23 the crossbow is prohibited. Accordingly, since there are no
24 compliance issues that require the department's review, we
25 consider your complaint to be closed. The department will

BRAD MOLNAR - EXAMINATION BY THE COURT

1 take no further action to process your request for an
2 accommodation to use a crossbow in Montana's hunting program."

3 Q. And then just that last -- the first sentence of the last
4 paragraph.

5 A. "If you disagree with the department's decision, you may
6 file a civil action in the appropriate US District Court having
7 jurisdiction over this matter."

8 Q. Isn't that what you just did in your particular situation?

9 A. I believe so.

10 MS. LEDUC: No more questions.

11 THE COURT: Mr. Molnar, may I have that letter,
12 please. It is now an exhibit.

13 EXAMINATION

14 BY THE COURT:

15 Q. A couple of questions, Mr. Molnar. When was the last year
16 that you participated during the archery season?

17 A. It would be about three years ago.

18 Q. About three years ago. So was it 2018? 2019?

19 A. 2018.

20 Q. All right. And do you currently possess all licenses and
21 permits required to bowhunt deer, elk, or antelope in Montana
22 in 2021?

23 A. I do.

24 Q. Okay. That's the only questions I have for you.

25 Any follow up?

TIM GARDIPEE - DIRECT EXAMINATION BY MS. LEDUC

1 MS. LEDUC: No, Your Honor.

2 MS. DOCKTER: No, Your Honor.

3 THE COURT: May this witness be excused?

4 MS. LEDUC: Yes, Your Honor.

5 THE COURT: Mr. Molnar, you are excused. Thank you.

6 Ms. LeDuc, you may call your next witness.

7 MS. LEDUC: Our next witness is Colonel Tim Andrew

8 Gardipee.

9 TIM GARDIPEE,

10 called for examination by counsel for the plaintiffs, after
11 having been first duly sworn to testify the truth, the whole
12 truth, and nothing but the truth, testified as follows:

13 THE COURT: Colonel, we have the ability to lift you
14 up into the witness stand. But I think what we will do,
15 because it's kind of cumbersome, is if you would just stay
16 right there next to the court reporter so that she can hear,
17 and we'll conduct the examination where you currently are
18 located.

19 THE WITNESS: Okay.

20 THE CLERK: Do you want a microphone for him?

21 THE COURT: We'll see if we can hear him.

22 Go ahead, Ms. LeDuc.

23 DIRECT EXAMINATION

24 BY MS. LEDUC:

25 Q. Good afternoon, Colonel.

TIM GARDIPEE - DIRECT EXAMINATION BY MS. LEDUC

1 A. Good afternoon.

2 Q. Could you please state and spell your full name for the
3 record?

4 A. Yes. First name is Tim, T-i-m; middle name Andrew,
5 A-n-d-r-e-w; and the last name is Gardipee, G-a-r-d-i-p-e-e.

6 Q. Thank you.

7 Where do you reside?

8 A. I currently reside in Missoula, Montana.

9 Q. Okay. And how old are you?

10 A. I am currently 64 years young.

11 Q. You have the word "colonel" attached to your name. Tell
12 me a little bit about your military service and your
13 background, Colonel?

14 A. Yes, I have Colonel attached because I am a retired
15 Lieutenant Colonel with the US Army, medically retired. I was
16 medically retired in 2013. I served from 1981, boot camp,
17 until 2013. Active many years, 16 years combined and also
18 16 years reserve duty. So in between, of course, the last few
19 decades, if you're following the news, there have been lots of
20 deployments of soldiers all over the world.

21 And during my military service, I served -- I started
22 out as a combat medic in the Army ROTC, University of Montana.
23 Commissioned an infantry officer. And then I went on to become
24 a logistics officer when I was a captain. And my last job
25 before I was paralyzed, I was an instructor for command and

TIM GARDIPEE - DIRECT EXAMINATION BY MS. LEDUC

1 general staff out at the college, Fort Leavenworth, Kansas
2 University, the Army Reserve System.

3 Q. Thank you for your service.

4 A. You're welcome. You deserve it.

5 Q. You mentioned that you were paralyzed. When did that
6 happen and how?

7 A. Yes, ma'am. I was paralyzed in December of 2012. I
8 was -- it came upon slowly over several days. We didn't
9 realize it. We sort of guessed why this paralysis came about.
10 The medical diagnosis at the time was transverse myelitis. In
11 other words, something got into my spinal cord and absolutely
12 made it -- inflamed it, infected it, crossed up your wiring and
13 threw your whole body off. You of course couldn't walk. And
14 it happened from what's called a C4, neck vertebrae down.

15 And it became quite apparent when I talked with the
16 neurosurgeon and several neurologists that due to a hard
17 parachute landing, crash landing in 2005, I was paralyzed --
18 excuse me -- not paralyzed, but injured in the neck. And
19 during my medical exam of 2012, I was given a flu shot,
20 influenza shot. And I sustained an influenza flu shot injury,
21 right at the neck. It damaged and paralyzed me.

22 Q. Let's back up a little bit. Your hunting background, why
23 don't you tell us a little bit about that.

24 A. Yes, ma'am. Of course, I grew up in Montana, in North
25 Central Montana. Some people call that the Hi-Line. There's a

TIM GARDIPEE - DIRECT EXAMINATION BY MS. LEDUC

1 range of mountains called the Bear Claw Mountains and Missouri
2 Breaks. And my uncle and father would often take me down there
3 hunting, even before I was -- could legally hunt. I would go
4 along and accompany them. And then I went to hunter safety
5 when I was 12 years old and started hunting deer and small game
6 or anything that came along from then on.

7 I hunted for many years. Sometimes it became -- I
8 would have to take a break when I was in college or I was off
9 deployed or I couldn't do it. I deployed -- excuse me -- I was
10 stationed in Fort Carson, Colorado. So that's another state
11 that I went hunting in for three years, three hunting seasons.
12 I had to take a hunters safety course there, and I hunted in
13 Colorado for three years.

14 After I was paralyzed, I had to recover a lot to be
15 able to shoot a rifle, and I was able to get a permit to hunt
16 from a vehicle to do disability hunting. So I went hunting
17 with a rifle since I have been paralyzed since -- I think the
18 first year was 2014, I went hunting.

19 Q. Okay. How about your bowhunting background?

20 A. My bowhunting background, I purchased a bow way back in
21 the '80s, practiced with that somewhat. In the '90s, I
22 practiced with it more. And then I purchased a -- went through
23 the hunters bowhunting course that you had to take for Montana.
24 Got my permit in 1998, early 1998, and then I went hunting in
25 the 1998 season for several weeks. And then in 1998, of

TIM GARDIPEE - DIRECT EXAMINATION BY MS. LEDUC

1 course, I got orders to go to Bosnia, and so I had to drop my
2 hunting and then to go to Bosnia in September of 1998.

3 Q. Did you bowhunt after that?

4 A. I haven't hunted with a bow since then.

5 Q. Why do you want to do so now?

6 A. I want to do so now because that -- archery season is
7 September and early October. That is the best time of year to
8 be out in the woods. Quaking aspen returning, the fall crisp
9 air, very clear, it's beautiful out there. The nights are
10 cooler; the mornings are cooler. If you do harvest game, you
11 can save it. Also, it's when the elk bugle. When the elk
12 bugle, they are in rut, and there can be -- some bowhunters
13 bugle them in and harvest them that way.

14 Q. Now, explain how your disability affects your ability to
15 bowhunt.

16 A. Well --

17 Q. With regular equipment.

18 A. Yes. Like I said, I've got nerve damage from the neck
19 down. I also have taken many years to rebuild myself to be
20 strong enough to hunt with a rifle and do other things. I do
21 regular physical therapy. But I also had injured my shoulder,
22 tendon tear -- excuse me -- biceps tendon tear, probably when I
23 was hospitalized in 2015, because they made me use a manual
24 chair, and a manual chair will cause a lot of damages to the
25 shoulders. A lot of this is common if it's overused. So I had

TIM GARDIPEE - DIRECT EXAMINATION BY MS. LEDUC

1 a biceps tear. It didn't get fixed until 2019. My shoulder
2 was in pain a lot for many years until just recently.

3 And so I looked at bowhunting, and I want to go out
4 and archery hunt during the archery season. And I fully
5 support the use of crossbows for those that are disabled, and I
6 believe that's the best thing to -- best alternative for
7 someone disabled. I think it's just like Montana's basically
8 stubbornness to not permit archery hunters to use a crossbow
9 during archery season, I think that's just incompatible to
10 human dignity.

11 Q. Has your doctor -- you evaluated the other state-approved
12 equipment with your doctor to make a determination as to
13 whether any of these would be possible for you?

14 A. I have talked with Senator Molnar and some of these others
15 about this Draw-Loc, and it is so unsafe. You are walking
16 around basically with a loaded weapon. I find it just totally
17 irresponsible. And no wonder some of these manufacturers went
18 out of business because they don't want to be held liable.
19 You're holding this locked and loaded weapon around with a very
20 sharp object around rough terrain. You can fall. I didn't
21 even mention it to my doctor, honestly.

22 Q. With your condition, just common sense, would you be able
23 to actually use that particular device?

24 A. No, I wouldn't.

25 Q. Okay. You submitted a reasonable accommodation request to

TIM GARDIPEE - DIRECT EXAMINATION BY MS. LEDUC

1 Fish, Wildlife, and Parks for the use of a crossbow during the
2 regular archery season; correct?

3 A. We -- all of us submitted basically a letter to the -- I
4 think it was read in the different exhibits that we had all our
5 hope set on this August 20th meeting to clarify that we could
6 use -- for those that are ADA qualified and disabled to use a
7 crossbow during hunting season, and that's what I remember. I
8 was turned down.

9 Q. Why did you have your hope set for August 20th?

10 A. That's when they would be able to notify us that -- that's
11 when the August -- that we would be able to hunt during the
12 2021 season.

13 MS. LEDUC: Permission to approach.

14 BY MS. LEDUC:

15 Q. Mr. Gardipee -- Colonel Gardipee, excuse me -- I'm handing
16 you what is your declaration filed on August 24th, marked as
17 Document 6 up at the top. Do you recognize this?

18 A. Yes, ma'am.

19 Q. Okay. Why don't you go ahead and turn to -- it's marked
20 as Exhibit 1, page 1. It should be right after page 9, the
21 last page of your declaration.

22 A. Okay.

23 Q. Take a moment to review that once you've gotten there.

24 A. Are you saying page 9?

25 Q. It would be after page 9. At the bottom it should say,

TIM GARDIPEE - DIRECT EXAMINATION BY MS. LEDUC

1 "Gardipee declaration," Exhibit 1, page 1.

2 A. Yes.

3 Q. Do you recognize this document?

4 A. Yes.

5 Q. What is it?

6 A. It's a request to use a crossbow during archery season as
7 a reasonable accommodation under the American with Disabilities
8 Act.

9 Q. And this was sent to Fish, Wildlife, and Parks?

10 A. Yes, it was sent to the FWP diversity coordinator.

11 MS. LEDUC: Okay. Move to admit the Gardipee
12 declaration, Exhibit 1, page 1 and 2 as well.

13 THE COURT: Any objection?

14 MS. DOCKTER: None.

15 THE COURT: It is admitted --

16 (Gardipee Exhibit 1 admitted into evidence.)

17 BY MS. LEDUC:

18 Q. Colonel, what happened after you sent this letter?

19 A. I got a letter that said, "We would consider it.

20 Unfortunately, we will not consider it for the -- won't

21 consider it until October 28th, 2021. And, unfortunately, you
22 will not be allowed to use a crossbow for the archery season of
23 2021."

24 Q. Colonel, if you are not granted the reasonable
25 accommodation that you've requested to use a crossbow this

TIM GARDIPEE - CROSS-EXAMINATION BY MS. DOCKTER

1 season, what does that mean for you?

2 A. That means that -- just another insult, insult to injury.

3 It's more -- I've had to live with this handicap, and people

4 just don't understand that you have to cross a whole another --

5 join a whole another group when you go in the handicap world.

6 Things are much slower. You have to think. You use your brain

7 a lot to do some of the smallest things. You have to do a lot

8 more planning. You have to do things, like, you know, sign

9 letters and ask for basic permissions that other people have

10 life, liberty, and pursuit of happiness to do. You have to do

11 extra things to do the simple things. That's what I'm saying.

12 I felt discriminated against.

13 MS. LEDUC: No further questions.

14 THE COURT: Ms. Dockter.

15 MS. DOCKTER: Thank you, Your Honor.

16 CROSS-EXAMINATION

17 BY MS. DOCKTER:

18 Q. Good afternoon, Mr. Gardipee.

19 A. Good afternoon, ma'am.

20 Q. So you might be able to guess what questions I'll ask you.

21 Do you have a permit to modify your archery equipment?

22 A. I honestly don't know what that is.

23 Q. So --

24 A. The permit the other archers were talking about, they said

25 that it was not -- excuse me. The equipment to modify my

TIM GARDIPEE - REDIRECT EXAMINATION BY MS. LEDUC

1 equipment was not worth it. It was dangerous, and I looked at
2 it, and it is dangerous if you walk around with it.

3 Nonsafety -- basically, it's a cocked weapon walking around.
4 Very unsafe.

5 Q. So you didn't attempt to get a permit to modify your
6 archery equipment?

7 A. No.

8 Q. No.

9 And so are you aware that there are several ways to
10 modify archery equipment?

11 A. Yes, I am sure there are several ways to modify archery
12 equipment.

13 Q. And so have you purchased your archery license for this
14 season?

15 A. No. I was waiting for the August 20th meeting. After the
16 August 20th meeting, if we got a favorable ruling, I would go
17 down and get the proper licenses. But I was obviously let
18 down.

19 MS. DOCKTER: No further questions.

20 THE COURT: Any redirect?

21 MS. LEDUC: Just a couple quick questions, Your
22 Honor.

23 REDIRECT EXAMINATION

24 BY MS. LEDUC:

25 Q. Colonel, going to the safety issues, did you do any

TIM GARDIPEE - REDIRECT EXAMINATION BY MS. LEDUC

1 military training regarding proper use and safety of weapons?

2 A. Yes. Many. Much. Lots of training. Lots of training
3 and actual -- as a matter of fact, one time I remember in
4 Bosnia, I had to be what's called a 15-6 Officer. Well, I had
5 to investigate a negligent discharge, negligent discharge of an
6 M9 pistol that luckily didn't kill anyone. I investigated this
7 and, of course, I learned a lot. We are trained how to utilize
8 the weapon, how to clear the weapon, how to always keep it
9 pointed in a safe direction, know what you are doing with that
10 weapon. So, yes, ma'am, I've had lots of training and lots of
11 study and research on the safety of weapons.

12 Q. And how does that translate into what we're talking about
13 here with respect to the bowhunting?

14 A. I think it's a -- I think it's sort of a -- thrown
15 everybody off base -- basically, taking disabled people and
16 throwing them -- throwing them some poor equipment, shoddy
17 equipment, to tell them to go have fun, and I think it's
18 totally wrong. It just doesn't make sense, and I think it's an
19 insult to have people use this Draw-Loc for archery.

20 Q. And in your opinion it's not a safe or reasonable
21 alternative for you?

22 A. It's not a safe or reasonable alternative, no, ma'am.

23 MS. LEDUC: No further questions.

24 THE COURT: May this witness be excused?

25 MS. LEDUC: Yes.

TIM GARDIPEE - REDIRECT EXAMINATION BY MS. LEDUC

1 THE COURT: Any objection?

2 MS. DOCKTER: None.

3 THE COURT: Colonel, you are excused. Thank you,
4 sir.

5 THE WITNESS: Thank you.

6 THE COURT: Mr. Fredrickson, I think you have one
7 more witness.

8 MR. FREDRICKSON: You would be correct.

9 THE COURT: He has been patiently waiting all
10 afternoon.

11 MR. FREDRICKSON: Dr. Albert Olszewski.

12 DR. ALBERT OLSZEWSKI,
13 called for examination by counsel for the plaintiffs, after
14 having been first duly sworn to testify the truth, the whole
15 truth, and nothing but the truth, testified as follows:

16 THE COURT: Let the record reflect that Dr. Olszewski
17 operated on my daughter's ankle 15 or 20 years ago and seems to
18 have done a good job. There haven't been any problems. He
19 probably doesn't even remember.

20 Go ahead, Mr. Fredrickson.

21 MR. FREDRICKSON: I hope she's doing just fine, Your
22 Honor.

23 THE COURT: She's fine.

24 MR. FREDRICKSON: That's good.

25 THE COURT: She's 41 years old now and doesn't have

ALBERT OLSZEWSKI - DIRECT EXAMINATION BY MR. FREDRICKSON

1 any ankle issues.

2 MR. FREDRICKSON: It's an aside, but that's scary.

3 DIRECT EXAMINATION

4 BY MR. FREDRICKSON:

5 Q. Name, spelling, occupation.

6 A. Albert David Olszewski; A-l-b-e-r-t; David, D-a-v-i-d;
7 Olszewski, O-l, s as in Sam, z as in zebra, e-w-s-k-i;
8 occupation, orthopedic surgeon.

9 Q. Doctor, briefly give the Court and counsel a briefing on
10 your educational and your professional background.

11 A. A Bachelor's of Arts in biology from Carroll College;
12 University of Washington Medical School, I received my medical
13 degree. I entered into the United States Air Force where I
14 received my general surgical training and orthopedic training.
15 After my military training ended in 1997, I went in and
16 finished a Sports Medicine and Adult Reconstruction Fellowship
17 in orthopedics at University of Texas Health Science Center, in
18 San Antonio, Texas. I have been practicing orthopedic surgery
19 and orthopedic medicine from 1998 to 2017, as a partner of
20 Flathead Orthopedics. After that, once it was required by the
21 hospital, by Flathead -- I'm sorry -- by Kalispell Regional
22 Hospital, I'm now a solo practitioner with an independent
23 nonoperative practice.

24 Q. Okay. I will try to get us out of here rather quickly,
25 Doctor, since it's 10 to 5:00. In your practice do you have

ALBERT OLSZEWSKI - DIRECT EXAMINATION BY MR. FREDRICKSON

1 occasion to -- an opportunity to do disability assessments?

2 A. In my practice I have evolved, and I do a large number of
3 independent medical evaluations, which include determining
4 impairment.

5 Q. Okay. And in what context do you typically do that?

6 A. In the context of the vast majority are dealing with
7 Workers' Compensation injuries within the state of Montana.

8 Q. Okay. And the disability assessments that you perform, is
9 that something that would be adoptable to what we're talking
10 about here today; in other words, disability assessments with
11 gentlemen like this and their ability to perform or operate
12 traditional archery equipment?

13 A. In the world of industrial injury, there is a large amount
14 of data and studies and text books to determine impairment
15 based on various injuries and diagnosis-related groups. And
16 the area of dealing with impairment of the upper extremities --
17 the axial spine, the lower extremities -- are all adaptable or
18 can be used in this situation.

19 Q. Are you generally familiar with these gentlemen's medical
20 backgrounds?

21 A. I have read their declarations of statement. I have had
22 the opportunity to visit with all but Mr. Helmers and
23 Culbertson (phonetic).

24 Q. Okay. And you heard testimony today?

25 A. Yes, sir.

ALBERT OLSZEWSKI - CROSS-EXAMINATION BY MS. DOCKTER

1 Q. Based on what you have heard, what you have read, and with
2 the assumption that obviously they are telling the truth in
3 their declarations, would you consider their disabilities
4 disabilities that would be adaptable to a special accommodation
5 of crossbow use?

6 A. All four of these gentlemen describe upper extremity
7 weakness and impairment that makes it difficult to use the
8 normal archery equipment. Based on the fact that their
9 impairment makes it difficult for this particular action or
10 sport, which is using archery equipment, it would be considered
11 disabling. That's a legal term rather than a physical term --
12 or medical term. And in this situation on a more probable than
13 not degree of medical certainty, they would be eligible for a
14 reasonable accommodation.

15 Q. Okay. Is a crossbow a reasonable accommodation in your
16 mind?

17 A. Crossbow would be a reasonable accommodation.

18 Q. I don't have anything else for you, Doctor.

19 THE COURT: Thank you, Mr. Fredrickson.

20 Ms. Dockter.

21 CROSS-EXAMINATION

22 BY MS. DOCKTER:

23 Q. Good afternoon, Dr. -- "Olszewski"? "Olszewski"?

24 A. Great. Works perfect.

25 Q. How about Dr. O?

ALBERT OLSZEWSKI - CROSS-EXAMINATION BY MS. DOCKTER

1 A. That works too.

2 Q. You testified that a crossbow is a reasonable
3 accommodation. Is the use of a companion in the field a
4 reasonable accommodation under the ADA?

5 A. Yes.

6 Q. Is the use of modified archery tackle, a Draw-Loc for
7 example, a reasonable accommodation?

8 A. It can be on a case-by-case basis.

9 Q. Is it a reasonable accommodation to use an apparatus to
10 help you hold up your bow?

11 A. If it works, yes.

12 Q. Yes.

13 And all of these questions, I guess, hinge on if they
14 work. Is that fair?

15 A. That is correct.

16 Q. Right.

17 Would it be a reasonable accommodation to allow the
18 use of crossbows in another season during the same time?

19 A. Yes.

20 Q. And would it be a reasonable accommodation to allow for
21 the use of crossbows during rifle season?

22 A. Yes.

23 MS. DOCKTER: I have no further questions.

24 THE COURT: Any redirect, Mr. Fredrickson?

25 MR. FREDRICKSON: Just a couple.

1 REDIRECT EXAMINATION

2 BY MR. FREDRICKSON:

3 Q. The reasonable accommodations that you just testified to,
4 are you applying those, Doctor, across the board; in other
5 words, to anybody who might have a disability and be limited to
6 crossbow using, or are you dealing on an individual basis?

7 A. At this time I'm looking at a generic basis, looking
8 across the span that it could be considered a reasonable
9 accommodation as a shooting sport, if there's a difficulty for
10 them to use a rifle in rifle season or if they have a
11 difficulty with archery in archery season. You know, it's a
12 reasonable accommodation if they are using it to accommodate
13 spear fishing in fishing season.

14 MR. FREDRICKSON: Sure. Nothing further.

15 EXAMINATION

16 BY THE COURT:

17 Q. Doctor, I am assuming, based on your testimony, that
18 although you're familiar with the four plaintiffs, did you read
19 their declarations?

20 A. I read their declarations, sir.

21 Q. Okay. But I'm assuming, based on your testimony, that you
22 have not physically examined the plaintiffs to make a
23 determination as a matter of medical view as an orthopedic
24 surgeon in terms of their actual disability?

25 A. That is correct. I have not done a formal physical

ALBERT DAVID OLSZEWSKI - EXAMINATION BY THE COURT

1 examination or an independent medical evaluation, sir.

2 Q. When you say you concluded -- I think you said you
3 concluded that they are -- or that they would meet the
4 definition of disability you said from a legal sense. I assume
5 you were referring to the broad definition of disability that's
6 within the ADA?

7 A. As a medical doctor, my expertise is in determining
8 impairment, which is some loss of function, strength, weakness,
9 and stability. Impairment is a term that belongs to anybody
10 regardless of age, regardless of gender, sex, or occupation.
11 If you lose your small finger and it's cut off, it's a
12 3 percent whole person impairment. And in that situation, it's
13 an impairment regardless. It's universal. If you're an
14 orthopedic surgeon, missing your small finger, you're not
15 disabled. If I am a concert pianist, I'm 100 percent disabled.
16 Disability is a legal term determined by judges, determined by
17 the legal system.

18 Q. Right. Understood.

19 Okay. Any follow-up questions, Mr. Fredrickson?
20 Ms. Dockter?

21 MR. FREDRICKSON: Not at all, Your Honor.

22 MS. DOCKTER: None here either, Your Honor.

23 THE COURT: May this witness be excused?

24 MR. FREDRICKSON: Yes, Your Honor.

25 THE COURT: Mr. Olszewski, you are excused.

1 THE WITNESS: Thank you, sir.

2 THE COURT: Any further evidence or testimony,
3 Mr. Fredrickson, Ms. LeDuc?

4 MR. FREDRICKSON: We rest, Your Honor.

5 THE COURT: Okay. Ms. Dockter, any evidence or
6 testimony from the state?

7 MS. DOCKTER: We do not, Your Honor.

8 THE COURT: Okay. I will give both of you ten
9 minutes to sum up. As I've indicated, I've read everything.
10 I've heard a lot of testimony this afternoon. And at the
11 outset, let me just indicate my belief is -- and I'm going to
12 deal with this accordingly unless somebody has a strong
13 objection -- that we have moved beyond the Temporary
14 Restraining Order phase. And, Mr. Fredrickson, you anticipated
15 that fact, I think, when you made your opening statements.

16 And based on the fact that we've had a hearing, it's
17 been noticed, parties have had an opportunity to be heard, I
18 believe we are at the preliminary injunction phase.

19 Agreed, Mr. Fredrickson?

20 MR. FREDRICKSON: Agreed.

21 THE COURT: Ms. Dockter?

22 MS. DOCKTER: Agreed.

23 THE COURT: All right. Mr. Fredrickson, you may sum
24 up.

25 MR. FREDRICKSON: I don't believe I will take ten

1 minutes, Your Honor.

2 THE COURT: That's all the better. Although, we'll
3 go until we're done tonight.

4 MR. FREDRICKSON: And thank you for accommodating
5 today. We do appreciate that.

6 We're talking about preliminary injunctive relief,
7 and Your Honor articulated the elements of proof necessary to
8 get there earlier today, success likely on the merits. I think
9 that's been demonstrated. I think it's been demonstrated in
10 spades. The ADA -- the ADA is a piece of federal legislation,
11 and what we've heard today -- what we have heard today
12 repeatedly is that we're going to meet in October. We're
13 relying on state law as a means, as an excuse, to overcome
14 federal legislation. Supreme clause does not allow that. If
15 there is a violation of the ADA, it exists, regardless of state
16 law, regardless of when we're going to consider what state law
17 may be.

18 We're talking about gentlemen with disabilities, with
19 disabilities that fall clearly within the confines of the ADA
20 and the Rehabilitation Act. I don't think there's any question
21 about that. We haven't heard anything today to the contrary.
22 So success likely on the merits, I believe, that that burden is
23 met. I can't see how it is not.

24 Irreparable harm, you've heard all of these
25 gentlemen --

1 THE COURT: Before you leave the first element,
2 reasonable accommodation, do you want to speak to that?

3 MR. FREDRICKSON: Sure. We're dealing about a very
4 special time, time period, the regular archery season. That's
5 what we're talking about. We're not talking about the rifle
6 season. We're not talking anything about the regular archery
7 season. That's limited to archers. That's limited to
8 gentlemen like this.

9 Reasonable accommodation, again, we've heard each of
10 these gentleman talk about the tools, the equipment, that the
11 state allows, that the state considers reasonable
12 accommodation. It may be to somebody disabled with the ability
13 to utilize that equipment. To somebody disabled without the
14 ability to utilize that equipment, with medical evidence of no
15 ability to be able to utilize that equipment, it's not a
16 reasonable accommodation. The state has to give due
17 consideration to what the disabled individual is suggesting for
18 reasonable accommodation.

19 The state talks repeatedly about companions. You
20 heard these gentlemen's testimony about what a companion does.
21 You know, do you want my son to hunt for me? To pull my bow
22 back? To hold my bow? Maybe that's a reasonable accommodation
23 at some level, but not for these guys who hunt and want to do
24 their own hunting.

25 You heard testimony today from Dr. Zink, the impact,

1 the biological impact of crossbows. You heard testimony today
2 about the mechanisms that are available for crossbows, the
3 crank, for these guys who can't even pull a crossbow back. Is
4 that a reasonable accommodation? It is unless it materially
5 impacts the structure and the integrity of the law that exists
6 in the state or words to that effect. That language is
7 included in the ADA and many of the cases. It doesn't. It
8 doesn't. Testimony from Dr. Zink -- you heard Brad Molnar
9 testify to some of the research he's done. There is no --
10 there is no impact to the state. The impact is to those that
11 are asking for what is otherwise a reasonable accommodation.

12 The *Baladamenti* case that is referenced in the
13 brief, a Louisiana case dealing essentially with the same
14 issue, the ability to use a blow air -- some -- I'm not
15 familiar with that. But the Louisiana Federal District Court
16 said, "Yeah, that's a reasonable accommodation for these
17 fellows or for this gentleman in that case." Almost
18 indistinguishable from what we're talking about here.

19 THE COURT: Okay. Hit the other three factors:
20 irreparable harm, balance the hardships, and the public
21 interest.

22 MR. FREDRICKSON: Irreparable harm, these guys can't
23 hunt. Some of them -- some of them physically. You heard
24 testimony about hunting in the heat. You know, you heard
25 testimony about age and the inability to participate in that

1 season. You heard Brad Molnar testify about "I can't hunt with
2 my son." They can't hunt during this season. There's a reason
3 for the season being special. There's a reason why there is a
4 separate archery only season, and these fellows can't
5 participate in it. Something that they have done for their --
6 many of them for most of their adult life -- well, since they
7 were kids, and they can't do it.

8 Balance of equalities, again, it gets back to -- I
9 mean, seriously, what's the harm to the state? What's the harm
10 to the state here? There is none. You've got four individuals
11 here out of a group of 53,000 archery hunters. It just -- I
12 struggle to even talk about that element of this because it's
13 so absurd. The balance of equalities allows these gentlemen to
14 do something that the -- a state sanctioned activity remember.
15 State sanctioned activity, the state is obliged -- is obligated
16 to provide reasonable accommodation if it can. It's obligated
17 to do that. It's not. It simply refused. Wait until October.
18 August comes around. Wait until October.

19 Public interest, Your Honor, same thing. You know,
20 we've talked in the complaint, in the brief, about similarly
21 situated individuals. You know, the public interest here
22 favors what? A group of bowhunters that are good lobbyists
23 that can keep the state from implementing accommodations like
24 these gentlemen are requesting? Public interest is in doing
25 what the ADA requires, and that's providing those reasonable

1 accommodations to those individuals who request, who qualify,
2 who fall within the confines of the restoration -- or the
3 Rehabilitation Act and the ADA.

4 It goes beyond these four, and it goes beyond what
5 the state is doing here. The state is absolutely not
6 listening. They are precluding these guys from doing what they
7 want to do, what every other abled body archer in the state of
8 Montana has the right to do.

9 So, Your Honor, I think all of these elements are
10 met. Our briefing, I think, supports that. The case law, I
11 think, supports that. When the courts are inclined to grant a
12 little league baseball coach who's wheelchair bound, when the
13 Court says, "That's enough" -- you know, you've got a rule that
14 says you can't be on the field because of safety reasons, no,
15 you fall under the ADA. You have to change the rule.

16 And the cases are pretty clear about that. It's
17 not -- the state cannot -- again, I'll say this, and I will sit
18 down. The state cannot rely on its rules and its procedures
19 and all of those nuances that we've heard today if there is a
20 violation, which at this stage it's likelihood of success on
21 the merits. The state can't use that as an excuse to get
22 around the ADA. Cannot. And that's precisely what they are
23 doing.

24 Your Honor, unless you have any questions of me, I
25 don't intend to take any more of your time.

1 THE COURT: Thank you, Mr. Fredrickson.

2 Ms. Dockter.

3 MS. DOCKTER: Thank you, Your Honor.

4 Your Honor, the ADA doesn't require a specific time
5 frame for moving through these processes. And you heard all of
6 the witnesses acknowledge that the department has taken steps
7 to move through that process. What also needs to occur, even
8 if -- what I heard from the witnesses was that the earliest
9 request was May 16th, I want to say, May 15th. Even if the
10 commission had acted the day after to make a decision to
11 accommodate these individuals, it takes six months to implement
12 a law to change, and the season would have passed by that
13 point.

14 THE COURT: What's the citation for that six-month
15 period of time?

16 MS. DOCKTER: The six-month -- I'm sorry, I don't
17 have it right in my head.

18 THE COURT: Is it within the Administrative
19 Procedures Act?

20 MS. DOCKTER: It is. And I can get that to you
21 immediately after the hearing, if necessary.

22 THE COURT: We'll find it.

23 MS. DOCKTER: Okay. Thank you, Your Honor.

24 The preliminary injunctive relief requires success --
25 likelihood of success on the merits. And to that you've

1 already heard their witness talk about the reasonable
2 accommodations, and he acknowledged that he had not looked at
3 and analyzed the physical disabilities of these individuals.

4 We are not disputing the physical disabilities of
5 these individuals. What we are doing is going through the
6 process understanding the disability and are in the process
7 concurrently to accommodate those individuals. The things we
8 talked about here that -- in that interim before we can get the
9 law changed, if indeed that's what the commission does, the
10 things you heard that would accommodate in the interim is what
11 we have to allow, including, even though there's not a
12 preference to do so, hunting during a shoulder season right now
13 with a crossbow; you know, hunting during the rifle season.
14 And these are all accommodations that the Department of the
15 Interior has actually acknowledged as a way to accommodate
16 persons with disabilities who request to use a crossbow during
17 the archery only season.

18 The modification for archery equipment, you heard
19 witnesses acknowledge that they had attempted one or in some
20 cases none to modify their archery equipment. For years the
21 department has had requests for accommodation, including
22 requests for a crossbow. And the way the commission has
23 accommodated those requests was to pass a programmatic
24 regulation that allows a very broad not prescriptive ability
25 for a bowhunter to modify their archery equipment. There are a

1 myriad of ways to modify archery equipment. I'm not here to
2 say I'm an expert in any of them, but there are many. And
3 you've heard witnesses acknowledge that. Yet I heard one
4 attempt or in some cases none to modify those archery
5 equipment. Really what the permit requires is anything short
6 of a crossbow that can work for them.

7 Irreparable harm has to be met as well, and what I
8 didn't hear from the witnesses is why this hunting season is
9 absolutely necessary. Some of the hunters haven't hunted since
10 2011, since 2018, and all of a sudden we have irreparable harm,
11 and they have to hunt in this season. What we have told them
12 is we acknowledge and understand the frustration, and I hear
13 this every day in my job, about the hunter's value of archery
14 season and rifle season. What we have done to accommodate this
15 is during the commission -- a commission process, a way to get
16 to a place where it may actually address the issue and make
17 this entire case moot.

18 I am not suggesting that I am the decision-maker here
19 and can tell you certainly that's what would happen. But there
20 still is a venue after that commission meeting in this very
21 court to claim that we did not adequately accommodate through
22 the process or through a reasonable accommodation. That still
23 exists for the plaintiffs after the process that is protected
24 by the Montana Constitution for the public to be involved in is
25 honored and allowed to move forward.

1 That brings me to the balance of equities. There are
2 likely many others -- I guess I shouldn't say "likely" because
3 we don't know that for certain. It would be a guess. There
4 are likely others that are similarly situated to the
5 plaintiffs. And you heard -- I think it was Senator Molnar
6 talk about another person he went into the regional office with
7 who also wanted a crossbow and was issued a permit to modify
8 archery equipment who wouldn't in this case be allowed to hunt
9 with a crossbow this season. The plaintiffs have requested
10 only these four be allowed to hunt with crossbows.

11 So the balancing of the equities, I guess, I would
12 say that over the population of archery hunters in Montana,
13 there's likely others who would like the same opportunity. And
14 that's what the commission's decision could afford them if
15 allowed to proceed.

16 The final situation is the public -- in the public
17 interest. I would suggest that that is served by allowing the
18 law to work as it was intended and allow the commission to hear
19 this situation, including the four plaintiffs, allow the
20 process to proceed in the way it was intended to and the
21 commission to make a decision on this. And in the event it
22 doesn't address the issues raised by the plaintiffs, we would
23 then be here again with a record to review but allowing the
24 agency and the commission the ability to lawfully address these
25 plaintiffs' requests.

1 I did see Counsel Fredrickson's inference that we
2 were a part of the legislation with Fish, Wildlife, and Parks,
3 Senate Bill 111. We were not lobbyist to that, and we did not
4 weigh in on that issue at all. I just wanted to clear that up
5 for the record.

6 I wonder if cocounsel from the state of Montana would
7 want to follow up with a couple of comments. I have nothing
8 further unless you have questions for me.

9 THE COURT: No questions.

10 Mr. Oestreicher, anything you wish to add, sir?

11 MR. OESTREICHER: Just briefly, Your Honor, to the
12 extent that the state of Montana has any distinguishable
13 difference in position, I think when we were in the context of
14 the Temporary Restraining Order and viewing this commission
15 process as, you know, beyond this current archery season, the
16 commission would not act to afford the plaintiffs this
17 opportunity.

18 For that reason the state, in consultation with FWP's
19 counsel, thought it might be best to not oppose a Temporary
20 Restraining Order or the injunctive relief, *pendente lite*,
21 during the course of this case. And it may very well be
22 resolved through this commission action on October 28th.

23 That said, Your Honor, we're not conceding the points
24 raised in Mr. Fredrickson's argument that somehow they've
25 satisfied all of the elements necessary for that injunctive

1 relief. It merely was a question of timing with the archery
2 season starting in five days that we could afford this group of
3 plaintiffs this accommodation through the litigation, so to
4 speak, and allow the process to work itself out at the
5 commission meeting on October 28th.

6 With that said, those elements have not necessarily
7 been satisfied, Your Honor, although the state is not standing
8 in the way of injunctive relief should the Court order that.
9 We have heard testimony that hunting with a crossbow is
10 permitted today. The plaintiffs could very well in fact go out
11 of the courtroom and hunt with a crossbow today.

12 And so with that, Your Honor, I don't want to belabor
13 it, and I know we're running late. Thank you for the
14 opportunity to clarify our position.

15 THE COURT: All right. Thank you.

16 Okay. The matter is fully submitted on the
17 preliminary injunctive aspect of this. Obviously, I have not
18 consolidated this matter or sought counsel's direction
19 consolidating this matter on a trial on the merits. So that's
20 not what's happening. And I will endeavor to get an order out
21 as quickly as possible.

22 Thank you, everyone. Be safe going home. I know you
23 probably felt a little bit put out by my requirement that you
24 all appear here in person. But I will tell you after a year
25 and a half of Zoom testimony and video appearances that it's

1 not ideal, and it can actually make things very difficult for
2 all of us.

3 So the matter is submitted, and we'll be in recess.

4 Thank you.

5 (The proceedings concluded at 5:19 p.m.)

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REPORTER'S CERTIFICATE

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REPORTER'S CERTIFICATE

I, Yvette Heinze, a Registered Professional Reporter and Certified Shorthand Reporter, certify that the foregoing transcript is a true and correct record of the proceedings given at the time and place hereinbefore mentioned; that the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription; that after being reduced to typewriting, a certified copy of this transcript will be filed electronically with the Court.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys to this action, nor financially interested in this action.

IN WITNESS WHEREOF, I have set my hand at Great Falls, Montana, this 4th day of October, 2021.

/s/ Yvette Heinze

Yvette Heinze
United States Court Reporter