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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

DEFENDERS OF WILDLIFE, NATURAL)
RESOURCES DEFENSE COUNCIL,)
SIERRA CLUB, HUMANE SOCIETY OF)
THE UNITED STATES, CENTER FOR)
BIOLOGICAL DIVERSITY, JACKSON)
HOLE CONSERVATION ALLIANCE,)
FRIENDS OF THE CLEARWATER,)
ALLIANCE FOR THE WILD ROCKIES,)
OREGON WILD, CASCADIA WILDLANDS)
PROJECT, WESTERN WATERSHEDS)
PROJECT, and WILDLANDS PROJECT,)

Plaintiffs,)

vs.)

H. DALE HALL, U.S. Fish and Wildlife)
Service Director; DIRK KEMPTHORNE,)
Secretary of the Interior; and UNITED)
STATES FISH AND WILDLIFE SERVICE,)

Defendants.)

Case No. CV-08-56-M-DWM

**MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

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INTRODUCTION

The U.S. Fish and Wildlife Service (“FWS”) has eliminated the protections for gray wolves in the northern Rockies that had, since the return of the wolf, prohibited the unregulated killing of wolves by humans. Since delisting, a spate of wolf killings by a variety of methods—pursuing wolves long distances with snowmobiles, shooting wolves from the roadside, and lying in wait for wolves at state-run elk feedgrounds—demonstrates the need now, as much as ever, to protect wolves under the Endangered Species Act. Without such protections, widespread unregulated killing of wolves will significantly reduce the abundance and distribution of wolves during the pendency of this case challenging wolf delisting. To prevent irreparable harm to wolves and members of plaintiff organizations, Plaintiffs seek a preliminary injunction to reinstate Endangered Species Act protections for gray wolves until this Court issues a final decision on the merits of this case.

BACKGROUND

Once numbering more than 350,000 in the American West, “wolves were hunted and killed with more passion and zeal than any other animal in U.S. history.” Ex. 1 (FWS fact sheet). In Montana, Idaho, Wyoming, and adjacent southwestern Canada, wolves were exterminated through poisoning, trapping, and shooting by the 1930s. 73 Fed. Reg. at 10, 514. Gray wolves were among the first species to be listed by the Secretary of Interior as endangered when Congress enacted the Endangered Species Act (“ESA”), 16 U.S.C. § 1531, et seq., in 1973. 39 Fed. Reg. 1,171 (Jan. 4, 1974). Protected under the ESA from unregulated killing by humans, gray wolves began to return to their native landscapes in northwestern Montana from Canada. In 1995 and 1996, gray wolf recovery took a giant leap forward when FWS reintroduced 66 gray wolves into Yellowstone National Park and central Idaho. Since that reintroduction, the northern

Rockies wolf population grew to approximately 1,500 when the Delisting Rule took effect on March 28, 2008; see also Complaint ¶¶ 27-54 (providing additional background information).

In 1987, FWS developed a wolf recovery plan that established a northern Rockies wolf recovery goal of at least 10 breeding pairs and 100 wolves for three consecutive years in each of three recovery areas: northwestern Montana, central Idaho, and the Greater Yellowstone area. Ex. 2. FWS recast these criteria in 1994 as requiring a minimum of “thirty or more breeding pairs ... comprising some 300+ wolves in a metapopulation ... with genetic exchange between subpopulations.” 72 Fed. Reg. 6,106, 6,107 (Feb. 8, 2007) (emphasis added). FWS has stated repeatedly that gray wolves will not be recovered in the northern Rockies until wolves in the Greater Yellowstone, central Idaho, and northwestern Montana recovery areas establish an effective northern Rockies metapopulation—where wolves regularly travel between core protected areas and exchange genetic material by breeding. See, e.g., id.; Ex. 3, App. 9, at 42 (FWS Environmental Impact Statement for wolf reintroduction [“1994 EIS”]).

Notwithstanding evidence that the population has not achieved the connectivity required by FWS’ own recovery criteria, on February 27, 2008, FWS deemed the northern Rockies wolf population “recovered” and removed it from the list of threatened and endangered species. 73 Fed. Reg. 10,514 (Feb. 27, 2008) (“Delisting Rule”). Moreover, FWS turned wolf management over to states that have adopted regulatory mechanisms that are inadequate to ensure a viable northern Rockies wolf population for the foreseeable future. See 16 U.S.C. § 1533(a)(1)(D) (requiring FWS to evaluate adequacy of existing regulatory mechanisms). State laws in Montana, Idaho, and Wyoming allow for unregulated wolf killing that radically reduces the possibility that the northern Rockies wolf population will ever constitute an effective, connected metapopulation.

Wolf delisting and implementation of state laws are already causing irreparable harm to wolves and members of the plaintiff organizations. Wolves are being exterminated as pests in nearly 90 percent of Wyoming, where they are classified as “predators.” Ex. 4 (Wyoming Reports). Montana, Idaho, and Wyoming laws allow wolves to be killed without a permit in response to perceived conflicts with livestock. See infra Section II.B.2. In Idaho, wolves may be killed without a permit for merely “worrying” livestock or domestic animals. Idaho Code § 36-1107. Further, Montana, Idaho, and Wyoming all intend to hold wolf hunts in the fall. Exs. 5, 6, 7.

To prevent irreparable injury to wolves and members of plaintiff organizations due to ongoing, unregulated wolf killing, plaintiffs request a preliminary injunction to reinstate ESA protections for northern Rockies gray wolves.

ARGUMENT

I. STANDARD OF REVIEW

The normal test for a preliminary injunction in the Ninth Circuit includes three factors: (1) plaintiff’s likelihood of success on the merits; (2) whether the balance of irreparable harm favors plaintiff; and (3) whether the public interest favors issuance of the injunction. Natural Res. Defense Council, Inc. v. Winter, 518 F.3d 658, 677 (9th Cir. 2008). The first two parts of this standard are judged on a “sliding scale”; a plaintiff must “demonstrate either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips in its favor.” Idaho Sporting Congress, Inc. v. Alexander, 222 F.3d 562, 565 (9th Cir. 2000).

However, “[t]he traditional preliminary injunction analysis does not apply to injunctions issued pursuant to the ESA.” Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv., 422 F.3d 782,

793 (9th Cir. 2005). Rather:

“In cases involving the ESA, Congress removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties’ competing interests.” Nat’l Wildlife Fed’n v. Burlington N. R.R., Inc., 23 F.3d 1508, 1511 (9th Cir.1994) (citing Friends of the Earth v. United States Navy, 841 F.2d 927, 933 (9th Cir. 1988)). As the Supreme Court has noted, “Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities.” TVA v. Hill, 437 U.S. 153, 194, (1978). Accordingly, courts “may not use equity’s scales to strike a different balance.” Sierra Club v. Marsh, 816 F.2d 1376, 1383 (9th Cir. 1987); see also Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1073 (9th Cir. 1996) (“Congress has determined that under the ESA the balance of hardships always tips sharply in favor of endangered or threatened species.”).

Id. at 793-94 (emphasis added). Accordingly, where plaintiffs show a probability of success on the merits of ESA claims, an injunction is appropriate if it “is necessary to effectuate the congressional purpose behind the statute.” Id. at 795 (citing Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1177 (9th Cir. 2002)); see also Sierra Club, 816 F.2d at 1384 (holding that “Sierra Club is entitled to injunctive relief if the [agency] violated a substantive or procedural provision of the ESA”).

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR CLAIM THAT FWS’ DECISION TO DELIST NORTHERN ROCKY MOUNTAIN GRAY WOLVES VIOLATES THE ENDANGERED SPECIES ACT

FWS violated the ESA by removing the northern Rockies wolf population from the endangered species list while it still faces significant threats to its survival. Wolf killing in the absence of ESA protections has already begun. The result is almost certain to be a significant population decline. At bottom, FWS’ decision to delist is based on the proposition that the wolf population has exceeded population recovery targets established by FWS nearly 20 years ago. Because the wolf population exceeds that number, FWS asserts the population is “recovered.” FWS ignores its own separate, long-established recovery criterion requiring connectivity among the northern Rockies’ core wolf populations—or a “metapopulation” dynamic. FWS’ own

scientific evidence demonstrates that wolves in the three recovery areas do not yet constitute an effective metapopulation. Moreover, FWS has sanctioned post-delisting wolf management schemes in Montana, Idaho, and Wyoming that will only increase the isolation of wolves in the core wolf recovery areas. Unregulated wolf killing that is permitted by state laws—and already underway—will significantly diminish the prospects for connectivity among northern Rockies wolf populations.

A. Northern Rockies Wolves Remain Endangered By The Lack Of Connectivity That FWS Determined Is Essential To Wolf Recovery.

FWS' failure to recognize that genetic isolation of wolves in the northern Rockies' three core recovery areas still constitutes a threat to the species' survival flouts the Service's own recovery standards and violates the ESA. See 16 U.S.C. § 1533(a)(1)(E) (FWS must determine that the gray wolf is not threatened by "other natural or manmade factors affecting its continued existence."); id. § 1533(b)(1)(A) (requirement to base delisting decisions "solely on ... the best scientific and commercial data available"). FWS has stated repeatedly that gray wolves will not be recovered in the northern Rockies until wolves in the Greater Yellowstone, central Idaho, and northwestern Montana core recovery areas establish a northern Rockies metapopulation. See, e.g., 72 Fed. Reg. 6,106, 6,107 (Feb. 8, 2007) (recovery standard requires a northern Rockies "metapopulation ... with genetic exchange between subpopulations") (emphasis added); id. at 6,121 ("The recovery plan, the metapopulation structure recommended by the 1994 EIS, and subsequent investigations recognize the importance of habitat connectivity between [recovery areas]") (citations omitted). Indeed, according to FWS, "[t]he importance of movement of individuals between sub-populations cannot be overemphasized." Ex. 3, App. 9 at 42; see also id., Glossary, at 4 (defining metapopulation as essential component of recovery).

In its proposed Delisting Rule, FWS relied on work by Oakleaf, et al. (2006) to suggest

that a functioning wolf metapopulation exists in the northern Rockies. 72 Fed. Reg. 6,106, 6,119 (Feb. 8, 2007). Oakleaf in fact determined that “currently there appears to be limited interchange of individuals between the 3 Northern Rockies recovery areas.” Ex. 8 (Oakleaf, et al. (2006)), at 555. In particular, Oakleaf noted that wolves in the Greater Yellowstone recovery area are almost entirely isolated from wolves in central Idaho and northwest Montana. Id. at 561. Oakleaf stated that just one wolf has been documented to enter the GYA from another recovery area (Idaho) and that individual has not reproduced. Id. Accordingly, Oakleaf made clear that a metapopulation is not yet established.

Subsequently, the results of a FWS-commissioned genetics study confirmed that Yellowstone wolves have remained genetically isolated since the 1995 reintroduction. See Ex. 9 (VonHoldt, et al. (2007)), at 13. The study concludes that “an effective metapopulation dynamic—where wolves travel between core protected areas, sharing genetic material and recolonizing depopulated areas—has yet to be achieved.” Wayne Dec. ¶ 3. Accordingly, the final Delisting Rule concedes that “little, if any, ... DNA [from dispersing wolves] has become incorporated into the GYA portion of the NRM DPS.” 73 Fed. Reg. at 10,553.

FWS’ response to the critical finding that an effective metapopulation has not been established in the northern Rockies was to assert in the Delisting Rule that wolves are recovered notwithstanding their lack of connectivity. 73 Fed. Reg. at 10,553. The final Delisting Rule states that “[t]he potential lack of genetic connectivity between wolves in [Yellowstone National Park] and wolves in the rest of the [northern Rockies] is not considered a threat under the Act’s criteria for persistence, because much smaller extant wolf populations with much lower genetic diversity have persisted for decades or even centuries.” Id. (emphasis added).

This rationale is insufficient to justify the delisting for several reasons. First, this

purported justification controverts FWS' long-established recovery standard requiring an effective northern Rockies wolf metapopulation. See 72 Fed. Reg. at 6,107; Ex. 3, App. 9 at 42; Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42 (1983) (agency must provide a "reasoned analysis" to justify a change of course). Second, FWS' about-face finding that a metapopulation dynamic is not essential to wolf recovery directly contradicts the best available scientific evidence. See 73 Fed. Reg. at 10,553. The FWS-commissioned Yellowstone genetics study concluded that if the Yellowstone wolf population remains relatively constant at 170 individuals (estimated to be Yellowstone's carrying capacity), the population will demonstrate substantial inbreeding effects within 60 years.¹ Ex. 9 (VonHoldt (2007)), at 19; see also Wayne Dec. ¶ 4 ("over time, significant inbreeding depression will occur without connectivity and migratory exchange with other populations"); Ex. 10 (Morell (2008)), at 892. "Given these results, we would expect to observe an increase in juvenile mortality from an average of 23 to 40%, an effect equivalent to losing an additional pup in each litter." Ex. 9 (VonHoldt (2007)), at 19; see also Wayne Dec. ¶ 4.² This increased pup mortality for Yellowstone wolves will occur well within the 100-year horizon considered in the Delisting Rule as the appropriate time frame for assessing genetic threats. 73 Fed. Reg. at 10,531. Further, FWS itself has acknowledged that without ongoing genetic interchange, isolated core recovery

¹ The VonHoldt (2007) conclusion that the Yellowstone population will demonstrate substantial inbreeding effects is based on studies of one of the same "smaller extant wolf populations" that FWS cited in support of its statement that the "potential lack of genetic connectivity" is not harmful. Compare 73 Fed. Reg. at 10,553-54 (citing Liberg 2005), with Ex. 9 (VonHoldt (2007)), at 19 (same).

² Further, a metapopulation dynamic may be necessary to maintain viability when stochastic events—i.e., drought, disease, fire, or some combination of unforeseen events—affect one subpopulation. See 1994 EIS, App. 9, at 39. The ability of wolves to disperse from one recovery area to another is key to rekindling subpopulations that are eliminated or severely diminished by unforeseen events, such as the disease outbreak in 2005 that was partially responsible for a Yellowstone wolf population crash from 171 wolves in 16 known breeding pairs in 2004, to 118 wolves in 7 breeding pairs in 2005. See 72 Fed. Reg. at 6,110.

populations of merely 100 individuals and 10 breeding pairs—as contemplated by the Delisting Rule—will not exhibit genetic diversity sufficient to withstand environmental variability and stochastic events such as drought, fire, and disease. See Ex. 3, App. 9 at 42 (“It is fairly clear that ten breeding pairs in isolation will not comprise a ‘viable’ population (i.e., have a high probability of survival for a long period without human intervention).”); see also Ex. 9 (VonHoldt (2007)), at 18 (“populations of this size [100 wolves in 10 breeding pairs] that remain isolated will lose genetic variation and become inbred over the long term”).

As a fall-back position, FWS states that “complications from a potential lack of natural habitat connectivity could be quickly resolved by agency management, such as relocations.” 73 Fed. Reg. at 10,533. Or, as the agency’s wolf recovery coordinator more colorfully explained: “Connectivity can happen through a ride in the back of a truck.” Ex. 10, at 892. This “back of a truck” theory of species recovery is wrong because the ESA requires recovery in a functioning ecosystem, not artificial maintenance of a captive or heavily manipulated population. See 16 U.S.C. § 1531(b) (purpose of ESA is to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved”); see also id. § 1539(a)(2)(B)(iv) (before issuing incidental take permit, FWS must find “the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild”) (emphasis added); Interagency Cooperative Policy for the Ecosystem Approach to the ESA, 59 Fed. Reg. 34,273, 34,274 (July 1, 1994) (agency policy is to “[d]evelop and implement recovery plans ... in a manner that restores, reconstructs, or rehabilitates the structure, distribution, connectivity and function upon which ... listed species depend”).

Moreover, even if it were true that wolf relocation provides an adequate substitute for a naturally functioning metapopulation, no relocation program has been established. Thus, FWS’

assurance that genetic interchange could occur through post-delisting human intervention, if the states decide to embark on such a costly program, is no assurance at all. See Or. Natural Res. Council v. Daley, 6 F. Supp. 2d 1139, 1154-55 (D. Or. 1998) (FWS may not rely on “unenforceable efforts” or efforts that are not “currently operational” in deciding not to list a species); Fed’n of Fly Fishers v. Daley, 131 F. Supp. 2d 1158, 1165 (N.D. Cal. 2000) (“Secretary may not rely on future conservation actions” in listing decisions); see also Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv., 481 F.3d 1224, 1241 (9th Cir. 2007) (agency may not rely on “general desire” to install future habitat improvements to support ESA § 7 finding that project will not jeopardize species without “a clear, definite commitment of resources for future improvements”); Arizona Cattle Growers’ Ass’n v. U.S. Fish and Wildlife Serv., 273 F.3d 1229, 1244 (9th Cir. 2001) (“speculative evidence” does not satisfy ESA requirement that agency use “best scientific and commercial data available”).

Rather than seeking ways to foster the effective metapopulation FWS had earlier deemed essential to recovery—e.g., expanding the wolf population to encourage dispersal or improving wolf dispersal corridors, see Ex. 8 (Oakleaf (2006)), at 561—FWS turned its back on its own recovery criterion without explanation and delisted the northern Rockies wolf population anyway. This arbitrary departure violates the ESA’s requirement to use the best available science, 16 U.S.C. § 1533(b)(1), and the Service’s own standards for delisting. See State Farm, 463 U.S. at 42.

B. Northern Rockies Wolves Face Immediate Threats To Their Survival Due to Inadequate State Regulatory Mechanisms

While FWS’ arbitrary disregard of its own viability standard alone requires that the Delisting Rule be set aside, the legal and biological inadequacy of the regulation is compounded by the agency’s approval of post-delisting state management schemes that permit a level of wolf

killing that radically diminishes the prospects for a functional northern Rockies metapopulation. Dozens wolves have already been killed during the 30 days that these laws have governed wolf management. In finding that state laws in Montana, Idaho, and Wyoming that allow unregulated wolf killing are nonetheless adequate to ensure a viable northern Rockies wolf metapopulation, FWS arbitrarily disregarded its own prior determinations regarding inadequate state mechanisms.

1. Wyoming’s 2007 Law Retains the Inadequacies of the 2003 Plan FWS Earlier Determined to Endanger the Northern Rockies Wolf Population

FWS eliminated ESA protections for gray wolves notwithstanding provisions in Wyoming law that FWS itself earlier found inadequate to prevent excessive wolf mortality. In January 2004, citing the agency’s obligation to make certain that state regulatory mechanisms would be adequate to ensure a viable wolf population in the region, FWS disapproved Wyoming’s first attempt at a wolf management plan—a plan that deemed wolves “predators” subject to unlimited killing in most of the state and failed to guarantee that 15 breeding pairs would be maintained statewide. See Ex. 11; see also 71 Fed. Reg. 43,410 (Aug. 1, 2006). FWS rejected the 2003 Wyoming plan for three reasons. Ex. 11, at 1. First, FWS determined that “[t]he ‘predatory animal’ status for wolves must be changed” as “[t]he unregulated harvest, inadequate monitoring plan, and unit boundaries proposed by the state’s management plan [did] not provide sufficient management controls to assure the Service that the wolf population [would] remain above recovery levels.” Id. By contrast, FWS stressed, statewide trophy game designation would allow Wyoming to “provide[] for self-sustaining populations above recovery goals, regulated harvest and adequate monitoring of that harvest.” Id. Second, FWS declared, “Wyoming state law must clearly commit to managing for at least 15 wolf packs in Wyoming.” Id. at 2. Finally, FWS concluded, Wyoming had to include a breeding pair–based metric for assessing compliance with recovery standards. Id.

Reversing itself, in December 2007, FWS “congratulate[d]” Wyoming for having adopted a revised management plan that FWS now considers adequate—a plan that deems wolves “predators” subject to unlimited killing in nearly 90 percent of the state and fails to guarantee that Wyoming will maintain 15 breeding pairs. Ex. 12.

In declaring that Wyoming’s 2007 management plan would maintain Wyoming’s wolf population “above recovery levels into the foreseeable future,” 72 Fed. Reg. 36,939, 36,941 (July 6, 2007), FWS ignored both the contents of the plan and FWS’ prior determinations. With respect to Wyoming’s establishment of a “trophy game” region in which modest protections are extended to wolves, Wyoming’s revised law designates nearly 90 percent of the state as a “predatory animal” area in which wolves “may be taken by anyone, anywhere . . . at any time, without limit, and by any means”—including, in FWS’ words, “shoot-on-sight; baiting; possible limited use of poisons; bounties and wolf-killing contests; locating and killing pups in dens including use of explosives and gas cartridges; trapping; snaring; aerial gunning; and use of other mechanized vehicles to locate or chase wolves down[.]” See 71 Fed. Reg. at 43,428; Wyo. Stat. § 23-1-101(b) (delineating maximum “trophy game” boundary in northwestern Wyoming and authorizing use of that boundary only where “necessary to achieve federal government delisting of the gray wolf”). FWS acknowledges that wolves are unlikely to persist in areas where they are deemed “predators.” 71 Fed. Reg. at 43,428. The spate of recent killings confirms this prediction, as wolves in Wyoming’s predator area have been stalked and killed at state-run elk feedgrounds, shot from the air, and tracked for miles by snowmobile. See Exs. 18, 19, 20. At least 13 wolves have been killed in Wyoming as predators in just one month.

Moreover, the “trophy game” region itself is malleable. The Wyoming Game and Fish Commission has authority to “diminish[.]” the “trophy game” area if it “determines [that] . . .

diminution [would] not impede the delisting of gray wolves and will facilitate Wyoming's management of wolves[,]” Wyo. Stat. § 23-1-101(a)(xii)(B)(I)—and Wyoming's governor has already expressed his “unhapp[iness]” with the “trophy game” boundary and his hope that it “can be revisited” after delisting, see Ex. 13, at 2. Moreover, under Wyoming law, the Game and Fish Commission may allow killing of game animals as “predators,” even within the trophy game zone. See Wyo. Stat. § 23-1-302(a)(ii); 23-3-103(a). FWS' reliance on Wyoming's illusory “trophy game” area was accordingly arbitrary.

FWS' conclusion that Wyoming has “clearly committed to manage for at least 15 breeding pairs and 150 wolves within the State,” with “7 of those breeding pairs ... outside the National Park Units in Wyoming[,]” is similarly flawed. See Ex. 12; see also 72 Fed. Reg. at 36,940. Contrary to FWS' finding, Wyoming's law provides no guarantee of maintaining 15 breeding pairs in the state if—as has already occurred—the wolf population in the state's national parks drops below eight breeding pairs. Under the 2007 law, the Wyoming Game and Fish Commission must manage wolves “only as necessary to reasonably ensure at least seven (7) breeding pairs of gray wolves are located in [Wyoming] and primarily outside [its national parks],” irrespective of breeding pair totals in the parks. Wyo. Stat. § 23-1-304(a) (emphasis added). Moreover, when seven breeding pairs exist outside the parks, Wyoming's law requires the issuance of “annual” lethal control permits to “landowners or livestock owners” and authorizes the Wyoming Game and Fish Department to take “any action necessary to protect big and trophy game populations” from predation by wolves. Id. § 23-1-304(e), (j), (n). Each of these provisions is premised upon the expectation that Yellowstone National Park will sustain at least eight breeding pairs—an expectation that FWS has already rejected as “unrealistic” and that recent experience has proven to be unfounded. 72 Fed. Reg. at 6,131. Thus, Wyoming law does

not include a commitment to maintain a statewide population of 15 breeding pairs—a commitment FWS deemed essential.

FWS’ determination that Wyoming law provides an adequate regulatory mechanism is arbitrary and must be set aside. See 5 U.S.C. § 706(2)(A). It also represents an unexplained departure from FWS’ prior rulemaking conclusions. See State Farm, 463 U.S. at 41-42.

2. State Regulatory Schemes Are Inadequate Because They Authorize Unlimited Wolf Killing for “Predator Control” Purposes

FWS’ reliance on the modest protections afforded to wolves under state “game” classifications in Idaho, Wyoming, and Montana is similarly misplaced. While the laws of each state do provide the states’ wildlife agencies with authority to manage wolves as game animals subject to regulated hunts, state laws also authorize unregulated killing of wolves deemed a threat to property, such as livestock. These provisions apply even in core wolf recovery areas. Just as FWS rejected unregulated killing in previously disapproving the Wyoming state plan, FWS rationally should have rejected unregulated killing under predator control laws in effect throughout Idaho, Wyoming, and Montana. See Exs. 16, 17; see also 71 Fed. Reg. at 43,428 (“Wolves are very susceptible to unregulated human-caused mortality[.]”).

In Idaho, where the gray wolf’s classification is left to the discretion of the Idaho Fish and Game Commission, see Idaho Code § 36-201, unregulated wolf killing in defense of property is permitted, see Ex. 14 (Senate Bill No. 1374, revising Idaho Code § 36-1107 effective the date of delisting); Idaho Code §§ 36-201 (requiring that “all methods of take” be authorized for wolf management, whatever the classification assigned to wolves), 36-715(2) (authorizing state “nuisance wol[f]” activities). Under Idaho law, “[w]olves may be disposed of by livestock or domestic animal owners ... when [they] are molesting or attacking livestock or domestic animals” without a permit. Ex. 14 (Idaho Code § 36-1107(c), as revised). “Molesting” is

sweepingly defined as “annoying, disturbing or persecuting, especially with hostile intent or injurious effect, or chasing, driving, flushing, worrying, following after or on the trail of, or stalking or lying in wait for, livestock or domestic animals.” Id. As demonstrated by a county prosecutor’s recent decision not to prosecute an Ashton, Idaho landowner who killed two wolves, one of which he pursued by snowmobile for more than a mile, see Exs. 20, 21, Idaho’s law places no meaningful limits on wolf killing in alleged defense of property.

In Montana, where the gray wolf’s classification is left to the discretion of the Department of Fish, Wildlife and Parks, see Mont. Code § 87-5-131(2), individuals are allowed to kill wolves without a permit when wolves are “attacking, killing, or threatening to kill ... livestock” or “attacking ... a domestic dog.” Id. § 87-3-130(1); see also Ex. 15, at 7, 41 (Montana wolf plan) (stating that § 87-3-130 is effective upon delisting). The Department of the Interior, in 1996, determined that a prior version of the same statute was “inadequate” to protect a recovered grizzly bear population as it allowed “unlimited take of grizzly bears by livestock owners” and thereby “could endanger maintenance of a recovered bear population.” See Ex. 16, at 2. For the same reason, Montana’s law is again inadequate here.

In Wyoming, wolves “doing damage to private property” anywhere within the state “may be immediately taken and killed” by property owners. Wyo. Stat. § 23-3-115 (a), (c). The Department of the Interior, in 1997, determined that this provision was “insufficient to meet the delisting criteria” for grizzly bears “for the same reasons” as Montana’s private predator control provision. See Ex. 17, at 1. This, in combination with other state measures providing for the “aggressive management” of wolves within Wyoming’s “trophy game” area, see, e.g., Wyo. Stat. § 23-1-304(g), (h), underscores the illusory nature of the protections set forth in Wyoming law.

Although Idaho, Montana, and Wyoming predator control laws allow unregulated wolf

killing, FWS makes no mention of them in its delisting analysis. Because these laws leave state wildlife officials powerless to limit wolf killing, they render arbitrary FWS' determination that existing regulatory mechanisms are adequate. See 16 U.S.C. § 1533(a)(1)(D); State Farm, 463 U.S. at 43 (action arbitrary if agency fails to consider an important aspect of the problem).

III. A PRELIMINARY INJUNCTION IS NECESSARY TO PREVENT FURTHER IRREPARABLE INJURY TO WOLVES AND PLAINTIFFS

Even without the demonstrable harm that wolves and Plaintiffs suffer as a result of FWS' decision to delist, injunctive relief pending a decision on the merits is warranted in this case because Plaintiffs have shown a likelihood of prevailing on the claim that FWS' decision to delist wolves despite ongoing threats to their survival violates the ESA. See Nat'l Wildlife Fed'n, 422 F.3d at 794; Sierra Club, 816 F.2d at 1384 (“Sierra Club is entitled to injunctive relief if the [agency] violated a substantive or procedural provision of the ESA”). However, the unregulated wolf killing that has resulted from FWS' unlawful delisting decision provides an additional reason why Plaintiffs' request for injunctive relief should be granted. As FWS has stated, “[w]olves are very susceptible to unregulated human-caused mortality.” 71 Fed Reg. at 43,428. FWS acknowledges that the “immediate harm” of delisting may warrant some type of injunctive relief, “as the Wyoming predatory-animal status could mean immediate killing of wolves.” Ex. 18, at 1 (statement of FWS wolf recovery coordinator).

The Supreme Court and the Ninth Circuit both have recognized that “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.” Idaho Sporting Congress, 222 F.3d at 569 (quoting Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987)). In the ESA context, “harm to a small number of animals is sufficient to demonstrate irreparable harm to an endangered, or even a threatened, species.” Humane Society of U.S. v. Kempthorne, 481 F.

Supp. 2d 53, 70 (D.D.C. 2006). Here, injury to wolves—on individual, pack, and population levels—constitutes irreparable injury warranting injunctive relief. See id. (lethal take of 43 gray wolves in Wisconsin constitutes irreparable injury); Defenders of Wildlife v. Norton, 354 F.Supp.2d 1156, 1174 (D.Or. 2005) (“death or injury of endangered wolves due to the [ESA section] 4(d) rules is irreparable injury”); see also Greater Yellowstone Coal. v. Flowers, 321 F.3d 1250, 1257 (10th Cir. 2003) (harm to three bald eagle nesting sites may constitute irreparable harm).

Further, the harm to members of plaintiff organizations stemming from unregulated wolf killing now occurring—and certain to continue—provides an additional basis for finding that the balance of harms favors an injunction here. See Natural Res. Defense Council, Inc., 518 F.3d at 696 (affirming issuance of preliminary injunction where plaintiffs demonstrated “possibility of irreparable harm to [plaintiff’s] membership” due to potential harm to marine species).

A. Delisting Irreparably Injures Individual Wolves

At least 37 wolves have already been killed since wolves in the northern Rockies lost ESA protections on March 28, 2008. Ex. 27, at 1. More are certain to die under state predator control laws. At least 13 wolves have been legally killed in Sublette County, within Wyoming’s predator zone. Two wolves were killed on the edge of a state-run feed ground on the day delisting took effect. Ex. 19. Another was pursued for more than 35 miles by an individual on a snowmobile before it was shot. Ex. 20. Because Wyoming law allows 10 days for reporting a wolf kill, and because many wolf kills go unreported, the toll in Wyoming is likely even higher.

Several wolves have been killed without a permit in Idaho since delisting took effect. Two of the wolves were killed on April 1, 2008, by a landowner just west of Ashton, in the far eastern portion of Idaho. The landowner shot the first wolf near his horses and pursued the

second wolf on a snowmobile for more than a mile before shooting it. See Ex. 20 (Idaho press release). Nevertheless, the county prosecutor declined to prosecute the killings under the Idaho law allowing the take of wolves deemed to be “molesting” livestock. Id.; Ex. 21. One alpha male wolf was also shot illegally near Clayton, in central Idaho, and found by the roadside.³ See Stone Dec. ¶ 5. In addition to these, many more wolves may have been killed in Montana, Idaho, and Wyoming, but not reported to state wildlife officials. 73 Fed. Reg. at 10,544 (noting that “many wolf killings are intentional, illegal, and are never reported to authorities”).

Given hostility within the region toward wolves, more are certain to die. Idaho’s governor is on record as supporting a “gray wolf kill,” in which all but 100 of Idaho’s wolves would be eradicated after delisting, and has said, “I’m prepared to bid for that first ticket to shoot a wolf myself.” See Ex. 22; Ex. 23. Further, Idaho’s official position is that “wolves be removed [from Idaho] by whatever means necessary.” See Ex. 24 (House Joint Mem. No. 5); Ex. 25 at 4 (Idaho Plan). Further, Montana, Idaho, and Wyoming have all proposed wolf hunts for this fall. Montana has finalized wolf hunting regulations. Ex. 5 (Montana Fact Sheet). Idaho and Wyoming are establishing regulations that will set a wolf hunting season and bag limits. See Ex. 6 (Idaho 4/11/08 report); Ex. 7 (Wyoming Fact Sheet). The killing of wolves that have been removed unlawfully from the endangered species list is sufficient to demonstrate irreparable harm. See Humane Soc’y of U.S., 481 F. Supp. 2d at 70.

B. Delisting Irreparably Injures Wolf Packs

The killing of individual wolves also irreparably harms entire wolf packs. Research

³ Although the wolf near Clayton was killed in violation of Idaho law, the penalty for such killing is exponentially lower than the penalty for taking an endangered species. Compare Id. Code § 36-1402 (\$200 penalty for illegal killing of big game animal) with 16 U.S.C. § 1540(a) (up to \$25,000 civil penalty for illegal take) and id. § 1540(b) (up to \$50,000 criminal penalty plus up to one-year imprisonment). Delisting removed a substantial deterrent to illegal wolf killing.

demonstrates that the probability that a wolf pack will reproduce the year after one or both alpha (i.e. breeding) wolves are killed is significantly reduced. Ex. 26, Brainerd, et al. (2008) at 92, 94-95. This impact is exaggerated for smaller or less concentrated wolf populations, as an alpha wolf that is killed generally must be replaced by a mature wolf from an adjacent pack to allow the pack to persist and produce pups the following year. Id. at 95. Thus, the reproductive potential of packs that lose breeding members will only diminish as state management successfully decreases the size and distribution of the northern Rockies wolf population.

At least one breeding alpha male has been killed in Idaho since delisting. See Stone Dec., ¶ 5. It is unknown whether other breeding members of any wolf pack have been killed in Montana, Idaho, or Wyoming since delisting, but the unregulated killing in those states makes the probability of such breeder loss substantial. These indirect impacts of unregulated wolf killing on packs' reproductive potential constitute irreparable harm that necessitates preliminary injunctive relief.

C. Delisting Irreparably Injures Wolves at the Population Level

Unregulated wolf killing is also detrimental to the viability of the northern Rockies wolf population as a whole. Unregulated wolf killing has significant potential to disrupt dispersal between core recovery populations in the Greater Yellowstone area, central Idaho, and northwestern Montana. See Wayne Dec. ¶ 3. Since delisting, two wolves were killed near Ashton, Idaho, on the far western edge of the Yellowstone population. See Ex. 20. Because of their location, the Ashton wolves were candidates to breed and establish essential connections between core wolf populations. Because they were killed—legally, under Idaho law—that potential is lost. Such unregulated killing of potential wolf dispersers impedes wolf recovery by diminishing the prospects for a northern Rockies wolf metapopulation. Id.

D. Delisting Irreparably Injures Members of Plaintiff Organizations

Members of the plaintiff organizations are irreparably harmed by delisting of the northern Rockies gray wolf. Plaintiffs' members enjoy seeing and hearing wolves in the wild. By allowing unregulated wolf killing, post-delisting state management of wolves substantially reduces those opportunities. Western Watersheds Project ("WWP") is headquartered on the 432-acre Greenfire Preserve located on the East Fork Salmon River, near Clayton in Custer County, Idaho. *Marvel Dec.* ¶ 3. WWP manages the Greenfire Preserve to provide habitat for native wildlife, including wolves. *Id.* ¶¶ 6-7. WWP members and staff often observe wolves on the Greenfire Preserve. *Id.* ¶ 7. Delisting and Idaho's law allowing liberal wolf killing without a permit imperils wolves that use the Greenfire Preserve and irreparably injures WWP. *Id.*

The killings of wolves in Sublette County, Wyoming—within Wyoming's predator zone—present the real possibility that plaintiffs' members will no longer be able to view any wolves in Sublette County. *See Camenzind Dec.*, ¶ 5. Wyoming law also imperils the popular Teton Pack and two other wolf packs near Jackson Hole, Wyoming, which occasionally travel south into Wyoming's predator zone, where the wolves will be subject to immediate killing. *Id.* ¶ 4. Members of plaintiff organizations in Jackson, Wyoming enjoy observing the Teton wolves and other packs, and will be irreparably injured if those wolves are shot. *Id.* Unregulated killing pursuant to predator control laws elsewhere in Wyoming, Idaho, and Montana similarly impairs plaintiffs' ability to see and hear wolves in the wild. *See id.* ¶ 4-5; *Stone Dec.*, ¶¶ 8-9; *Marvel Dec.* ¶¶ 7, 10-14.

Because Plaintiffs are likely to prevail in their challenge to FWS' delisting decision—a decision that has caused and will continue to cause irreparable harm to wolves, wolf packs, wolf populations, and plaintiffs' members—this Court should enter a preliminary injunction

reinstating essential ESA protections for wolves.

CONCLUSION

Unregulated wolf killing in Wyoming, Idaho, and Montana has commenced. Plaintiffs respectfully request that their motion for a preliminary injunction be granted, and that this Court order that ESA protections for gray wolves in the northern Rockies shall be reinstated pending a final decision on the merits of this case.

Respectfully submitted this 28th day of April, 2008.

/s/ Jenny K. Harbine

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April, 2008, I caused copies of:

MOTION FOR PRELIMINARY INJUNCTION;
MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION;
DECLARATION OF JENNY K. HARBINE;
DECLARATION OF ROBERT WAYNE;
DECLARATION OF FRANZ CAMENZIND;
DECLARATION OF JONATHAN MARVEL; and
DECLARATION OF LYNNE STONE

to be personally served on the United States Attorney at the following address:

Bill Mercer, U.S. Attorney
105 E Pine St # 2
Missoula, MT 59802

and to be served by overnight delivery via Federal Express upon the following:

Michael Mukasey, Attorney General
U.S. Department of Justice
950 Pennsylvania Ave. NW
Washington, D.C. 20530-0001

/s/ Jenny K. Harbine
Jenny K. Harbine