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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

DEFENDERS OF WILDLIFE, et al.,

Plaintiffs,

vs.

KEN SALAZAR, et al.,

Defendants.

GREATER YELLOWSTONE COALITION,

Plaintiff,

vs.

KEN SALAZAR, et al.,

Defendants.

Case No. CV-09-77-M-DWM
Case No. CV-09-82-M-DWM
(Consolidated)

PLAINTIFFS DEFENDERS OF WILDLIFE ET AL.'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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Plaintiffs Defenders of Wildlife, et al. hereby reply to the response briefs of Federal Defendants and all Defendant-Intervenors.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

A. The ESA Does Not Permit Delisting A Portion Of A Listed Species

1. The Plain Language Of The ESA Does Not Permit Partial Delisting

The U.S. Fish and Wildlife Service's ("FWS") decision to delist a fraction of the northern Rockies wolf population notwithstanding its determination that the distinct population segment ("DPS") remains endangered across "a significant portion of its range" cannot be reconciled with the plain language of the Endangered Species Act ("ESA"). See 74 Fed. Reg. 15,123, 15,184 (Apr. 2, 2009) (the northern Rockies DPS remains "in danger of extinction" in Wyoming, a significant portion of its range). Consistent with its title, the Endangered Species Act deals in "species"—that is, species, "subspecies of fish or wildlife or plants," or "any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16) (emphasis added). Under the statute, "species" are deemed "endangered species" whenever they are "in danger of extinction throughout all or a significant portion of [their] range." Id. § 1532(6) (emphases added); see also id. § 1532(20) ("The term 'threatened species' means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.") (emphases

added). It is endangered "species"—not chosen members of an endangered species—that are afforded the protections of the Endangered Species Act. See, e.g., id. § 1536(a)(2) ("Each Federal agency shall … insure that any action … is not likely to jeopardize … any endangered species ….") (emphasis added); id. § 1538(a)(1) (take prohibition applicable "to any endangered species of fish or wildlife") (emphasis added); see also, e.g., Trout Unlimited v. Lohn, 559 F.3d 946, 949 (9th Cir. 2009) ("[I]f NMFS decides to list a species or a distinct population segment as 'endangered' or 'threatened,' it must accord the species or the distinct population segment various legal protections.") (emphasis added); Alsea Valley Alliance v. Evans, 161 F. Supp. 2d 1154, 1162 (D. Or. 2001) ("listing distinctions below that of subspecies or a DPS of a species are not allowed under the ESA"), appeal dismissed for lack of jurisdiction, 358 F.3d 1181 (9th Cir. 2004). Accordingly, FWS's attempt to strip the statute's protections from parts of the northern Rockies DPS when the DPS remains endangered in a "significant portion of its range" was arbitrary and unlawful.

Less than five years ago, FWS readily acknowledged that "the [Endangered Species] Act does not allow wolves to be delisted on a State-by-State basis." See 70 Fed. Reg. 1,286, 1,296 (Jan. 6, 2005). Now, it asserts the opposite. After declaring the ESA to be "ambiguous" on the issue, FWS contends that Plaintiffs' statutory challenge to State-by-State delisting "lacks merit." FWS Resp. at 13-18.

None of the agency's arguments withstands scrutiny.

First, FWS's newfound conviction that the ESA does not speak clearly regarding partial delisting cannot be reconciled with the statute's text. In asserting that "the plain language of the ESA is ambiguous regarding whether ESA protections must be applied to the entire listed entity," FWS relies on the Ninth Circuit's identification of statutory ambiguity in Defenders of Wildlife v. Norton, 258 F.3d 1136 (9th Cir. 2001). See FWS Resp. at 13. In Defenders, however, the Court's analysis was limited to determining what constitutes a "'significant portion of [a species'] range'"—a phrase that "is not defined in the statute." 258 F.3d at 1145. Here, FWS concedes that Wyoming is a "significant portion" of the northern Rockies wolf population's range. 74 Fed. Reg. at 15,184. Moreover, the agency acknowledges that the northern Rockies DPS—the "species"—remains "in danger of extinction" across that "significant portion of its range." Id. As a result, the only question is whether the DPS is accordingly an "endangered species" entitled to the protections of the ESA—a question clearly answered by the statute's text. See 16 U.S.C. § 1532(6) ("The term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range[.]") (emphases added). FWS's willingness to push the statute's language aside is not enough to render the ESA ambiguous. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress

is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

Second, in contending that the statutory definition of "species" is somehow irrelevant to the agency's "listing process," FWS misconstrues Ninth Circuit precedent. See FWS Resp. at 15-16. In Trout Unlimited v. Lohn, on which FWS relies, the Ninth Circuit held that the identification of a "species" and the assessment of the species' conservation status are "two analytically distinct phases of agency action" under the ESA and, thus, the identification phase may not be influenced by a "threats" analysis. 559 F.3d at 955-56. The Court did not conclude, however, that the ESA permits extending its protections to anything less than the "species" identified in the statute's first "phase" of analysis. To the contrary, the Ninth Circuit affirmed that the "plain language of the statute" requires "a status review of [an] entire 'species'—no more, and no less." Id. at 957; see also id. at 961 ("The ESA requires … that status reviews evaluate an entire species."). In the words of the Court, "if [FWS] decides to list a species or a distinct population segment as 'endangered' or 'threatened,' it must accord the species or the distinct population segment [the] various legal protections" of the ESA. Id. at 949-50 (emphasis added). FWS failed to do this here, and so violated the statute.

Third, in asserting that Plaintiffs' argument "reads the word 'or' out of" the statutory phrase "in danger of extinction throughout all or a significant portion of its range," FWS Resp. at 16-17, FWS again misconstrues Ninth Circuit precedent. In Defenders, on which the agency rests its assertion, the Court rejected FWS's contention that "a species is in danger of extinction in 'a significant portion of its range' [under the ESA] only if it is in danger of extinction everywhere," noting that the interpretation had "the effect of rendering the ['significant portion of its range'] phrase superfluous." 258 F.3d at 1142-43. Plaintiffs' argument has no such effect. Rather, it respects Congress's determination that "species" are to be deemed "endangered" whenever they are "in danger of extinction throughout all … of [their] range" or, alternatively, "in danger of extinction throughout … a significant portion of [their] range." See 16 U.S.C. § 1532(6).

Fourth, in attempting to salvage its extensive reliance on ESA section 4(c)(1), FWS declares that Plaintiffs have "cite[d] no support for their characterization" of the provision as a "mere 'bookkeeping' or 'procedural' requirement[]." FWS Resp. at 17. However, section 4(c)(1) announces itself as such a requirement, providing that "[t]he Secretary of the Interior shall publish in the Federal Register a list of all species determined … to be endangered [or threatened] species" and "from time to time revise [the] list … to reflect" substantive determinations made under sections 4(a) and 4(b) of the statute. 16

U.S.C. § 1533(c)(1). Moreover, FWS fails to acknowledge that the ESA's various protective provisions operate independently of the publication requirement, as they attach to "endangered species" and "threatened species"—not published portions of the species' range. See, e.g., id. § 1536(a)(2) ("Each Federal agency shall … insure that any action … is not likely to jeopardize … any endangered species ….") (emphasis added); id. § 1538(a)(1) (take prohibition applicable "to any endangered species of fish or wildlife") (emphasis added). In short, section 4(c)(1) does serve a useful role in notifying officials (and the public) of FWS's endangerment findings, as publication of the "significant portion" of range where a species is imperiled could guide the Secretary in promulgating section 4(d) rules to fine-tune the scope of any take restrictions and/or in utilizing streamlined informal consultation procedures to minimize any section 7 burdens in areas outside the endangerment zone. See, e.g., 50 C.F.R. § 402.13 (addressing informal consultation); Trout Unlimited, 559 F.3d at 950, 961-62 (discussing authority to tailor regulations to certain members of threatened populations under section 4(d)); cf. Farm Bureaus' Resp. at 7 (asserting that "there would be no purpose for FWS to identify over what portion of a species' range that a species was endangered or threatened if FWS was required to afford protections over every square mile of the species' range as Plaintiffs argue"). Section 4(c)(1) does not, however, constrict the bounds of the ESA's protections.

Fifth, in arguing that a plain-language reading of the ESA would lead to "absurd results," FWS offers the Court a red herring. See FWS Resp. at 12-13. According to FWS, "in many circumstances, an endangered DPS also would constitute a significant portion of the range of the 'species' to which it belongs, and Plaintiffs' logic would require the entire species to be protected." Id. at 12. This argument ignores the flexibility afforded to FWS through the ESA's definition of "species," which allows the agency to list individual populations where it deems a species-wide listing inappropriate. See Section I.A.2, infra. In other words, rather than "undercut[ting] Congress's intent to give FWS the flexibility to tailor protections to the actual threats facing species," FWS Resp. at 13, Plaintiffs' argument recognizes the manner in which Congress afforded FWS such flexibility. The same cannot be said of FWS's unreasonable interpretation, which cannot be sustained.

2. FWS's Decision To Delist Members Of An Endangered Species Is At Odds With The Purposes Of The ESA

FWS also contends that its new interpretation of the ESA's "significant portion" provision "furthers the purposes of the [statute] by providing [the agency] with the flexibility to 'recognize the conservation practices and protection efforts of States and local jurisdictions, while also ensuring that the Act's protections are properly provided.'" FWS Resp. at 17. This argument fails. Rather than furthering Congress's desire to extend the ESA's protections to "species" that are

"in danger of extinction throughout … a significant portion of [their] range," see 16 U.S.C. § 1532(6), FWS's redundant reading of the statute inappropriately undermines Congress's intent to preclude population-level listings of plants and invertebrates, see id. § 1532(16).

As noted in the act's legislative history, Congress drafted the ESA in a manner allowing FWS to avoid unnecessarily "'broad listing[s]'" that would unnecessarily inhibit local wildlife management. See Defenders, 258 F.3d at 1145 (quoting Senator Tunney). However, Congress did not provide this "flexibility" by way of the statute's "significant portion of its range" provision—a provision that was designed to allow the protection of species before they faced "worldwide extinction," as had been required under prior legislation. See H.R. Rep. No. 93-412 (1973) (Ex. 6 at 149) ("The term 'Endangered Species' means any species of fish or wildlife which is in danger of extinction throughout its entire range, or any portion of its range. This definition is a significant shift in the definition in existing law, which considers a species to be endangered only when it is threatened with worldwide extinction."); see also Defenders, 258 F.3d at 1144 (quoting same in noting that the ESA's "significant portion" standard "broadened protection for species"). Instead, it did so by defining the critical term "species" in a manner that permits the protection of individual wildlife populations—be they "group[s] of fish or wildlife of the same species or smaller taxa in common spatial arrangement that

interbreed when mature," as the 1973 statute originally provided, or "distinct population segment[s] of any species of vertebrate fish or wildlife which interbreed[] when mature," as the definition now reads. See Endangered Species Act of 1973, Pub. L. No. 93-205, § 3(11), 87 Stat. 884, 886 (1973); 16 U.S.C. § 1532(16). "Th[is] authority to list and separately protect individual populations provides the flexibility to apply the Act's conservation measures selectively to those populations of a species that are currently in trouble, while leaving unregulated healthy populations of the same species." Michael J. Bean & Melanie J. Rowland, The Evolution of National Wildlife Law 200 (3d ed. 1997); see also Trout Unlimited, 559 F.3d at 949 ("'The ability to designate and list [DPSs] allows the [agency] to provide different levels of protection to different populations of the same species.'") (quoting Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835, 842 (9th Cir. 2003)); 61 Fed. Reg. 4,722, 4,725 (Feb. 7, 1996) (FWS policy noting that the ESA's DPS provision allows FWS "to address local issues (without the need to list, recover, and consult rangewide)," resulting in a "more effective program"); cf. Farm Bureaus' Resp. at 11 (wrongly suggesting that "significant portion" listings are required under the ESA in order to afford early protections and thereby "potentially obviate the need for a range-wide listing at a later date").[1]

[1] Citing an imprecise statement by a single senator, the Ninth Circuit has previously suggested in dicta that FWS's geographic management "flexibility" is rooted in the ESA's "significant portion" provision. See Defenders, 258 F.3d at

The role of the ESA's "species" definition in granting FWS its geographic management "flexibility" was underscored in a House debate concerning, of all things, wolves. When asked if the statute would permit "designat[ing] the timber wolf as an endangered species in all States of the Union except Minnesota," Representative Dingell responded:

> [T]he answer to that question is that [the Secretary of the Interior] could so do, if the population of wolves in question were to be found in Minnesota. H[is] responsibility and discretion would extend to particular species, subspecies or populations of wolves and other kinds of endangered or threatened animals.

Cong. Rec. (Dec. 20, 1973) (Ex. 6 at 478) (emphasis added); see also Cong. Rec. (Oct. 14, 1978) (Ex. 6 at 882) (comments of Rep. Dingell opposing an amendment that would have redefined "species" in a manner excluding individual populations on the grounds that the amendment would have prevented the Secretary from "say[ing] that the bald eagle is endangered in the lower 48 States and is not endangered in Alaska, [as] he would have to either declare it endangered throughout the whole of its range, or not declare it endangered at all"); S. Rep. No.

1144-45 (quoting Senator Tunney). The Ninth Circuit has since affirmed, however, that it is the statute's DPS provision—not discussed in Defenders—that allows FWS "'to provide different levels of protection to different populations of the same species.'" Trout Unlimited, 559 F.3d at 949 (quoting Nat'l Ass'n of Home Builders, 340 F.3d at 842). To read the "significant portion" provision as performing the same task is accordingly inappropriate, as "[s]uch a redundant reading of a significant statutory phrase is unacceptable." See Defenders, 258 F.3d at 1142.

96-151 (1979) (Ex. 6 at 1397) (rejecting similar amendment to remove "populations" from the definition of "species" on the grounds that "there may be instances in which FWS should provide for different levels of protection for populations of the same species").[2] Contrary to FWS's assertion in its brief, therefore, the agency's 1978 listing of the gray wolf "as a threatened species in Minnesota and as an endangered species in the remaining 47 coterminous United States and Mexico" did not inappropriately "provide ESA protections for part of a species." See FWS Resp. at 12; see also Safari Club Resp. at 7 (contending that the 1978 listing "is precedent for the Final Rule"). Instead, the listing reflected FWS's authority and flexibility to list individual populations as "species" under the statute.[3]

Ultimately, it is FWS's new interpretation of the ESA that undermines the clear intent of Congress. Under the agency's reading of the statute's "significant portion" provision, FWS would effectively have the authority to list plants and

[2] Senator Tunney's much-referenced comments, which focused on the Secretary's ability to engage in population-level listing under the ESA rather than the statutory source of that authority, are consistent with Representative Dingell's more precise remarks. See Defenders, 258 F.3d at 1144-45 (quoting Senator Tunney); Safari Club Resp. at 8 (same); Farm Bureaus' Resp. at 9 n.1 (same).

[3] While FWS also notes Congress's desire to avoid "'pre-empt[ing] efficient [state management] programs,'" FWS Resp. at 17-18, Congress accomplished this with section 6 of the ESA, which authorizes FWS to "enter into a cooperative agreement … with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species." 16 U.S.C. § 1535(c)(1). FWS's authority to enter such agreements is not at issue.

invertebrates below the species or subspecies level—a result Congress prohibited in limiting its definition of listable "distinct population segment[s]" to "any species of vertebrate fish or wildlife which interbreeds when mature." See 16 U.S.C. § 1532(16); see also 61 Fed. Reg. at 4,724 (DPS Policy "recogniz[ing] the inconsistency of allowing only vertebrate species to be addressed at the level of DPS's," but concluding that "the Act is perfectly clear and unambiguous in limiting this authority"). Thus, rather than being "consistent with … Congress's amended definition of 'species' to include DPSs," FWS Resp. at 18 n.8, FWS's new reading accomplishes the very thing the DPS provision was intended to foreclose.[4]

B. FWS's Assessment Of The Significance Of The Region's "Unsuitable" And "Unoccupied" Habitat Was Arbitrary And Unlawful

In attempting to defend its arbitrary declaration that the northern Rockies' vast "unoccupied" areas are of no significance to the region's wolves, see 74 Fed. Reg. at 15,183-84, FWS no more than asserts that it "thoroughly considered all areas" as potentially "significant" and thus acted reasonably, see FWS Resp. at 26-27; see also Farm Bureau's Resp. at 12 (asserting same). This conclusory

[4] Intervenor Farm Bureaus' observation that "[n]o 'distinct population' was identified" at the time of the 1978 wolf listing, Farm Bureaus' Resp. at 10, sheds no light on the statutory question before the Court given that the "distinct population segment" language did not yet exist in the ESA at the time of the 1978 wolf listing.

assertion, however, does nothing to remedy the flaws fatal to FWS's "significance" analysis. First, in relying on human-caused threats as grounds for declaring large areas of wolf habitat to be "insignificant" and accordingly irrelevant to the agency's endangerment analysis, FWS arbitrarily and unlawfully evaded an assessment of whether the species remains threatened or endangered by "the present or threatened destruction, modification, or curtailment of its habitat or range" or "other … manmade factors affecting its continued existence." See 16 U.S.C. § 1533(a)(1)(A), (D); PI Br. at 13-16. Second, while conceding that it deemed "dispersal habitat" insignificant to wolf conservation, see FWS Resp. at 27, FWS fails to reconcile this determination with its own recovery standard, which emphasizes the importance of genetic exchange, see, e.g., 74 Fed. Reg. at 15,130-31; PI Br. at 15-16. Finally, FWS makes no attempt to reconcile its declaration that the "unoccupied" areas outside Wyoming are of no significance to wolf conservation with its recognition that all of Wyoming—including both occupied and unoccupied habitat—is a "significant portion" of the wolf's range. See FWS Resp. at 26-27; PI Br. at 16.

C. FWS Fails To Support Its Finding That The Northern Rockies Wolf Population Is Not Threatened By A Foreseeable Lack Of Genetic Exchange

FWS fares no better in addressing the genetic exchange portion of the northern Rockies wolf recovery standard. FWS begins its defense of its genetic

exchange determination by faulting Plaintiffs for focusing on "the potential future status of [northern Rockies] wolves," preferring to discuss the population's current status, which was achieved under the protections of the ESA. FWS Resp. at 19-20 (emphasis in original). However, a delisting inquiry by its nature requires FWS to assess whether a species will become threatened or endangered after the ESA's protections are lifted. See 16 U.S.C. § 1533(a)(1); id. § 1532(20) ("The term 'threatened species' means any species which is likely to become an endangered species within the foreseeable future.") (emphasis added). Accordingly, the issue is not whether any genetic exchange has occurred at population levels far in excess of FWS's demographic recovery standards; it is whether FWS rationally determined that the key genetic exchange recovery standard would be attained when state regulatory mechanisms replace the ESA. FWS has failed to demonstrate that, absent ESA protections, the northern Rockies wolf population will exhibit the genetic exchange that FWS has deemed essential to wolf recovery.

FWS in its response brief does not attempt to support its statement in the Delisting Rule that genetic exchange is not necessary in the northern Rockies wolf population because small, isolated wolf populations in other parts of the world have persisted without it (albeit with significant effects of inbreeding depression). See FWS Resp. at 19-26; 74 Fed. Reg. at 15,177. Nor does FWS attempt to support the Delisting Rule's claim that Idaho and Montana have committed to

maintaining more than 1,000 wolves—more than three times the states' actual commitment. See FWS Resp. at 19-26; 74 Fed. Reg. at 15,133, 15,177. Likewise, FWS appears to have abandoned its argument that future genetic exchange is likely because, in the last 13 years, four wolves from outside the Greater Yellowstone Area ("GYA") (including two that were artificially transplanted into the area) produced offspring there. See FWS Resp. at 19-26; 74 Fed. Reg. at 15,176. Instead, FWS now insists that unspecified or unenforceable measures are adequate regulatory mechanisms to achieve and maintain genetic connectivity, that the northern Rockies wolf population will achieve needed genetic exchange even if it is managed for only 150 wolves in 15 breeding pairs, and that FWS may rely on future, "human-assisted genetic exchange" to deem the northern Rockies wolf population recovered. None of these contentions has merit.

1. FWS Cannot Justify Delisting In Light Of Inadequate Regulatory Mechanisms

Neither in its Delisting Rule nor in its response brief has FWS identified a single regulatory mechanism to address the genetic exchange requirement that is clearly stated in FWS's own recovery standard. While the Delisting Rule cited FWS's "belie[f]" that the northern Rockies wolf population "will be managed for over 1,000 wolves" to support the agency's finding that genetic connectivity will occur, 74 Fed. Reg. at 15,133, FWS now effectively concedes that no regulatory mechanisms exist to maintain state wolf populations above 150 wolves and 15

breeding pairs. See FWS Resp. at 21 (Idaho and Montana have "committed to ensure that the population does not fall below 15 breeding pairs and 150 wolves"); see also McDonald Dec. [Doc. 80-2] ¶ 21 ("At this point, Montana hasn't established wolf population objectives other than to maintain at least 150 wolves and 15 breeding pairs as described in the Wolf Management Plan."). In light of this concession, FWS's reliance in the Delisting Rule on Idaho and Montana's purported commitments to manage for 1,000 wolves was arbitrary.

FWS claims that Idaho and Montana's wolf hunts will not impair genetic connectivity, reiterating the discussion of those hunts in the Delisting Rule. See FWS Resp. at 25-26. In its brief, FWS fails to address Plaintiffs' arguments that hunter-caused wolf mortality will jeopardize future genetic exchange because hunting is permitted during wolves' peak dispersal period and in key dispersal areas. See id.; see also PI Br. at 22; AR 2009-005418 (email from Montana wolf program coordinator Carolyn Sime stating, "[i]f we were truly promoting [wolf dispersal], seasons would close by November and they don't anywhere in the three states. … And there are more things that we could have done to 'promote' connectivity relative to public harvest and we did not. Lipstick on a pig—well—it's still a pig."). Although FWS asserts that it "considered this issue," FWS Br. at 25, it fails to justify its Delisting Rule determination that regulatory mechanisms are nonetheless adequate.

Both FWS and the state intervenors cite an MOU as evidence that regulatory mechanisms are adequate. However, the MOU is a voluntary agreement, not a regulatory mechanism that can justify removal of ESA protections. See PI Br. at 21-22. FWS describes the MOU's provisions as "binding commitments," and then cites a case, Federation of Fly Fishers v. Daley, 131 F. Supp. 2d 1158 (N.D. Cal. 2000), that FWS alleges supports its consideration of "voluntary measures toward conservation." FWS Resp. at 23 (emphasis added). Idaho similarly relies on Federation of Fly Fishers and characterizes the case as prohibiting only reliance on "proposals for future conservation action." Idaho Resp. at 8. Contrary to both arguments, Federation of Fly Fishers held that FWS acted arbitrarily and capriciously in relying not only on "proposals for future action," but also on "voluntary measures toward conservation," particularly given that "past state conservation efforts were inadequate." 131 F. Supp. 2d at 1169. Given that the measures lauded by Defendants are likewise voluntary and similarly stand against a backdrop of state management that has been uniformly hostile to wolves, FWS's reliance on voluntary measures here was equally unlawful in assessing the adequacy of regulatory mechanisms. See also Oregon Nat. Res. Council v. Daley, 6 F. Supp. 2d 1139, 1155 (D. Or. 1998) ("[F]or the same reason that the Secretary may not rely on future actions, he should not be able to rely on unenforceable efforts. Absent some method of enforcing compliance, protection of a species can

never be assured.").

2. The Potential For Genetic Exchange Does Not Satisfy FWS's Recovery Goal

FWS misstates its own findings, and those of its hand-picked experts, in stating that state wolf populations of 15 breeding pairs and 150 wolves "provide[] the potential for genetic exchange and appropriately define[] a viable, recovered DPS." FWS Resp. at 22 (emphasis added). Indeed, time after time, FWS has emphasized that 15 breeding pairs and 150 wolves in each of the three northern Rockies wolf recovery areas would constitute a viable regional wolf population only if the subpopulations also exhibit genetic exchange. See 74 Fed. Reg. at 15,130-31, 15,134 (reiterating 1994 recovery standard requiring "[t]hirty or more breeding pairs comprising some 300+ wolves in a metapopulation … with genetic exchange between subpopulations") (emphasis added); AR 2009-042228 (USFWS 1994) (stating that "[t]he importance of movement of individuals between sub-populations cannot be overemphasized" and "[i]t is fairly clear that ten breeding pairs in isolation will not comprise a 'viable' population"); AR 2009-036158 (Bangs 2002) ("Connectivity was the single issue brought up most often by [peer] reviewers.") (emphasis in original). Moreover, this Court has already held that the mere "potential for genetic exchange" does not satisfy FWS's recovery criteria. Defenders of Wildlife v. Hall, 565 F. Supp. 2d 1160, 1169 (D. Mont. 2008).

FWS's argument that "scientific evidence" supports its finding that 150 wolves and 15 breeding pairs in each state is an adequate population level to facilitate genetic exchange between subpopulations relies on documentation of a single wolf dispersal into the GYA when the population was below this level. FWS Resp. at 22. This dispersal occurred in 1992, before wolf reintroduction and when wolves were still listed under the ESA, but when no other known wolves occupied the GYA. See id.; see also 74 Fed. Reg. at 15,177. In any event, this wolf did not breed and was shot just south of Yellowstone Park shortly after its presence was first documented. See Bangs Dec. ¶ C17.A.

Furthermore, FWS's claim that genetic exchange will be adequate if the states manage wolves to FWS's minimum recovery level contradicts FWS's own findings in the Delisting Rule that, "[i]f the population is managed to the minimum recovery target of 150 wolves per State, dispersal would be noticeably impacted, which could require costly and intensive management to mitigate." 74 Fed. Reg. at 15,142; see also id. at 15,172 ("Managing to minimal recovery levels … would reduce the opportunities for demographic and genetic exchange in the WY portion [of] the GYA."); Defenders, 565 F. Supp. 2d. at 1171-72 ("genetic exchange is not likely to occur with these numbers [at least 150 wolves in 15 breeding pairs]"). In short, FWS's argument makes clear that no regulatory mechanisms exist to maintain state wolf populations above a level that FWS itself conceded would

impair essential genetic exchange among subpopulations.

3. Perpetual Genetic Augmentation Cannot Support FWS's Determination That Northern Rockies Gray Wolves Have Recovered

Failing even to acknowledge the Ninth Circuit's recent affirmation that "the ESA's primary goal is to preserve the ability of natural populations to survive in the wild," Trout Unlimited, 559 F.3d at 957, FWS argues that reliance on euphemistically described "human-assisted migration management" is an adequate substitute for natural wolf dispersal among subpopulations under the ESA. FWS Resp. at 23. However, FWS offers no limiting principle to explain how its acceptance of "human intervention in maintaining recovered populations" would stop short of authorizing even maintenance of imperiled wildlife as relic zoo populations.

The ESA directs FWS to employ "all methods and procedures which are necessary to bring [imperiled species] to the point at which the measures provided pursuant to [the ESA] are no longer necessary." 16 U.S.C. § 1532(3). Such "methods and procedures" are defined to include "propagation, live trapping, and transplantation." Id. Thus, while transplantation is an appropriate tool under the ESA for promoting species recovery, a population whose viability relies on perpetual artificial augmentation may not be deemed already recovered. FWS's reliance upon future human manipulation of the northern Rockies wolf population

to support its determination that the population is recovered violates the ESA's mandate, affirmed by the Ninth Circuit, that the agency must "promote populations that are self-sustaining without human interference." Trout Unlimited, 559 F.3d at 957 (quotation omitted). In any event, FWS offers nothing at all in response to Plaintiffs' observation that no "human-assisted migration program" for northern Rockies wolves has been established, let alone funded. See PI Br. at 28.[5]

II. A PRELIMINARY INJUNCTION IS NECESSARY TO PREVENT IRREPARABLE HARM

A. Winter Does Not Alter The ESA Injunction Standard

Intervenors argue that the Supreme Court's 2008 decision in Winter v. Natural Res. Def. Council, 129 S. Ct. 365 (2008), alters the injunction standard under the ESA, pursuant to which "the balance of hardships always tips sharply in favor of the endangered or threatened species." Washington Toxics Coal. v. EPA, 413 F.3d 1024, 1035 (9th Cir. 2005); see Idaho Resp. at 21-22; Sportsmen for Fish and Wildlife Resp. at 4. Intervenors are wrong.[6]

Winter addressed the propriety of an injunction entered to enforce the National Environmental Policy Act, which "imposes only procedural

[5] While FWS now asserts that such measures will be "easy to perform," FWS Resp. at 23, FWS in the Delisting Rule described such measures as "costly and intensive." 74 Fed. Reg. at 15,142.

[6] FWS's contention that Plaintiffs must show "likely" success on the merits rather than a "probability" of success, FWS Resp. at 4, represents a semantic quibble that should not detain this Court.

requirements." 129 S. Ct. at 376. By contrast, the ESA imposes substantive prohibitions on harms to endangered or threatened species. See, e.g., 16 U.S.C. §§ 1536(a)(2), 1538. Recognizing the congressional judgment reflected in these substantive prohibitions, the Supreme Court has held that the ESA represents a special enactment that divests courts of their customary equitable discretion: "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, thereby adopting a policy which it described as 'institutionalized caution.'" TVA v. Hill, 437 U.S. 153, 194 (1973). Although TVA arose in the context of a jeopardizing action that would violate ESA section 7, the Ninth Circuit has made clear that the same equitable balance in favor of imperiled species applies where, as here, the government violates its listing obligations under ESA section 4. See Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1177-78 (9th Cir. 2002) ("Congress' purpose for passing the ESA applies to both provisions.").

Over the ensuing years, the Supreme Court has repeatedly reaffirmed its TVA v. Hill holding that courts must defer to Congress' judgment in the ESA that protection of imperiled species trumps other concerns. See United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 496-97 (2001); Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 543 n.9 (1987); Weinberger v. Romero-Barcelo, 456 U.S. 305, 313-14 (1982). The Supreme Court reaffirmed the continuing

vitality of TVA v. Hill as recently as 2007 in National Association of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 669-71 (2007), in an opinion endorsed by the same five justices who issued the majority opinion in Winter. Intervenors' contention that these same five justices effectively overruled TVA v. Hill sub silentio less than two years later in a case that did not mention Hill or even present an ESA injunction issue should be rejected by this Court. Winter calls on courts to "balance the competing claims of injury," 129 S. Ct. at 376 (quotations and citation omitted); TVA v. Hill makes clear that, in the special case of the ESA, the balance has already been struck by Congress "in favor of affording endangered species the highest of priorities." 437 U.S. at 194.[7]

B. Plaintiffs Have Demonstrated Irreparable Injury

FWS argues that "the killing of a single wolf" does not constitute irreparable harm justifying injunctive relief under the ESA. FWS Resp. at 6. FWS attacks a straw man because Plaintiffs do not seek injunctive relief to stop the killing of a single wolf, but instead seek an injunction to halt the killing of 330 wolves in

[7] Although intervenors cite two post-Winter district court cases to claim an alteration of the ESA injunction analysis, see Idaho Resp. at 17; Safari Club Resp. at 15, both decisions faithfully apply TVA v. Hill. See Oregon Natural Desert Ass'n v. Kimbell, 2009 WL 1663037, at *1 (D. Or. June 15, 2009) ("Because Congress has determined that listed species are to be afforded the highest of priorities, the court finds that plaintiffs have also shown that the balance of equities tips in their favor, and that an injunction is in the public interest."); Animal Welfare Inst. v. Martin, 588 F. Supp. 2d 70, 106 (D. Me. 2008) ("[T]here is no dispute the ESA mandates that protected species, like the lynx, are 'to be afforded the highest of priorities.'").

Idaho and Montana amounting to approximately 20 percent of the entire Northern Rockies population. This is well above the threshold for impacts to members of an endangered or threatened species that courts have found to warrant a preliminary injunction in ESA cases. See Humane Soc'y of U.S. v. Kempthorne, 481 F. Supp. 2d 53, 70 (D.D.C. 2006) (issuing preliminary injunction to stop killing of 43 wolves representing 10 percent of Wisconsin population), vacated as moot, 527 F.3d 181 (D.C. Cir. 2008); Am. Rivers v. U.S. Army Corps of Eng'rs, 271 F. Supp. 2d 230, 258 (D.D.C. 2003) (issuing preliminary injunction to halt illegal take of 15 to 121 terns and plovers out of population of 2,000 terns and 7,000 plovers); Fund for Animals v. Turner, 1991 WL 206232, at *8 (D.D.C. Sep. 27, 1991) (issuing preliminary injunction to stop hunting of three to nine grizzly bears out of population of 440 to 680); see also Marbled Murrelet v. Babbitt, 83 F.3d 1060, 1067-68 (9th Cir. 1996) (finding sufficient showing of harm to warrant permanent injunction against logging 237-acre forest tract that yielded 100 detections of murrelets from a listed three-state population estimated at 18,000 birds[8]).

Nevertheless, FWS relies heavily on a California district court case, Pacific Coast Federation of Fishermen's Associations v. Gutierrez, 606 F. Supp. 2d 1195 (E.D. Cal. 2008), to argue that such harms cannot justify injunctive relief unless they are "significant for the species as a whole." FWS Resp. at 6 (quotations and

[8] FWS's murrelet population estimate is available at http://ecos.fws.gov/docs/five_year_review/doc2417.pdf.

citation omitted). This argument offers little help to FWS given that the Pacific Coast court found its "significant for the species" standard satisfied in the Humane Society case cited above, where a killing program threatened only 10 percent of a wolf population—less than is planned here. See 606 F. Supp. 2d at 1210 n.12. Moreover, Pacific Coast wrongly purported to find support for its novel "significant for the species" standard in the Ninth Circuit's decision in Marbled Murrelet v. Babbitt, 83 F.3d at 1060. See 606 F. Supp. 2d at 1210 n.12. However, the Ninth Circuit in Marbled Murrelet specifically inquired into the sufficiency of plaintiffs' showing of harm to support an ESA injunction, and found sufficient evidence based on highly localized impacts to a few individuals from a far more numerous and geographically widespread population, without even inquiring about broader species-level impacts. See 83 F.3d at 1067-68; cf. Nat'l Wildlife Fed'n v. Burlington Northern R.R. Co., 23 F.3d 1508, 1512 (9th Cir. 1994) (finding insufficient evidence to warrant ESA injunction where plaintiff failed to show that challenged action "will result in the deaths of members of a protected species") (emphasis added).[9]

[9] FWS also seeks support from the Ninth Circuit's emergency stay pending appeal decision in Humane Soc'y v. Gutierrez, 523 F.3d 990, 991 (9th Cir. 2008), which FWS wrongly claims found that "death of hundreds to thousands of listed salmon did not constitute irreparable harm." FWS Resp. at 6. In fact, the Ninth Circuit in Gutierrez reasoned that both the lethal taking of California sea lions and the consumption of salmon by the sea lions constituted irreparable harm. See 523 F.3d at 990 ("First, the lethal taking of the California sea lions is, by definition,

In any event, even assuming for the sake of argument that a species-level impact were needed to justify injunctive relief, here, Plaintiffs have established it. The wolf hunts planned by Idaho and Montana will coincide with typical wolf dispersal periods and threaten to disrupt the genetic exchange that FWS itself has repeatedly identified as necessary for wolf recovery. See PI Brief at 31. Further, the level of authorized wolf hunting, in combination with agency control actions, will reduce current population levels.[10] See PI Br. at 29-30. Indeed, Idaho's wolf hunt alone would cause a population decline in that state, see Idaho Resp. at 22 (authorized harvest of 21.6% is greater than projected annual growth rate of 20%), and Idaho has a two-year goal of further reducing the current population of around 850 wolves to 518 wolves, see id. at 11; AR 2008-001608 (Idaho Wolf Population

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irreparable. This logic also applies to the salmon consumed by the sea lions."). Gutierrez found that the balance of harm tipped in favor of preserving the sea lions due to the predicted large size of the 2008 salmon run. See id. Gutierrez arose under the Marine Mammal Protection Act, and the Ninth Circuit thus did not address the well-established principle that "the balance has been struck in favor of affording endangered species the highest of priorities" where a defendant violates the ESA. TVA v. Hill, 437 U.S. 153, 194 (1978).

[10] Ignoring the hunting mortality quotas established by the states, FWS relies on declarations to argue that "regulated hunting that does not permit poisoning, aerial shooting, or trapping, as proposed by the States, is ineffective in reducing overall wolf population numbers." FWS Resp. at 10 (emphasis in original). However, FWS acknowledged in the Delisting Rule that wolf mortality under state management, including hunting and other sources of mortality, will reduce the regional wolf population. See 74 Fed. Reg. at 15,142. Furthermore, in the only example of wolf hunting to date in this region, "most of the wolves in [Wyoming's] predatory animal area were killed within a few weeks of losing the Act's protection" in 2008. Id. at 15,170.

and Mgmt. Plan at 18). These dual threats to recovery (the killing of dispersing wolves and an overall wolf population reduction) are sufficient to demonstrate a species-level impact—if such a showing were required. See Am. Rivers, 271 F. Supp. 2d at 259 (finding irreparable harm warranting preliminary injunction where reduced river flows threatened bird species' recovery); see also Defenders, 565 F. Supp. 2d at 1177-78 (finding irreparable harm where "[t]he reduction in the wolf population that will occur as a result of public wolf hunts and state depredation control laws … is more than likely to eliminate any chance for genetic exchange to occur between subpopulations").[11]

FWS wrongly characterizes this Court's irreparable harm inquiry as a question of "whether Plaintiffs have demonstrated that these biologically and genetically healthy [wolf] populations can withstand one season of regulated hunting." FWS Resp. at 9 (emphasis added). FWS's formulation would require not just a threat to wolf recovery, but rather a threat to the wolf population's very survival. FWS's proffered standard has been explicitly rejected. See Nat'l Wildlife Fed'n, 23 F.3d at 1512 n.8 ("We are not saying that a threat of extinction

[11] Idaho's assertion that "[n]o court … has ever recognized the mere act of publicly-authorized and regulated hunting as environmentally harmful or as personally harmful to non-hunters," Idaho Resp. at 18, ignores contrary case law. See Sierra Club v. Clark, 755 F.2d 608 (8th Cir. 1985) (finding violation of ESA conservation duty where Secretary sought to allow sport trapping of Eastern timber wolf); Fund for Animals v. Turner, 1991 WL 206232, at *8 (issuing preliminary injunction to halt sport hunting of listed grizzly bears).

to the species is required before an injunction may issue under the ESA. This would be contrary to the spirit of the statute."); Greater Yellowstone Coal. v. Flowers, 321 F.3d 1250, 1256-58 (10th Cir. 2003) (rejecting argument that demonstration of irreparable harm required showing that "the challenged action will irretrievably damage the entire species")[12]; Humane Soc'y, 481 F. Supp. 2d at 69 ("[R]equiring Plaintiffs to show jeopardy to the existence of [the] species in order to secure injunctive relief would stand the ESA on its head.").[13]

FWS further attempts to minimize injury to Plaintiffs' members as "speculative" and "without credible factual basis." FWS Resp. at 5-6. To the contrary, Plaintiffs have demonstrated that they recreate, and will continue to recreate, in areas where wolves are known to reside in the hopes of seeing and hearing wolves. See Marvel Dec., ¶ 11; S. Stone Dec., ¶ 14; Garrity Dec., ¶¶ 4-5. Wolf hunting will harm Plaintiffs by diminishing their likelihood of viewing

[12] Flowers addressed the standard for an injunction to be issued under the Clean Water Act ("CWA"). See 321 F.3d at 1257-58. It would be a perverse result to require a higher showing of harm to justify an injunction under the ESA than is required under the CWA, given that the Supreme Court has construed the CWA not to require injunctive relief with the same force as the ESA. See Romero-Barcelo, 456 U.S. 305 at 313-19.

[13] In its effort to defeat Plaintiffs' showing of irreparable harm, FWS supplements its legal arguments with a multitude of scientific affidavits. However, FWS's declarants offer opinions on the harm issue that are divorced from the relevant legal standard under the ESA. See, e.g., Hebblewhite Decl. (Doc. 72-3) ¶ 14 ("I interpret irreparable harm to mean that mortality of one wolf within a wolf pack would lead to death of all wolves within the wolf pack.").

wolves in these areas. Further, Plaintiffs' members regularly enjoy seeing and hearing wolves near their homes and property, including in areas that are targeted for extensive wolf hunting. See Second Marvel Dec. ¶¶ 2-7; L. Stone Dec. ¶¶ 4-7; Willcox Dec. ¶¶ 3-4, 8. Western Watersheds Project and Sierra Club member Lynne Stone hosts weekly field trips to give members of the public opportunities to view wolves in the Phantom Hill and Basin Butte wolf packs, both of which reside in the Sawtooth region. See L. Stone Dec. ¶¶ 5. Idaho has authorized 50 percent hunting mortality for this area, all but ensuring that some, if not most, of the wolves that Ms. Stone regularly enjoys viewing will be killed. See PI Br., Ex. 3; AR 2009-041117. Plaintiffs' members also are engaged in ongoing wolf conservation efforts that implement proactive, nonlethal deterrents to reduce wolf conflicts with livestock. See S. Stone Dec. ¶¶ 2, 6, 14; L. Stone Dec. ¶¶ 3, 6. The hunting of these same wolves renders those efforts, and the substantial time and effort invested in their success, worthless. For all of these reasons, wolf hunting irreparably injures Plaintiffs' members.

C. The Equities Favor An Injunction

Idaho argues, contrary to controlling Ninth Circuit and Supreme Court authority, that this Court must "consider the effects of a preliminary injunction on Idaho and the other defendant-intervenors." Idaho Resp. at 22. As discussed supra, in cases arising under the ESA, Congress declared that the balance of

hardships and the public interest unequivocally favor the protection of threatened and endangered species. Even if it were proper to consider Idaho's alleged interests in killing wolves—which it is not—they do not outweigh the public and Plaintiffs' interest in wolf conservation.

First, Idaho argues that "many rural residents of Idaho have suffered significant financial losses" due to wolf predation on livestock. Idaho Resp. at 23. However, FWS has adopted ESA regulations to address the impact of wolves on livestock, allowing wolf killing by both wildlife agents and individuals. 50 C.F.R. § 17.84(n)(4)(viii) (2007) ("We [FWS] or our designated agent(s) may carry out harassment, non lethal control measures, relocation, placement in captivity, or lethal control of problem wolves.); id. § 17.84(n)(3) (definition of "problem wolves"); id. § 17.84(n)(4)(xiii) ("Any person legally present on private or public land, except land administered by the National Park Service, may immediately take a wolf that is in the act of attacking the individual's stock animal or dog."). Indeed, in 2008, wildlife agents killed more than 100 wolves in each of Idaho and Montana in response to confirmed livestock depredations. See AR 2009-041093 (2008 Annual Wolf Report, Table 5b). While wolves were on the endangered species list, "[c]onflict between wolves and livestock … resulted in the average annual removal of 8 to 14 percent of the [northern Rockies] wolf population." 74 Fed. Reg. at 15,160. Furthermore, livestock owners receive compensation for

confirmed livestock loss due to wolf depredation. "In 2008, Defenders [of Wildlife] paid $183,000 in 133 compensation payments to livestock producers throughout the northern Rocky Mountains for 279 sheep, 194 cattle, and 24 other types of livestock or guarding animals," and the states additionally compensated affected livestock owners. AR 2009-041211 to 041212.

Second, Idaho argues that "wolves have had significant impacts on ungulate populations, particularly elk herds in the Lolo, Selway, and Sawtooth DAUs." Idaho Resp. at 23. As an initial matter, despite more than a decade of wolf presence in the northern Rockies, the great majority of elk herds in the region are at or above state management objectives. See 73 Fed. Reg. 4,720, 4,723 (Jan. 28, 2008) ("many ungulate herds and populations in Idaho, Montana, and Wyoming are at or above State management objectives and most of those below management objectives are most affected by factors other than wolves"). Where there are isolated instances of legitimate adverse impacts from wolves, the ESA special management regulations permit wolves in most of Idaho and Montana to be lethally removed in response to any state-determined "unacceptable impact" on elk or other wild ungulates.[14] See 50 C.F.R. § 17.84(n)(4)(v) (2007) ("If wolf

[14] Although Plaintiffs have challenged the 2008 "10(j)" regulation, which lowered the bar for wolf killing in response to ungulate impacts, the preceding regulation, which Plaintiffs did not challenge, also allows lethal wolf removal to address declines in wild ungulate populations primarily caused by wolves. See 50 C.F.R. § 17.84(n)(3) (2007) (definition of "unacceptable impact").

predation is having an unacceptable impact on wild ungulate populations … as determined by the respective State or Tribe, a State or Tribe may lethally remove the wolves in question."). Idaho has prepared an application for lethal wolf removal in the Lolo region to address precisely the elk population decline discussed in its brief, but did not submit the application because wolves were delisted. See 73 Fed. Reg. at 4,721; 74 Fed. Reg. at 15,169. Thus, restoration of ESA-protected status during the pendency of this litigation does not eliminate the States' tools "to protect ungulates and reduce livestock depredations." Idaho Resp. at 24.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court issue a preliminary injunction reinstating essential ESA protections for wolves.

Respectfully submitted this 29th day of August, 2009.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), I hereby certify that the foregoing brief contains 8,045 words, as determined by the word count function of Microsoft Word 2003 Professional Edition. Plaintiffs have moved to file this consolidated reply brief in excess of the Court's 3,250 word limit for a single reply brief.

Dated: August 29, 2009

/s/ Jenny K. Harbine
Jenny K. Harbine