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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,)

v.)

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

Defendants.)

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

**OPPOSITION TO MOTION FOR
PRELIMINARY INJUNCTION**

INTRODUCTION

On February 27, 2008 the United States Fish and Wildlife Service (“USFWS”) issued its *Final Rule Designating the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and Removing This Distinct Population Segment From the Federal List of Endangered and Threatened Wildlife*, 73 Fed. Reg. 10514 (Feb. 27, 2008) (“Final Rule”). The Final Rule established a distinct population segment (“DPS”) of the gray wolf in the Northern Rocky Mountains (“NRM”) that encompasses all of Montana, Idaho, and Wyoming, the eastern third of Washington and Oregon, and a small part of north central Utah, and it found, based on the best scientific and commercial data available, that the NRM DPS “is no longer an endangered or threatened species pursuant to the Endangered Species Act.” Id. The recovery of the NRM gray wolf population is a true wildlife conservation success story. The gray wolf was first listed as an endangered species in 1974. Id. At that time wolves had been virtually extirpated from the region as a result of a sustained, focused government eradication program in the early 1900's. Id. Today the NRM wolf population is a robust metapopulation, numbering over 1,500 wolves distributed across three core recovery areas. Id. at 10523. By the time of delisting, the NRM wolf population had exceeded the minimum numerical and distributional recovery goals established in its recovery plan for *seven consecutive years*, and the population had increased at a rate of about *24 percent annually* for a period of *eleven consecutive years*. Id. Threats to the wolf’s long-term viability, either alone or in combination with others, had been reduced or eliminated to the point that the NRM DPS no longer fits the definition of an endangered or threatened species. Id. at 10557. This success can be credited in large measure to the intensive recovery efforts of the Federal Government – which included the reintroduction of wolves from Canada – but it would not have been possible without the close partnership Montana, Idaho, and Wyoming. The Final Rule went into effect on March 28, 2008. Since then Montana, Idaho, and Wyoming have each assumed responsibility for the management of gray wolves within their respective borders. Id. at 10514. The USFWS no longer retains management authority for wolves within the boundaries of the former DPS.

The Final Rule is the product of the USFWS's careful consideration of the gray wolf's progress in the NRM, the Endangered Species Act ("ESA"), the ESA's implementing regulations, multiple recovery plans, extensive public input (including Plaintiffs'), input from the States, a comprehensive peer review process, a huge body of scientific research, and the agency's own unparalleled experience in the successful management of gray wolves. As such, the Final Rule is entitled to a high degree of deference from this Court. Plaintiffs' Motion for Preliminary Injunction asks the Court to ignore the amazing strides that the NRM wolf population has made, the best available scientific data on genetics and population viability, and the States' commitments, and relist the NRM population based on speculation and their own unconventional reading of the science. Contrary to Plaintiffs' claims, the USFWS correctly determined that (1) the NRM gray wolf is a recovered population with strong genetic diversity and sufficient interchange for long-term viability and (2) State management provides adequate regulatory mechanisms to ensure that the NRM gray wolf will remain recovered. Plaintiffs have no likelihood of success on the merits and have shown no irreparable harm to the NRM wolf population. Their motion should be denied.

BACKGROUND

I. GRAY WOLF BIOLOGY

Gray wolves are the largest wild members of the family *Canidae*. Id. Pack sizes in the NRM average about ten wolves in protected areas, but a few substantially larger complex packs have formed in Yellowstone National Park ("YNP"). Id. Packs typically occupy large distinct territories from 200-500 miles², which they defend against other wolves and wolf packs. Id. Once occupied by resident wolf packs, an area becomes saturated and wolf numbers within the area are regulated by available prey, dispersal, intra-species conflict, and other forms of mortality. Id. Wolves can disperse extremely long distances in their search to join another pack or form a pack of their own. Id. Pack social structure is highly adaptable and resilient. Id. Although typically only the top-ranking male and female in a pack breed and produce pups, breeding members can be quickly replaced, either by other wolves within the pack or by wolves outside the pack, and pups can be

reared by other pack members if their parents die. Id.; Exh. 52 (Brainerd et al. 2008); Exh. 16 (Mech 2006, p.1482). As a result, wolf populations can rapidly recover from severe disruptions, including very high levels of disease or human-caused mortality. 73 Fed. Reg. at 10514. After severe declines, wolf populations can more than double in just two years if mortality is reduced, and increases of nearly 100 percent have been documented in low density suitable habitat. Bangs Decl. ¶9. In fact, pup production and survival increase when density is lower and food availability increases. Exh. 2 (Fuller et al. 2003, pp. 181-186); Exh. 63a (2007 Annual Report, Table 4).

II. GRAY WOLF RECOVERY

The NRM gray wolf was first listed under the ESA in 1974. 39 Fed. Reg. 1171 (Jan. 4, 1974). In 1978, the gray wolf was relisted at the species level (*C. lupus*) throughout the lower 48 states and Mexico. 43 Fed. Reg. 9607 (March 9, 1978). In 1994, the USFWS designated portions of Idaho, Montana, and Wyoming as two nonessential experimental population areas for the gray wolf under section 10(j) of the ESA. 59 Fed. Reg. 60252 (November 22, 1994); 59 Fed. Reg. 60266 (November 22, 1994). These designations enabled the USFWS to initiate gray wolf reintroduction projects in central Idaho and the Greater Yellowstone Area (“GYA”). In 1995 and 1996, the FWS released wolves captured in southwestern Canada (Alberta and British Columbia) into central Idaho and the GYA in an effort to recover the gray wolf in the Northern Rocky Mountains. 68 Fed. Reg. 15804, 15815-16 (April 1, 2003); 72 Fed. Reg. 6106, 6108 (Feb. 8, 2007) (Proposed Rule). Wolf reintroduction and the flexible management authority afforded under section 10(j) to address State and local concerns greatly expanded numbers and distribution of wolves in the NRM. Id.

Shortly after the NRM gray wolf was listed, the USFWS formed an interagency wolf recovery team to complete a recovery plan for the NRM population. 73 Fed. Reg. at 10520. Recovery plans are not regulatory documents. Recovery of a species is a dynamic process that involves the constant influx of new information and discovery of potential new recovery opportunities, and it requires adaptive management that may, or may not, fully follow the guidance provided by a recovery plan. Id. The NRM Recovery Plan was first approved in 1980 and focused

efforts on restoring gray wolves in their former range, where feasible. Id., 68 Fed. Reg. at 15810-11. The USFWS revised the recovery plan in 1987 to identify a recovery criterion of at least ten breeding pairs of wolves for three successive years in each of three core recovery areas – (1) northwestern Montana, (2) central Idaho, and (3) the GYA – with an NRM wolf population of about 300 adult wolves upon delisting. 73 Fed. Reg. at 10520-21. In 1994, the USFWS completed an Environmental Impact Statement (“EIS”) on the Reintroduction of Gray Wolves to Yellowstone National Park and Central Idaho, in which the agency evaluated whether the population goal for delisting wolves contained in the 1987 recovery plan would result in a viable population. Id. at 10521. Based on a thorough literature review, consideration of recovery goals for other wolf populations, and consultation with 25 experts on wolf population viability, Appendix 9 to the EIS stated that the goal of ten breeding pairs in three separate recovery areas for three consecutive years was “reasonably sound and would maintain a viable wolf population in the foreseeable future,” but that the goal was “somewhat conservative . . . and should be considered minimal.” Pl. Exh. 3 at 42. Appendix 9 stated, “Thirty or more breeding pairs comprising some 300+ wolves in a metapopulation (a population that exists as partially isolated sets of subpopulations) with genetic exchange between subpopulations should have a high probability of long-term persistence.” 73 Fed. Reg. at 10521. The USFWS determined that such a population would contain enough individuals and successfully reproducing packs, distributed over distinct but somewhat connected large areas to be viable for the long term and would fully achieve the recovery objectives for the NRM gray wolf. Id. No wolf population of this size and distribution has gone extinct in recent history unless it was deliberately eradicated. Id.; Exh. 19 (Boitani 2003, pp. 321-331). In late 2001 and early 2002, the USFWS conducted another evaluation of what constitutes a recovered wolf population. 73 Fed. Reg. at 10521. Following another review of the literature and a survey of 86 experts in wolf and conservation biology, the USFWS reaffirmed its 1994 recovery criteria. Id.

Starting in 2002, the USFWS divided the overall recovery goal equally among the states of Montana, Idaho, and Wyoming. Each state contains at least part of one of the three core recovery

areas, which are (1) northwestern Montana, (2) central Idaho, and (3) the GYA. These core recovery areas contain manmade or natural refuge from high levels of human-caused mortality, such as National Parks, wilderness areas, and remote Federal lands. Id. at 10522. To ensure that the NRM wolf population continues to exceed the recovery goal of 30 breeding pairs and 300 wolves, Montana, Idaho, and Wyoming have each committed to maintain at least 15 breeding pairs and 150 wolves per State in mid-winter (when the wolf population is at its annual low point) and to maintain its metapopulation structure.^{1/} Id.

The NRM wolf population first met its overall numerical and distributional recovery goal of a minimum of thirty breeding pairs and 300 wolves well-distributed among Montana, Idaho, and Wyoming in 2000. Id. at 10523; Exh. 57 (Annual Report 2001, Table 1). This minimum recovery goal has been exceeded every year since 2000. Id. at 10523; Exhs. 58-63a (Annual Reports 2002-2007, Table 4; Exh. 3 (USFWS 2007a). Because the recovery goal had to be achieved for three consecutive years, the temporal element of recovery was not achieved until the end of 2002. Id. at 10523; Exh. 59 (Annual Report 2003, Table 4). At the end of 2007, the population had achieved its numerical and distributional recovery goals for eight consecutive years and had increased at a rate of about 24 percent annually since 1996. Id. at 10523; Exhs. 57-63a (Annual Reports 2001-2007, Table 4); Exh. 3 (USFWS 2007a). Today the NRM wolf population is a robust metapopulation, numbering over 1,500 wolves well-distributed across three core recovery areas. Id. at 10523.

III. DISPERSAL, CONNECTIVITY, AND GENETIC EXCHANGE

Genetic diversity throughout the NRM is very high. Id. at 10553. Wolf dispersal has been well-documented among and outside of the core recovery areas. Wolf packs are relatively contiguous throughout the northwestern Montana and central Idaho core recovery areas and into Canada, where wolf packs are numerous and connected as far northward as the Arctic Ocean. Id.

^{1/}In fact, a commitment to maintain 45 breeding pairs would likely result in more than 450 wolves in the NRM because USFWS data since 1986 indicate that each breeding pair has actually corresponded to 14 wolves in mid-winter, for a total of 630 wolves. Id.; Exh. 63a, Table 4.

Routine dispersal of wolves has been documented among northwestern Montana, central Canada, and adjacent Canadian populations, demonstrating that northwestern Montana's wolves are demographically and genetically linked to both the wolf populations in Canada and in central Idaho. Id. at 10525; Exh 6 (Boyd & Pletscher 1999, pp. 1105-06). Wolves dispersing into northwestern Montana from both directions will continue to join or form new packs and supplement this portion of the NRM wolf population. Id. at 10525; Exh. 43 (Forbes & Boyd 1996, p. 1082); Exh. 44 (Forbes & Boyd 1997, p. 1226); Exh. 45 (Von Holdt et al. 2007, p. 19). Central Idaho contains the greatest amount of highly suitable wolf habitat. As a result, the central Idaho population has grown continuously and expanded its range since reintroduction, including establishing linkages, or connectivity, with the wolf population in northwestern Montana. Id. at 10525.

Finally, the GYA population, while somewhat less connected than the other two core recovery areas, is nevertheless highly diverse genetically (in part as a result of the exceptionally high diversity of its founding members). Id. at 10553. Yellowstone National Park sits at the center of the GYA core recovery area, which is composed of wolves in YNP, as well as those outside of YNP in northwestern Wyoming, southwestern Montana, and southeastern Idaho. Wolves have naturally dispersed both into and out of the GYA core recovery area. Id. A non-radio-collared black wolf from northwestern Montana was found just south of Yellowstone National Park in 1992. Id.; Exh. 46 (Fain 2007) A black wolf was also filmed in YNP around the same time. Id. at 10553. Since 1995 the USFWS has documented the dispersal of at least four radio-collared wolves from Idaho, including one radio-collared male that was seen with a YNP female. Id.; Exh. 47 (USFWS 2007b). Other wolves have undoubtedly made the journey to the GYA, – data from the NRM indicate known wolf dispersal distances of 60 to 500 miles – but have not been detected because they were not marked or tracked with radio telemetry. Id. at 10518, 10553. On average only 30 percent of the wolf population is marked. Id. at 10553. Although genetic testing is ongoing, at the time of the Final Rule, the DNA samples analyzed to date had not yet revealed that dispersers from central Idaho or northwestern Montana had produced offspring in the GYA. Id. Yet, in light of the

documented ability of wolves to disperse into and out of the GYA, the conditions are clearly present for genetic interchange to occur with the other core populations, if it has not occurred already. Id.

The USFWS also found that even in the highly unlikely event that “no new genes ever entered the GYA in the next 100 years, . . . the GYA wolf population’s currently high genetic diversity would be reduced, but not to the point the GYA wolf population would be threatened.” Id. Review of the scientific literature shows that, throughout the world, truly isolated wolf populations that are far smaller and far less genetically diverse than the GYA population have persisted for many decades and even centuries. Id.; Exh. 40 (Fritts & Carbyn 1995, p. 33); Exh. 19 (Boitani 2003, pp. 322-23, 330-35); Exh. 41 (Liberg 2005, pp.5-6). Additionally, in mate selection, wolves have a strong tendency to avoid inbreeding by selecting breeders based on genetic difference. Thus, future dispersers into a system experiencing some level of inbreeding would be much more likely to be selected for breeding and have their genes incorporated into the inbred population. 73 Fed. Reg. at 10554; Exh. 48 (Bensch et al. 2006, p. 72); Exh. 45 (Van Holdt et al. 2007, p. 1). Indeed, introduction of just one or two new genetic lines can save a severely inbred small wolf population. Id. at 10554; Exh. 49 (Vila et al. 2003, p. 9); Exh. 50 (Liberg et al. 2004); Exh. 41 (Liberg et al. 2005, pp. 5-6); Exh. 51 (Mills 2007, pp. 195-96); Exh. 37 (Fredrickson et al. 2007, p. 2365).

IV. STATE MANAGEMENT

The USFWS has long recognized that human-caused mortality poses the primary threat to wolves. To ensure that the States would manage for sustainable levels before removing the ESA’s protections, it requested that Montana, Idaho, and Wyoming prepare wolf management plans to demonstrate how they would manage wolves after delisting. To gain approval, the management plans had to include regulatory control of take, a “pack” definition consistent with the USFWS “breeding pair” definition, the ability to manage the wolf population, monitoring of impacts, and agreement to manage for an adequate number of breeding pairs and wolves above the minimum recovery levels. 73 Fed. Reg. at 10547. USFWS based its decision about the adequacy of each State’s plan on the plan’s content, its understanding of that State’s laws, wolf biology, peer review,

the State's response to peer review, and the agency's own experience managing wolves over the last twenty years. Id. at 10547, 10532. USFWS determined that Montana, Idaho, and Wyoming's management plans and laws were adequate to ensure that each State's share of the NRM wolf population would be maintained above recovery levels following delisting, and therefore constituted "adequate regulatory mechanisms" under the ESA. Id.

STATUTORY BACKGROUND

I. THE ENDANGERED SPECIES ACT

Under the ESA, an "endangered species" is any species, subspecies, or DPS that is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. §§ 1532(6); 1532(16); 50 C.F.R. § 424.02(e), (k). A threatened species is any species, subspecies, or DPS that is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20); 50 C.F.R. § 424.02 (m). Listing under the ESA affords certain legal protections, along with corresponding restrictions on the conduct of private actors and government entities. For example, the ESA prohibits the unauthorized "taking" of endangered species. 16 U.S.C. § 1538(a)(1).² The Secretary of the Interior, by regulation, has extended the same protections against unauthorized taking to threatened species. 16 U.S.C. § 1533(d); 50 C.F.R. § 17.31(a); see also 50 C.F.R. § 17.21.

The Secretary is charged with making listing decisions based on five statutorily prescribed factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. 16 U.S.C. § 1533(a)(1). Any one of the five listing factors is sufficient to support a listing determination if that particular factor causes the species to be "in danger of extinction" or "likely to become an endangered species in the foreseeable

²The ESA defines "take" to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" 16 U.S.C. § 1532(19); 50 C.F.R. § 222.102.

future” throughout all or a significant portion of its range. The same five factors are used to determine whether threats to the species have been diminished or removed to the point that downlisting or delisting is appropriate. The ESA does not require listing based on the mere *existence* of threats to a species, and, by the same token, the statute does not require the removal of *all* threats to a species before it can be downlisted or delisted.

Listing decisions must be made “solely on the basis of the best scientific and commercial data available,” and without reference to the possible economic or other impacts of such a determination. 16 U.S.C. § 1533(b)(1)(A); 50 C.F.R. § 424.11(b); 50 C.F.R. § 424.13. Courts have construed the Section 4 “best available data” standard as requiring only the consideration of that information “presently available.” Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 679-80 (D.D.C. 1997). “Recovery” is “improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in [ESA] § 4(a)(1).” 50 C.F.R. § 402.02.

ARGUMENT

I. STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF

A preliminary injunction is an extraordinary remedy the entitlement to which the plaintiff bears the burden of proving by clear and convincing evidence. See Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 442-442 (1974). “Under the traditional test, a plaintiff must show: ‘(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases).’” Ranchers Cattlemen Action Legal Fund v. USDA, 415 F.3d 1078, 1092 (9th Cir. 2005) (citation omitted). “The alternative test requires that a plaintiff demonstrate ‘either a combination of probable success on the merits and the possibility of irreparable harm or that serious questions are raised and the balance of hardships tips sharply in his favor.’” Id. at 1092. “These two alternatives are ‘extremes of a single continuum’ in which ‘the greater the relative hardship to the party seeking the preliminary injunction, the less probability of success must be shown.’” Lands Council v. McNair, 494 F. 3d 771, 775 (9th Cir. 2007), *reh’g en*

banc granted, 512 F.3d 1204 (9th Cir. 2008) (citations omitted). Only when plaintiffs have made a clear case for success on the merits does should an injunction issue when plaintiffs show a mere possibility of irreparable harm.” Earth Island Institute v. U.S.F.S., 442 F. 3d 1147, 1158 (9th Cir. 2006), cert denied, 127 S.Ct. 1829 (2007).

II. STANDARD OF REVIEW

Judicial review of administrative actions, including those involving the ESA, is governed by section 706 of the Administrative Procedure Act (“APA”). 5 U.S.C. §706(2)(A); City of Sausalito v. O’Neill, 386 F.3d 1186, 1205 (9th Cir. 2004). Under the APA, a reviewing court must satisfy itself that the agency decisions are not “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.” Id. at 1206. “[T]he reviewing court must uphold the administrative action if the agency ‘considered the relevant factors and articulated a rational connection between the facts found and the choice made.’” Id. (citation omitted). Review under the arbitrary and capricious standard is to be “searching and careful” but “narrow,” and a court is not to substitute its judgment for that of the agency. Marsh v. Oregon Nat. Res. Council, 490 U.S. 360, 378 (1989). As long as the agency considered the relevant factors and there has been no clear error of judgment, the decision should be upheld.³ Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

III. PLAINTIFFS HAVE NO LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiffs assert that the Final Rule delisting the NRM gray wolf is arbitrary and capricious for two reasons: (1) the three NRM gray wolf core recovery areas lack “connectivity” and therefore fail to meet the recovery criteria established for them by the USFWS, and (2) Montana, Idaho, and Wyoming’s laws and management plans are not adequate regulatory mechanisms under the ESA. As set forth below, Plaintiffs are wrong on both counts.

³The scope of review in this case is limited to the Administrative Record (“AR”). Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743 (1985). All documents cited as exhibits (“Exh.”) are part of the AR for the Final Rule. The Declaration of Edward Bangs explains complex subject matter involved in the action. See Southwest Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996). The Smith, Mech, and Boyce Declarations address injury.

A. The NRM Gray Wolf Population is a Metapopulation.

At bottom, Plaintiffs' claim that the three gray wolf recovery areas do not form an effective metapopulation amounts to a misunderstanding of the term "metapopulation" as that term has been used by the USFWS in Appendix 9 of the 1994 EIS and in the Proposed Rule, and a disagreement over how to interpret a particular report on a genetic sampling study carried out on about 30 percent of the wolf population in Yellowstone National Park (Von Holdt et al. 2007), which represents a small fraction of the total population in the GYA. Plaintiffs do not argue that USFWS failed to consider whether the NRM gray wolf population comprised a "metapopulation," nor do they argue that the agency failed to consider the Von Holdt study; indeed, the agency considered both very carefully. They simply draw different conclusions about the level of connectivity necessary for a "metapopulation" and the appropriate amount of weight to be given to certain speculative predictions made by the Von Holdt paper. Both of Plaintiffs' arguments boil down to a "battle of the experts," and the case law is very clear that this is a battle USFWS should win. Greenpeace Action v. Franklin, 14 F.3d 1324, 1333 (9th Cir. 1992).

Both of these decisions required the USFWS to make judgments based on the evaluation of complex scientific data within the agency's particular technical expertise, and thus they are entitled to an especially high degree of deference. Marsh, 490 U.S. at 377 (holding that courts are at their most deferential when reviewing an agency's technical analysis and judgments involving the evaluation of complex scientific data within the agency's particular technical expertise); Baltimore Gas & Elec. v. NRDC, 462 U.S. 87, 103 (1983). This Court is not required to weigh conflicting expert opinions. Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir. 1985). Rather, the law is settled that the USFWS was entitled to rely on the reasonable opinions of its own qualified experts. Marsh, 490 U.S. at 378. That Plaintiffs dispute the agency's findings and conclusions "is not a sufficient basis for [the court] to conclude that [the agency's] action was arbitrary and capricious. If it were, agencies could only act upon achieving a degree of certainty that is ultimately illusory." Greenpeace, 14 F.3d at 1336.

1. Definition of Metapopulation

As an initial matter, Plaintiffs wrongly assert that the delisting decision was “based on the proposition that the wolf population has exceeded recovery targets established by FWS nearly 20 years ago.” Pl. Br. at 4. This statement is incorrect for two reasons. First, meeting the targets in a recovery plan is not dispositive of whether a species should be delisted. 73 Fed. Reg. at 10520. The delisting decision, while significantly informed by the achievement of the recovery goals contained in the recovery plan, is based on analysis of the five listing factors set out in Section 4 of the ESA. 16 U.S.C. § 1533(a)(1). The NRM gray wolf population did exceed the delisting goals in its recovery plan, as revised in 1994, but it was delisted because it no longer qualified for listing under the ESA’s five listing factors. 73 Fed. Reg. at 10557. Second, the USFWS revisited the 1987 recovery targets in 1994 and determined that the 1987 goals, although sufficient, warranted revision. The agency reviewed the 1994 recovery goals in 2001 and 2002 to ensure their adequacy. See Background II, *supra*; Bangs Decl. ¶18.

Contrary to what Plaintiffs claim, the USFWS did not do an “about face” nor did it “ignore” its recovery criterion requiring a “‘metapopulation’ dynamic.” Pl. Br. at 4,7. Rather, the agency utilized the 1994 EIS Appendix 9 criteria to gauge the wolf’s recovery, and it demonstrated in the Final Rule that the NRM population has exceeded the 1994 recovery criteria. See Background II and III; Bangs Decl. ¶¶5, 18A. In particular, the Final Rule explains that the northwestern Montana and central Idaho core recovery areas are well connected to each other and to wolf populations in Canada through regular dispersal, and that the populations have established genetic and demographic linkages. See Background III. The Final Rule also explains that the GYA core recovery area, while not as well connected as the other two, is, nevertheless, genetically highly diverse as a result of the diversity of its founding members, and connected to northwestern Montana and central Idaho by documented dispersals. Id. While genetic exchange with the two other areas had not yet been documented based on the limited sampling done to date in YNP, the conditions for such exchange clearly exist given that dispersers from the other two areas have made their way to

the GYA, and the GYA is well within the documented range for typical gray wolf dispersal. Id.

Oakleaf, et al. (2006), does not contradict the Final Rule, as Plaintiffs suggest. Pl. Br. at 6. Oakleaf looked at theoretical habitat suitability and identified potential high quality dispersal corridors among the three core recovery areas. It concluded, consistent with the Final Rule, that northwestern Montana and central Idaho were linked by contiguous tracks of quality habitat and demonstrated genetic exchange, while linkages to the GYA were not as strong. Exh. 29 (Oakleaf et al. 2006, p. 561). The purpose of the study was not to investigate actual dispersal or genetic issues. Nevertheless, the report cites six documented dispersals between the GYA and the other recovery areas, including one successful dispersal, and states that wolves are able to travel through relatively poor habitat to recolonize other areas. Id. The report also predicts continued expansion of the NRM population and additional potential dispersal corridors into Utah, Oregon, and Washington. Id. Oakleaf does not say that there is no metapopulation, but rather that to “effectively function as a metapopulation, it will be desirable to prioritize the protection and perhaps restoration of dispersal linkages between the GYA and other recovery areas.” Id.; see also 73 Fed. Reg. at 10533, Response 33; Exhs. 31-36 (Interagency efforts to facilitate linkages).

Plaintiffs have improperly attempted to redefine the USFWS’s 1994 recovery criteria to require documented proof of DNA exchange among all three subpopulations – regardless of the size, location, or inherent genetic diversity of those subpopulations – before the USFWS could declare the criteria achieved. Pl. Br. at 5-9. However, Appendix 9 of the 1994 EIS does not support Plaintiffs’ interpretation.⁴ Appendix 9 describes the revised recovery goal as, “thirty or more breeding pairs comprising some 300+ wolves in a metapopulation with genetic exchange between subpopulations.” Pl. Exh. 3, p. 42; 73 Fed. Reg. at 10521. The “Glossary of Terms” for this document describes a “metapopulation,” in relevant part, as follows: “Recovery of wolf populations in the northern Rocky Mountains of the U.S. requires a wolf population be established that is

⁴Clear deference is owed to an agency’s interpretation of its own administrative guidance documents. Udall v. Tallman, 380 U.S. 1, 16, reh’g denied, 380 U.S. 989 (1965).

composed of three (Yellowstone, central Idaho, and northwestern Montana) parts, or subpopulations, which in combination would be called a meta-population.” Pl. Exh. 3, p. 4. The term “genetic exchange” is not defined by the glossary, and the rest of Appendix 9 makes clear that no specific level of natural connectivity between the segments is required for an effective metapopulation to exist. *Id.* at 38-42. Moreover, in its discussion of the benefits of a metapopulation structure, Appendix 9 does not emphasize, or even discuss, the need for proof of DNA exchange between every subpopulation. Rather, it emphasizes “spacial distribution” and describes the benefit of a metapopulation structure as the potential for such exchange to occur in the event of a stochastic event like fire, disease, or human-caused mortality that extinguishes a large number of a subpopulation. *Id.* at 39. If a population is too geographically isolated, new colonization will not occur because new colonizers cannot reach the area. *Id.* “In a true metapopulation, dispersers from one subpopulation are likely to reach and rekindle the subpopulation in another area.” *Id.* This is certainly true of each of the three core recovery areas that comprise the NRM metapopulation. 73 Fed. Reg. at 10525, 10553; Bangs Decl.¶5.

Appendix 9 also addresses population size, location, and inherent diversity in the setting of recovery goals. It notes that concerns about genetic diversity and the need for ongoing genetic exchange are lessened where, as is true of the reintroduced GYA population, the population is large, not completely isolated, and diversity is inherently high due to a large number of genetically diverse founders. Pl. Exh. 3 at 38-41. In fact, Appendix 9 specifically states that the “security of a Yellowstone National Park wolf population could be greatly increased by expanding the recovery zone outside the Park” to include the GYA. *Id.* at 39. Plaintiffs’ effort to recast what constitutes a “metapopulation” is unsupported. The USFWS reasonably interpreted the 1994 recovery criteria as having been fully achieved. *Greenpeace*, 14 F.3d at 1336.

Finally, even if the Court were to find that the 1994 recovery criteria has not been fully met, the delisting decision should still be upheld because the Final Rule provides a reasoned explanation why a potential lack of genetic connectivity between wolves in YNP and wolves in the rest of the

NRM DPS is not a threat under the ESA's listing criteria.⁵⁷ 73 Fed. Reg. at 10553-54; Background III; Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 42 (1983).

2. Von Holdt Study and Report

Much of Plaintiffs' argument that the NRM wolf population remains endangered by a lack of connectivity turns on their, and their Declarant Robert Wayne's, interpretation of Von Holdt, et al. (2007) (Exh. 45). The Von Holdt paper, as well as Dr. Wayne's comments on the Proposed Rule (Exh. 42) are addressed at length in the Final Rule. 73 Fed. Reg. at 10553. The primary purpose of the Von Holdt study was to assess the genetic variation in the YNP population based on DNA samples of 200 wolves collected between 1995 and 2004. Exh. 45. This analysis revealed greater diversity in the YNP population than previously observed in any other natural wolf population and nearly absolute inbreeding avoidance. Id. at 1, 7-14. But none of the YNP wolves sampled over this time period showed a recent genetic relationship to the northwestern Montana or central Idaho populations. This result may be attributable to the fact that YNP is completely saturated and there is simply no room for left for wolves to disperse into the Park and breed. Bangs Decl. ¶18C.

Based on the assumption that there is no strong outbreeding – an assumption contradicted by the study's principal finding that wolves in the Park deliberately outbreed to maximize genetic diversity – the Von Holdt paper used a theoretical model to predict a “worst case scenario” in which the YNP population could become inbred and suffer reduced pup survival within 100 years. Ex. 45 at Fig. 8. This modeling suffers from serious limitations. First, it is based on DNA samples taken from only about 30 percent of the YNP population, not the whole YNP population, and only through 2004, so it is possible that genetic exchange with other populations has occurred, even within YNP, but was not detected. No samples were taken from the larger GYA population where dispersal from other populations has been documented. Bangs Decl. ¶18C. As the Final Rule explains, the “worst

⁵⁷Plaintiffs' “back of the truck’ theory of species recovery,” Pl. Br. at 8., grossly mischaracterizes the Final Rule, which calls relocation “a final safeguard, which is highly unlikely to be needed.” 73 Fed. Reg. at 10554. The States have committed to foster wolf dispersal. Id., Exhs. 21, 26

case scenario” presented by the modeling is based on unrealistic assumptions. First, it assumes that the YNP population will be totally isolated from the GYA population and the GYA population will be totally isolated from all other wolf populations. 73 Fed. Reg. at 10533. For this reason, the model assumes a static population of only 170 wolves, instead of the over 400 wolves that exist in the much larger GYA. But the facts are at odds with this assumption, as YNP is the high-density cornerstone of the GYA core recovery area and the source of dispersers into the GYA, and radio telemetry data have already documented the dispersal of wolves from other areas into the GYA and indicate that dispersals have likely occurred every year. *Id.*; Bangs Decl.¶18C. Second, the model caps the population at the YNP population’s winter nadir, rather than at higher springtime levels when pups are born. Bangs Decl.¶8. The Van Holdt paper and Dr. Wayne also make recommendations about NRM gray wolf delisting that are based on inaccurate assumptions. Exhs. 42, 45 at p. 18. For example, they assume that the States will manage wolves for the bare minimum recovery levels of 100 wolves and ten breeding pairs, when in fact the States have committed to manage for at least 150 wolves and 15 breeding pairs, and in fact will be managing for over 1,000 wolves in the NRM and likely over 300 wolves in the GYA. Bangs Decl.¶18C. Further, wolves in national parks will not be affected by delisting. In all, the Von Holdt paper’s predictive modeling does not represent the “best available science.” The USFWS was justified in relying on the more credible opinions of its own experts. *Marsh*, 490 U.S. at 378.

B. The States’ Regulatory Mechanisms Are Adequate

Plaintiffs’ arguments about the adequacy of state regulatory mechanisms are premised on the incorrect notion that the States’ laws permit “unregulated wolf killing” that will “radically diminish” prospects for a functional metapopulation.

1. Wyoming’s 2007 Management Plan Corrects Prior Inadequacies

Plaintiffs are mistaken when they claim that Wyoming’s current management plan fails to correct inadequacies identified in Wyoming’s 2003 plan. Comparison of the 2004 letter from USFWS Director Steve Williams to the WGFDD (Exh. 23) explaining the reasons for the agency’s

rejection of the 2003 management plan (Exh. 20) with the 2007 letter from USFWS Director H. Dale Hall to the WGFD (Exh. 24) approving the 2007 management plan (Exh. 21) demonstrates that Wyoming's 2007 management plan and legislation resolved all three reasons that the 2003 regulatory framework was not approved. Wyoming's 2003 regulatory framework was not approved for three primary reasons: (1) Wyoming's predatory animal area was too large, monitoring was insufficient, and its unit boundaries were too confusing; (2) Wyoming's definition of a pack was inconsistent with the USFWS recovery goal criteria of breeding pairs; and (3) Wyoming had not clearly committed to manage for at least 15 breeding pairs. Exh. 23.; see also 72 Fed. Reg. at 6131-32. The 2007 legislation and revised Wyoming wolf management plan resolved all three of these issues. Exh. 24. The Hall letter indicates:

The area of Wyoming designated as "trophy game" now encompasses enough area, and will allow for the regulation and monitoring of wolf harvest sufficiently to easily support a recovered wolf population in suitable habitat in northwestern Wyoming. Wyoming has clearly committed to manage for at least 15 breeding pairs and 150 wolves within the State, and 7 of those breeding pairs will be maintained outside of the National Parks Unit in Wyoming. The State has also committed to measure recovery and its management objectives by breeding pairs, as defined by the biologically based standard consistent with that of Idaho and Montana. Id.

Critical to the USFWS's decision was the fact that the 2007 legislation and revised plan established a fixed trophy game area that included most of the suitable habitat and all of the areas that have historically contained wolf breeding pairs in Wyoming. Bangs Decl.¶18D. The 2007 regulatory framework, contrary to Plaintiffs' claims, also unambiguously committed to maintaining seven breeding pairs outside the National Parks and at least 15 breeding pairs and 150 wolves in Wyoming regardless of how many breeding pairs and wolves were in National Parks. 73 Fed. Reg. at 10549-50; Exh. 21 (2007 Wyoming Plan, p. 1). The Wyoming Plan speaks directly to the statute troubling Plaintiffs, Wyoming Statute §23-1-304: "According to W.S. 23-1-304 and interpretation of said statute by the Wyoming Attorney General's Office, upon delisting, Wyoming will maintain a minimum of 15 breeding pairs within the State Seven of the 15 breeding pairs will be maintained in northwestern Wyoming but outside YNP, GTNP, and the Parkway." Exh. 21 at 10.

Plaintiffs' cited authority does not support their claim that the trophy game area is

“malleable.” Pl. Br. at 12. The 2007 Wyoming plan clearly identifies the borders of the trophy game area in Figure 1. Exh. 21, Fig. 1. The Final Rule acknowledges the problematic nature of statements to the media by some public officials, but explains that the official written policy and laws of the States, which commit to manage for a wolf population that always exceeds minimum recovery levels, supersede politicians’ sound bites. 73 Fed. Reg. at 10532. Finally, while it is true that Wyoming law permits the Commission to allow the taking of “specified trophy game animals” in “designated areas” of the trophy game zone as predatory animals, that limited allowance is regulated and does not render the entire trophy game area “illusory.” Pl. Br. at 12.

Plaintiffs make much of the fact that “almost 90 percent” of Wyoming falls within the predatory animal area. Pl. Br. at 11. This figure sounds impressive until one understands that the vast majority of this land is not suitable wolf habitat, and it is unlikely that wolves would ever become established in these areas. Indeed, the area outside the trophy game area has not supported persistent wolf packs since 1995. 73 Fed. Reg. at 10549; 72 Fed. Reg. at 6118-20; Exh. 11 (Bangs et al. 1998, p. 788); Exhs. 55-63a (Service et al. 1999-2007, Fig. 1); Exh. 29 (Oakleaf et al. 2006); Bangs Decl. ¶¶8, 11. The trophy game area in northwestern Wyoming encompasses 70 percent of the suitable wolf habitat in Wyoming, and 91 percent of this area is secure public land. 73 Fed. Reg. at 10549. In 2006 this area supported at least 25 packs, 15 breeding pairs, and 175 wolves. *Id.*; Exh. 63a (Service et al. 2007, Table 2). Thus, USFWS reasonably concluded that the Wyoming trophy game area would be large enough to support 15 breeding pairs and 150 wolves even if YNP had none. 73 Fed. Reg. at 10549. The Wyoming law and plan are an adequate regulatory mechanism.

2. The States’ Laws Regulate Wolf Take

Plaintiffs are also mistaken when they claim that depredation control laws in Montana, Idaho, and Wyoming authorize “unlimited killing” of wolves. Pl. Br. at 13. They do not. In fact, most predator control actions permitted under State depredation control laws likely would have been authorized under the previous federal management. *See* Jimenez Declaration [Dkt. 7-2]. The USFWS has removed problem wolves since 1987 and the wolf population has continued to expand

at an average rate of 24 percent annually despite an average annual removal of 10 percent of the wolf population because of chronic livestock depredation. 73 Fed. Reg. at 10523-24. Montana, Idaho, and Wyoming's laws and wolf management plans commit them to each maintain at least 15 or more breeding pairs and at least 150 or more wolves. *Id.* at 10531-32, 10546-47; Exh. 26 (2007 Idaho Plan, pp. 16, 20-21); Exh. 21 (2007 Wyoming Plan, p.1); Exh. 65 (2003 Montana Plan, pp. 132). The States have committed to do so in a manner patterned after the USFWS nonessential experimental population rules first enacted in 1994 and modified in 2005 and 2008. 16 U.S.C. § 1539(j); 50 C.F.R. §17.84. Lethal predator control activities, by agencies and/or individuals, will be modified or halted if recovery might ever be at risk. In addition, only a small proportion of wolves chronically depredate in any given year, so legally-authorized predator control, similar to that authorized by the USFWS since 1994, would be very unlikely to affect a large enough proportion of the wolf population to impact recovery. 73 Fed. Reg. at 10542; Background I. Lethal control for wolves listed as trophy game but attacking livestock or domestic animals is adequately regulated in Montana, Idaho, and Wyoming. Each State provides safeguards in its plan and implementing regulations to ensure wolf recovery is never compromised.⁹ Bangs Decl. ¶¶16,18E.

IV. PLAINTIFFS CANNOT SHOW IRREPARABLE INJURY

Along with showing that they have a likelihood of success on the merits, Plaintiffs must also show that they will suffer irreparable injury absent an injunction. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 544-545 (1987). The burden of justifying interim relief lies with the movant, and threatened, speculative harm does not amount to irreparable injury for purposes of justifying an injunction. *Goldie's Bookstore, Inc. v. Superior Court of California*, 739 F.2d 466, 472 (9th Cir. 1984). Plaintiffs err in asserting that for an ESA claim, the balance of harms automatically favors Plaintiffs. *National Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1510-12 (9th Cir. 1994). In this case, Plaintiffs allege that delisting irreparably harms individual wolves, wolf

⁹Plaintiffs' Exhs. 16 and 17, DOI legal memoranda, are not relevant. They assess if different laws are adequate for a species far less resilient to human-caused mortality. Exh. 1 (Keith 1983).

packs, the NRM wolf population, and Plaintiffs themselves due to reduced wolf viewing opportunities. Pl. Br. at pp. 15-19. Defendants do not dispute that some individual wolves, particularly those in Wyoming's predatory animal area, will be killed that might not have been killed had these animals remained listed. See Jimenez Decl. [Dkt 7-2]. Other than these individuals, all of Plaintiffs' alleged harm is highly speculative. Breeder loss does not constitute irreparable harm to packs for several reasons. Mech Decl. ¶21. First, packs do not need to breed every year. Second, packs that lose a breeder often import one from outside the pack or recruit a mature wolf from within the pack to step into the breeding role. Id. Thus, the average time to production after breeder loss for populations greater than 75 wolves is only 12 months. Id.; Background I. Breeder loss is not uncommon, and most packs, unless very small, are able to adjust. Smith Decl. ¶10. Moreover, the loss of individual wolves or even the temporary disruption of the pack social structure, "has no bearing" on threats to the viability of the NRM wolf population, and does not constitute irreparable harm from a wildlife management perspective. Boyce Decl. ¶8.

Plaintiffs' allegations that delisting harms the NRM population are completely unsupported. Prior to delisting, 70 percent of mortality for the NRM population was due to anthropogenic causes, and the leading cause has long been legal killing due to conflict with livestock, yet the population has continued to expand at a rate of 24 percent annually. Smith Decl. ¶6. Given these facts, human-caused mortality could increase post-delisting to remove an additional 24 percent of the population without decreasing the total NRM population at all. Boyce Decl. ¶10. Merely holding a wolf population stationary requires total annual take of 28-50 percent per year. Mech. Decl. ¶¶15, 23. Indeed, despite aggressive management Canadian wolf populations remain healthy. Boyce Decl. ¶¶11-18. Agencies seeking to reduce wolf populations try to kill 70 percent per year. Id. at ¶15. Allegations of harm based on the Wayne Declaration similarly lack foundation. Smith Decl. ¶¶6-9; Mech Decl. ¶¶14-19. Finally, Plaintiffs' allegations that their ability to view wolves in the wild will be diminished is exaggerated and certainly not irreparable. Smith Decl. ¶11; Bangs Decl. ¶10. Accordingly, Defendants ask that the Court deny Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted this 9th day of May, 2008,

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