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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 **MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' MOTION FOR VOLUNTARY REMAND AND VACATUR**

and

SAFARI CLUB INTERNATIONAL; SAFARI CLUB INTERNATIONAL FOUNDATION; THE NATIONAL RIFLE ASSOCIATION OF AMERICA; STATE OF MONTANA; MONTANA DEPARTMENT OF FISH, WILDLIFE, AND PARKS; STATE OF IDAHO; GOVERNOR C.L. "BUTCH" OTTER; IDAHO FISH AND GAME COMMISSION; IDAHO DEPARTMENT OF FISH AND GAME; IDAHO OFFICE OF SPECIES CONSERVATION; STATE OF WYOMING; SPORTSMEN FOR FISH AND WILDLIFE; MONTANA STOCK GROWERS ASSOCIATION, INC.; MONTANA FARM BUREAU FEDERATION; WESTERN MONTANA FISH AND GAME ASSOCIATION, INC.; MONTANA SHOOTING SPORTS ASSOCIATION, INC.; FRIENDS OF THE NORTHERN YELLOWSTONE ELK HERD; WYOMING STOCK GROWERS ASSOCIATION, INC.,

Defendant-Intervenors.

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 Final Rule went into effect on March 28, 2008.

On April 28, 2008, Plaintiffs filed their complaint alleging that the Final Rule violated sections 2 and 4 of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, 1533, and the USFWS's implementing regulations. In addition to seeking declaratory relief, Plaintiffs' complaint

asks the Court to set aside the Final Rule and issue an injunction reinstating ESA protections for NRM gray wolves. On the same day, Plaintiffs also filed a Motion for Preliminary Injunction (Dkt. No. 2). On July 18, 2008, this Court granted Plaintiffs' motion and issued a preliminary injunction that returned NRM gray wolves to the list of endangered species (Dkt. No. 104). The Court found that: 1) Plaintiffs were likely to prevail on the merits of their claim that the NRM gray wolf had not met its recovery criteria due to a lack of genetic exchange between the Greater Yellowstone Area ("GYA") and the other northern Rocky Mountain populations; 2) Plaintiffs were likely to prevail on the merits of their claim that Wyoming's 2007 regulatory framework was an inadequate regulatory mechanism; and 3) immediate potential harm existed because of hunts planned for Fall 2008.

Federal Defendants H. Dale Hall, Dirk Kempthorne, and USFWS (collectively "Defendants") herein provide points and authorities in support of their Motion for Voluntary Remand and Vacatur of the Final Rule. In this motion, Defendants respectfully request a voluntary remand of the Final Rule in order to reconsider the rulemaking in light of the Court's opinion and order granting Plaintiffs' Motion for Preliminary Injunction. In addition, Defendants ask that the Court vacate the existing Final Rule. Vacatur of the Final Rule would return NRM gray wolves to the *status quo* before the Final Rule went into effect, thereby placing wolves back on the list of endangered and threatened species. On remand, the USFWS intends to conduct further rulemaking and render new determinations regarding the appropriate designation and status of gray wolves in the northern Rocky Mountains.

ARGUMENT

I. STANDARD OF REVIEW

A "voluntary remand" is a request by an agency for "remand without [judicial] consideration of the merits," while "a court-generated remand" is "a remand after consideration of the merits." *Central Power & Light Co. v. United States*, 634 F.2d 137, 145 (5th Cir. 1980). According to the Supreme Court, the power to remand a decision without judicial consideration

is vested in a court's equitable powers:

> [t]he jurisdiction to review the orders of [the agency] is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action.

Ford Motor Co. v. NLRB, 305 U.S. 364, 373 (1939); *see also* *Loma Linda Univ. v. Schweiker*, 705 F.2d 1123, 1127 (9th Cir. 1983) (reviewing court has inherent power to remand a matter to an administrative agency).

A voluntary remand is consistent with the principle that "[a]dministrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider." *Trujillo v. General Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) (citing *Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950)). It also serves the interests of judicial economy by allowing an agency to reconsider and rectify an erroneous decision without further expenditure of judicial resources. *See, e.g.*, *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993) (granting EPA's opposed motion for voluntary remand to consider newly developed evidence) ("We commonly grant such motions [for voluntary remand], preferring to allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete."); *id.* at 524 n.3 (collecting cases); *cf. Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1268 (9th Cir. 1977). Thus, the Court has the equitable discretion to grant Defendants' request for a voluntary remand of the Final Rule now, without the case proceeding to ultimate review of the merits on summary judgment briefing.

II. VOLUNTARY REMAND AND VACATUR

In light of this Court's July 18, 2008 opinion and order, the USFWS has determined that it is appropriate to reconsider certain determinations made in the Final Rule. Federal Defendants, therefore, move this Court for a voluntary remand of the Final Rule. As explained below, it is within the Court's equitable discretion to issue an order effectuating this voluntary remand to the agency prior to its consideration of the merits. Such a "voluntary remand" would

allow the USFWS to reconsider its previous determinations and the administrative record for that rulemaking in light of this Court's July 18, 2008 opinion and order. Indeed, the Court has inherent power to issue such a remand and should exercise its discretion to do so here. *Loma Linda Univ.*, 705 F.2d at 1127.

Courts in the Ninth Circuit frequently have granted federal agencies' requests for voluntary remands, including cases involving the ESA. *Natural Res. Def. Council v. U.S. Dep't of Interior*, 275 F. Supp. 2d 1136, 1141 (C.D. Cal. 2002); *Center for Biological Diversity v. Norton*, 212 F. Supp. 2d 1217 (S.D. Cal. 2002), modified on other grounds, No. 01cv2101IEG LAB, 2003 WL 22225620 (S.D. Cal. Sept. 9, 2003). *See also Lute v. Singer Co.*, 678 F.2d 844, 846 (9th Cir. 1982) (discussing *Trujillo*), amended on other grounds on denial of reh'g, 696 F.2d 1266 (9th Cir. 1983). The same principles evaluated in those cases suggest that a remand is appropriate here.

Moreover, reaching the merits of the Final Rule now risks wasting the parties' and Court's resources because the USFWS intends to generate a new final agency action during the remand. A new decision could render moot or otherwise resolve Plaintiffs' claims. *See e.g. Ethyl Corp.*, 989 F.2d at 524 (granting EPA's opposed motion for voluntary remand). If Plaintiffs are satisfied with the agency's new decision, it may obviate the need for further litigation. If Plaintiffs are dissatisfied after remand, they may renew their challenges at that time, based on the new decision and administrative record. Proceeding now will not result in meaningful judicial review.

If the parties were to litigate this case, and the Court found that the Final Rule was arbitrary and capricious, the law is well settled that the proper course would be to remand the decision for reconsideration. *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 338 (D.C. Cir. 1989); *Environmental Def. Fund v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981). The Supreme Court also has acknowledged the limited scope of circumstances in which a court may order an executive agency to make a specific discretionary

determination. *See* *Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976) (judicial review of agency action ordinarily requires remand to agency so that agency can exercise its discretion); *Citizens for Balanced Env't & Transp. v. Volpe*, 650 F.2d 455 (2d Cir. 1981) (court's role is limited; it may not substitute its judgment for that of the agency). Courts have adhered to this doctrine in ESA cases. *See* *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir. 1995) (remanding to USFWS for notice and comment and review of record to determine whether to list Bruneau Hot Springs snail as endangered); *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 629 (W.D. Wash. 1991) (remanding to USFWS for review and analysis of petition to list Northern spotted owl as endangered). Accordingly, granting Federal Defendants' request for voluntary remand of the Final Rule now will result in the same relief to which Plaintiffs would be entitled after a successful litigation of the merits, but conserves the resources of both parties and this Court. Because Federal Defendants also ask that the Court vacate the existing Final Rule, Plaintiffs cannot claim that they will be harmed in any way if the Court grants this motion. Indeed, Plaintiffs will have achieved what their complaint requested -- that the Final Rule be set aside and that ESA protections be reinstated for gray wolves in the northern Rocky Mountains.

Respectfully submitted this 22nd day of September, 2008,

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