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UNITED STATES DISTRICT COURT
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, WESTERN WATERSHEDS PROJECT, WILDLANDS NETWORK, and HELLS CANYON PRESERVATION COUNCIL, *Plaintiffs*, v. KEN SALAZAR, Secretary of the Interior; ROWAN GOULD, Acting U.S. Fish and Wildlife Service Director; and UNITED STATES FISH AND WILDLIFE SERVICE, *Defendants*.	)	Case Nos. CV-09-77-M-DWM CV 09-82-M-DWM (consolidated) IDAHO'S RESPONSE MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION
GREATER YELLOWSTONE COALITION *Plaintiff*, v. KEN SALAZAR, Secretary of the Interior; ROWAN GOULD, Acting U.S. Fish and Wildlife Service Director; and UNITED STATES FISH AND WILDLIFE SERVICE, *Defendants*.	)	

INTRODUCTION

This memorandum is filed by Intervenor-Defendant State of Idaho and Intervenor-Defendant Governor C.L. "Butch" Otter (collectively Idaho") in opposition to the Motion for Preliminary Injunction filed by Plaintiffs Defenders of Wildlife et al.

Given the short time for this Court's review prior to hearing of the Plaintiffs' motion for preliminary injunction, Idaho will defer to, and incorporate, the response of Defendant United States with regard to most of the legal issues raised by Plaintiffs. Idaho is, however, compelled to file this memorandum to rebut the Plaintiffs' mischaracterizations and distortions of the recent action taken by the Idaho Fish and Game Commission ("Commission") to authorize a limited harvest of wolves in 2009. As this memorandum will demonstrate, the Commission's decision was based upon the best available science and conservative population assumptions. The Commission was faced with the difficult task of balancing its mandate to protect and preserve gray wolves with its duty of preserving and protecting the prey upon which the wolves must feed. The Commission also had to consider the impacts of wolves on private property rights, particularly livestock. After balancing the various public interests, the Commission determined a harvest limit based on sound

science, and tailored the harvest to provide added protection for wolves in critical dispersal areas to foster genetic exchange. Under the strict standards for issuance of preliminary injunctions, this Court must exercise great caution in substituting its judgment as to the proper level of wolf harvest for that of a publicly-appointed commission implementing the recommendations of professional wildlife biologists.

ARGUMENT

A. Idaho has authorized a maximum harvest of 220 wolves, which will result in a minimum population of at least 800 wolves at year's end.

Plaintiffs allege that "Idaho has authorized the killing of 255 wolves." Plaintiffs Brief at 1. This is incorrect. Idaho has in fact authorized the taking of a maximum of 220 wolves. Plaintiffs' asserted number of 255 includes harvest allocated to the Nez Perce Tribe by prior agreement. Allocation, however, is not authorization. The Tribe is a sovereign government and must take independent action to authorize harvest. The Tribe many choose to forego harvest or limit its harvest. The Plaintiffs have not introduced any evidence to this Court indicating that the Tribe has authorized harvest for 2009. Until such evidence is introduced the number of wolves to be harvested by the Tribe, if any, is a matter of speculation and cannot be considered by this Court. See In

re Excel Innovations, Inc., 502 F.3d 1086, 1098 (9th Cir. 2007) ("[s]peculative injury cannot be the basis for a finding of irreparable harm").

Thus, the case should proceed upon the current record, which shows that the Commission has only authorized harvest of up to 220 wolves out of a current estimated wolf population of over 1020 wolves. Declaration of James Unworth ("Unsworth Declaration") ¶ 44. The minimum year-end population following state harvest would be at least 800 wolves, for two reasons. First, Idaho's population estimates are true minimums, based on a series of conservative assumptions, so that the actual wolf population is likely larger than the official estimate. Declaration of Jon Rachael ("Rachael Declaration") ¶¶ 4-18. Second, state harvest is expected to be below the harvest limits. Experience from other states and Canada is that gray wolves are notoriously difficult to hunt, especially using "fair chase" restrictions. Unsworth Declaration ¶ 50. Idaho's big game hunting rules prohibit wolf hunters from trapping, poisoning, baiting, electronic calls, using dogs, or chasing or shooting from motorized equipment. See generally IDAPA 13.01.08. [1] Hunting access in many units is limited by steep terrain, heavy timber, federal wilderness

[1] The Idaho administrative code (generally referred to as IDAPA) is available at: http://adm.idaho.gov/adminrules/rules/idapa13/13index.htm.

designations, other federal travel restrictions, and in many areas Commission restrictions on the use of all-terrain vehicles.[2]

Plaintiffs describe Idaho's harvest limit as allowing "an extraordinary level of killing" (Plaintiff's Brief at 1). The Commission established the harvest, however, only after careful consideration of population growth and expected non-hunting mortality. It is well-documented in the literature that wolf populations can sustain harvest rates substantially higher than Idaho's estimated harvest rate of 21% without population declines. See AR 2009-37052 (Fuller et al. 2003) (finding "human take of wolves can sometimes exceed 35% without permanently reducing a population," and citing numerous examples of stable populations with even higher levels of take).

B. Idaho's hunting seasons limit mortality in key dispersal areas.

The Plaintiffs assert that Idaho has "not adopted regulations to limit wolf mortality in key dispersal areas," that Idaho's hunting season "threatens to virtually eliminate wolves in connecting corridors," and that Idaho plans to reduce wolf populations in "critical dispersal areas." Plaintiffs' Brief at 1, 22, 31. Contrary to Plaintiffs' assertions, the Commission, in setting its wolf

[2] In restricted units, all-terrain vehicles (ATVs) may only be used for hunting by holders of a Handicapped Persons Motor Vehicle Hunting Permit. IDAPA 13.01.08.411.02. All other hunters may use ATVs only for packing in and out of hunting camps and for retrieval of game. Id.

hunting limits, emphasized the protection of genetic connectivity, particularly between Idaho and Wyoming. Unsworth Declaration ¶ 44. In order to implement management objectives, Idaho has established twelve wolf data analysis units (DAUs). The Southern Mountains and Upper Salmon DAUs have been identified as being used for dispersal of wolves between Idaho and Wyoming. After considering the factor of genetic dispersal, the Commission limited hunting in the Southern Mountains DAU to ten wolves, and in the Upper Salmon DAU to five wolves. Rachael Declaration Ex. 2. Such limitations ensure that Idaho's hunting limits are consistent with the goal of promoting genetic connectivity among wolf populations in Idaho, Montana and Wyoming.

C. Idaho has implemented regulatory mechanisms to maintain viable wolf populations and ensure genetic exchange.

Plaintiffs assert that the Secretary of the Interior ("the Secretary") erred in his reliance upon Idaho's regulatory mechanisms that ensure natural connectivity, monitor genetic health, and, where necessary, take affirmative steps to address genetic issues, including relocation of wolves. Plaintiffs assert that Idaho's wolf management efforts are nothing more than unenforceable "aspirational statements," and that the Secretary's reliance upon them was

based on "nothing more than faith." Plaintiffs Brief at 20. Such assertions are baseless.

Section 4(a)(1)(D) of the ESA provides that in a listing or delisting decision, the Secretary is to ascertain the adequacy of "existing regulatory mechanisms." The Idaho Wolf Population Management Plan (AR 2008-1586) ("Wolf Management Plan") meets the statutory standard for consideration as a regulatory mechanism. First, the Plan existed at the time of the 2009 Delisting Rule, and, in fact, had been implemented by the Idaho Department of Fish and Game ("IDFG") during the previous delisting in 2008. It is therefore distinguished from state "proposals for future conservation action" that have been held by courts to not meet the criteria of § 4(a)(1)(D) when relied upon by the Secretary in listing decisions. See, e.g., Fed'n of Fly Fishers v. Daley, 131 F. Supp. 2d 1158, 1168 (N.D. Cal. 2000) (finding that state conservation plans that were "in fact proposals for future action" were not "existing" regulatory mechanisms).

More importantly, Idaho's Wolf Management Plan is not a mere aspirational statement, but is an integral part of Idaho's comprehensive wolf management scheme. The use of a management plan as a framework for regulating wolf management is a mirror of the regulatory scheme employed by

the ESA. The Secretary prepares a recovery plan, then uses its regulatory powers in manners consistent with the objectives of the plan. No one would dispute that the recovery plan, though itself unenforceable, is an integral part of the regulatory mechanisms used to achieve the objectives of the ESA.

Likewise, Idaho's Wolf Management Plan is an existing regulatory mechanism upon which the Secretary may rely in determining the adequacy of state management. The Wolf Management Plan carries out the statutory mandate that all wild animals, including gray wolves, be "preserved, protected, perpetuated, and managed." Idaho Code § 36-103. The Wolf Management Plan incorporates elements from IDFG's 15-year strategic plan, known as the "Compass," and elements from the 2002 Idaho Wolf Conservation Plan, then integrates such elements into a cohesive and comprehensive framework for management of gray wolves. AR 2008-1591.

The framework in the Wolf Management Plan sets forth the objective of managing "for a self-sustaining, viable wolf population that provides for a diversity of values and uses." AR 2008-1593. The plan established the goal of maintaining a population of at least 518 wolves. AR 2008-1591. To achieve this population goal, the Idaho wolf population is divided into 12 wolf DAUs, with each DAU consisting of two or more game management units ("GMUs").

AR 2008-1615. Mortality limits (which include mortality from all sources) and hunting limits are allocated among the DAUs. This way, hunting mortality can be allocated to encourage hunting in DAUs where reductions in wolf populations are desirable to avoid conflicts, while minimizing hunting in areas with smaller wolf populations or in areas used by wolves as migration corridors. AR 2008-1616. The 2008 Wolf Plan specifically identifies six border GMUs that will "be closely monitored and managed for connectivity." Id.

The management framework in the Wolf Management Plan is implemented through regulations published in IDAPA and by annual proclamations of the Commission to establish seasons and hunting limits.[3] The regulations limit each hunter to a single wolf, IDAPA 13.01.08.200, and require holders of wolf tags to comply with seasons and hunting limits set by Commission proclamation. IDAPA 13.02.08.250.01.j. Baiting is prohibited, as is hunting within a half-mile of any IDFG big game feeding site. IDAPA 13.01.08.500.02. In order to ensure wolf hunts may be shut down quickly in the event hunting limits are met, hunters must report all wolf kills within 24

[3] The "setting of any season or limit on numbers, size, sex, or species" is accomplished through proclamation because of the impracticability of formally promulgating rules to establish such annual limits. Idaho Code § 36-105.

hours (all other big game species have a five-day or ten-day reporting requirement). IDAPA 13.01.08.422.

In short, the Wolf Management Plan is not a mere voluntary action or otherwise unenforceable. It is implemented by regulations that restrict the circumstances under which gray wolves may be killed or harvested. Violations of such regulations carry criminal penalties. As such, the Management Plan is a classic regulatory mechanism, and, if anything, is more enforceable than management plans upheld as regulatory mechanisms by other courts. See, e.g., Defenders of Wildlife v. Kempthorne, 535 F. Supp. 2d 121, 131-32 (D.C. 2008) (state management plans "are not future nor speculative regulatory mechanisms" where such plans "have been implemented [and] include tangible steps to preserve black bear habitats"). The Secretary correctly relied upon the conservation parameters set forth in the Wolf Management Plan to determine that Idaho would adequately manage wolves to preserve viable wolf populations in Idaho and to promote dispersal of wolves to and from populations in Montana and Wyoming.

D. Idaho is firmly committed to managing wolves to protect and promote dispersal.

In addition to its commitment to maintaining a population of at least 518 wolves after annual harvest, thus providing a source population for dispersal,

Idaho is taking affirmative steps to promote dispersal among the three wolf populations in Idaho, Montana and Wyoming. This commitment is expressed not only in the Wolf Management Plan, but also by means of a Memorandum of Understanding entered into between Idaho, Montana, and the U.S. Fish and Wildlife Service ("MOU"). AR 2009-3082. Plaintiffs allege that the MOU cannot be considered a regulatory mechanism because it includes a provision stating that it "does not obligate any . . . agencies to the expenditure of funds." Plaintiffs' Brief at 21. Such a provision, however, is a standard provision in almost every state and federal contract and is necessary to comply with legal limitations on the ability of state and federal agencies to commit to the expenditure of funds not yet appropriated. The inclusion of such a legally-mandated provision does nothing to lessen the commitment of the parties to "ensure robust population demographic performance and genetic variation of gray wolves in the NRM." AR 2009-3083.

Moreover, Plaintiffs misrepresent the nature of the MOU. The MOU is not a source of regulatory authority, nor is it the only expression of each party's commitment to maintaining connectivity. Rather, it is simply a mechanism that will be used by IDFG to implement the regulatory objectives expressed in its Wolf Management Plan, including the objective of "ensur[ing]

genetic transfer among states through maintaining connectivity and functional metapopulation processes." AR 2008-1608.

The use of an MOU to coordinate the respective management authorities of the three entities is a valid regulatory mechanism under Idaho law: the Idaho Code specifically directs agencies to enter into cooperative agreements with other state and federal agencies in order to promote efficiencies in government. Idaho Code § 67-2326. Additionally, IDFG is specifically authorized and directed to "develop and coordinate wolf management plans with state agency officials of the states of Wyoming and Montana," Idaho Code § 36-715, and to consult and coordinate with federal agencies in the implementation of IDFG wolf management authorities. Id.

Because the MOU is authorized by statute and sets forth specific steps for each party to use its existing regulatory authorities to monitor genetic diversity and assure gene flow among the three subpopulations, the Secretary did not act arbitrarily or capriciously in considering the MOU in his determinations as to the adequacy of future state regulations.

E. Idaho continues to set, monitor, and adjust wolf harvest limits based on total mortality.

Plaintiffs assert that Idaho has abandoned its regulatory mechanism whereby "all known Idaho wolf mortality, including that related to defense of

property, count against the total mortality limit for that hunting unit and would be removed from the allowable hunting harvest." Plaintiffs' Brief at 20. Plaintiffs allege the total mortality limit was simply an "aspirational statement" and that Idaho now has "no requirement to reduce hunting if other sources of wolf mortality skyrocket." Id.

Once again, Plaintiffs simply construct facts without supporting documentation. As explained to the Court in prior litigation, IDFG staff calculates the total mortality that is consistent with the end-of-year population goal. Total mortality includes all known sources of mortality, including natural causes, automobile accidents, agency control actions, private predation control actions, and state-approved hunting. Calculated total mortality also includes the estimated maximum harvest by the Nez Perce Tribe, even though, as discussed above, tribal harvest is outside state control. IDFG calculates total mortality and tracks actual mortality throughout the year on a state-wide basis and for each of the twelve wolf DAUs. In setting harvest limits, the Commission took into account known mortality as of the date of the Commission meeting on August 17, 2009, to set harvest limits for both the state as a whole and for individual zones.

If actual mortality from non-harvest sources were to exceed calculated non-harvest mortality, IDFG or the Commission would make adjustments to harvest limits on a zone basis or statewide as appropriate. For example, if mortality from a disease outbreak is higher than expected in a particular zone, hunting in that zone can be limited. Such limitation can occur by the Commission revising harvest limits or closing seasons early. The Director of IDFG also has the authority to close hunting seasons as necessary if non-harvest sources of mortality are, or are likely to be, excessive. Past reasons for harvest closures for other species have included habitat destruction due to wide-scale wildfires, outbreaks of disease such as West Nile Virus, or undue harvest pressures created by extreme weather conditions. Unsworth Declaration ¶ 58. The Commission is also scheduled to review wolf hunting success in conjunction with other mortality at its November meeting and adjust seasons as necessary.

Total mortality limits were not presented to the Commission for formal adoption and publication in 2009. This was done to avoid the potential for confusion by members of the public that the mortality limits are in fact hunting limits. Based on public misinterpretation of total mortality limits published for

the proposed 2008 hunting season, IDFG reasonably concluded that it was best to have a single set of numbers circulated to the public.

In short, IDFG continues to calculate and track total mortality as described to this Court in prior litigation. IDFG refined its use of the methodology to avoid confusion, but will continue to assure that harvest limits are adjusted if non-harvest sources of mortality outpace calculations.

F. Plaintiffs have failed to show that Idaho's wolf hunting season will cause irreparable and personal harm to Plaintiffs during the course of this litigation.

The Supreme Court has recently held that a preliminary injunction "is an extraordinary remedy never awarded as of right." Winter v. Natural Resources Defense Council, ___ U.S. ___, 129 S. Ct. 365 (2008). The Court rejected Ninth Circuit precedents allowing preliminary injunctions to be issued "based only on a possibility of irreparable harm" and emphasized that a "plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." 129 S.Ct. at 374-75. The Court held that "[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an

extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Id. at 375-76.

The Plaintiffs would have this Court ignore the Winter case. Plaintiffs argue that in cases alleging ESA violations the only burden on the plaintiffs is to "show a probability of success on the merits." Plaintiffs' Brief at 5. The Ninth Circuit has acknowledged, however, that after Winter, Ninth Circuit decisions that allowed preliminary injunctions to issue upon a mere possibility of harm under certain circumstances are "no longer controlling, or even viable." American Trucking Associations, Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009).

While the Ninth Circuit has not had an opportunity to apply Winter in the context of ESA claims, at least one court has concluded that following Winter, plaintiffs alleging ESA violations are not relieved from the burden of demonstrating irreparable harm to their specific and personal interests. See Animal Welfare Institute v. Martin, 588 F. Supp. 2d 70, 102 (D. Me. 2008) ("[t]he Court does not agree, particularly following Winter, that if they demonstrate the other prongs for injunctive relief, the Plaintiffs are relieved from demonstrating irreparable injury").

In short, "the extraordinary nature of the preliminary injunction power" requires that it "not be exercised unless the moving party shows that it specifically and personally risks irreparable harm." Adams v. Freedom Forge Corp., 204 F.3d 475, 487 (3d Cir. 2000). Mere allegations of environmental harm are insufficient: plaintiffs "must still make a specific showing that the environmental harm results in irreparable injury to their specific environmental interests." Davis v. Mineta, 302 F.3d 1104, 1114-15 (10th Cir. 2002), Even then, preliminary injunctions "must be narrowly tailored . . . to remedy only the specific harms shown by the plaintiffs, rather than to enjoin all possible breaches of the law." Price v. City of Stockton, 390 F.3d 1105, 1117 (9th Cir. 2004) (internal quotation marks omitted).

Here, the types of harms alleged by Plaintiffs are insufficient to justify the extraordinary remedy of a preliminary injunction. First, the declarations suffer from the unstated, but underlying assumption that the authorization of any level of wolf harvest would be harmful to plaintiffs. No court, however, has ever recognized the mere act of publicly-authorized and regulated hunting as environmentally harmful or as personally harmful to non-hunters. The public policy of the state and federal governments is to promote responsible hunting on public lands as a recreational activity. Thus, to the extent that the

declarations suggest that mere hunting causes them harm, they must be rejected out of hand.

Even if one assumes that carefully-regulated hunting can be the cause of harm, the declarations do not describe the types of specific and personal harm necessary for a preliminary injunction. For example, declarant Michael Garrity, who reports last seeing a wolf in 1995, alleges in the most general terms that he "intend[s] to continue to visit areas occupied by wolves in the future in the hope of seeing or hearing wolves in the wild [including] hiking this year in the Beaverhead-Deerlodge National Forest." Such general allegations of harm are insufficient to support standing, much less a preliminary injunction. In the recent decision of Summers v. Earth Island Institute, ___ U.S. ___, 129 S. Ct. 1142 (2009), the Supreme Court emphasized that both standing and injunctive relief must be based on "concrete and particularized" injuries that are "actual and imminent, not conjectural or hypothetical." 129 S. Ct. at 1149. The Court was particularly critical of a declaration indicating the declarant's future intent to visit the national forests, stating:

> This vague desire to return is insufficient to satisfy the requirement of imminent injury: such some day intentions—without any description of concrete plans, or indeed any

> specification of *when* the some day will be—do not support a finding of the actual or imminent injury that our cases require.

Id. at 1150-51 (internal quotation marks omitted).

Garrity fails to state whether he will be hiking before or after the planned wolf hunting season. Moreover, Declarant Garrity fails to explain how the hunting of a small percentage of the wolf population will injure his interests in observing wolves during the course of this litigation. If, in fact, wolves were facing extirpation Garrity could conceivably assert an injury to his ability to see wolves, but the potential taking of a small percentage of the wolf population is consistent with Garrity's desire to visit the national forest and observe wolves. His odds of observation may be slightly lessened, but not to the extent necessary to justify the extraordinary remedy of preliminary injunction.

The declaration of Suzanne Stone suffers from the same deficiencies. She fails to identify any concrete plans to observe wolves during the course of this litigation that may be affected by the planned hunting seasons. She states only that she has hiked (past tense) in areas where wolf hunts are planned, and makes general allegations that if hunting proceeds she would feel a "personal loss" that would diminish her opportunities to enjoy wolves in the wild. Under

the standards set forth in Summers, such general assertions are not sufficient to show the type of imminent harm justifying a preliminary injunction.

Likewise, the declaration of Jon Marvel fails to identify specific harms that may befall him during the course of this litigation. Jon Marvel merely alleges that he enjoys the presence of wolves on property owned by the Western Watershed Project on the East Fork of the Salmon River. Hunting is consistent with Marvel's continued enjoyment of wolves. Under Idaho's proposed wolf seasons, a maximum of ten wolves may be taken in the Southern Mountains DAU, which includes the property identified in Marvel's declaration. The limit of ten wolves was set with the objective of maintaining the population in the Southern Mountains DAU to promote dispersal. Unsworth Declaration ¶ 44. Marvel fails to explain how he will be irreparably harmed by IDFG efforts that maintain the existing population in the DAU.

G. Before issuing a preliminary injunction, the Court must consider the injuries that will be suffered by Idaho and other parties if the Plaintiffs' requested relief is granted.

In Winter, the Supreme Court emphasized that a preliminary injunction is an "extraordinary remedy" that is "never awarded as of right[:] [i]n each case, courts must balance the competing claims of injury and must consider the effect on each party of granting or withholding the requested relief." Winter,

129 S. Ct. at 376 (emphasis added) (internal quotation marks omitted). The Court's directive did not provide for any exception. Therefore, Idaho submits that despite prior Ninth Circuit guidance discounting the balancing of harm in ESA cases, this Court must consider the effects of a preliminary injunction on Idaho and the other defendant-intervenors.

First, this Court must consider that the introduction of wolves into Idaho was accompanied by assurances, from the United States and a number of the Plaintiffs, that wolf numbers would be considered recovered when the population reached 100 wolves or ten breeding pairs, so that impacts on prey populations and on livestock would be limited. The Idaho Fish and Game Commission, despite significant public pressure, has committed itself, with the Governor's support, to maintaining a population at least five times greater than the numerical recovery level. For 2008, it took the step of significantly limiting harvest: the authorized harvest of 21.6% is only slightly greater than the projected annual growth rate of 20%. Rachael Declaration ¶ 9. Yet still, Plaintiffs assert that Idaho is not doing enough.

The Commission's decision is entitled to substantial deference, for it is the result of extended deliberations that took into account the biological needs of the wolves and the impacts of wolves on the public interest. While Plaintiffs

would have the Court believe that wolves are entirely beneficial, the on-the-ground experience of Idaho and other parties with actual wolf management experience is otherwise. As with everything else, wolf reintroduction has come with a price. When introduced into habitat with insufficient prey to support them, wolves will turn to livestock for sustenance, so that many rural residents of Idaho have suffered significant financial losses. Other rural residents have lost pets and trained working dogs to wolves who view such dogs as competitors. Even in more remote areas with less human conflicts, wolves have had significant impacts on ungulate populations, particularly elk herds in the Lolo, Selway, and Sawtooth DAUs. IDFG has invested considerable resources in documenting such losses and confirming that wolves are the primary reason for observed declines in such elk herds. Declaration of Cal Groen ¶ 7. In the Lolo DUA, elk density has declined from six elk per square mile to two elk per square mile. Id. ¶ 2. IDFG peer-reviewed studies have confirmed that 90% of recent elk loss in the Lolo DAU is due to predation, with 88% of predation loss being caused by wolves. Id. ¶ 2. Because of predation losses, IDFG has been forced to reduce hunting tags for the Lolo DAU by 90%. Id. ¶ 5. Outfitters dependent on elk hunting have suffered financial losses, and IDFG has suffered revenue losses as out-of-state elk

hunting tags have dropped 30% in the last year alone. Id. ¶ 10. Survey respondents indicate that the leading single cause for their not returning to Idaho is the identified impacts of wolves on deer and elk populations. Id.

Idaho's modest hunting season simply seeks to balance the need to protect wolf populations against the need to protect ungulates and reduce livestock depredations. If hunting is allowed to proceed, it will provide a significant opportunity to determine whether hunting is a useful tool for wolf management. Livestock depredations and ungulate populations will be carefully monitored in the years after harvest to see if hunting is successful in helping to balance wolf populations with available prey and discouraging colonization of less suitable habitat. Rachael Declaration ¶¶ 34-35. Such factors should be considered by the Court in determining whether a preliminary injunction is justified.

CONCLUSION

Idaho has worked diligently to implement a wolf management framework that maintains wolves at recovery levels five times those originally proposed. Should this Court grant a preliminary injunction based on the superficial allegations of harm set forth by Plaintiffs, it will almost certainly have a severe chilling effect on Idaho's efforts to support the recovery of the

gray wolf and other threatened species. The Plaintiffs' motion for preliminary injunction must be denied.

RESPECTFULLY SUBMITTED this 28TH day of August 2009.

/s/ James D. Johnson
James D. Johnson
Attorneys for Intervenor-Defendants State of Idaho and Governor C.L. "Butch" Otter

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is in compliance with the 6500 word limit of L.R. 7.1(d)(2)(A), in that it consists of 4,547 words as calculated by Microsoft Word 2003, excluding the parts of the brief exempted by the rule; and with L.R. 10(1)(a), in that it is double spaced and in a 14-pt font typeface except for quoted material and footnotes.

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