IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-35661

ALLIANCE FOR THE WILD ROCKIES, FRIENDS OF THE CLEARWATER, and WILDEARTH GUARDIANS
Plaintiffs – Appellants,

vs.

KEN SALAZAR, in his official capacity as United States Secretary of the Interior, ROWAN GOULD, in his official capacity as Acting Director of the United States Fish and Wildlife Service, and UNITED STATES FISH AND WILDLIFE SERVICE,
Defendants – Appellees.

On appeal from the United States District Court for the District of Montana, Missoula Division, No. 9:11-cv-00070-DVM

BRIEF OF *AMICUS CURIAE* IN RESPONSE TO EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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ATTORNEYS FOR *AMICUS CURIAE* STATE OF IDAHO

INTRODUCTION

The State of Idaho files this amicus curiae brief pursuant to Federal Rule of Appellate Procedure 29(a). Idaho has a substantial stake in the outcome of appellants' motion. According to recovery standards adopted by the United States Fish and Wildlife Service ("Service"), wolves in the northern Rocky Mountains exceed recovery standards so long as there are 150 wolves in each of the three states of Idaho, Montana, and Wyoming, with genetic exchange between populations. 74 Fed. Reg. at 15,132.[1] Wolf populations in Idaho, Montana and Wyoming have been biologically recovered for many years. See 74 Fed. Reg. 15,123 (April 2, 2009) ("[t]he end of 2008 will mark the ninth consecutive year the population has exceeded our numeric and distributional recovery goals").

Upon recovery, species are to be removed or "delisted" from the list of endangered and threatened species protected by the Endangered Species Act ("ESA"). Here, however, a district court decision[2] enjoined the delisting of healthy and recovered wolf populations in Idaho and Montana because wolves in the Wyoming portion of the northern Rocky Mountains distinct population segment would not be similarly delisted due to the lack of an approved state wolf

[1] The actual recovery goal remains 100 wolves and ten breeding pairs in each of the three states, but each state has agreed to maintain a population of at least 150 wolves and 15 breeding pairs "[t]o ensure that the [northern Rocky Mountains] wolf population always exceeds the recovery goal." 74 Fed. Reg. at 15,132.

[2] Defenders of Wildlife v. Salazar, 729 F. Supp. 2d 1207 (D. Mont. 2010).

management plan. This unique situation prompted Congress to enact an appropriation act rider that directed the delisting of the distinct population segment outside Wyoming within 60 days "without regard to any other provision of statute or regulation that applies to issuance of such rule." Section 1713, P.L. 112-10, 125 Stat. 38 (April 15, 2011) (hereinafter "Section 1713").

Pursuant to Section 1713, Idaho, under the terms of its Service-approved wolf management plan, will manage wolf populations so that they never fall to levels requiring re-application of ESA protections. By managing wolves in accordance with long-established recovery levels, Idaho's pending wolf hunting seasons will, by definition, avoid irreparable harm to any interest appellants' may have in protecting the viability of wolf populations. In short, the extraordinary injunctive relief sought by appellants is simply unnecessary and unjustified under the standards established by this Court.

ARGUMENT

A. Appellants Have Failed to Raise Serious Questions Going to the Merits.

Given the limited space available, amicus Idaho will not address at length the likelihood of appellants' prevailing on the merits other than to note that even under the "serious question" standard appellants fail to meet the minimum quantum of likely success necessary to justify a stay. Appellants all but concede that the district court correctly applied this Court's precedents in concluding that a

congressional directive requiring an agency to perform a specified action "without regard to" existing statutes[3] that have been held by federal courts to otherwise bar such action does not violate the separation of powers. Consejo de Desarrollo Economico de Mexicali, A.C. v. United States, 482 F.3d 1157, 1167-69 (9th Cir. 2007); see also National Coalition to Save our Mall v. Norton, 269 F.3d 1092, 1097 (D.C. Cir. 2002) (holding that statute, enacted in response to pending litigation and directing agency to initiate construction of a war memorial in accordance with terms of agency-issued special use permit "[n]otwithstanding any other provision of law," did not violate separation of powers because the congressional directive "amends the applicable substantive law" to "address[] a specific problem, namely, whether specified government decisions . . . complied with prior general legislation").

To prevail, appellants must convince this Court to reconsider and overturn its own precedents, something that simply cannot happen at the panel level absent a need to conform to intervening Supreme Court decisions. Norita v. N. Mariana Islands, 331 F.3d 690, 696 (9th Cir. 2003). Given the lack of such intervening

[3] More commonly, such directives employ the synonymous term "notwithstanding" existing laws, which this Court has held should be interpreted as "requiring the disregard" or "direct[ing] the disregard" of federal environmental and natural resource laws otherwise applicable to the congressionally-mandated action. Oregon Natural Resources Council v. Thomas, 92 F.3d 792, 796-97 (9th Cir. 1996).

decisions, the appellants' likelihood of prevailing is, if not nil, then so approaching it as to be unmeasurable.

B. Appellants Have Failed to Demonstrate that Idaho's Wolf Hunting Seasons will Result in Irreparable Harm to Appellants.

The appellants' failure to prove likely success on the merits is echoed not only by its failure to demonstrate irreparable harm, but by its failure to employ the proper test for measuring such harm. "[I]n the context of the ESA, 'the test for determining if equitable relief is appropriate is whether an injunction is necessary to effectuate the congressional purpose behind the statute.'" National Wildlife Federation v. National Marine Fisheries Service, 422 F.3d 782, 795-96 (9th Cir. 2005), quoting Biodiversity Legal Foundation v. Badgley, 309 F.3d 1166, 1177 (9th Cir. 2002). Here, the appellants' assertion of irreparable harm due to the death of individual wolves is inconsistent with the "ESA's 'primary purpose [which] is to prevent animal and plant species endangerment and extinction caused by man's influence on ecosystems, and to return the species to the point where they are viable components of their ecosystems.'" Trout Unlimited v. Lohn, 559 F.3d 946, 949 (9th Cir. 2009), quoting H.R. Rep. No. 95-1625. Thus, to the extent that appellants have interests in wolves,[4] the measure of irreparable harm to such

[4] Appellants' motion does not specify the particular interests that appellants or their members may have in wolf populations, nor do appellants make any

interests must be measured by whether there is a threat to the recovery of the species or distinct population segment, not by harm to individual wolves. See Defenders of Wildlife v. Salazar, 2009 WL 8162144, 4 (D. Mont. 2009) (finding "the measure of irreparable harm [to gray wolves] is taken in relation to the health of the overall species rather than individual members"). Even appellants concede that the standard for irreparable harm is whether the challenged action "prevents, or possibly, retards, recovery of the species." Emergency Motion at 17, quoting National Wildlife Federation v. Burlington Northern R.R., Inc., 23 F.3d 1508, 1513 (9th Cir. 1994).

Even assuming the truth of all facts asserted by appellants, there is no showing that the hunting seasons adopted by Idaho and Montana threaten the recovery of the species. Appellants make two primary arguments: first, that "hundreds of wolves in Montana and Idaho are about to die," second, that "both Montana and Idaho have issued more hunting licenses allowing wolf killing – than the total number of wolves that exist in either State." Emergency Motion at 18. Neither argument demonstrates irreparable harm.

First, the assertion that "hundreds" of wolves will likely be killed during the upcoming hunting season does not demonstrate any violation of the primary goal of the ESA, which is to ensure the recovery of species. Idaho has approximately

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showing as to how their interests would be adversely affected by hunting seasons that maintain wolf populations above long-established viability levels.

1,000 wolves, thus exceeding the numeric recovery goal by a factor of ten. Declaration of James Unsworth, ¶ 13.[5] The harvest of "hundreds" of wolves will not place recovery in jeopardy, for even the harvest of hundreds of wolves will leave sufficient numbers to meet the recovery standard.

Moreover, experience demonstrates that wolf populations, due to robust birth rates and dispersal capabilities, are able to sustain a high level of mortality with little impact on population numbers. In 2009 Idaho conducted a sports hunting season for gray wolves following delisting. At the beginning of 2009, Idaho had an estimated wolf population of approximately 850 wolves. Unsworth Declaration ¶ 5. Hunters harvested 188 wolves, and another 100 wolves were killed in response to livestock depredations, yet the population at the end of 2009 remained approximately 850 wolves. Unsworth Declaration ¶¶ 9, 10. This is consistent with published research showing that removal rates up to 35% may have no discernable impact on year-to-year wolf populations, and that removal rates of 50 to 80% annually may be necessary to stabilize or decrease wolf populations. Unsworth Declaration ¶ 11.

As for the appellants' concern that the number of wolf hunting license tags issued to date exceeds the total number of wolves in Idaho, experience again

[5] The Declaration of James Unsworth, Ph.D, in Support of Brief of Amicus Curiae in Response to Emergency Motion for Injunction Pending Appeal, was filed concurrently with this amicus curiae brief.

demonstrates that the number of license tags issued has little correlation with the number of wolves killed. In 2008, Idaho issued 31,400 wolf tags, and the total wolf harvest was 188 wolves, Unsworth Declaration ¶¶ 8, 9, a success rate of 0.6 percent. In Idaho's mountainous terrain wolf sport hunting is notoriously difficult, and despite liberalization of rules allowing longer seasons, two annual tags per hunter, artificial calls, and incidental harvest of wolves approaching bear baiting stations, the Idaho Department of Fish and Game ("IDFG") expects sport hunting success to remain low. Unsworth Declaration ¶ 16. Moreover, in the five hunting zones where hunter success in 2009 was higher, IDFG has adopted harvest limits to ensure that wolf populations remain well above recovery levels. Unsworth Declaration ¶ 22. Maximum harvest in those five zones**,** representing more than 40% of the occupied wolf habitat in Idaho, is 165 wolves.[6] Unsworth Declaration ¶ 23.

In five of its 13 wolf hunting zones, IDFG has also authorized trapping in order to assist in bringing wolf populations in line with prey populations, which in many areas have dropped dramatically since wolf reintroduction. Unsworth Declaration ¶ 21. Trappers, however, may not purchase more than three wolf trapping tags annually. Unsworth Declaration ¶ 15. Due to the limited area open

[6] While the lands south of the Snake River are designated as the "Southern Idaho" wolf hunting zone, that area has no known wolf packs and is typically excluded from any calculation of suitable wolf habitat in Idaho.

to trapping, and the limited number of tags per trapper, impacts on wolf populations will be moderate and populations will remain well above recovery levels.

Appellants also ignore the fact that IDFG carefully monitors wolf harvest and keeps a running tally of wolf mortality, which is published on IDFG's website. If there is any expectation that harvest will reduce the wolf population below recovery levels the director of IDFG has the authority to impose emergency closures, Idaho Code § 36-106(6)(A), and the Idaho Fish and Game Commission has scheduled reviews of wolf harvest for its November and January meetings, during which harvest limits can be adjusted if harvest significantly exceeds expectations. Unsworth Declaration ¶ 18.

C. The Balance of Equities and the Public Interest Both Tip in Favor of Denying the Injunction.

Appellants assert that the balance of equities and public interest should be determined solely by reference to the general provisions of the ESA, in accordance with decisions of this Court holding that the ESA "removed the traditional discretion of courts in balancing the equities before awarding injunctive relief" and struck such balance "in favor of affording endangered species the highest of priorities." Biodiversity Legal Foundation v. Badgley, 309 F.3d 1166, 1177 (9th Cir. 2002), quoting TVA v. Hill, 437 U.S. 153, 194 (1978).

The holding in TVA and Badgley assume that the balance struck by Congress regarding the subject species can be determined by reference to the general policies of the ESA. Here, however, Congress has explicitly reset the balance of equities and public interest by directing the delisting of the gray wolf distinct population segment without regard to existing ESA provisions. In short, Congress determined that in this singular instance the delisting of wolves in Idaho and Montana and their return to state management is to be given priority over any conflicting ESA provisions. Congress' undeniable policy directive informs the balance of equities and public interest applicable to appellants' motion.

Congress' plain statement of policy is not altered by the appellants' challenge to its constitutionality. Until this Court determines otherwise on the merits, Congress' policy choice is entitled to deference. This Court will "invalidate a statutory provision" alleged to violate separation of powers "only 'for the most compelling constitutional reasons.'" Gray v. First Winthrop Corp., 989 F.2d 1564, 1567-68 (9th Cir. 1993), quoting Mistretta v. United States, 488 U.S. 361, 384, (1989). Likewise, if there is any possible interpretation that will render a statute constitutionally valid the Court's "plain duty is to adopt that which will save the act." Robertson v. Seattle Audubon Soc., 503 U.S. 429, 441 (1992), quoting NRLB v. Jones, 301 U.S. 1, 30 (1937). Given the presumption of constitutionality that must be accorded to Section 1713, the policy choice made by

Congress not only informs this Court's balancing of the equities and determination of public interest, it precludes any outcome other than denial of the requested injunction pending a decision on the merits.

CONCLUSION

For the reasons stated above, the appellants' motion for an emergency injunction pending appeal should be denied.

DATED this 22d day of August 2010.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

/s/ Steven W. Strack
STEVEN W. STRACK
Deputy Attorney General

CERTIFICATE OF COMPLIANCE

I certify that pursuant to F.R.A.P. 27(d)(2) and F.R.A.P. 32(a)(5) and (a)(6), the foregoing amicus brief is proportionately spaced, has a typeface of 14 points, and does not exceed ten pages (i.e., one half the amount allowed to respondent), excluding the cover, the certificate of compliance, the certificate of service, and accompanying documents authorized under F.R.A.P. 27(a)(2)(B).

/s/ Steven W. Strack
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Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 22, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Steven W. Strack
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