

NO. 11-35661

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

Plaintiffs - Appellants

v.

KEN SALAZAR, in his official capacity as United States Secretary of the Interior,
DAN ASHE, in his official capacity as 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
Nos. CV 11-70-M-DWM and CV 11-71-M-DWM (consolidated)

**STATE OF MONTANA'S AND
MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS'
AMICUS CURIAE BRIEF IN SUPPORT
OF FEDERAL DEFENDANTS-APPELLEES OPPOSITION TO
PLAINTIFFS-APPELLANTS EMERGENCY MOTION UNDER CIRCUIT
RULE 27-3(a) FOR INJUNCTION PENDING APPEAL**

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I. PURPOSE AND POSITION

The State of Montana and the Montana Department of Fish, Wildlife and Parks ("Montana" or "MFWP") files this amicus curiae brief in support of the federal Defendants and Appellees, Ken Salazar, Dan Ashe, and the United States Fish and Wildlife Service (Federal Defendants) opposition to the emergency motion pending appeal under Circuit Rule 27-3(a) made by the Plaintiff-Appellants, Alliance for the Wild Rockies, Friends of the Clearwater, and Wildearth Guardians (Plaintiffs) for the purpose of stopping the planned wolf hunting season in Montana and Idaho.

Montana's position is that the planned wolf hunt for the fall of 2011 is to manage Montana's wolf population with a conservative hunt designed to achieve a balance between wolves and ungulate prey and to address areas of chronic wolf depredation on livestock. The impact of the hunt is controlled by an overall quota with separate quotas for each wolf hunting district and is fully informed by Montana's experiences with a prior wolf hunt in 2009.

Montana is in the best position to explain that its hunt is for the management of its wolf population and will not irreparably harm wolves in Montana, and to rebut the Plaintiffs' argument that selling more wolf hunting licenses than the number of wolves somehow equates to irreparable harm.

MFWP, which includes its Montana Fish, Wildlife and Parks Commission,

manages wildlife under the authority of Title 87, Mont. Code Ann. and has authorized a 2011 Montana wolf hunt.

II. ARGUMENT

A. Requirements for the issuance of injunction relief

The United States Supreme Court characterizes "injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). The Court stated the rule:

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. *Id.* 555 U.S. at 20.

The Ninth Circuit has adopted the *Winter* standard overruling prior cases that have applied a lesser standard. *American Trucking Ass'n v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

The Plaintiffs' motion for a stay rests first on showing both a likelihood of success on the merits and a likelihood of irreparable harm. Because the Plaintiffs can satisfy neither of these two key criteria, the remaining balancing of the equities tests in the *Winters* formulation are not reached and, therefore, consideration of how *TVA v. Hill*, 437 U.S. 153 (1973) may affect the balancing of the equities is not a necessary part of the analysis of the merits of Plaintiffs' motion.

B. Plaintiffs cannot show a likelihood of success on the merits

Montana adopts the Federal Defendants' arguments that the Plaintiffs cannot show a likelihood of success on the merits. This is because Congress has specifically and conditionally exempted the Northern Rocky Mountain gray wolf distinct population segment, except for Wyoming, from the Department of Interior, Fish and Wildlife's list of endangered and threatened wildlife. Under the Endangered Species Act (ESA), 16 U.S.C. §1531, et seq., the Secretary of the Interior applies the listing criteria of the ESA to determine by rulemaking which species are to be or not to be listed as threatened or endangered. The statutory authority of the Secretary of the Interior to adopt rules listing or delisting species is a delegation of legislative authority to the agency and, therefore, when Congress amended the threatened and endangered rule by requiring the Secretary of the Interior to reissue a rule removing the Northern Rocky Mountain gray wolf from the list of threatened species, Congress amended the ESA. Section 1713 of Public Law 112-10; 76 Fed. Reg. 25, 590, 91-92 (delisting rule); Part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations (amended listing rule).

This act of Congress does not violate the separation of powers between the legislative and executive branches under the holdings and precedent of the United States Supreme Court and the Ninth Circuit. *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992); *Ecology Center, Inc. v. Castenada*, 426 F.3d 1144

(9th Cir. 2005); *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419 (9th Cir. 1989); *Gray v. First Winthrop Corp.* 989 F.2d 1564 (9th Cir. 1993).

C. Plaintiffs' motion for a stay pending appeal must be denied because they cannot establish irreparable harm

Montana's planned hunting season for the fall and winter of 2011 is designed to maintain a viable and connected gray wolf population within Montana. This conclusion is based on a prior 2009 wolf hunting season, an analysis of the predicted results of the planned season, and Montana's experience with management, including hunting seasons of almost all other wildlife species in Montana, including predators such as mountain lions and black bears. In fact, Montana's Wolf Management Plan, rules, and statutes mandate that Montana maintain a viable, secure, and connected wolf population.

1. Montana's regulatory mechanisms protect the long-term viability of the wolf and ensure that irreparable injury does not result from the wolf's transition to state management.

Montana has multiple layers of regulatory mechanisms in place that guide wolf conservation and management. The State has taken progressive steps legislatively and administratively to ensure wolf recovery. Its constitution, state statutes, administrative rules, and its Wolf Conservation and Management Plan offer the same type of multi-layered regulation that the ESA provides.

Montana is statutorily mandated to implement programs that manage wildlife, fish, game, and nongame animals in a manner that prevents the need for

listing under the state or federal endangered species acts. Mont. Code Ann. §87-1-201(9).

Montana's Nongame and Endangered Species Conservation Act provides a multi-layered approach to species conservation, much like the ESA, setting out classifications for species as endangered or in need of management. Mont. Code Ann. §87-5-103 through 105. Mont Code Ann. §87-5-106 prohibits any person from taking, possessing, transporting, exporting, or selling wildlife deemed in need of management, except as provided in regulations. Section 87-5-105, Mont Code Ann., mandates that Montana issue management regulations for a species of wildlife that it deems in need of management to establish limitations on the take, possession, and transportation of that species.

Gray wolves in Montana are classified as a species in need of management pursuant to Section 87-5-131, Mont. Code Ann., and Mont. Admin. R. 12.9.1301 (Exhibit A). The rule directs Montana to “implement management and conservation strategies to make sure that wolves continue to thrive and are integrated as a valuable part of Montana’s wildlife heritage. The department will manage wolves to assure that the recovery criteria are met or exceeded.” Further, the Montana Fish, Wildlife, and Parks Commission has authority to adopt a hunting season only when the statewide number of wolves exceed 15 breeding pairs. Mont. Admin. R. 12.9.1301(1).

2. Montana's 2011 hunting season for wolves will not harm the gray wolf population in Montana so a threat of irreparable harm is completely absent.

Montana's 2011 wolf hunt is designed to reduce the wolf population so that it approaches a balance point with its primary ungulate prey species of elk and deer and reduces chronic depredation on livestock such as cattle and sheep. McDonald Affidavit ¶19 (Exhibit B).

Because, with an increased wolf population, wolf predation on livestock and in some areas on big game populations have created unacceptable impacts, MFWP has determined to reduce the wolf population, while still maintaining a sustainable, viable, and connected wolf population. *Id.* at ¶19.

At the start of 2011, the known, counted minimum number of wolves was 566 with the actual number likely to be 30% higher for a probable population around 735. *Id.* at ¶13.

The hunting quota is for a maximum harvest of 220, a number that may not be reached. *Id.* at ¶15 and 17. If 220 are killed during the hunt, the projected known minimum, counted population at the end of the year will be 425 wolves compared to minimum count of 566 wolves at the end of 2010. This prediction is based on computer modeling that includes all contributions to the population such as birth of wolf pups and immigration from outside Montana and all reductions in the population including removal of wolves that depredate on livestock, natural

and illegal mortalities, and hunter harvest. *Id.* at ¶16.

The Montana Fish, Wildlife and Parks Commission adopted the hunting quota and hunting regulations based on seven adaptive management objectives. The objectives start with the principle of maintaining "a viable and connected wolf population", address relationships with constituent groups, strike a balance with the impacts on livestock producers and other big game populations, and ends with a commitment to "learn and improve as we go". *Id.* at ¶14.

It is important to understand that under Montana's commitment to the adaptive management of wolves, the 2011 quota is only for this fall's hunting season. Based on the result of the 2011 hunt and an analysis of how the wolf management objectives are being met, the Department will recommend and the Commission will adopt the next hunting season's structure and quota. The goal of next season's quota could be to allow the wolf population to increase, remain stable, or to decrease the population. In other words, the adaptive management objectives will guide future quotas, always with the ultimate grounding of maintaining a viable and connected population. *Id.* at ¶27.

In addition to the ultimate safeguard of a quota, the 2011 wolf hunting season has numerous other requirements to ensure that the total quota is not exceeded, including a 12-hour reporting requirement when a hunter kills a wolf and a 24-hour closure when or before quotas are reached. *Id.* at ¶15 and 26.

Baiting of wolves and hunting from aircraft are not allowed. *Id.* at ¶26. The total quota is allocated among 14 wolf management units with each closing when their subquota is reached. *Id.* at ¶15. The season, at the latest, ends on December 31, allowing time for pair bonding prior to the February breeding season. The majority of the harvest will not begin until the start of the big game rifle season in late October when the young-of-the year are capable of scavenging and hunting successfully for themselves. *Id.* at ¶25. The 2011 Montana Wolf Hunting Regulations are attached as Exhibit C.

In 2009, Montana conducted a wolf hunt with a quota of 75. The hunt was stopped when 72 wolves were killed with approximately 2 weeks left in the general big game rifle season where most of the harvest occurred. *Id.* at ¶21. During that year, the minimum counted wolf population increased from 497 to 524. *Id.* at ¶21. Hunter success rate was very low, 0.5% to 0.8%, with 15,603 wolf licenses sold in 2009. *Id.* at ¶20. The pace of license sales in 2011 show that approximately 15,000 wolf licenses will be sold in 2011. *Id.* at ¶18.

The quota structure caps the total number of wolves potentially killed by hunters at 220 and is predicted to maintain 425 wolves based on a minimum count which probably translates to approximately 552 wolves (adding 30% to the minimum count to estimate the actual number of wolves). *Id.* at ¶13 and 16. The quota system also enables MFWP to biologically tailor harvest and consider

special conservation needs or conflict areas. Id. at ¶22.

The 2011 wolf quota will ensure a modest reduction in the wolf population and ensure the population remains well above both state and federal minimum recovery and minimum management standards. Id. at ¶16 and 26.

The purpose of Kenneth P. McDonald's Affidavit is to describe in detail the philosophy and biological analysis supporting Montana's 2011 wolf hunt, along with specific safeguards that demonstrate the extraordinary effort and care invested in establishing a conservative hunt.

MFWP intends to manage wolves like other carnivores, including black bears and mountain lions, by striving for a balance with prey populations and reducing wolf densities where there is chronic livestock depredation. Id. at ¶11 and 19.

MFWP wolf management is succinctly stated by Kenneth P. McDonald:

"...it is the intent of MFWP to integrate wolves into Montana's traditional wildlife management program whereby they are managed similar to black bears and mountain lions - as a valued game animal in a manner that respects the species while adaptively managing the population in a manner that balances viable and sustainable population objectives with local habitat conditions, prey populations, land uses and the people that live there."

Id. at ¶28.

Montana 2011 wolf management hunt is part of wolf management. Other carnivores including mountain lions and black bears are managed in part with hunting seasons. It is not a plot to irreparable harm wolves but instead to integrate

them into Montana's traditional wildlife management program.

The district court in Montana previously denied a motion for a preliminary injunction to prevent scheduled wolf hunts starting in the fall of 2009 in Montana and Idaho while the wolf was delisted under the 2009 rule. The court found the Plaintiffs offered no evidence of irreparable harm in contrast to the Defendants' offer of evidence that there would be no irreparable harm from the hunts.

Defenders of Wildlife v. Salazar, 2009 U.S. Dist. LEXIS 131058 at *13-17 (D. Montana, Sept.8, 2009). This mirrors the Plaintiffs' position here where they have offered only unsubstantiated speculation that, because more wolf licenses will be issued than there are wolves, there will be irreparable harm. Plaintiffs' Brief, p. 19. Montana has thoroughly rebutted this erroneous and illogical contention. Wolf management including hunting that is focused on maintaining a secure, recovered wolf population in balance with other species and livestock is protective of the wolf population, not harmful. Wildlife management does not threaten a species with irreparable harm.

III. CONCLUSION

Plaintiffs' motion for an injunction pending appeal to halt the 2011 wolf hunt should be denied because Plaintiffs have not demonstrated irreparable harm while Montana has shown that the hunt is a beneficial part of wolf management.

Dated this August 22, 2011.

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s/ Robert N. Lane
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CERTIFICATE OF COMPLIANCE

This brief complies with the FRAP 29(c) and (d), FRAP 27(d)(2), and FRAP 32(a)(4), (5), and (6). It is proportionately spaced typeface using Microsoft Word 2007 14 point Times New Roman and does not exceed 10 pages.

s/ Robert N. Lane

Robert N. Lane

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing will be electronically filed this 22nd day of August 2011, and will be automatically served upon counsel of record, all of whom appear to be subscribed to receive notice from the ECF system.

s/ Robert N. Lane

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