

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 11-35661

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

vs.

KEN SALAZAR, in his official capacity as Secretary of the Interior, DAN ASHE,  
in his official capacity as Director of the United States Fish and Wildlife Service,<sup>1/</sup>  
and UNITED STATES FISH AND WILDLIFE SERVICE,  
Defendants – Appellees

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

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**DEFENDANTS-APPELLEES' RESPONSE IN OPPOSITION TO  
APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE  
27-3(a) FOR INJUNCTION PENDING APPEAL**

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<sup>1/</sup> Dan Ashe, Director of the Fish and Wildlife Service, is substituted for Rowan Gould, former Acting Director, pursuant to Fed. R. App. P. 43(c)(2).

## INTRODUCTION AND SUMMARY

Defendants-Appellees Ken Salazar, Secretary of the Interior, et al., oppose the Emergency Motion Under Circuit Rule 27-3(a) for Injunction Pending Appeal filed by appellants Alliance for the Wild Rockies, et al. (“the Alliance”) on August 13, 2011. This dispute arises out of a long-running controversy regarding the status of gray wolves in the Northern Rocky Mountain area. In 2009, the United States Fish and Wildlife Service (“FWS”) issued a final rule that designated a gray wolf distinct population segment in the Northern Rocky Mountains, and that removed that distinct population segment (except for the Wyoming portion) from the protections of the Endangered Species Act (“ESA”). *See* 74 Fed. Reg. 15,123 (Apr. 2, 2009) (“2009 Rule”). In this final rule, FWS concluded that gray wolves had recovered sufficiently to remove the protections of the ESA in those areas where state regulatory mechanisms were adequate to maintain recovered populations. Upon challenge by appellants and others, the district court set aside the rule on grounds that the statute did not permit removing the protections of the ESA from only a portion of a distinct population segment. *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010). Appeals from that ruling were filed by a number of parties, including the federal parties, and those appeals are currently stayed.

Congress then enacted legislation requiring the Secretary to reissue the 2009 Rule, without regard to any other provision of statute or regulation. Section 1713 of the Department of Defense and Full-Year Continuing Appropriations Act of 2011, P.L. 112-10 § 1713, 125 Stat. 38 (Apr. 15, 2011) provides in full:

Before the end of the 60-day period beginning on the date of enactment of this Act, the Secretary of the Interior shall reissue the final rule published on April 2, 2009 (74 Fed. Reg. 15123 et seq.) without regard to any other provision of statute or regulation that applies to issuance of such rule. Such reissuance (including this section) shall not be subject to judicial review and shall not abrogate or otherwise have any effect on the order and judgment issued by the United States District Court for the District of Wyoming in Case Numbers 09–CV–118J and 09–CV–138J on November 18, 2010.

As directed by Congress, the Secretary on May 5, 2011, reissued the 2009 Rule. 76 Fed. Reg. 25,590. The reissued rule identifies the Northern Rocky Mountain distinct population segment as a “species” under the ESA and then specifies the State of Wyoming as the “portion of its range [where] it is endangered.” Also on May 5th, the Alliance and other parties filed the present litigation, which seeks to set aside the reissued rule solely on the ground that Section 1713 is unconstitutional.

On cross-motions for summary judgment, the district court ruled that under Supreme Court and Ninth Circuit precedents, Section 1713 does not

unconstitutionally infringe on the separation of powers, and granted judgment for the federal defendants. *Alliance for the Wild Rockies v. Salazar*, CV 11-70-M-DWM (D. Mont. 2011) (Appellants' Exhibit 1). The Alliance brought this appeal, but did not seek an injunction pending appeal from the district court pursuant to Fed. R. Civ. P. 62(c). It now seeks an emergency injunction in this Court staying the effect of the May 5, 2011 reissued rule.

The requested injunction should be denied. First, since there was nothing to prevent the Alliance from seeking an injunction pending appeal first in the district court, it cannot show compliance with Fed. R. App. P. 8(a)(1). Second, this Court and others have repeatedly held that it is constitutional for Congress to require an agency to take a particular action, even one that has been blocked by litigation, notwithstanding any other provision of law. Accordingly, the Alliance cannot show any likelihood of success on the merits of its appeal, or even serious questions going to the merits. Third, the Alliance has not produced any credible evidence that the viability of wolf populations nor its members' interests in viewing wolves will be irreparably harmed by the transfer of management authority over wolves to the States of Montana and Idaho. Nor can the Alliance demonstrate that the balance of harms or the public interest favors injunctive relief simply by pointing to the policies of the ESA, particularly where Congress has

made a recent, clear and specific determination that management of wolves should be returned to those States that have adequate regulatory programs. The motion for injunction pending appeal should be denied.

### STANDARD FOR INJUNCTION PENDING APPEAL

An injunction pending appeal is similar in effect to a preliminary injunction, which is “an extraordinary and drastic remedy,” “never awarded as of right.” *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (internal citations omitted). It “may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. NRDC*, 555 U.S. 7, 23 (2008). To obtain the “extraordinary remedy” of an injunction pending appeal, the Alliance must clearly establish four elements: “that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest.” *See Winter*, 555 U.S. at 22 (describing factors in the context of preliminary injunction).<sup>2f</sup>

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<sup>2f</sup> In some circumstances under this Circuit’s precedents, an injunction may be appropriate if an appellant can show “serious questions” on the merits, if it carries its burden on the other three factors and if the balance of hardships “tips sharply” in its favor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9<sup>th</sup> Cir. 2011). Here, this test requires at a minimum that the Alliance show a “substantial case for relief on the merits.” *Leiva-Perez v. Holder*, \_\_\_ F.3d \_\_\_, 2011 WL 1204334, \*5 (9<sup>th</sup> Cir., Apr. 1, 2011).

## ARGUMENT

### **I. The Alliance Has Not Complied With Rule 8(a)(1).**

A party moving for an injunction pending appeal “must ordinarily move first in the district court.” Fed. R. App. P. 8(a)(1); *see also* Goelz, Christopher A., and Meredith J. Watts, CALIF. PRACTICE GUIDE: FED. 9TH CIR. CIV. APP. PRACTICE, § 6:652 (2011) (“the movant should be certain to exhaust all alternatives in the lower court or agency”). The district court “is best and most conveniently able to exercise the nice discretion” needed to adjudicate a motion for an injunction pending appeal, for it “has considered the case on its merits, and therefore is familiar with the record.” *Cumberland Tel. & Tel. Co. v. La. Pub. Serv. Comm’n*, 260 U.S. 212, 219 (1922). For this reason, the prerequisite of seeking relief in the district court is “[t]he cardinal principle with respect to stay applications under Rule 8.” 16A Charles A. Wright, *et al.*, FED. PRACTICE & PROCEDURE § 3954, at 588 (4th ed. 2008).

The Alliance does not claim that seeking relief first in the district court would have been “impracticable” within the meaning of Rule 8(a)(2)(A)(i), and expressly concedes that “preliminary injunctive relief was available in the District Court.” *See* Alliance Rule 27-3 certificate at *iii*. The only excuse offered by the Alliance for not seeking an injunction pending appeal in the district court is that

the court had found in its ruling on the merits that the Alliance's arguments were contrary to binding precedent. *See* Rule 27-3 certificate at *iv*. That circumstance exists in virtually every appeal, however, and if it were sufficient to excuse the requirement of seeking relief first in the district court, the requirement in Rule 8(a)(1) would effectively be negated. The Alliance's clear failure to comply with Rule 8(a)(1) is sufficient in itself to warrant denial of its motion for injunction pending appeal. *See Baker v. Adams County / Ohio Valley School Bd.*, 310 F.3d 927, 931 (6<sup>th</sup> Cir. 2002).

**II. The Alliance Fails to Show a Likelihood of Success on the Merits or to Raise Serious Legal Issues Going to the Merits.**

The district court's conclusion that Ninth Circuit precedent bars the Alliance's constitutional challenge is plainly correct. Ex. 1 at 13-18. In *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1167 (9<sup>th</sup> Cir. 2007) (*Consejo*), this Court considered a virtually identical separation of powers claim. In that case, while a challenge to a canal lining project was pending before this Court, Congress enacted a statute providing (*inter alia*), that “[n]otwithstanding any other provision of law, upon the date of enactment of this Act, the Secretary shall, without delay, carry out the [Project]....” *Consejo*, 482

F.3d at 1167 (quoting Tax Relief and Health Care Act of 2006, P.L. No. 109-432, 120 Stat. 2922). This Court rejected the separation of powers claim because:

[T]he 2006 Act does not direct us to make any findings or to make any particular application of law to facts. Rather, the legislation changes the substantive law governing pre-conditions to commencement of the Lining Project. As such, it does not violate the constitutional separation of powers.

482 F.3d at 1170.

Likewise, Section 1713 does not direct any court to make findings or any particular application of law to facts. Instead, just as in *Consejo*, Section 1713 directs the agency to proceed with a particular initiative (the 2009 Rule) that had been blocked by litigation “without regard to any other provision of statute or regulation that applies to issuance of such rule.” In this way, Section 1713 amends the ESA insofar as that statute might otherwise prevent issuance of the Rule that Congress wanted to go forward. *See Sierra Club v. U.S. Forest Serv.*, 93 F.3d 610, 614 (9<sup>th</sup> Cir. 1996) (reading statute instructing federal agency to award permit “notwithstanding any other provision of law” as exempting project from statutory environmental requirements).

As *Consejo* also points out, *see* 482 F.3d at 1170, this sort of congressional enactment has been held constitutional many times by this Court and by the Supreme Court. *See, e.g., Robertson v. Seattle Audubon Soc.*, 503 U.S. 429,



437-38 (1992); *Ecology Ctr. v. Castaneda*, 426 F.3d 1144, 1148 (9<sup>th</sup> Cir. 2005); *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 991 (9<sup>th</sup> Cir. 1999); *Mt. Graham Coalition v. Thomas*, 89 F.3d 554, 556-68 (9<sup>th</sup> Cir. 1996); *Apache Survival Coalition v. United States*, 21 F.3d 895, 903 (9<sup>th</sup> Cir. 1994); *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1457-61 (9<sup>th</sup> Cir. 1993); *Stop H-3 Association v. Dole*, 870 F.2d 1419, 1432 (9<sup>th</sup> Cir. 1989); *see also Natl. Coal. to Save our Mall v. Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001).

The Alliance relies on *United States v. Klein*, 80 U.S. 128 (1871), which the Alliance contends establishes that separation of powers is breached “when Congress passes a law directing the judiciary to reach a particular outcome in a pending case under existing law.” Motion at 3. But the Alliance never explains how Section 1713 directs a particular outcome in a pending case, let alone directs a court to give certain effect to particular evidence. Thus, it falls not within the Supreme Court’s holding in *Klein*, but rather the Supreme Court’s holding in *Robertson v. Seattle Audubon Society*. In legislating that “any other provision of statute or regulation” is inapplicable to the reissued rule, Section 1713 “compelled changes in law,” rather than changing “findings or results under old law.” *Robertson*, 503 U.S. at 438.

Moreover, even if Section 1713 could be read to direct a particular outcome in a pending case, there is a reasonable alternative reading that avoids any constitutional problem and must therefore be adopted. As the Supreme Court made clear in *Robertson*, “as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act.” 503 U.S. at 441, quoting from *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). Here, Section 1713 may be interpreted simply to amend or supersede any statutes or regulations that might otherwise conflict with the 2009 Rule. The district court was plainly correct in finding no merit in the separation of powers claim here.

Rather than grapple with the district court’s holding, the Alliance uses concerns expressed in the district court opinion as a platform to argue that it has made a strong showing of success on the merits. Motion at 4 (arguing that the success on the merits prong is satisfied due to “the District Court’s exceptionally strong reluctance to rule for the Federal Defendants. . .”); *id.* at 13-16 (same). The district court’s opinion demonstrates the opposite – that strongly-felt considerations regarding the proper role of Congress or the administration of the ESA cannot create any serious merits question in the face of clear, binding, and dispositive Supreme Court and Circuit precedent relating to the Alliance’s specific

separation of powers claim. If it were legally possible to hold Section 1713 unconstitutional, the district court gave every indication that it would have done so.<sup>37</sup> However, the district court found that a searching review yielded only one appropriate legal conclusion: that “under Ninth Circuit law a constitutional reading of Congress's directive to reissue the Rule is possible.” Ex. 1 at 18.

Accordingly, the Alliance cannot show that it has a likelihood of success on the merits of its appeal, or that it has raised serious questions going to the merits.

### **III. The Alliance Fails to Show That Irreparable Harm is Probable Absent an Injunction.**

To obtain the “extraordinary remedy” of an injunction pending appeal, the Alliance must also establish that it is “likely to suffer irreparable harm in the absence of preliminary relief.” *Winter*, 555 U.S. at 374. Relying on several pre-*Winter* decisions of this Court, the Alliance first contends that the burden of showing irreparable harm is less in cases claiming violations of the procedural or substantive requirements of the ESA, or claiming violations of the prohibition against “takes” of endangered species found in Section 9 of that statute, 16 U.S.C.

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<sup>37</sup> The Alliance contends that the district court “agreed with Appellants that Section 1713 violates the separation of powers doctrine articulated by the Supreme Court in *Klein*.” Motion at 3. But even if the district court was sympathetic to the Alliance’s interpretation of *Klein*, it acknowledged that “[o]ur Circuit has not seen *Klein* or *Robertson* this way,” and accordingly concluded that there could be no finding of a constitutional violation based on this theory. Ex. 1 at 15.

§ 1538. Motion at 11-13. This attempt to lighten the Alliance’s burden fails at the outset because this case does not involve any claimed violations of the ESA. As made clear in the Alliance’s complaint, *see* Exhibit A, this case seeks to block implementation of an Act of Congress (Section 1713) on grounds that it allegedly violates the separation of powers. The Alliance’s contention (motion at 16) that in this case “the fundamental issue is compliance with the ESA” is simply incorrect. Thus, the cases the Alliance relies upon, even if they survive *Winter*,<sup>4</sup> have no application here, and the Alliance has cited no cases suggesting that a lesser burden falls on plaintiffs who seek injunctive relief aimed at blocking the implementation of an Act of Congress.

The Alliance plainly fails to show that irreparable harm is “likely” without an injunction pending appeal. As a result of Section 1713, management of gray wolf populations in Montana and Idaho has been returned to those States. In its

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<sup>4</sup> *See, e.g., Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757 (2010) (interpreting *Winter* to mean that “[a]n injunction should issue only if the traditional four-factor test is satisfied,” and as not permitting a presumption that injunctive relief should be granted for certain types of statutory violations); *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009) (applying *Winter* factors to request for stay, and finding that “similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined”).

2009 Rule, FWS carefully analyzed the capacity of both Montana and Idaho to manage their wolf populations, and concluded that regulatory mechanisms in these two States were adequate to preserve the status of gray wolves as recovered populations. *See* 2009 Rule, 74 Fed. Reg. 15,167-69. This analysis specifically recognized that Montana and Idaho would have discretion to conduct regulated wolf hunts as part of their management programs. *Id.* The Alliance focuses narrowly on the States' plan to allow regulated hunting, but presents no evidence to contradict FWS's expert conclusion that state law protections in Montana and Idaho are adequate to preserve recovered populations of gray wolves.

All of the Alliance's claims of irreparable harm from state-managed wolf hunts stem from the premise that Congress has provided a special protective status to gray wolves, and that state management would impinge on that special status. Congress, however, has specifically determined that the 2009 Rule should take effect and that management should return to certain States, including Montana and Idaho. Thus, it cannot reasonably be contended that management by those two States, including regulated wolf hunts, conflicts with a congressional determination to give special protection to gray wolves in Montana and Idaho pursuant to the ESA.

Even if this Court were to find that plaintiffs are likely to prevail on the merits, such that the ESA would still apply to gray wolves in Montana and Idaho, an injunction would not be justified. In denying a request for a preliminary injunction in 2009 against planned wolf hunts in Montana and Idaho, Judge Molloy pointed out that the purpose of the ESA is to protect “species” from extinction, and that accordingly “the measure of irreparable harm is taken in relation to the health of the overall species rather than individual members.” *Defenders of Wildlife v. Salazar*, 2009 WL 8162144, \*4-5 (D. Mont. 2009); accord *Water Keeper Alliance v. U.S. Department of Defense*, 271 F.3d 21, 34 (1st Cir. 2001) (to make a showing of cognizable “irreparable harm,” plaintiff must make showing of probable take of listed species and species-level impact). Applying this rule, Judge Molloy found that “[t]he Plaintiffs fail to offer evidence that the [distinct population segment] will suffer irreparable harm if the Idaho and Montana wolf hunting seasons occur in 2009 – even assuming hunters manage to kill 330 wolves.” *Defenders of Wildlife*, 2009 WL 8162144, at \*4-5. Wolf hunts took place in Idaho and Montana in 2009, but after those hunts – in the period of exclusive State management – wolf populations increased. See Exhibit C, Rocky Mountain Wolf Recovery 2010

Interagency Annual Report, at Table 4b (demonstrating change in minimum estimated population from 2008 to 2009 in Idaho and Montana).<sup>57</sup>

While the hunts planned by Idaho and Montana are more extensive than those carried out in 2009, the Alliance has failed to offer any evidence that wolf populations in either Idaho or Montana will suffer any irreparable harm from these state-managed hunts. The Alliance simply points to the number of hunting licenses that have been issued by these States, but that is not an indicator of how many wolves will be taken, since only a small percentage of hunters who receive a license actually kill a wolf. Although over 40,000 tags were issued to hunters in Idaho and Montana in 2009, only 206 wolves were taken. *See* Exhibit B, 2009 Interagency Annual Report, at 6.<sup>67</sup> The Alliance's contention that hunters will take "perhaps two-thirds of the total wolf population in the Northern Rockies," *see* Motion at 18, is unsubstantiated speculation.

The number of licenses issued is also not an indicator of the impact of hunting on the population as a whole. Wolf populations "can rapidly recover from

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<sup>57</sup> Full reports may be found at: <http://www.fws.gov/mountain-prairie/species/mammals/wolf/annualrpt09/index.html> (last checked 8/22/2011).

<sup>67</sup> Idaho extended its 2009 hunting season into 2010, but the Annual Report contains data only for the original season. In the extended season, hunters took an additional 48 wolves. Thus, for the entire season, Idaho issued 26,428 licenses for hunters to fill a statewide quota of 220 wolves, but only 182 wolves were taken.

severe disruptions,” and “can maintain themselves despite sustained human caused mortality rates of between 30 and 50 percent per year.” 2009 Rule, 74 Fed. Reg. at 15,151, 15,162. FWS found that much of the Northern Rocky Mountain wolf habitat is at or above its population carrying capacity, but that if the population were reduced below its habitat’s carrying capacity, the population would grow rapidly. *See id.* at 15,140, 15,165-66. More recently, FWS has noted that “[b]y every biological measure the NRM DPS wolf population is fully recovered,” with “very high” genetic diversity. *See Exhibit C, 2010 Interagency Annual Report, at 8.* Particularly in light of these findings, the Alliance has submitted no evidence that one season of regulated hunting will irreparably harm the Northern Rocky Mountain wolf population.

For these reasons, the Alliance’s claims of irreparable harm are speculative and conjectural, and insufficient to demonstrate entitlement to the extraordinary relief of an injunction pending appeal. *Goldie’s Bookstore, Inc. v. Superior Ct. of Cal.*, 739 F.2d 466, 472 (9<sup>th</sup> Cir. 1984) (purely speculative injury does not constitute irreparable injury).



#### **IV. The Balance of Equities and the Public Interest Favor Denial of Injunctive Relief.**

A party seeking injunctive relief pending appeal “must establish . . . that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter*, 555 U.S. at 20. The Alliance seeks to meet this test simply by repeating its argument that the balance of equities always tips in favor of protecting species listed pursuant to the ESA. Motion at 16. That argument is flawed, for reasons set out *supra* at 10-12.

The Alliance is correct that congressional enactments are an important factor in determining the balance of equities and the public interest. *See United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497-98 (2001) (“a court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation.”) (internal quotation omitted). However, the relevant congressional determination here is Section 1713. That provision is a recent and specific directive relating to the subject matter of this suit. Congress considered the particular issue whether management of gray wolves should be returned to some States, and determined that it should in accordance with the 2009 Rule. Even if the Alliance were correct that there is a constitutional infirmity in Section 1713, that

statute serves as a clear statement of Congress's view of the public interest.

Accordingly, the Alliance has failed to carry its burden on this part of the test for injunctive relief.

The public interest served by the 2009 Rule is also well documented in the record. As the FWS stated in publishing the Rule, “[r]egulated public hunting is a valuable and cost-effective wildlife management tool to conserve healthy wildlife populations, fund wildlife conservation, maintain and improve local human tolerance of wolves, and manage the numbers and distribution of wildlife populations to reduce conflicts with people.” 74 Fed. Reg. at 15,162.<sup>7</sup> This Court’s public interest analysis must also include the benefits that State management (including regulated hunting) may have for farmers and ranchers negatively affected by wolves; FWS found that “State management will reduce economic losses caused by livestock depredation.” *Id.* at 15,155.

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<sup>7</sup> See also 2009 Rule, 74 Fed. Reg. At 15,151 (“State management of wolves will be in alignment with the classic state-led North American model for wildlife management which has been extremely successful at restoring, maintaining, and expanding the distribution of numerous populations of other wildlife species, including other large predators, throughout North America.”); Exhibit B, 2009 Interagency Annual Report, at 9 (“Delisting the NRM wolf population would allow implementation of a more efficient, sustainable, and cost-effective wildlife conservation model...”).

The Supreme Court in *Nken v. Holder*, 129 S. Ct. 1749 (2009), noted that “[t]he parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders that the legislature has made final.” *Id.* Here, as we have shown, the Alliance has not made any of the showings necessary to justify the extraordinary relief of an injunction pending appeal. But even if it had, the interest in promptly executing the determination made by the legislature in Section 1713 would outweigh any of the concerns raised by the Alliance.

### CONCLUSION

For the foregoing reasons, the motion for an injunction pending appeal should be denied.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on August 22, 2011, I electronically filed the foregoing Response in Opposition to Appellants' Emergency Motion for Injunction Pending Appeal with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I further certify that all participants in this case are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ David Gunter

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 11-35661

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

vs.

KEN SALAZAR, in his official capacity as Secretary of the Interior, DAN ASHE,  
in his official capacity as Director of the United States Fish and Wildlife Service,  
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On Appeal from the United States District Court for the District of Montana  
Missoula Division, No. 9:11-cv-00070-DWM

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**DEFENDANTS-APPELLEES' RESPONSE IN OPPOSITION TO  
APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE  
27-3(a) FOR INJUNCTION PENDING APPEAL**

**EXHIBIT A**

Complaint in *Alliance for the Wild Rockies v. Salazar*, No. 9:11-cv-00070

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**UNITED STATES DISTRICT COURT  
FOR DISTRICT OF MONTANA  
MISSOULA DIVISION**

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

Plaintiffs, )

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. )

Case No. \_\_\_\_\_

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

\_\_\_\_\_ )

## INTRODUCTION

1. Through this suit, Plaintiffs challenge the Federal Defendants' action re-instituting the rule removing gray wolves in all areas of the Northern Rocky Mountains Distinct Population Segment ("DPS") outside of Wyoming from the list of species protected under the Endangered Species Act ("ESA"). See 74 Fed. Reg. 15123 (April 2, 2009) (delisting rule). This Court previously struck down this delisting rule because the Court concluded that delisting less than an entire DPS exceeded Defendants' statutory authority under the ESA. See Defenders of Wildlife, et al. v. Salazar, et al., 729 F.Supp.2d 1207 (D. Mont. 2010). Subsequently, while this Court's decision striking down the delisting rule remains pending on appeal, Congress passed and the President signed H.R. 1473, the Department of Defense and Full Year Continuing Appropriations Act of 2011. Section 1713 of this Act directed the Federal Defendants to take the challenged action re-instituting the delisting rule previously struck down by this Court. P.L. 112-10 § 1713, 125 Stat. 38 (April 15, 2011) (hereinafter the "Budget Rider"). The Budget Rider did not amend the ESA in any manner and is simply a legislative and executive effort to reverse this Court's holding in Defenders of Wildlife, 729 F.Supp.2d 1207. As a legislative enactment designed to affect the outcome of a particular pending case, without

amending the underlying statute involved, the Budget Rider violates the Separation of Powers Doctrine contained in the U.S. Constitution and is therefore unconstitutional. See U.S. v. Klein, 80 U.S. 128 (1871).

Accordingly, Plaintiffs seek a declaratory judgment that the Budget Rider is unconstitutional and injunctive relief prohibiting its implementation.

### **JURISDICTION AND VENUE**

2. This Court has jurisdiction over Plaintiffs' claim pursuant to 28 U.S.C. § 1331 (federal question) and may issue a declaratory judgment and injunctive relief pursuant to 28 U.S.C. §§ 2201-02.

3. Venue is proper in this District under 28 U.S.C. § 1391 because lead Plaintiff Alliance for the Wild Rockies resides in the District of Montana; land affected by the challenged action is within the District of Montana; and a substantial part of the events giving rise to Plaintiffs' claim occurred in this District. Venue is proper in the Missoula Division because every county within the Missoula Division is also within the Northern Rocky Mountain gray wolf DPS and is affected by the challenged action. In addition, the case which the Budget Rider attempts to reverse, Defenders of Wildlife, 729 F.Supp.2d 1207 arose in the Missoula Division.



## PARTIES

4. Plaintiff ALLIANCE FOR THE WILD ROCKIES (“AWR”) is a tax-exempt, non-profit, public-interest organization dedicated to the protection and preservation of the native biodiversity of the Northern Rockies Bioregion, its native plants, fish and animal life, and its naturally functioning ecosystems. AWR has over 2,000 individual members and more than 500 member businesses and organizations. AWR is a plaintiff in Defenders of Wildlife, et al. v. Salazar, et al., 729 F.Supp.2d 1207 (D. Mont. 2010).

5. Plaintiff FRIENDS OF THE CLEARWATER (“FOC”), a recognized non-profit organization since 1987, defends the Idaho Clearwater Bioregion’s wildlands and biodiversity through a Forest Watch program, litigation, grassroots public involvement, outreach and education. The Wild Clearwater Country, the northern half of central Idaho’s Big Wild, contains many unprotected roadless areas and wild rivers, and provides crucial habitat for countless rare plant and animal species. FOC strives to protect these areas, restore degraded habitats preserve viable populations of native species, recognize national and international wildlife corridors, and to protect public lands. FOC is a plaintiff in Defenders of Wildlife, et al. v. Salazar, et al., 729 F.Supp.2d 1207 (D. Mont. 2010).

6. Plaintiff WILDEARTH GUARDIANS (“Guardians”) is a relatively new conservation organization created on January 28, 2008 from the merger of three older organizations: Forest Guardians, Sinapu (the Ute word for wolf), and the Sagebrush Sea Campaign. Guardians continues the work of these three predecessor organizations. Guardians’ mission is to protect and restore wildlife, wild rivers, and wildlands throughout the American West. Headquartered in Santa Fe, New Mexico, Guardians also maintains offices in Denver, Colorado and Phoenix, Arizona. The organization has approximately 4,500 members who live throughout the country, including within the range of the wolf in the Northern Rocky Mountains.

7. All Plaintiffs file suit on behalf of themselves and their adversely affected members. All Plaintiffs have long-standing interests in the preservation and recovery of gray wolves in the northern Rockies, because Plaintiffs and their members place a high value on preserving wolves and their critical role in the functioning of healthy ecosystems. Plaintiffs seek to protect and recover the gray wolf through a wide array of actions including public education, scientific analysis, and legal advocacy promoting healthy ecosystems in the region.

8. Members of each of the Plaintiff conservation groups use public land in the northern Rocky Mountains for recreational pursuits, including hiking, camping, backpacking, hunting, fishing, skiing, wildlife viewing, and aesthetic enjoyment. Members of the Plaintiff groups seek to view wolves and signs of wolf presence in the wild throughout the northern Rockies, and Defendants' challenged action will reduce their opportunity to do so. The removal of Endangered Species Act protection for gray wolves in most of the northern Rockies will also cause irreparable ecological harm to the ecosystems where wolves are now found. The legal violation alleged in this Complaint causes direct injury to the aesthetic, conservation, recreational, scientific, educational and wildlife preservation interests of Plaintiff organizations and their members.

9. Plaintiffs' aesthetic, conservation, recreational, scientific, educational and wildlife preservation interests have been, are being, and, unless their requested relief is granted, will continue to be adversely and irreparably injured by the Federal Defendants' unconstitutional conduct. Additionally, Plaintiffs AWR and FOC have been, are being, and unless their requested relief is granted, will continue to be adversely and irreparably injured by the deprivation of the successful judicial relief they obtained from this Court in Defenders of Wildlife, et al. v. Salazar, et al., 729 F.Supp.2d

1207 (D. Mont. 2010). These are actual, concrete injuries traceable to Defendants' conduct that would be redressed by the requested relief. Plaintiffs have no adequate remedy at law.

10. Defendant KEN SALAZAR is the U.S. Secretary of the Interior. In that capacity, Secretary Salazar has supervisory authority over the U.S. Fish and Wildlife Service. Defendant Salazar is sued in his official capacity.

11. Defendant ROWAN GOULD is the Acting Director of the U.S. Fish and Wildlife Service. Defendant Gould is sued in his official capacity.

12. Defendant UNITED STATES FISH AND WILDLIFE SERVICE ("FWS" or the "Service") is a federal agency within the U.S. Department of the Interior. FWS is responsible for administering the ESA with respect to terrestrial wildlife such as gray wolves.

13. Defendants Salazar, Gould, and FWS (collectively the "Federal Defendants") are responsible for implementing the unconstitutional Budget Rider challenged in this suit.

### **THE SEPARATION OF POWERS DOCTRINE**

14. The Separation of Powers Doctrine, setting apart the executive, legislative, and judicial functions of government is one of the basic constitutional "checks and balances" contained in the Constitution. As Chief

Justice Marshall wrote nearly two hundred years ago, “[t]he difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law.” Wayman v. Southard, 23 U.S. 1 (1825). See also Marbury v. Madison, 5 U.S. 137 (1803) (establishing authority of judicial branch, including authority to order executive to comply with law and to overrule acts of Congress).

15. By incorporating the Separation of Powers Doctrine into the basic checks and balances of the Constitution, the framers paid heed to the political philosopher Montesquieu’s warning that “[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. . . . [T]here is no liberty, if the judiciary power is not separated from the legislative and executive.” Baron de Montesquieu, The Spirit of the Laws, bk. XI, ch. 6.

16. Defending the Constitution in the Federalist Papers, James Madison agreed with Montesquieu describing the Separation of Powers Doctrine as “essential to a free government.” The Federalist No. 48 at 308, James Madison, New American Library ed., 1861.

17. In keeping with the framers’ intent, the Supreme Court has stated:

The doctrine of separation of powers is fundamental in our system. It arises, however, not from Art. III nor any other single provision of the

Constitution, but because “[b]ehind the words of the constitutional provisions are postulates which limit and control.”

National Mut. Ins. Co. of the Dist. of Col. v. Tidewater Transfer Co., 337

U.S. 582, 590-91 (1949), *quoting* Principality of Monaco v. Mississippi, 292

U.S. 313, 322 (1934).

18. In interpreting the Constitution’s Separation of Powers Doctrine, the Supreme Court has held that Congress has authority to make prospective changes in the law, and that even if it does so in a manner intended to impact the outcome of pending litigation its exercise of its prospective law-making authority is not unconstitutional. Robertson v. Seattle Audubon Soc., 503 U.S. 429 (1992).

19. On the other hand, if Congress passes a law directing the judiciary to reach a particular outcome in a pending case under existing law -- yet does not amend the existing law -- Congress exceeds its Constitutional authority and treads on the judiciary’s authority to construe existing law. U.S. v. Klein, 80 U.S. 128 (1871).

20. Accordingly, the question of whether a law which influences the outcome of a pending case is unconstitutional in violation of the Separation of Powers Doctrine depends on whether Congress amends existing law, and thus behaves constitutionally under Robertson, or whether Congress directs the judiciary as to its construction of law and decision-

making in a pending case, and thus behaves unconstitutionally under Klein.

## FACTUAL ALLEGATIONS

### I. The Court's Prior Ruling Construing Existing Law

21. On August 5, 2010, this Court vacated and set aside the Federal Defendants' April 2, 2009 Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a District Population Segment, 74 Fed. Reg. 15,123. Defenders of Wildlife, et al. v. Salazar, et al., 729 F.Supp.2d 1207, 1229 (D. Mont. 2010). The Court reached this conclusion by construing the Endangered Species Act (ESA) and determining that the challenged Final Rule violated the plain language of the statute by taking de-listing action at a level below that allowed by the ESA – i.e. treating different portions of a unified DPS differently. Id. at 1221-22 (“By listing and/or protecting something less than a DPS, the Service violated the plain terms of the ESA”); see also id. at 1228 (“The northern Rocky Mountains DPS must be listed, or delisted, as a district population and protected accordingly”).

22. The Federal Defendants and Defendant-Intervenors in Defenders of Wildlife v. Salazar appealed the Court's ruling. These appeals remain pending. Nos. 10-35885, 10-35886, 10-35894, 10-35897, 10-35898, and 10-35926 (9<sup>th</sup> Circuit).

## **II. The Budget Rider**

23. On April 15, 2011, the President signed into law H.R. 1473, the Department of Defense and Full-Year Continuing Appropriations Act of 2011. P.L. 112-10 § 1713, 125 Stat. 38 (April 15, 2011). Section 1713 of this Act states in its entirety:

Before the end of the 60-day period beginning on the date of enactment of this Act, the Secretary of the Interior shall reissue the final rule published on April 2, 2009 (74 Fed. Reg. 15213 et seq.) without regard to any other provision of statute or regulation that applies to issuance of such rule. Such reissuance (including this section) shall not be subject to judicial review and shall not abrogate or otherwise have any effect on the order and judgment issued by the United States District Court for the District of Wyoming in Case Numbers 09-CV-118J and 09-CV-138J on November 18, 2010.

Id. On May 5, 2011, pursuant to the Congressional direction above, the Secretary reissued the April 2, 2009 Final Rule that was previously vacated and set aside by this Court as contrary to the plain language of the ESA. 76 Fed. Reg. 25590 (May 5, 2011).

24. Section 1713 of H.R. 1473 is the only section of the approximately 459-page budget bill discussing the wolf-delisting rule.

## **III. The Budget Rider Does Not Amend the ESA**

25. Because Section 1713 of H.R. 1473 was a “rider” embedded in an approximately 459-page budget bill its legislative history is sparse.



26. Section 1713 of H.R. 1473 apparently grew out of a bill introduced by Senators Max Baucus and Jon Tester of Montana on February 10, 2011. S. 321. See Cong. Rec. Vol. 157, No. 21 (February 10, 2011) at S642. This bill, the “Delisting Gray Wolves to Restore State Management Act of 2011,” provided:

Notwithstanding any other provision of law (including regulations), effective beginning on the date of enactment of this Act, the final rule, entitled 'Endangered and Threatened Wildlife and Plants; Final Rule To Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and To Revise the List of Endangered and Threatened Wildlife' (74 Fed. Reg. 15123 (April 2, 2009)), shall have the full force and effect of law.

Id.

27. A provision similar to S. 321 also appears as Section 1713 in H.R. 1, the House’s initial budget bill for Fiscal Year 2011.

Before the end of the 60-day period beginning on the date of enactment of this division, the Secretary of the Interior shall reissue the final rule published on April 2, 2009 (74 Fed. Reg. 15123 et seq.) without regard to any other provision of statute or regulation that applies to issuance of such a rule. Such reissuance (including this section) shall not be subject to judicial review.

H.R. 1 at 266. On February 16, 2011, Rep. Cynthia Lummis of Wyoming attempted to amend Section 1713 of H.R. 1 to change the reference to the April 2, 2009 delisting rule to the February 27, 2008 delisting rule, 73 Fed. Reg. 10514, that included Wyoming. Her amendment failed. Cong. Rec. Vol. 157, No. 25 (February 16, 2011), at H984.

28. The next discussion of Section 1713 in the Congressional Record took place on March 9, 2011 when Senator Cardin stated:

And finally, the Senate bill is a dramatic improvement over H.R. 1 in terms of environmental policy. The other body approved legislative riders that would stop EPA from being able to protect the air Americans breathe every day and it would stop dead in its tracks the Chesapeake Bay restoration effort. The Senate bill, to its credit, eliminates these terrible policy directives. The Senate bill, however, does include a provision that would legislatively de-list the gray wolf from the endangered species list. I continue to oppose legislative efforts to delist endangered species. We have a regulatory process that is based on scientific data, and we should use it. All that is needed is for the States in the Northern Rockies to submit appropriate management plans to the Department of Interior so that the law can work the way Congress intended.

Cong. Rec. Vol. 157, No. 35 (March 9, 2011), p. S1477. H.R. 1 failed in the Senate on March 9, 2011. Id.

29. H.R. 1473 was introduced on April 11, 2011. Between April 11<sup>th</sup> and April 15<sup>th</sup> 2011, when H.R. 1473 became law, Section 1713 was mentioned only three times in the Congressional Record. On April 13, 2011 Senator Cardin criticized Section 1713:

I will make it clear, Mr. President. I am very disappointed by many of the provisions included in this compromise. It is a true compromise. It is not what the Democrats would have written, I can assure you of that, and it is not what the Republicans would have written. It is a true compromise, and that is what we had to go through, I understand, but I feel compelled to at least let the people of Maryland know the cost of the compromises... There is a rider that was attached that did survive that deals with the delisting of the great wolf under the Endangered Species Act. That is not how we should be acting. There is a remedy for dealing with the delisting. There is a process we go

through. We shouldn't go down a dangerous precedent that starts congressional or political action on delisting species that are included under the Endangered Species Act.

Cong. Rec. Vol. 157, No. 54, at S2421. On April 14, 2011, Senator Cardin again criticized Section 1713:

I pointed out yesterday that on the environmental front regarding the Endangered Species Act, there is a provision that delists the great wolf. That shouldn't be targeted for congressional action. That is a dangerous precedent for us to set.

Cong. Rec. Vol. 157, No. 55, at S2473. Finally, on April 14, 2011, the text of Section 1713 of H.R. 1473 as passed appears in the Congressional Record. Cong. Rec. Vol. 157, No. 55, at H2720.

30. Though sparse, this legislative history makes clear that at no time in its consideration of Section 1713 of H.R. 1473, or its predecessors, did Congress consider actually amending the ESA. Rather, Congress was merely trying to return the April 2, 2009 delisting rule to force without amending the governing Statute.

31. The statements of the proponents of Section 1713 outside of the sparse Congressional debates makes it abundantly clear that Congress designed Section 1713 to overturn this Court's decision in Defenders of Wildlife v. Salazar, 729 F.Supp.2d 1207, and not to amend the ESA.

32. On February 10, 2011, Senator Jon Tester of Montana posted an entry on his Facebook page, announcing the filing of his bill, S. 321, with

Senator Max Baucus, stating: “[t]he Baucus-Tester bill would restore management practices as they were before the 2010 court ruling that resulted in the return of the gray wolf to federal management under the endangered species act.”

33. On February 15, 2011, Idaho Congressman Mike Simpson issued a press release stating he was “spearheading an effort to undo the August 2010 ruling by Judge Molloy that put wolves back on the endangered species list.”

34. On March 18, 2011 Representative Mike Simpson of Idaho issued a press release stating that he had included language in H.R. 1, legislation continuing operations for the federal government for the remainder of the fiscal year, “*to overturn Judge Molloy’s decision and return management of wolf populations in the region to states with approved management plans ....*” (emphasis added).

35. On April 12, 2011 Representative Mike Simpson of Idaho issued a press release stating that his language in H.R. 1473 “*overturns the August 2010 decision by a district court in Montana to put wolves in Idaho, Montana, Oregon, Washington, and Utah back on the endangered species list ....*” (emphasis added).

36. Also on April 12, 2011, the Associated Press wrote an article on

the H.R. 1473, quoting Jon Tester, and stating: “[l]awmakers said they inserted the rider to circumvent a federal judge who repeatedly blocked proposals to hunt [wolves].”

37. On April 13, 2011, the New York Times published an article on Section 1713 of H.R. 1473 describing it as a proposal from Senator Jon Tester of Montana and Representative Mike Simpson of Idaho and quoting Senator Tester as saying “[w]e didn’t amend the *Endangered Species Act*” (emphasis added).

38. On April 14, 2011, Senator Jon Tester issued a press release stating that Congress had approved his plan to remove gray wolves in Montana from the endangered species list. Tester’s press release also thanked Representative Mike Simpson for his leadership on the issue in the House of Representatives and stated: “[a]fter a judge’s ruling against Montana’s wolf management plan last year, Tester has fought hard to put wolves back under the management of the state.”

39. The Solicitor of the U.S. Department of the Interior is in agreement with Plaintiffs that Section 1713 of H.R. 1473 did not amend the Endangered Species Act. On May 4, 2011, the Solicitor issued a Memorandum, M-37024, withdrawing her predecessor’s March 16, 2007, Opinion, M-37013, on the Meaning of “In Danger of Extinction Throughout

All or a Significant Portion of its Range” previously rejected by this Court in Defenders of Wildlife, et al. v. Salazar, et al., 729 F.Supp.2d 1207, 1229 (D. Mont. 2010). The Solicitor’s May 4, 2011 Memorandum, M-37024, states:

As noted above Sec. 1713 of P.L. 112-10 directed reissuance of the 2009 Northern Rocky Mountain wolf rule. Nothing in that section affects my authority to withdraw Opinion M-37013. The statute is applicable only to the issuance of this single rule; it makes no reference to Opinion M-37013 nor does it amend the Endangered Species Act generally.

Memorandum M-37024 at n. 4.

### **CLAIM FOR RELIEF**

40. Plaintiffs incorporate by reference all proceeding paragraphs of this Complaint into their claim for relief.

41. Section 1713 of H.R. 1473 does not amend the Endangered Species Act. Rather Section 1713 of H.R. 1473 merely directs the Federal Defendants to reissue the Final Rule delisting wolves throughout all of the northern Rocky Mountains DPS outside of Wyoming in order to reverse this Court’s ruling setting aside and vacating the Final Rule as contrary to the plain language of the ESA. Defenders of Wildlife, et al. v. Salazar, et al., 729 F.Supp.2d 1207, 1229 (D. Mont. 2010). In so doing, Congress impermissibly trespassed on the judiciary’s power to construe existing law and thereby violated the Separation of Powers Doctrine contained in the United States Constitution. U.S. v. Klein, 80 U.S. 128 (1871).

## **PRAYER FOR RELIEF**

THEREFORE, Plaintiffs respectfully request this Court:

A. Declare Section 1713 of H.R. 1473, the Department of Defense and Full-Year Continuing Appropriations Act of 2011, P.L. 112-10 § 1713, 125 Stat. 38 (April 15, 2011), unconstitutional in violation of the Separation of Powers Doctrine contained in the Constitution.

B. Declare the Federal Defendants' reissuance of the Final Rule delisting the northern Rocky Mountains gray wolf Distinct Population Segment outside of the State of Wyoming unconstitutional and void in violation of the Separation of Powers Doctrine contained in the Constitution.

C. Order the Federal Defendants' to return the northern Rocky Mountains gray wolf Distinct Population Segment to the protection of the ESA until such DPS is delisted in accordance with law.

D. Award Plaintiffs their reasonable attorneys' fees, costs, and expenses associated with this litigation consistent with the Equal Access to Justice Act, 28 U.S.C. § 2412, or other applicable authority, and

E. Grant Plaintiffs such further and additional relief as the Court may deem just and proper.

Respectfully submitted,

Dated: May 5, 2011

/s/ Rebecca K. Smith

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*(Pending approval of pro hac vice motion)*

Attorneys for Plaintiffs



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 11-35661

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

vs.

KEN SALAZAR, in his official capacity as 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

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

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**DEFENDANTS-APPELLEES' RESPONSE IN OPPOSITION TO  
APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE  
27-3(a) FOR INJUNCTION PENDING APPEAL**

**EXHIBIT B**

Rocky Mountain Wolf Recovery 2009 Interagency Annual Report (excerpt)

# Rocky Mountain Wolf Recovery 2009 Interagency Annual Report

*A cooperative effort by the U.S. Fish and Wildlife Service, Nez Perce Tribe, National Park Service, Montana Fish, Wildlife & Parks, Idaho Fish and Game, Blackfeet Nation, Confederated Salish and Kootenai Tribes, and USDA Wildlife Services*



*Photo by FWP Volunteer Erika Edgley*

*This cooperative annual report presents information on the status, distribution and management of the Northern Rocky Mountain wolf population from January 1, 2009 to December 31, 2009.*

*It is also available at:*

<http://westerngraywolf.fws.gov/annualreports.htm>

This report may be copied and distributed as needed.

***Suggested Citation:*** U.S. Fish and Wildlife Service, Nez Perce Tribe, National Park Service, Montana Fish, Wildlife & Parks, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Idaho Fish and Game, and USDA Wildlife Services. 2010. Rocky Mountain Wolf Recovery 2009 Interagency Annual Report. C.A. Sime and E. E. Bangs, eds. USFWS, Ecological Services, 585 Shepard Way, Helena, Montana. 59601.

***Note to Readers:***

Because of delisting and state-led wolf management in Montana and Idaho, the 2009 Interagency Annual Report is comprised of separate sections, one each for the individual annual reports from the states of Montana and Idaho, federal agencies for Wyoming and Yellowstone National Park combined, and the overall U.S. Fish and Wildlife Service Northern Rockies Recovery Program. This makes for some degree of overlap and duplication between sections. However, U.S. Fish and Wildlife Service requires Montana and Idaho to submit an annual report each year. By incorporating their state annual reports in this modified structure, the public can still access information about gray wolves in the northern Rocky Mountains in a single, comprehensive report or by individual state.

You can download the Interagency Report in its entirety and cite the Interagency Report as suggested on the cover. Alternatively, you may download a state report or section of the Interagency Report and cite it individually. I hope you find this format useful.

Thank you,

Ed Bangs

U.S. Fish and Wildlife Service Northern Rockies Wolf Recovery Program Coordinator

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## NORTHERN ROCKIES WOLF SUMMARY 2009

Abstract- The 2009 NRM wolf population increased over 2008 levels and now includes at least 1,706 wolves in 242 packs and 115 breeding pairs. Wolf packs and especially breeding pairs largely remain within the core recovery areas, but for the first time breeding pairs were confirmed in eastern Washington and Oregon. Agency control, hunting, other causes of mortality, and the natural territorial behavior of wolves slowed population growth to less than 4 percent in 2009, the lowest growth rate since 1995. In 2009 Federal agencies spent \$3,763,000 for wolf management. Private and state agencies paid \$457,785 in compensation for wolf-damage to livestock in 2009. Confirmed cattle losses in 2009 (192) were lower than in 2008 (214), but confirmed sheep losses (721) and dog losses (24) were higher than in 2008 (355 and 14 respectively). Montana removed 145 wolves by agency control and 72 by hunting. Idaho removed 93 by agency control and 134 by hunting. In Wyoming, 32 wolves were removed by agency control. In Oregon two wolves were removed by agency control. No wolves were controlled in Washington or Utah. Wolves in the NRM, except in Wyoming, were removed from the list of endangered species on May 4, 2009. That decision by the U.S. Fish and Wildlife Service is being litigated in both Wyoming and Montana Federal District Courts.

NRM Wolf Population- The NRM wolf population increased in 2009. On December 31, 2009 the gray wolf population in the Northern Rocky Mountain (NRM) Distinct Population Segment (DPS) (Idaho, Montana, Wyoming, eastern one-third of Washington and Oregon, and a small part of northcentral Utah) was estimated to have at least 1,706 wolves in 242 wolf packs, and 115 breeding pairs, more than were estimated in 2008 (1,645 wolves; 217 packs; and 95 breeding pairs respectively). The overall distribution of the NRM wolf packs also increased (Figure 1). At the end of 2009 we estimated there were at least 319 wolves in the Northwest Montana Recovery Area (NWMT), 455 in the Greater Yellowstone Recovery Area (GYA), and 913 in the Central Idaho Recovery Area (CID)(Figure 1, Table 4a). Within the NRM DPS by state boundaries, there were an estimated minimum of 524 wolves in Montana, 320 in Wyoming, 843 in Idaho (Table 4b). Five wolves were in eastern Washington and 14 in eastern Oregon (Tables 6 & 7). Of approximately 242 packs (groups of 2 or more wolves with territories persisting until Dec. 31, 2009), 115 packs met the definition of “breeding pair,” (packs containing at least one adult male and one adult female and 2 or more pups on December 31) (Tables 4a, 4b). Minimum recovery goals (an equitably distributed NRM wolf population that never goes below 100 wolves and 10 breeding pairs in Montana, in Idaho, and in Wyoming) have been exceeded in the NRM DPS every year since 2002 (Table 4b). Wolves in the NRM DPS, except in Wyoming, were delisted in 2009. As the wolf population expands our minimum estimate becomes less accurate because our field efforts have been relatively stable for the past few years. However, our estimate of the NRM wolf population it is still a very accurate compared to most estimates of wildlife population density and distribution in North America.

Wolf Packs in NRM- The NRM had 242 confirmed wolf packs at the end of 2009. Montana had 111 wolf packs present at some point in 2009 but 10 packs (9% of all packs present in 2009) were gone by the end of 2009 (Table 1). In Wyoming, 44 packs were present in 2009 but 7 (16% of all packs present in 2009) were gone by year’s end (Table 2). In Idaho, 102 wolf packs were present but 8 packs (9% of all packs present in 2009) were gone by year’s end (Table 3). Agency control was responsible for most (64%) of the packs that did not persist. One out of 3

packs in Oregon was gone by year's end when both its members repeatedly depredated and were removed. Only one pack was documented in Washington in 2009. No packs were documented in Utah (Table 6).

Wolf Depredations in NRM- Wolf depredation increased in 2009. Wolves in the NRM DPS subsist mainly on elk, white-tailed deer, mule deer, and moose, but livestock are also attacked. Although wolf depredation results in a comparatively small proportion of all livestock losses in the NRM DPS, wolf damage can be significant to some livestock producers. Confirmed livestock depredations by wolves in 2009 included 214 cattle, 721 sheep, 24 dogs, and 7 other livestock (4 llamas and 4 goats) (Tables 5a, 5b, 5c). Approximately of 81 out of 267 NRM wolf packs that existed in 2009 (30%) were involved in at least one confirmed livestock or pet depredation, 25 (10%) of those packs no longer existed by the end of 2009, often (64%) because of agency control of depredating wolves. In response to depredations, 272 wolves were lethally removed.

Agency control of wolves in the NRM- Agency control in Montana removed the largest and Wyoming the smallest percentage of its wolf population in 2009. For strictly comparative purposes we estimated the absolute minimum number of wolves alive in 2009 by combining the at least 1,706 wolves living on Dec 31, and by adding all known wolf mortality (272 by agency control, 206 by hunting, and 108 by all other known causes (illegal, accidental, and natural which are all obviously under-reported and do not usually include mortality of young pups). This absolute minimum estimated population of 2,292 wolves in 2009 in MT (779), ID (1,115), WY (377), WA (5) and OR (16) was only used to compare the relative rates of wolf removal between states and by cause. A total of 272 wolves (12% of the minimum NRM population) was removed by agency control in 2009 (145 in Montana, 32 in Wyoming, 93 in Idaho, and 2 in Oregon) (Table 5b & 5c). In 2009 agency authorized control (which included legal take by private citizens in defense of their private property- 11 in MT, 6 in ID, and 0 in WY) removed 19% of the estimated minimum wolf population in Montana; 8% in Wyoming; 8% in Idaho; and 12% in Oregon.

Public Hunting of Wolves in the NRM- Fair-chase hunting removed a maximum of 9% of the minimum estimated 2009 NRM wolf population. Montana set a maximum wolf hunting quota of 75 wolves and Idaho set a quota of 220 wolves. A total of 206 wolves were legally harvested by hunters in 2009 (72 in Montana and 134 in Idaho). Hunters bought \$749,196 in tags for the opportunity to hunt a single wolf in Montana (\$325,916 for 15,603 tags) and Idaho (\$423,280 for 26,428 tags). Hunting removed a maximum of 5% in Montana and 12% in Idaho of each state's minimum estimated wolf population.

Human-caused Wolf Mortality by State and Cause- Montana had the highest rate of known human-caused mortality on wolves and Wyoming the lowest in 2009. Agency control (145) and hunting (72) removed 28% of the minimum estimated wolf population in Montana. In Idaho, hunting (134) and control (93) removed 20% of the minimum estimated wolf population. In Wyoming 9% of the minimum wolf population was removed by agency control (32). Wolf hunting was not allowed in Wyoming, Washington, Oregon, or Utah. In addition, past research on radio-collared wolves from 1984-2004 (Smith et al. 2010) indicated roughly 26 out of every 100 adult-sized wolves died annually. On average about 10 of them were killed by agency



control, 10 by illegal killing, 3 were killed accidentally by people (mainly vehicle collisions) and 3 by natural causes (mainly wolf-to-wolf conflict and disease/parasites).

Wolf Funding- The cost of wolf management in the NRM DPS increased in Federal Fiscal Year 2009 (Oct 1, 2009-Sept 30, 2010). Federal agencies spent \$3,763,000, including \$1,123,000 spent by USDA WS to investigate reports of suspected wolf damage and to control problem wolves. In 2009, \$457,785 was paid by private and state compensation programs for confirmed, probable, and likely livestock damage caused by NRM wolves. In 2009, \$141,462 in compensation for wolf damage was paid in Montana, \$233,271 in Idaho, \$78,352 in Wyoming, and \$4,700 in Oregon. In FY 2010, an estimated \$4,206,000 in federal funding will be spent for wolf management in the NRM.

Wolf Population Recovery- By every biological measure the NRM wolf population is fully recovered. Resident packs now appear to saturate suitable habitat in the core recovery areas and dispersing wolves routinely travel between them and breed. Consequently, genetic diversity in the NRM remains very high. The 3 subpopulations function as a single large NRM meta-population (Figure 1). Lone dispersing wolves travel beyond the core recovery areas and have gone into most adjacent states. Numerous research projects are underway examining: wolf population dynamics, predator-prey interactions, wolf interactions with other wildlife species, wolf diseases and parasites, possible wolf-caused trophic cascades, and livestock depredation by wolves. Biological restoration of wolves to the NRM has been completed. Numerous scientific papers were published about wolves in the NRM. State, tribal, and USFWS management will maintain a fully recovered wolf population in the delisted areas of the NRM DPS. State and tribal management should help reduce conflicts and damage to livestock and pets, and will continue to implement the transition into a more efficient, sustainable, and cost-effective wildlife conservation model. However, controversy will remain high because of the strong symbolism that humans ascribe to wolves.

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## NORTHERN ROCKIES BACKGROUND

Gray wolf populations were extirpated from the western U.S. by the 1930s. Subsequently, wolves from Canada occasionally dispersed south into Montana and Idaho but failed to survive long enough to reproduce. Eventually, public attitudes toward predators changed and wolves received legal protection with the passage of the Endangered Species Act (ESA) in 1973. Wolves began to successfully recolonize northwest Montana in the early 1980s. By 1995, there were 6 wolf packs in northwest Montana. In 1995 and 1996, 66 wolves from southwestern Canada were reintroduced to Yellowstone National Park (YNP) (31 wolves) and CID (35 wolves). From 1989-2001, we also relocated wolves 117 times to reduce conflicts with livestock, including moving wolves among different recovery areas. This included 10 wolf pups from northwestern Montana whose pack was involved in chronic livestock depredation were relocated to Yellowstone National Park. They were released from their holding pen in spring 1997.

The NRM DPS (Montana, Idaho, and Wyoming, the eastern one-third of Washington and Oregon, and a small part of northcentral Utah) contains 3 core recovery areas: the NWMT (Figs. 1, 2) includes northern Montana and the northern Idaho panhandle; the GYA (Figs. 1, 3) includes Wyoming and adjacent parts of Idaho and Montana; the CID (Figs. 1, 4) includes central Idaho and adjacent parts of southwest Montana. Wolf packs were also documented adjacent to CID in eastern Oregon and Washington for the first time in 2009 (Figs. 1, 7 and Tables 6 & 7). Wolves in the NRM DPS, except for in Wyoming were delisted in 2009 and are managed by the respective states and tribes. Wolves in Wyoming remained protected under the Endangered Species act by the 1994 experimental population rules and continue to be managed by the USFWS.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 11-35661

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

vs.

KEN SALAZAR, in his official capacity as 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, No. 9:11-cv-00070-DWM

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**DEFENDANTS-APPELLEES' RESPONSE IN OPPOSITION TO  
APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE  
27-3(a) FOR INJUNCTION PENDING APPEAL**

**EXHIBIT C**

Rocky Mountain Wolf Recovery 2010 Interagency Annual Report (excerpts)

# Rocky Mountain Wolf Recovery 2010 Interagency Annual Report

*A cooperative effort by the U.S. Fish and Wildlife Service, Montana Fish, Wildlife & Parks, Nez Perce Tribe, National Park Service, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Wind River Tribes, Washington Department of Wildlife, Oregon Department of Wildlife, Utah Department of Natural Resources, and USDA Wildlife Services*



*MFWP Photo by Liz Bradley*

*This cooperative annual report presents information on the status, distribution and management of the Northern Rocky Mountain wolf population from January 1, 2010 to December 31, 2010.*

*It is also available at:*

**<http://westerngraywolf.fws.gov/annualreports.htm>**

This report may be copied and distributed as needed.

***Suggested Citation:*** U.S. Fish and Wildlife Service, Montana Fish, Wildlife & Parks, Nez Perce Tribe, National Park Service, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Wind River Tribes, Washington Department of Wildlife, Oregon Department of Wildlife, Utah Department of Natural Resources, and USDA Wildlife Services. 2011. Rocky Mountain Wolf Recovery 2010 Interagency Annual Report. C.A. Sime and E. E. Bangs, eds. USFWS, Ecological Services, 585 Shepard Way, Helena, Montana. 59601.

***Note to Readers:***

The 2010 Interagency Annual Report is comprised of separate sections, one each for the individual annual reports from the state of Montana, the Nez Perce Tribe for Idaho, federal agencies for Wyoming and Yellowstone National Park combined, and the overall U.S. Fish and Wildlife Service Northern Rockies Wolf Recovery Program. This makes for some degree of overlap and duplication between sections. Despite producing individual annual reports by state in this modified structure, the public can still access information about gray wolves in the northern Rocky Mountains in a single, comprehensive report or by individual state.

You can download the Interagency Report in its entirety and cite the Interagency Report as suggested on the cover. Alternatively, you may download a state report or section of the Interagency Report and cite it individually as noted on the cover page of each individual report, respectively. I hope you find this format useful.

Thank you,

Ed Bangs

U.S. Fish and Wildlife Service Northern Rockies Wolf Recovery Program Coordinator

Abstract- The 2010 wolf population within the Northern Rocky Mountain Distinct Population Segment (Idaho, Montana, Wyoming, eastern one-third of Washington and Oregon, and a small part of north central Utah)(NRM DPS; Fig. 1) is roughly the same as it was in 2009 with at least 1,651 wolves in 244 packs, and 111 breeding pairs. Wolf packs and especially breeding pairs largely remain within the core recovery areas, but breeding pairs were again confirmed in eastern WA and OR. Agency control, hunting, other causes of mortality, and the natural territorial behavior of wolves appeared to maintain the wolf population at about 2009 levels. While breeding pairs and pack numbers were virtually identical, total numbers were down from an estimate at least 1,733 wolves in 2009 to at least 1,651 wolves in 2010. The apparent decline was solely due to a lower minimum population estimate in ID. Private and state agencies paid \$453,741 in compensation for wolf-damage to livestock in 2010 the same level as in 2009. Confirmed cattle death losses in 2010 (199) were virtually the same as in 2009 (193). However, confirmed sheep (249) and dog losses (2) in 2010 were much lower than in 2009 (749 and 24 respectively). In 2010 slightly fewer problem wolves were controlled (includes agency and legal private take) (260) than in 2009 (272). In 2010 MT removed 141 wolves by agency control; ID removed 78 by agency control and another 48 by public hunting; and in WY, 40 wolves were removed by agency control. No wolves were removed by agency control in OR or WA. A lone depredating wolf was killed by agency control in UT. In 2010 Federal agencies spent \$4,566,000 for wolf management. Wolves became delisted May 4, 2009, but on August 5, 2010 a federal court order put wolves in the NRM DPS back on the list of endangered species.

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## **NORTHERN ROCKIES BACKGROUND**

Gray wolf populations were extirpated from the western U.S. by the 1930s. Subsequently, wolves from Canada occasionally dispersed south into Montana and Idaho but failed to survive long enough to reproduce. Eventually, public attitudes toward predators changed and wolves received legal protection with the passage of the Endangered Species Act (ESA) in 1973. Wolves began to successfully recolonize northwest Montana (NW MT) in the early 1980s. By 1995, there were 6 wolf packs in northwest Montana. In 1995 and 1996, 66 wolves from southwestern Canada were reintroduced to Yellowstone National Park (YNP) (31 wolves) and central Idaho (CID) (35 wolves). From 1989-2001, we also relocated wolves 117 times to reduce conflicts with livestock, including moving wolves among different recovery areas. This included 10 wolf pups from NW MT whose pack was involved in chronic livestock depredation were relocated to YNP. They were released from their holding pen in spring 1997.

The NRM DPS (Montana, Idaho, and Wyoming, the eastern one-third of Washington and Oregon, and a small part of north central Utah) contains 3 core recovery areas: the NWMT (Figs. 1, 2) includes northern Montana and the northern Idaho panhandle; the Greater Yellowstone Area (GYA) (Figs. 1, 3) includes Wyoming and adjacent parts of Idaho and Montana; the CID (Figs. 1, 4) includes central Idaho and adjacent parts of southwest Montana. Wolf packs were also documented adjacent to CID in eastern Oregon and Washington for the second time in 2010 (Tables 6 & 7). Wolves in the NRM DPS were relisted by court order in 2010. Wolves in Montana are managed by Montana Fish, Wildlife and Parks (MFWP). Wolves in Idaho were managed by Idaho Department of Fish and Game (IDFG) until October 2010 and are now being managed by the U.S. Fish and Wildlife Service (USFWS) with assistance from the Nez Perce Tribe (NPT). Tribes manage wolves on their tribal reservations. Wolves in Wyoming continue to be managed by the USFWS. The USFWS assists the Washington Department of Wildlife, the Oregon Department of Wildlife, and Utah Department of Natural Resources to manage wolves in their states.

## **NORTHERN ROCKIES WOLF SUMMARY 2010**

Abstract- The 2010 wolf population within the Northern Rocky Mountain Distinct Population Segment (Idaho, Montana, Wyoming, eastern one-third of Washington and Oregon, and a small part of north central Utah)(NRM DPS; Fig. 1) is roughly the same as it was in 2009 with at least 1,651 wolves in 244 packs, and 111 breeding pairs. Wolf packs and especially breeding pairs largely remain within the core recovery areas, but breeding pairs were again confirmed in eastern WA and OR. Agency control, hunting, other causes of mortality, and the natural territorial behavior of wolves appeared to maintain the wolf population at about 2009 levels. While breeding pairs and pack numbers were virtually identical, total numbers were down from an estimate at least 1,733 wolves in 2009 to at least 1,651 wolves in 2010. The apparent decline was solely due to a lower minimum population estimate in ID. Private and state agencies paid \$453,741 in compensation for wolf-damage to livestock in 2010 the same level as in 2009. Confirmed cattle death losses in 2010 (199) were virtually the same as in 2009 (193). However, confirmed sheep (249) and dog losses (2) in 2010 were much lower than in 2009 (749 and 24 respectively). In 2010 slightly fewer problem wolves were controlled (includes agency and legal

private take) (260) than in 2009 (272). In 2010 MT removed 141 wolves by agency control; ID removed 78 by agency control and another 48 by public hunting; and in WY, 40 wolves were removed by agency control. No wolves were removed by agency control in OR or WA. A lone depredating wolf was killed by agency control in UT. In 2010 Federal agencies spent \$4,566,000 for wolf management. Wolves became delisted May 4, 2009, but on August 5, 2010 a federal court order put wolves in the NRM DPS back on the list of endangered species.

Wolf Population- Estimating the size of the NRM DPS wolf population became less precise as it grew larger and our monitoring effort remained constant. However, our minimum estimate of the NRM DPS wolf population it is still a very accurate compared to most estimates of wildlife population density and distribution in North America. The NRM DPS wolf population in 2010 was estimated to be about what it was in 2009. In 2010 wolf numbers in the states of MT, WY, WA, and OR increased slightly (~9%) from 2009 levels but the 2010 Idaho estimate was about 20% lower than 2009. Pack and breeding pair estimates in 2010 were the same as in 2009. We suspect the difference in wolf numbers in ID was partly due to loss of radio-collared wolves and reduced monitoring effort in the inaccessible rugged forested mountainous terrain in central ID Wilderness areas. In addition to our wolf monitoring data, other indices of wolf population abundance, such as livestock damage, percentage of packs depredating, agency control, and site-specific research suggested the overall wolf population in 2010 was not higher than 2009 levels.

On December 31, 2010 the gray wolf population in NRM DPS was estimated to have at least 1,651 wolves in 244 wolf packs, and 111 breeding pairs, similar to the estimates in 2009 (1,733 wolves; 242 packs; and 115 breeding pairs). The overall distribution of the NRM DPS wolf packs also was similar (Figure 1). At the end of 2010 we estimated there were at least 374 wolves in the Northwest Montana Recovery Area (NWMT), 501 in the Greater Yellowstone Recovery Area (GYA), and 739 in the Central Idaho Recovery Area CID)(Figure 1, Table 4a). Within the NRM DPS by state boundaries, there were an estimated minimum of 566 wolves in Montana, 343 in Wyoming, 705 in Idaho (Table 4b). Sixteen wolves were in eastern Washington and 21 in eastern Oregon (Tables 6 & 7). Only 1 pack was located adjacent to the NRM DPS (Twisp, WA) and it did not raise pups in 2010. Of approximately 244 packs (groups of 2 or more wolves with territories inside the NRM DPS persisting until Dec. 31, 2010), 111 packs met the definition of “breeding pair,” (packs containing at least one adult male and one adult female and 2 or more pups on December 31) (Tables 4a, 4b). Minimum recovery goals (an equitably distributed wolf population that contained at least 300 wolves and 30 breeding pairs in Montana, in Idaho, and in Wyoming for at least 3 successive years) have been exceeded in the NRM DPS every year since 2002 (Table 4b).

Wolf Packs- The NRM DPS had 244 confirmed wolf packs at the end of 2010. Pack size in the NRM DPS averages less than 7 wolves at the end of the year. Montana had 118 wolf packs present at some point in 2010 but 13 packs (11% of all packs present in 2010) were no longer thought to exist by the end of 2010 (Table 1). In WY, 45 packs were present but 3 (7%) were gone by end of 2010 (Table 2). In ID, 87 wolf packs were present but 14 (16%) were gone by end of 2010 (Table 3). Agency control was likely responsible for (48%) of all the packs in the NRM DPS that did not persist. However, about one half of the packs that were recorded as not persisting in ID in 2010 were simply not confirmed due to the difficulty of monitoring wolves in

the central ID Wilderness. All packs in WA and OR persisted into the end of 2010. No packs were documented in UT (Table 6).

Wolf Depredations- In 2010 wolf depredation was about the same on cattle, decreased on sheep and dogs, and increased on other types livestock compared to 2009. Wolves in the NRM DPS subsist mainly on elk, white-tailed deer, mule deer, and moose, but livestock are also attacked. Although depredation results in a comparatively small proportion of all livestock losses in the NRM DPS, wolf damage can be significant to some livestock producers in the areas with wolves. Confirmed livestock depredations by wolves in 2010 were down from 2009 levels but included 199 cattle, 249 sheep, 2 dogs, and 15 other livestock (2 llamas, 6 goats, 4 horse, 4 miniature horses, and a domestic bison)(Tables 5 & 6). Approximately 64 out of 260 NRM DPS wolf packs (outside of YNP) that existed in 2010 (25%) were involved in at least one confirmed livestock or pet depredation down from the 2009 estimate of 32% of packs outside of YNP being involved in at least one depredation.

Agency Control of Problem Wolves- Lethal control of problem wolves (includes by agencies and legal take by private citizens in defense of private property) in 2010 (260) was 4% lower than 2009 (272) levels. Agency control in Montana removed the largest and Idaho the smallest proportion of their wolf population in 2010. For strictly comparative purposes we estimated the absolute minimum number of wolves alive in 2010 by combining the at least 1,651 wolves alive on Dec 31, and by adding all known wolf mortality (260 by agency control, 48 by hunting, and 86 by all other known causes (illegal, accidental, and natural which are all obviously under-reported and do not include mortality of young pups). This absolute minimum estimated population of 2,045 wolves at some point during 2010 [MT (746), ID (849), WY (412), WA (16), OR (21), UT (1)] was only used to compare the relative rates of wolf removal between states and by cause. A total of 259 wolves (13% of the minimum NRM DPS population) were removed by agency control in 2010 (141 in Montana, 40 in Wyoming, 78 in Idaho) (Table 5b). In 2010 agency authorized control (which included legal take by private citizens in defense of their private property- 16 in MT, 13 in ID, and 0 in WY- Table 1) removed 18% of the estimated minimum wolf population in MT; 10% in WY; 9% in ID.

Public Hunting of Wolves- Fair-chase hunting removed a maximum of 2% of the minimum estimated 2010 NRM DPS wolf population. ID extended a fall 2009 fair-chase hunting season into early 2010 (Jan 1- March 31) and 48 wolves were harvested. Hunting removed a maximum of 6% of Idaho's minimum estimated wolf population in 2010. ID and MT both took steps to prepare for a fall 2010 hunting season. However, the seasons were canceled due to the court order wolf delisting on August 5, 2010.

Human-caused Wolf Mortality by State and Cause- MT had the highest documented rate of human-caused mortality on wolves and Wyoming the lowest. In 2010 all documented human-caused mortality (agency authorized control, hunting, and other human-caused) removed 179 wolves in MT, 142 in ID, and 56 in WY. This meant 24% of the estimated minimum wolf population in MT, 17% in ID, and 13% in WY was known to be killed by people in 2010. In addition, past research on radio-collared NRM DPS wolves from 1984-2004 (Murray et al. 2010; Smith et al. 2010) indicated roughly 26% of adult-sized wolves died annually (80% of all mortality was caused by humans) and the population still grew >20% annually. On average about

10 of them were killed by agency control, 10 by illegal killing, 3 were killed accidentally by people (mainly vehicle collisions) and 3 by natural causes (mainly wolf-to-wolf conflict and disease/parasites, which, because of fewer prey, caused the natural decline of wolves in YNP in 2008).

Wolf Funding- The cost of wolf management in the NRM DPS increased in Federal Fiscal Year 2010 (Oct 1, 2009-Sept 30, 2010). Federal agencies spent \$4,556,000, including \$1,103,000 spent by USDA WS to investigate reports of suspected wolf damage and to control problem wolves. In 2010, \$453,741 was paid by private and state compensation programs for confirmed, probable, and likely livestock damage caused by NRM DPS wolves, a very similar amount to that paid in 2009 (\$457,785). In 2010, \$96,097 in compensation for wolf damage was paid in MT, \$270,263 in ID, \$82,186 in WY, \$4,335 in OR, \$463 in WA, and \$397 in UT. In FY 2011, an estimated \$4,765,000 in federal funding will be spent for wolf management in the NRM DPS.

Table 1. Wolves legally killed by private citizens in defense of private property\*\*, either in the act of depredating or under shoot on sight permits from Jan. 1995 through December 2010 or under state defense of property laws when wolves were delisted from May 2, 2009 to August 5, 2010.

<u>Year</u>	<u># WY</u>	<u># ID</u>	<u># MT</u>
1995-2000	0	0	2
2001	0	0	0
2002	0	0	1
2003	2	0	0
2004	2	0	0
2005	1	3	7
2006	1	7	2
2007	0	7	7
2008	0	14	7
2009	0	6	14
2010	0	13	16
Total	6	50	56

\*\*Footnote- Defense of Property regulations for legal take of problem wolves by private citizens only applied in the experimental population areas in southern Montana, Idaho south of the panhandle, and all Wyoming beginning in January 1995. The experimental population regulations for defense of property were liberalized in January 2005 and again in January 2008 for states and tribes with Service-approved wolf management plans. Only citizens in the experimental population areas of Montana, Idaho, and the Wind River Tribal Reservation in Wyoming could take advantage of those more liberal regulations to defend private property from wolf depredation.

Wolf Population Recovery- By every biological measure the NRM DPS wolf population is fully recovered. Resident packs appear to saturate suitable habitat in the core recovery areas and dispersing wolves routinely travel between them and Canada and successfully breed. Consequently, genetic diversity in the NRM DPS is very high and will almost certainly be

maintained solely by natural dispersal at a population size less than half of current levels (vonHoldt et al. 2010). The 3 subpopulations function as a single large NRM DPS meta-population (Figure 1). In addition, the NRM DPS is simply a 400-mile southern extension of a vast western Canadian wolf population that by itself contains over 12,000 wolves. Lone dispersing wolves continue to routinely travel beyond the core recovery areas and a few even go outside the NRM DPS.

Data collected in 2010 about wolf distribution, numbers, packs, and breeding pairs; livestock depredation, compensation, and wolf control; and apparent declines in prey populations in the most remote areas in the NRM DPS that have the lowest rate of livestock conflict and the longest history of pack persistence (YNP and central Idaho Wilderness), suggest the NRM DPS wolf population maybe stabilizing or even starting a slow decline to some as yet undetermined lower equilibrium based on natural carrying capacity in suitable habitat and human social tolerance.

Numerous research projects are underway examining: wolf population dynamics, predator-prey interactions, wolf interactions with other wildlife species, wolf diseases and parasites, possible wolf-caused trophic cascades, wolf/elk interactions on elk winter feed-grounds, and livestock depredation by wolves. Numerous scientific papers were published about wolves in the NRM DPS (see literature cited).

State, tribal, and USFWS management will maintain a fully recovered wolf population in the NRM DPS while attempting to reduce conflict. Delisting the NRM wolf population would allow implementation of a more efficient, sustainable, and cost-effective wildlife conservation model, but has been difficult to achieve. However, regardless of which agencies manage the wolf population, controversy is likely to remain high because of the strong symbolism that humans ascribe to wolves.

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**Table 4b: Northern Rocky Mountain minimum fall wolf population and breeding pairs\* 1980-2010, by State.**

(Includes only those within the Northern Rocky Mountain Distinct Population Segment. See Figure 1.)

**Minimum Fall Wolf Population by State:**

Year	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10
<b>State</b>																															
MT	1	2	8	6	6	13	15	10	14	12	33	29	41	55	48	66	70	56	49	74	97	123	183	182	152	256	316	422	497	524	566
WY																21	40	86	112	107	153	189	217	234	272	252	311	359	302	320	343
ID																14	42	71	114	156	187	251	263	345	422	512	673	732	856	870	705
OR																													14	21	
WA																													5	16	
UT																															0
TOTAL	1	2	8	6	6	13	15	10	14	12	33	29	41	55	48	101	152	213	275	337	437	563	663	761	846	1020	1300	1513	1655	1733	1651

**Breeding Pairs by State:**

Year	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10
<b>State</b>																															
MT							1	2	1	1	3	2	4	4	5	6	7	5	5	7	8	7	17	10	15	19	21	39	34	37	35
WY																2	4	9	6	7	12	13	18	16	25	16	25	25	22	27	27
ID																	3	6	10	10	10	14	13	28	26	36	41	43	39	49	46
OR																														1	2
WA																														1	1
UT																															0
TOTAL							1	2	1	1	3	2	4	4	5	8	14	20	21	24	30	34	48	54	66	71	87	107	95	115	111

\* By the standards of the Rocky Mountain Gray Wolf Recovery Plan and wolf reintroduction environmental impact statement, a breeding pair is defined as an adult male and an adult female wolf, accompanied by 2 pups that survived at least until Dec 31. Recovery goals call for 10 breeding pairs per area, or a total of 30 breeding pairs distributed through the 3 areas, for 3 years.

NOTE: Each year, wolf packs discovered in the current year that contain  $\geq 2$  yearlings and  $\geq 2$  adults are added to the previous year's breeding pair and population totals; similarly, if evidence in the current year indicates that  $< 2$  pups or  $< 2$  adults survived on December 31 of the previous year, that wolf pack is deleted from the previous year's breeding pair counts and population totals. Therefore, breeding pair counts and population totals are updated in current annual reports.