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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

WESTERN WATERSHEDS PROJECT,  
CENTER FOR BIOLOGICAL DIVERSITY,  
FRIENDS OF THE CLEARWATER,  
WILDEARTH GUARDIANS, and  
PREDATOR DEFENSE,

Plaintiffs,

v.

TODD GRIMM, Idaho Director,  
Wildlife Services, and USDA WILDLIFE  
SERVICES,

Defendants.

No. 1:16-cv-218-EJL-CWD

**PLAINTIFFS' RESPONSE TO  
DEFENDANTS' SEPARATE  
STATEMENT OF UNDISPUTED  
MATERIAL FACTS (ECF No. 18-2)**

Pursuant to LR 7(c)(2), Plaintiffs hereby respond to Defendants' Separate Statement of Undisputed Material Facts (SOF), ECF No. 18-2. The numbered paragraphs correspond to the numbered paragraphs in Defendants' Statement of Facts. Plaintiffs dispute the following facts,

and for the Court's convenience, have included the relevant portion of Defendants' facts in italics, prior to Plaintiffs' objection.

Plaintiffs note that in an administrative record case, the relevant facts are those contained in the administrative record, whose ultimate determination is the Court's under the Administrative Procedure Act (APA). An agency's *characterizations* of evidence in the administrative record are given no weight or deference. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) (refusing to defer to "an agency's convenient litigating position"); *see United States v. Velarde-Gomez*, 269 F.3d 1023, 1031–32 (9th Cir. 2001) (giving no constitutional weight to government's characterization of factual evidence). Therefore, disputes over the characterization of facts in the administrative record do not preclude summary judgment.

Finally, Defendants' reliance upon court opinions and citations to the Federal Register is inconsistent with Defendants' contention that Plaintiffs improperly rely on court opinions and the Federal Register in their Statement of Facts. *Contrast* Defs. SOF ¶ 3, n.2, ECF No. 18-2 *with* Defs Resp. to Pls. SOF 1-2, ECF No. 17-1.<sup>1</sup>

4. *States traditionally manage the wildlife within their boundaries. See, e.g., Wyoming v. United States*, 279 F.3d 1214, 1231 (10th Cir. 2002). *The ESA alters this traditional management authority in limited circumstances by shifting management of certain species listed as threatened or endangered under the ESA to FWS. See AR-EA18482-83 (generally describing federal gray wolf management under ESA). FWS was therefore responsible for managing wolves in Idaho while they were listed as endangered and the Idaho Department of Fish and Game*

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<sup>1</sup> Facts from court opinions and Federal Register notices upon which Plaintiffs rely can be accurately and readily determined from their sources, whose accuracy cannot reasonably be questioned, and this Court may take judicial notice of them. Fed. R. Evid. 201(b); 44 U.S.C. § 1507 ("The contents of the Federal Register shall be judicially noticed."). Alternatively, they fall within the exceptions to the general rule regarding use of extrarecord evidence in administrative record cases. *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1162 (9th Cir. 2006). In any case, most of the Federal Register materials Plaintiffs cited are also included in the administrative record. *E.g.*, AR-EA #699 (1994 Wolf Reintroduction EIS), AR-EA #778 (2009 delisting rule).

*(IDFG) managed gray wolves within Idaho during the periods in which they were preliminarily delisted before May 2011 and since delisting in May 2011. AR –EA09496 (IDFG “is charged by statute with the management of Idaho’s wildlife.”).*

4. Plaintiffs dispute the third sentence of paragraph 4 because, in fact, the Nez Perce Tribe managed Idaho wolves for much of the periods in which they were delisted before May 2011. *E.g.*, AR-EA #488, 9178 (referring to memorandum of agreement with Nez Perce Tribe).

11. *IDFG also updated predation management plans for three elk management zones in 2014. AR-DNS01569-99 (Sawtooth); AR-DNS01600-18 (Middle Fork); AR-DNS01619-36 (Panhandle). Those plans generally reflected IDFG’s commitment to monitoring wolf populations to ensure compliance with the post-delisting wolf population criteria in the 2002 State Wolf Plan. See, e.g., AR-DNS01613-615; AR-DNS01633-634.*

11. Plaintiffs dispute the second sentence of paragraph 11 because the plans are not mere monitoring documents and state that they “provide[] the analysis that sets the stage for increased regulated harvest of wolves and agency wolf removal.” AR-DNS #108, 1573; *see also* AR-EA #110, 1622-23 (finding wolves responsible for elk failure to meet management objectives and committing to “actions” to help reach objectives).

17. *To that end, the 2011 EA considered in detail the environmental consequences of five alternative levels of involvement by WS-Idaho for responding to requests for assistance with wolf damage management. AR-EA00103-06; AR-EA00127-47.*

17. Plaintiffs dispute the second sentence of paragraph 17 because the 2011 did not consider the environmental consequences of the five alternatives “in detail.” Rather, the EA relies on maintaining a population of 500 wolves as a substitute for a thorough, independent analysis. *See* Pls. Resp. Br. 14-15; AR-EA #005, 128.

20. *The 2011 EA discussed in detail the potential effects of WS-Idaho’s actions on the wolf population in Idaho. In particular, the 2011 EA provided a detailed background of the status of the NRM and Idaho wolf population, available wolf habitat in the NRM and Idaho, and IDFG management of wolves upon delisting. AR-EA00122-25. The 2011 EA then analyzed in detail the potential effects of WS-Idaho’s wolf damage management activities on the wolf population in Idaho under each of the five alternatives. AR-EA00128-33; AR-EA00137-38; AR-EA00139-40; AR-EA00142-43; AR-EA00144; AR-EA00148-49 (table summarizing effects under each alternative). The 2011 EA concluded that under any of the alternatives, “it is reasonable to expect that . . . the cumulative impacts on Idaho’s wolf population do not result in the population going below 500” and that FWS “through [its] approval of [the 2002 State Wolf Plan], has*

*concluded that ensuring maintenance of at least 15 breeding pairs (~150 wolves) would provide for the long-term maintenance of a viable wolf population in Idaho.” AR-EA00132-33. In reaching this conclusion, the 2011 EA contemplated “future wolf harvest seasons” as well as the effect of management actions to protect ungulates. AR-EA00130-131; AR-EA00137-46.*

20. Plaintiffs dispute paragraph 20 because the 2011 EA did not discuss the potential effects of WS-Idaho’s actions on the wolf population in Idaho “in detail.” Instead, its conclusions relied solely upon the assumption that a 500-wolf population would be maintained. *See* Pls. Resp. Br. 14-16; AR-EA #005, 128, (assuming 500-wolf population to be maintained), 130 (Idaho wolf population to be maintained at around 500 wolves under Alternative 1), 138 (effects on wolf population expected to be about the same under Alternative 2), 140 (same under Alternative 3), 143 (same under Alternative 4, post-delisting), 144 (same under Alternative 5); *see also id.* at 96-97 (dismissing possible environmental effects).

22. *Each of those reports, among other things, detailed WS-Idaho’s response to requests for assistance from IDFG to conduct wolf damage management activities and analyzed the effects of such assistance on Idaho’s wolf population and the effectiveness of lethal and non-lethal controls in reducing wolf predation on livestock and wild ungulates. See AR-DNS04399-406 (FY11 Report); AR-DNS04388-95 (FY12 Report); AR-DNS02770-85 (CY13-14 Report).*

22. Plaintiffs dispute the fourth sentence of paragraph 22 because the monitoring reports do not analyze the effectiveness of nonlethal control in reducing livestock depredations and rely on IDFG’s wolf population objectives rather than an independent analysis of the effects of Wildlife Services’ assistance. AR-DNS #165, 2774, 2779; AR-DNS #276, 04400, 04402; AR-DNS #275, 04389-91.

DATED this 21st day of April, 2017.

Respectfully submitted,

s/ Talasi B. Brooks  
Talasi B. Brooks  
Attorney for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of April, 2017, I filed the foregoing PLAINTIFFS' RESPONSE TO DEFENDANTS' SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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