

Lauren M. Rule (ISB # 6863)  
ADVOCATES FOR THE WEST  
PO Box 1612  
Boise ID 83701  
(208) 342-7024  
(208) 342-8286 (fax)  
[lrule@advocateswest.org](mailto:lrule@advocateswest.org)

Laurence (“Laird”) J. Lucas (ISB # 4733)  
PO Box 1342  
Boise ID 83701  
208-424-1466 (phone and fax)  
[llucas@lairdlucas.org](mailto:llucas@lairdlucas.org)

Attorneys for Plaintiffs

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

WOLF RECOVERY FOUNDATION, and	)	No. 09-cv-686-BLW
WESTERN WATERSHEDS PROJECT	)	
	)	<b>PLAINTIFFS’ OPENING BRIEF</b>
Plaintiffs,	)	<b>IN SUPPORT OF MOTION FOR</b>
	)	<b>SUMMARY JUDGMENT ON</b>
	)	<b>SECOND CLAIM FOR RELIEF<sup>1</sup></b>
U.S FOREST SERVICE and USDA APHIS	)	
WILDLIFE SERVICES,	)	
	)	
<u>Defendants.</u>	)	

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<sup>1</sup> As explained in footnote 2 of their Motion for Summary Judgment on Second Claim for Relief, Plaintiffs have achieved the relief they were seeking under their First Claim for Relief and thus do not need to pursue that claim here.

## INTRODUCTION

Plaintiffs Wolf Recovery Foundation and Western Watersheds Project challenge Defendant USDA APHIS Wildlife Services' failure to assess under the National Environmental Policy Act ("NEPA") the impacts of its wolf damage management activities in Idaho. Wildlife Services completed Environmental Assessments ("EAs") under NEPA in 1996 and 2002 for its general predator damage management program in Idaho, but those assessments excluded analysis of wolf damage control actions and their impacts. Since then, Wildlife Services has issued only "reports" and "reviews" monitoring its predator damage management program but has not conducted any further NEPA analysis of the Idaho program.

Instead of conducting new NEPA analysis to properly assess impacts from its wolf damage management, Wildlife Services specifically excluded wolf control activities from NEPA review in 2008, 2009, and 2010 by issuing Categorical Exclusion decisions for Gray Wolf Conflict Resolution in each wolf management zone of the state. By refusing to conduct any NEPA analysis of its wolf control actions, Wildlife Services avoided the need to consider alternative actions, take a hard look at the direct, indirect, and cumulative impacts of those actions, disclose that information to the public, and receive public input.

Now, seven months after Plaintiffs filed this lawsuit, Wildlife Services has issued a draft EA on Gray Wolf Damage Management in Idaho in recognition of its lack of proper NEPA analysis. As Plaintiffs have witnessed many times, however, agencies often fail to complete the EA process and issue a final EA and decision, or may take years to complete the process. In the meantime, Wildlife Services continues to kill wolves and take other control actions. By implementing its wolf damage management before completing any adequate environmental analysis, Wildlife Services is violating NEPA.

Wildlife Services is also violating the Sawtooth National Recreation Area (“SNRA”) Act because it has not conducted any analysis to insure that its wolf control actions are not substantially impairing the wildlife and recreation values of the SNRA. Due to these violations of NEPA and the SNRA Act, the Court should grant Plaintiffs’ motion for summary judgment on their second claim for relief.

## **FACTUAL BACKGROUND**

### **A. Reintroduction and Regulation of Wolves in Central Idaho**

Sixty years after humans extirpated gray wolves from the Rocky Mountain West, the U.S. Fish and Wildlife Service (“FWS”) reintroduced the species to central Idaho, northwest Montana, and Wyoming in 1994. *Statement of Facts (“SOF”) ¶¶ 1-2; AR FS009686* (Reintroduction Rule). Wolves had been listed as endangered under the Endangered Species Act (“ESA”) in 1974 but were reintroduced under Section 10(j) of the ESA as “nonessential experimental populations,” which allowed for more flexibility in their management than with species that are simply threatened or endangered under the Act. *SOF ¶¶ 1-2; AR FS009686-87*.

In order to appease public opposition to the reintroduction of wolves, regulations issued under Section 10(j) allowed livestock producers to harass wolves, kill wolves that attacked livestock on private land, and obtain a permit to kill wolves that attacked livestock on public land. *SOF ¶ 3; AR FS009699*. The regulations also authorized FWS or its designated agents to use non-lethal control methods or to capture and move wolves that attacked livestock; and once six breeding pairs of wolves were established in the area, to kill wolves that continued to cause problems after exhausting other methods of control. *SOF ¶ 3; AR FS009699-9700*.

Before publishing the reintroduction rules, FWS issued an environmental impact statement in 1994 assessing the impacts of reintroducing wolves to central Idaho, northwest

Montana, and Wyoming. *SOF ¶ 4; AR APHIS 000001-000414*. This EIS assessed the impacts of five alternatives for reintroduction and assumed a recovered population of 100 wolves in Idaho. *SOF ¶ 4; AR APHIS 000060, 000200-207*. In discussing various public land designations in central Idaho, the EIS did not include any mention of the SNRA or the duties required by the SNRA Act. *SOF ¶ 4; AR APHIS 000166-68*.

Initially, the Nez Perce Tribe coordinated with FWS to manage wolf recovery in Idaho until the State produced a wolf management plan in 2002, which was subsequently approved by FWS. *SOF ¶ 5; AR APHIS 002163-93* (Idaho Wolf Conservation and Management Plan). This Plan called for maintaining 15 packs of wolves in Idaho, managing wolves as a big game species, monitoring wolf populations, and cooperating with USDA APHIS Wildlife Services in wolf control actions to address wolf depredations. *SOF ¶ 5; AR APHIS 002166-67*.

In 2005, FWS revised the 10(j) rules for the central Idaho and Montana nonessential experimental populations of wolves to allow the States to petition for lead authority over wolf management. *SOF ¶ 6; AR FS009747*. Pursuant to this new rule, Idaho Department of Fish and Game (“IDFG”) entered into a Memorandum of Agreement (“MOA”) with U.S. Department of Interior on January 5, 2006 to transfer authority for day-to-day management of wolves to IDFG. *SOF ¶ 7; AR APHIS 001531*.

The 2005 rules also provided for more aggressive control actions to kill wolves on private and public land that were a threat to livestock or guard dogs, and allowed killing of wolves that were negatively impacting local ungulate populations at an “unacceptable level.” *SOF ¶ 6; AR FS009760-63*. A further revision to the wolf 10(j) rules in 2008 gave even more flexibility for killing wolves that were having an “adverse impact” on ungulate populations. *SOF ¶ 8; AR FS009775*.

Also in 2008, the Idaho Fish and Game Commission adopted the Idaho Wolf Population Management Plan, which called for maintaining at least 15 breeding pairs of wolves; managing for 2005-2007 wolf population levels (518-732 wolves); minimizing wolf conflicts with humans and livestock; and managing wolves so that they do not adversely affect big game populations. *SOF ¶ 9; AR APHIS 002194-2282* (Idaho Wolf Population Management Plan 2008-2012). The Commission further clarified in 2009 that the statewide wolf population objective is to maintain the population at the low end of the proposed range, around 500 wolves—which is a 40% reduction from the current population of 800-900 wolves. *SOF ¶ 9; AR APHIS 001502*.

In April 2009, FWS removed ESA protections for central Idaho and Montana wolves and IDFG took over full management of wolves. *SOF ¶ 10; AR FS009794*. Once wolves were no longer a listed species under the ESA, IDFG authorized wolf hunting and set the harvest level for the 2009 hunting season at 220 wolves. *SOF ¶ 10; AR APHIS 002373*. Final harvest totals from 2009 showed that 188 total wolves were harvested. *Id.*

The U.S. Court for the District of Montana, however, recently overturned the rule that removed central Idaho and Montana wolves from under the ESA and thus central Idaho wolves are again protected by the ESA. *SOF ¶ 11; Defenders of Wildlife v. Salazar*, No. 09-cv-00077-DWM, Docket No. 164 (August 5, 2010). While general hunting of wolves is not permitted at this time, the State of Idaho will continue to lead day-to-day management of wolves in accordance with its management plans and authorize Wildlife Services to carry out wolf control actions just as it did before the April 2009 rule.

In fact, control actions by Wildlife Services may actually increase now that wolves are back under the ESA in Idaho. Subsequent to the relisting, IDFG publicly stated that it will still pursue the goal of reducing the wolf population by almost 40%, and specifically has proposed a

plan for wolf control actions to reduce a population of 100 wolves in the Lolo zone by 80% to supposedly protect elk in that area. *SOF ¶ 11; Second Declaration of Ken Cole ¶ 33 & Exs. E-F* (filed herewith). The State is also looking at options to restore wolf hunting even while wolves are listed under the ESA. *SOF ¶ 11; Cole Decl. Ex. E.*

**B. NEPA Analysis for USDA Wildlife Service’s Predator Control Program**

As a federal agency, Wildlife Services must comply with the requirements of NEPA, and thus completed Environmental Assessments (“EAs”) for its predator damage management program in Idaho in 1996. *SOF ¶ 13; AR APHIS 000415-511* (EA for Southern Idaho program), *512-607* (EA for Northern and Central Idaho program). These analyses considered impacts from conducting various types of control actions on predators and other target species, but did not analyze wolf control actions or the impacts of such actions on the wolf population or the ecosystem in general. *Id.*

The EA for Southern Idaho was revised in 2002 to address an expanded predator control program for management of sage grouse and Idaho ground squirrel predators. *SOF ¶ 14; AR APHIS 000618-709*. This document again excluded wolves and impacts of wolf control actions from its analysis. *SOF ¶ 14; AR APHIS 00643-50, 666-77*. Each of these EAs was accompanied by a “Finding of No Significant Impact” (“FONSI”) concluding that the predator management programs did not have any significant environmental impacts and thus did not warrant preparation of an Environmental Impact Statement. *SOF ¶ 15; AR APHIS 000875-888, 893-902*.

Wildlife Services has not completed further NEPA analysis for its Idaho predator management program since these 1996 and 2002 EAs. Instead, it has issued annual reports and five-year reviews for the Idaho program, along with new FONSI, that briefly discuss new

information. *SOF ¶ 16; AR APHIS 000710-720, 730-743* (five-year reviews for Southern Idaho and Northern and Central Idaho); *744-874* (annual reports). These five-year reviews and annual reports included information on wolf control actions, and briefly summarized the number of depredations by wolves, the number and type of control actions (lethal control versus trapping and releasing or relocating), and the total percent of the wolf population that was killed in control actions. *SOF ¶ 17; AR APHIS 000713, 735, 744-874.*

The five-year reviews and their FONSI s concluded that the effects from the predator management program were consistent with the analysis in the prior EAs and were not having significant impacts, and thus there was no need to revise the EAs. *SOF ¶ 18; AR APHIS 000715, 738, 914-926.* These five-year reviews did not discuss locations of wolf control actions, which packs they affected, or impacts to other species and the ecosystem from removing wolves; nor did they consider any alternatives to the existing wolf control program. *SOF ¶ 18; AR APHIS 00712-13, 734-36.*

Then, in 2008, 2009, and 2010, Wildlife Services issued decisions to categorically exclude wolf control actions in Idaho from any NEPA review. *SOF ¶ 19; AR APHIS 001057-1321* (CE decisions). Similar to CEs issued in 2008 and 2009, Wildlife Services issued a separate CE determination in 2010 for each of ten wolf management zones in the state. *SOF ¶ 19; AR APHIS 001241-1321.* Each of these 2010 determinations described the wolf depredations from 2009 in that zone, the number of wolves killed in the zone (from control actions as well as other causes), and the estimated number of requests to remove wolves in 2010 for that zone. *SOF ¶ 20; see e.g. AR APHIS 001257-59* (Sawtooth zone CE).

The 2010 CEs also noted that IDFG planned to increase authorizations to kill most or all members of wolf packs that have a history of depredations from previous years, and that a

decline in the total wolf population of only 2% from 2009 to 2010 is considerably less than the desired level of reduction. *SOF ¶ 20; AR APHIS 001258-59*. Because these CE determinations were excluded from NEPA review, they did not consider or assess effects of any alternatives to the existing wolf control activities, did not consider cumulative effects, and were not subject to public review and comment. *SOF ¶ 21; AR APHIS 001257-1264*.

Finally, just this month, Wildlife Services issued a draft EA for Gray Wolf Damage Management in Idaho. *SOF ¶ 22; Draft EA found at [http://www.aphis.usda.gov/regulations/pdfs/nepa/idaho\\_wolf\\_ea.pdf](http://www.aphis.usda.gov/regulations/pdfs/nepa/idaho_wolf_ea.pdf)*. The agency allowed thirty days for public comment but made no indication when a final EA or decision would issue. *SOF ¶ 22; See Notice of Availability, found at [http://www.aphis.usda.gov/regulations/ws/ws\\_nepa\\_public\\_notice\\_ID.shtml](http://www.aphis.usda.gov/regulations/ws/ws_nepa_public_notice_ID.shtml)*.

### **C. Wolf Control Actions in Idaho**

Since the reintroduction of wolves into central Idaho, Wildlife Services has conducted many control actions on wolves in response to depredations of livestock. In the early years after reintroduction, most of the control actions consisted of trapping and relocating wolves, but after the wolf population grew to more than six breeding pairs, the majority of control actions killed wolves. *SOF ¶ 23; AR APHIS 001337-1506* (annual wolf activity reports).

As the wolf population continued to increase, more control activities occurred each year, with the number of wolves killed in the state steadily increasing from 10 in FY 2000 to 107 in FY 2009. *SOF ¶ 24; AR APHIS 001358-1506*. Because the control activities were aimed primarily at protecting livestock, they occurred in areas that had extensive livestock use and thus were focused heavily in western and central Idaho. *SOF ¶ 24; Compare AR APHIS 001430-1506* (2005-2009 reports listing wolf packs that were subject to control actions) *to APHIS 001507-1511* (maps of wolf packs in Idaho 2005-2009); *see also Cole Decl. ¶¶ 20-28 and Ex. D*.



In some instances, individual wolves were killed but increasingly, all or many members of an entire pack were killed in response to livestock depredations. *SOF ¶ 25; AR APHIS 001372-1506* (wolf activity reports showing usually 1 or 2 wolves from a pack killed in 2001-2007 while usually 4 or more wolves from a pack killed in 2008 and 2009). For instance, in FY 2009 and the first part of FY 2010, Wildlife Services' control actions resulted in removal or nearly complete removal of 9 wolf packs due to livestock depredations. *SOF ¶ 25; AR APHIS 002535*. IDFG plans to continue this trend of increased authorizations to kill most or all members of wolf packs that have a history of depredations. *SOF ¶ 20; AR APHIS 001258*.

Some of Wildlife Service's control actions killed wolves in and around the SNRA. *SOF ¶ 27; AR APHIS 002374-76*. With its numerous lakes, rivers, mountains, trails, and spectacular scenery, the SNRA is highly regarded and heavily used for recreational activities such as hiking, boating, fishing, hunting, wildlife viewing, mountain biking, camping, and horseback riding in the mountains and valleys of the Sawtooth, White Cloud, and Boulder ranges. *SOF ¶¶ 27-28*. The SNRA also contains all or parts of numerous allotments that the Forest Service authorizes for cattle or sheep grazing. *SOF ¶ 29; AR APHIS 002366-67*.

Due to wolf depredations on private and public land, Wildlife Services has killed 60 wolves over the years in and around the SNRA. *SOF ¶ 29; AR APHIS 002375*. The agency removed wolves from nine different packs, with complete removal of four packs from the SNRA (Stanley Basin, White Cloud, Whitehawk, Basin Butte), and substantial removal of another three packs (Buffalo Ridge, Galena, Pass Creek). *SOF ¶ 30; AR APHIS 002364 n.6, 2375-76*.

Most recently, Wildlife Services killed all or most of the Basin Butte pack just before Thanksgiving 2009 right outside the town of Stanley. *SOF ¶ 31; Cole Decl. ¶¶ 31-32*. This was one of the most-watched wolf packs in all of Idaho. *Cole Decl. ¶ 32*. Only two wolf packs

are currently residing on or using parts of the SNRA. *SOF ¶ 31; AR APHIS 002364*. In 2009 alone, the total number of wolves killed in control actions in or near the SNRA was 28. *SOF ¶ 32; AR APHIS 002364*. In addition, 27 wolves were killed during hunting and 14 wolves died from other causes in that same vicinity, for a total of 69 wolf deaths. *Id.*

The SNRA Organic Act prohibits use and management of natural resources on the SNRA from substantially impairing wildlife or recreation values there, but Wildlife Services has never assessed whether its wolf control actions comply with this standard. *SOF ¶ 33; 16 U.S.C. § 460aa (Public Law No. 92-400)*. None of the final EAs, CEs, or other reports issued by Wildlife Services discussing its wolf control activities in Idaho mention the SNRA or assesses the impacts of its wolf control program on wildlife and recreation values there. *SOF ¶ 34; AR APHIS 000415-709, 710-720, 730-874, 1241-1321*.

## **ARGUMENT**

Wildlife Services has never completed proper NEPA analysis for wolf damage management in Idaho. Instead, it relied on a variety of old NEPA analyses, various “reviews” and “reports,” and recent categorical exclusions to supposedly fulfill its NEPA duties for its wolf control activities. This conglomeration of documents, however, does not satisfy NEPA’s hard look requirement because individually or together, they do not provide the comprehensive analysis that NEPA requires. These documents never considered and assessed impacts of a range of alternatives regarding wolf damage management, truly took a hard look at the impacts of current wolf control actions, and then disclosed this information to the public for review and comment. Indeed, Wildlife Services apparently concedes it lacks adequate NEPA in light of its issuance of a draft EA for wolf damage management in Idaho several months after the filing of

this lawsuit. Wildlife Services must complete this comprehensive analysis and issue a final decision before implementing further control actions to comply with NEPA.

## **I. NATIONAL ENVIRONMENTAL POLICY ACT**

As our “basic national charter for protection of the environment,” NEPA requires agencies to take seriously the potential environmental consequences of a proposed action by taking a “hard look” at the action’s impacts in an EA or EIS. 40 C.F.R. § 1500.1(a); *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 864 (9<sup>th</sup> Cir. 2005). The statute’s twin objectives are to: (1) ensure that an agency “consider[s] every significant aspect of the environmental impact of a proposed action,” and (2) “inform the public that it has indeed considered environmental concerns in its decisionmaking process.” *Earth Island Inst. v. U.S. Forest Service*, 442 F.3d 1147, 1153-54 (9<sup>th</sup> Cir. 2006).

The analysis in an EA or EIS is intended to be used to guide decisionmaking, and thus the assessment of a range of alternatives is “naturally the heart” of the analysis. *Oregon Natural Desert Ass’n v. BLM*, 531 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2008) (citing 40 C.F.R. § 1502.14). An agency must “rigorously explore and objectively evaluate all reasonable alternatives” such that the “discussion of alternatives fosters informed decisionmaking and informed public participation.” *Id. at 1121, 1143*. Consideration of alternatives is critical to the goals of NEPA in both an EA and EIS. *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228–29 (9<sup>th</sup> Cir. 1988).

Furthermore, NEPA’s hard look requirement mandates that agencies study and reveal the direct, indirect, and cumulative effects of the action. 40 C.F.R. §§ 1508.7, 1508.8. Agencies cannot avoid finding significant effects from an activity by segmenting their analysis—i.e., breaking it down into small component parts, “each of which individually has an insignificant

environmental impact, but which collectively have a substantial impact.” 40 C.F.R. § 1508.27(b)(7); *Earth Island v. U.S. Forest Service*, 351 F.3d 1291, 1305 (9<sup>th</sup> Cir. 2003) (quoting *Thomas v. Peterson*, 753 F.2d 754, 758 (9<sup>th</sup> Cir. 1985)). Segmentation violates NEPA’s requirement that agencies perform a comprehensive environmental analysis of multiple proposed actions that are connected or have cumulative effects. *See Earth Island*, 351 F.3d at 1304.

An agency must share its analysis with the public prior to making its decision because “NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1(b); *see also* §§ 1501.2 and 1502.5 (agencies must complete analysis early in the planning process so that it will contribute to the decisionmaking process and not simply justify a decision already made). Moreover, the agency must not make any commitment of resources pending the NEPA analysis that would prejudice the decisionmaking process, such as taking an action that would cause environmental harm or limit the choice of reasonable alternatives available to the agency. *Id.* §§ 1502.2(f); 1506.1(a). The Ninth Circuit has affirmed that NEPA and its regulations prohibit agencies from making any “irreversible or irretrievable commitment of resources” before an EIS is completed so that the agency does not impair the decisionmaking process and prejudice consideration of alternative actions. *Conner v. Burford*, 848 F.2d 1441, 1446 (9<sup>th</sup> Cir. 1988); *Metcalf v. Daley*, 214 F.3d 1135, 1142-43 (9<sup>th</sup> Cir. 2000); *Anderson v. Evans*, 371 F.3d 475, 501 n.25 (9<sup>th</sup> Cir. 2004).

By requiring agencies to take a hard look at how the choices before them affect the environment, and then place the data and conclusions before the public, NEPA relies upon the democratic process to ensure that “the most intelligent, optimally beneficial decision will ultimately be made.” *Oregon Natural Desert Ass’n*, 531 F.3d at 1120 (citation omitted).

**II. WILDLIFE SERVICES HAS NEVER COMPLETED A VALID NEPA ANALYSIS FOR ITS WOLF CONTROL ACTIVITIES IN IDAHO.**

**A. Existing NEPA Analyses Do Not Adequately Analyze Wolf Control Actions.**

None of the NEPA analyses that relate to wolf reintroduction or predator damage management in Idaho addressed impacts of Wildlife Services' current wolf control activities. And subsequent reviews and reports monitoring the predator management program in Idaho did not conduct the necessary analysis of wolf damage management under NEPA. Thus, none of these documents, individually or together, satisfy the agency's duty under NEPA.

The 1994 EIS for the reintroduction of wolves considered a range of alternatives for the reintroduction of the species and assessed the effects of those alternatives on various resources, including domestic livestock, big game populations, and the public. *AR APHIS 000001-414*. The EIS discussed the wolf control measures that would be allowed under each alternative, but these measures were not the subject of the alternatives analysis. *Id. at 000061-93*. In other words, the EIS assessed alternatives for wolf reintroduction, not alternatives for wolf control activities. Thus, when evaluating the environmental consequences, the EIS evaluated only impacts of the various reintroduction options, not impacts of various options for wolf control. *Id. at 000177-251*. While the EIS contained a brief discussion of the long-term effects of reintroduction, such as restoring a natural component of the ecosystem and restoring a top predator to the food chain, there was no discussion of the impacts of removal of wolves through control actions once they were reestablished in Idaho. *Id. at 000213*.

Furthermore, the 1994 wolf reintroduction EIS is well out of date and factually inaccurate. The EIS assumed that a recovered wolf population would entail 100 wolves in Idaho and based its assessment of environmental consequences on that assumption. *Id. at 000200-207*. That assumption is now inaccurate, as there are more than 800 wolves in Idaho. *AR APHIS*

001900. Since the 1994 wolf reintroduction EIS was issued, FWS has revised the 10(j) rules twice to allow more aggressive control actions aimed to protect livestock and ungulate populations. *See AR FS009747 & FS009775* (2005 and 2008 revisions). Therefore, the description of control measures in the 1994 EIS is no longer accurate either. And the State of Idaho now has oversight of wolf management and is implementing its own wolf management plans, which was not the case in 1994. *AR APHIS 001531-33, 002163-2282*.

Because the 1994 EIS did not analyze a range of alternative wolf control options and their environmental consequences, and the information and assumptions in the EIS are outdated and inaccurate, this EIS does not satisfy Wildlife Services' duty under NEPA for its current wolf damage management activities.

Likewise, the 1996 and 2002 EAs that covered the predator damage management program in Idaho did not adequately address wolf control actions and also are outdated. None of these EAs contained an analysis of wolf control activities or any assessment of environmental consequences to wolves or the ecosystem from wolf control actions. *AR APHIS 000415-511, 512-607, 618-709*. When assessing impacts on wildlife populations, the EAs included only information and analysis for coyotes, red fox, striped skunks, badgers, raccoons, bobcats, black bears, and mountain lions. *See AR APHIS 000463-70, 563-70, 666-77*.

It is not surprising that these EAs contained little to no discussion of the impacts of wolf damage management because at the time these EAs were issued, few wolf control actions were occurring. *See AR APHIS 001332-1385* (wolf activity reports showing ten or fewer lethal control actions per year through 2001). Since then, the number of wolves killed in control actions has increased dramatically, particularly after the 10(j) rules were revised in 2005 and the State of Idaho assumed lead management authority in 2006. *See AR APHIS 001460-1506* (wolf

activity reports showing 48, 82, and 107 wolves killed in 2007, 2008, and 2009 respectively).

And IDFG recently declared that it wants to remove more wolf packs that have a history of depredations and reduce the wolf population by almost 40%, which will undoubtedly lead to even more wolf control actions per year. *See AR APHIS 001258* (noting plan to increase authorizations to kill most or all members of wolf packs that have a history of depredations), *001502* (noting objective to reduce population of wolves from 835 to around 500). Therefore, even if the previous EAs contained sufficient analysis at the time, which they did not, discussion of the predator damage management program in those older EAs is no longer applicable with respect to wolf damage management. Again, like the 1994 wolf reintroduction EIS, the 1996 and 2002 predator damage management EAs did not adequately analyze impacts of wolf control activities or alternatives to those activities, and are now outdated anyway.

Finally, the subsequent annual reports and five-year reviews monitoring the whole predator damage management program in Idaho do not cure the lack of sufficient NEPA analysis for wolf control actions. The annual reports and five-year reviews briefly summarized the change in management authority over wolves, the number of wolf depredations of livestock, the number and type of control actions on wolves, and the percent of the wolf population killed in control actions. *See AR APHIS 00712-13, 734-36* (five-year reviews, summarizing information from annual reports). Wildlife Services asserted that the percent of wolves killed in control actions each year did not adversely affect the wolf population in Idaho or its recovery, but that was the extent of its analysis regarding wolves. *Id. at 713, 735*. It also concluded that the effects of its predator damage management program did not go beyond those assessed in the prior EAs and thus there was no need to revise the EAs. *Id. at 715, 738*.

Yet the prior EAs never adequately assessed effects of wolf control activities because

those activities were so limited at the time the EAs were issued, and the five-year reviews did not cure this deficiency. Although the reviews contained updated information on the number of wolf control actions that had occurred, they did not assess alternatives to current wolf damage management actions or take a hard look at the environmental consequences of those actions. A hard look requires more than simply calculating what percent of the statewide wolf population was killed in control actions. *See Oregon Natural Desert Ass'n*, 531 F.3d at 1130 (hard look requires that agency consider “every significant aspect of the environmental impact of a proposed action”). The agency never discussed what packs have undergone control actions and where those packs were located, and the consequences of removing wolves and wolf packs—often repeatedly from the same areas—on the wolf population itself and on other species and the ecosystem in general. *See Cole Decl.* ¶¶ 16-28 & Exs. A-D (discussing role of wolves in ecosystem and impacts on other species and noting heavy concentration of wolf removals in western and central Idaho).

Wildlife Services also did not conduct a cumulative effects analysis, as required by NEPA, to assess impacts of its current control actions combined with other past, present, and reasonably foreseeable future actions, such as the hunting or other killing of wolves by private individuals in these same areas, removing wolves to protect ungulates, and culling of the overall wolf population to meet statewide objectives. *See* 40 C.F.R. §§ 1508.7, 1508.8; *City of Carmel-by-the-Sea v. U.S. Dept. of Transportation*, 123 F.3d 1142, 1160 (9<sup>th</sup> Cir. 1997) (agency must include useful analysis of the cumulative impacts of past, present, and future actions). Without this analysis, the agency has not taken a hard look at the impacts of its control actions.

The heart of NEPA is the alternatives analysis and the consideration of every significant aspect of the environmental impact of a proposed action, including the direct, indirect, and



cumulative impacts. *Oregon Natural Desert Ass'n*, 531 F.3d at 1120; *Earth Island Inst*, 442 F.3d at 1153. The documents discussed above do not fulfill those requirements with respect to Wildlife Service's current wolf damage management.

**B. Wildlife Services' Categorical Exclusions Do Not Satisfy NEPA.**

Wildlife Services also issued a series of decisions in 2008, 2009, and 2010 categorically excluding wolf control activities from NEPA review, but these decisions also fail to satisfy the agency's duty under NEPA. Not only has Wildlife Services segmented the action by looking at its wolf control activities by wolf management zone rather than taking a comprehensive look statewide, but it also improperly excluded these activities from NEPA review when they may have significant effects and they do not reasonably fit within the categorical exclusion selected by the agency.

Wildlife Services issued a separate CE decision for each of ten wolf management zones and determined that the control activities within each zone did not need to undergo NEPA review. *See AR APHIS 001241-1321* (2010 CEs). Wildlife Services has tried to substitute this approach for a comprehensive analysis that looks at wolf damage management across the state by breaking the action down into small component parts, each of which individually may have an insignificant environmental impact, but which collectively have a substantial impact. 40 C.F.R. § 1508.27(b)(7); *Earth Island*, 351 F.3d at 1305. Segmenting the wolf control actions by management zone violates NEPA's requirement that agencies perform a comprehensive environmental analysis of multiple proposed actions that are connected or have cumulative effects. *See Earth Island*, 351 F.3d at 1304. Identical wolf damage management activities taking place adjacent to each other and impacting the same wolf population are certainly connected and have cumulative effects and thus must be assessed together in a comprehensive environmental

analysis.

Furthermore, a CE can be used only if there will be no significant effects to the environment. When an action “may have the potential” for any significant effect, an EA or EIS must be prepared. 40 C.F.R. §§ 1508.4, 1508.27; 7 C.F.R. § 372.5(d); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1027 (9<sup>th</sup> Cir. 2007); *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 481 F. Supp.2d 1059, 1080 (N.D. Cal. 2007). This determination requires consideration of various “context” and “intensity” factors. 40 C.F.R. § 1508.27. Context means looking at short and long-term effects to the local and regional area, while intensity requires considering the unique characteristics of the geographic area, the degree to which the effects on the quality of human environment are likely to be highly controversial, the degree to which the action may establish a precedent for future actions with significant effects or represent a decision in principle about a future consideration, whether the action is related to other actions with individually insignificant but cumulatively significant impacts (significance cannot be avoided by breaking an action down into small component parts), and the degree to which the action may adversely affect an endangered or threatened species. 40 C.F.R. § 1508.27.

Here, Wildlife Service’s wolf control activities within each management zone are related to the control activities in other management zones and cumulatively may have significant effects not only to the wolves but also to other species (including humans) and to the ecosystem as a whole both in the short-term and long-term. *See Cole Decl.* ¶¶ 16-19 & Exs. A-C. The agency cannot avoid doing an EA or EIS by breaking the action down into small component parts and issuing a separate CE for each wolf management zone each year. 40 C.F.R. § 1508.27(b)(7).

The control actions also implicate other context and intensity factors, particularly with

regard to repeated removal of wolves from within and around certain areas such as the SNRA and other parts of central Idaho that have and will likely continue to experience removal of numerous wolf packs due to depredations. *See AR APHIS 002364, 2375-76; Cole Decl. ¶¶ 20-28 & Ex. D.* These actions implicate factors such as a unique geographic area (i.e., the SNRA), the highly controversial effects of consistently removing wolves from the same areas—particularly areas that are valued by the public for recreation and wildlife viewing, and now that wolves are relisted under the ESA, the potential for adverse effects to a listed species. 40 C.F.R. § 1508.27(b). The agency also must consider the effects of its control actions combined with other past, present, and foreseeable future activities that kill wolves. Because there may be significant effects from killing wolves in control actions when considering the short and long-term effects on local and regional scales as well as cumulative effects, Wildlife Services violated NEPA by breaking the action down and issuing multiple CEs every year for its wolf damage management.

Finally, Wildlife Service’s selection of the categorical exclusion that supposedly covers its wolf control actions was unreasonable. The CEs cite 7 C.F.R. § 372.5(c)(1)(i) as the justification for categorically excluding wolf control activities from NEPA. *See e.g. AR APHIS 001260.* This regulation states that activities that would normally require at least an EA may be categorically excluded if the “means through which adverse environmental impacts may be avoided or minimized have actually been built right into the actions themselves. The efficacy of this approach generally has been established through testing and/or monitoring.” 7 C.F.R. § 372.5(c).

The class of actions Wildlife Services points to for its wolf control CEs are labeled “Routine measures” in the regulations, such as “identifications, inspections, surveys, sampling

that does not cause physical alteration of the environment, testing, seizures, quarantines, removals, sanitizing, inoculations, control, and monitoring employed by agency programs to pursue their missions and functions.” *Id.* § 372.5(c)(1)(i). The examples provided of routine measures that have mitigation built right into the action itself are: (A) Inoculation or treatment of discrete herds of livestock or wildlife undertaken in contained areas (such as a barn or corral, a zoo, an exhibition, or an aviary); (B) Pesticide treatments applied to infested plants at a nursery; and (C) Isolated (for example, along a highway) weed control efforts. *Id.* § 372.5(c)(1)(ii).

These self-contained and isolated treatment methods are a far cry from the widespread killing of wolves across millions of acres using traps, ground shooting, and aerial shooting. *See California ex rel. Lockyer v. U.S. Dept. of Agriculture*, 459 F. Supp.2d 874, 901-02 (N.D. Cal. 2006) (using examples in handbook to determine whether activity fell within CE category).

The other types of categorically excluded actions listed in this regulation further demonstrate the limited nature of activities contemplated, such as research and development activities that are carried out in laboratories, facilities, or other areas designed to eliminate the potential for harmful environmental effects; licensing and permitting activities; and rehabilitation of facilities. *Id.* § 372.5(c)(2),(3)&(4). The widespread control and killing of wolves in Idaho also does not resemble these categories of excluded actions.

And, as noted above, an action that “may have the potential” for significant effects cannot be categorically excluded. *Id.* § 372.5(d). An example of such a situation is “when any routine measure, the incremental impact of which, when added to other past, present, and reasonably foreseeable future actions (regardless of what agency or person undertakes such actions), has the potential for significant environmental impact.” *Id.* Here, the wolf control activities considered within each CE, when added to other past, present, and future wolf killings by Wildlife Services

and others, has at least the potential for significant impacts. By using this categorical exclusion to avoid considering any alternatives to wolf control actions and taking a hard look at the direct, indirect, and cumulative effects of those actions, Wildlife Services violated NEPA and its own regulations.

**C. Wildlife Services Must Halt Further Wolf Damage Control Actions Until It Completes the NEPA Process.**

Wildlife Services itself now concedes the need to conduct NEPA analysis for its wolf damage management because it is currently in the process of preparing an EA for Idaho and issued a draft earlier this month. *See Draft EA for Gray Wolf Damage Management in Idaho, found at [http://www.aphis.usda.gov/regulations/pdfs/nepa/idaho\\_wolf\\_ea.pdf](http://www.aphis.usda.gov/regulations/pdfs/nepa/idaho_wolf_ea.pdf).* Similarly, Wildlife Services recently announced the preparation of an EA for Oregon wolf control activities after the filing of a separate lawsuit. *Cole Decl. Ex. G (News Article “Feds Call Off Oregon Wolf Hunt”)*. Until it completes its analysis for Idaho, Wildlife Services must refrain from taking lethal control actions to comply with NEPA, as it is doing in Oregon.

NEPA regulations state that agencies must complete their analysis early in the planning process so that it will contribute to the decisionmaking process and not simply justify a decision already made. 40 C.F.R. §§ 1501.2, 1502.5. Furthermore, the agency must not make any commitment of resources pending the NEPA analysis that would prejudice the decisionmaking process, such as taking an action that would cause environmental harm or limit the choice of reasonable alternatives available to the agency. *Id.* §§ 1502.2(f); 1506.1(a).

The Ninth Circuit has affirmed that NEPA and its regulations prohibit agencies from making any “irreversible or irretrievable commitment of resources” before NEPA analysis is completed so that the agency does not impair the decisionmaking process and prejudice consideration of alternative actions. *Conner*, 848 F.2d at 1446; *Metcalfe*, 214 F.3d at 1142-43;

*Anderson*, 371 F.3d at 501 n.25. For example, an agency cannot authorize killing an animal before the environmental analysis for that authorization is complete. *Metcalf*, 214 F.3d at 1143 (contract for whale hunt); *Anderson*, 371 F.3d at 501 n.25 (permit to kill whale). NEPA emphasizes up-front environmental analysis so that an agency does not act on incomplete information, “only to regret its decision after it is too late to correct.” *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9<sup>th</sup> Cir. 1998) (quoting *Marsh v. ONRC*, 490 U.S. 360, 371 (1989)).

Thus, Wildlife Services must not take any action before it **completes** its analysis for wolf damage management in Idaho that could cause adverse effects to the environment or preclude any alternative actions—i.e. cannot make any irreversible commitment of resources. The whole purpose of NEPA is to study the effects of an action **before** taking that action. 40 C.F.R. § 1500.1(b) (“NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.”).

Continuing to kill wolves and entire wolf packs before completing the NEPA process runs counter to this purpose. This is especially true given the likely increase in wolf killings in response to IDFG’s goals of removing entire wolf packs that have a history of depredations, reducing wolves in the Lolo Zone by 80%, and decreasing the overall wolf population by almost 40%—all despite wolves being relisted under the ESA. *See Cole Decl.* ¶ 33 & *Exs. E-F* (IDFG statements about plan to reduce wolf population by 40% and draft proposal to kill 80% of Lolo wolves issued subsequent to relisting of wolves) Like in *Metcalf* and *Anderson*, Wildlife Services must complete its NEPA analysis before killing wolves to fulfill NEPA’s mandate of preparing an analysis that contributes to the decisionmaking process rather than justifying a decision already made. *Metcalf*, 214 F.3d at 1143; *Anderson*, 371 F.3d at 501 n.25. Indeed,

Wildlife Services has said it will not kill wolves in Oregon until it has completed its analysis.

*See Cole Decl. Ex. G.* Idaho Wildlife Services must follow suit.

In sum, the array of NEPA-related documents that pertain to wolves and predator damage management in Idaho do not constitute the required analysis under NEPA for wolf control actions. These documents did not analyze a range of alternatives to Wildlife Service's wolf control actions nor did they take a hard look at the environmental consequences—direct, indirect, and cumulative impacts—of wolf damage management in Idaho. Wildlife Services has conceded as much by issuing a draft EA earlier this month on its wolf damage management in Idaho, but until the decisionmaking process is completed and the agency issues a final analysis and decision, it must not conduct any lethal control actions on wolves to comply with NEPA.

### **III. WILDLIFE SERVICES HAS NOT ANALYZED WHETHER ITS WOLF CONTROL ACTIONS ARE VIOLATING THE SNRA ACT.**

The Act establishing the SNRA prohibits use or management of resources in the area from substantially impairing values protected under the Act, including wildlife and recreation. In addition to the NEPA violations discussed above, Wildlife Services is also violating the SNRA Act because it has never assessed in any NEPA analysis whether its wolf control activities are substantially impairing SNRA values.

The SNRA Act calls for preserving and protecting the natural, scenic, historic, pastoral, and fish and wildlife values and providing for the enhancement of the recreational values in the SNRA. 16 U.S.C. § 460aa. It also prohibits management, utilization, and disposal of natural resources on the SNRA from substantially impairing the values described above. *Id.* As stated in a settlement agreement in a prior SNRA Act case before this Court, as well as the Forest Plan, substantial impairment analysis is completed as part of the NEPA environmental analysis for a proposed action. *AR FS009367* (settlement agreement); *AR FS013544, 13546* (Forest Plan

Appendix I noting that substantial impairment analysis for wildlife and recreation values would occur within NEPA analysis).

Wildlife Services has killed numerous wolves and wolf packs from in and around the SNRA since wolf reintroduction. *See AR APHIS 002364, 2375-76* (noting that 28 wolves were killed by Wildlife Services on or near the SNRA in 2009 alone, 60 wolves have been removed from around the SNRA since 1999, and four packs have been completely removed and three more substantially removed in that time). Yet, the agency has never assessed whether its wolf control actions are substantially impairing wildlife or recreation values.

The 1994 wolf reintroduction EIS never even mentioned the SNRA or its requirements, let alone assess whether control actions there would substantially impair any of the area's values. *AR APHIS 000155, 166-168*. Likewise, the 1996 and 2002 Idaho predator damage management EAs, annual reports, and five-year reviews did not refer specifically to the SNRA, acknowledge that Wildlife Services must comply with the SNRA Act, discuss how many depredations and resulting control actions occurred in the area, or assess the impacts of those actions on SNRA values. *AR APHIS 000415-607* (1996 EAs), *618-709* (2002 EA), *710-720 & 730-743* (five-year reviews), *744-874* (annual reports). Even the CEs for the Sawtooth and Southern Mountains wolf management zones, which partly overlap with the SNRA, did not address how many control actions occurred or are expected to occur in the upcoming year in and around the SNRA and the impacts of those actions on SRNA values. *See AR APHIS 002372* (map of SNRA and wolf management zones); *1257-1264* (Sawtooth Zone CE), *1265-73* (Southern Mountains Zone CE).

Also following the filing of this action, the Forest Service completed a substantial impairment analysis to assess whether livestock grazing is impairing SNRA values, which updated previous substantial impairment analyses prepared as part of the NEPA process for



various grazing allotments. *See AR APHIS 002361-93* (Forest Service June 2010 update to substantial impairment analysis), 2366-67 (describing prior analyses from 2003-2008).<sup>2</sup>

Wildlife Services cannot rely on that analysis to satisfy its own independent duty. Whether livestock grazing on public land in the SNRA is causing substantial impairment is a different question from whether Wildlife Services' extensive control actions on both private and public land in the SNRA will substantially impair SNRA values.

Such an analysis is particularly pertinent given that the Sawtooth wolf management zone was tied for the highest number of control actions of any management zone (28) and also had by far the highest number of wolves killed from hunting of any zone (49). *AR APHIS 002373, 2377*. In light of the consistent removal of wolves from in and around the SNRA, and direction from IDFG to remove packs that have a history of depredations and to reduce the overall wolf population by 40%, it is a near certainty that Wildlife Services will continue to kill wolves around the SNRA. *AR APHIS 002375-76, 1258-59*. It is also likely that, as in the past, most of the depredations and resulting control actions will occur in the Sawtooth and East Fork Salmon River valleys and the White Cloud Mountains, which are areas heavily used for recreation and wildlife viewing. *AR APHIS 002285-86; Cole Decl. ¶¶ 29-32*.

Wildlife Services has failed to complete the necessary analysis as part of any NEPA process to insure that its wolf control actions are not substantially impairing wildlife and recreation values on the SNRA, in violation of the SNRA Act. Like with its NEPA analysis, until the agency completes a substantial impairment analysis, it must not conduct any lethal control actions on wolves in the SNRA to insure that it is not substantially impairing the wildlife values or recreation opportunities in the area.

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<sup>2</sup> Plaintiffs are not conceding that this 2010 analysis is adequate, but do acknowledge that the Forest Service conducted the analysis, which was all that Plaintiffs were seeking in Claim One.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for summary judgment on their second claim for relief.

Dated: August 30, 2010

Respectfully submitted,

/s/ Lauren M. Rule  
Lauren M. Rule  
Attorney for Plaintiffs