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

WESTERN WATERSHEDS PROJECT,  
CENTER FOR BIOLOGICAL DIVERSITY,  
WILDEARTH GUARDIANS, and  
PREDATOR DEFENSE,

Plaintiffs,

v.

USDA WILDLIFE SERVICES,

Defendant.

**No. 1:17-cv-206-BLW**

**PLAINTIFFS' OPENING BRIEF IN  
SUPPORT OF MOTION FOR REMEDIES**

## INTRODUCTION

In its Summary Judgment Decision (ECF No. 33), this Court held that Wildlife Services' Final Environmental Assessment (EA) and Decision/Finding of No Significant Impact (Decision/FONSI) violated the National Environmental Policy Act (NEPA) and Administrative Procedure Act (APA) by failing to fully assess the environmental impacts of its proposed "predator damage management" actions in Idaho, including killing thousands of coyotes each year and killing predators to allegedly benefit game species at the request of the Idaho Department of Fish and Game (IDFG). The Court was particularly critical of Wildlife Services' failure to respond to comments of sister agencies alerting it to science showing that lethal controls are ineffective, inhumane, and have ecological consequences. *See* Summ. J. Or. 16–22.

To remedy the adjudicated legal violations, Plaintiffs now move the Court to vacate and remand the Final EA and Decision/FONSI, and order Wildlife Services to prepare a legally-adequate Environmental Impact Statement (EIS) and Record of Decision (ROD) for Wildlife Services' proposed Idaho predator damage management actions within a date certain – which Plaintiffs propose to be three years after entry of the Court's Remedies Order. Plaintiffs further request that the Court direct Wildlife Services to issue a draft EIS within 18 months of the Court's Remedies Order and allow for a 60-day public comment period.

In addition, Plaintiffs move the Court for the following interim injunctive relief while Wildlife Services is curing its legal violations and preparing a full EIS:

- A. Enjoin Wildlife Services from conducting lethal "proactive" (or "preventive") coyote control in Idaho, as defined on page 93 of the EA (AR37260), and allow Wildlife Services to only conduct lethal corrective control, as defined and discussed in the EA, pages 93–94 (AR37260–61), within two miles of a confirmed depredation by the specific predator targeted;
- B. To ensure Wildlife Services' predator control activities are limited to specific offending animals, enjoin Wildlife Services from using the following lethal

methods in Idaho: M-44 sodium cyanide ejector capsules, neck snares, and body-gripping (conibear) traps;

- C. Enjoin Wildlife Services from killing predators discussed in the EA in “unique geographic areas” in Idaho described in the EA Appendix B (AR37586-89), specifically including Wildernesses, Wilderness Study Areas (WSAs), National Monuments, Areas of Critical Environmental Concern (ACECs), and National Reserves;
- D. Enjoin Wildlife Services from killing predators to “protect” prey species, as described in the EA, pages 19–34 (AR37186–201).

The requested relief is appropriate, narrowly-tailored to Plaintiffs’ harms from Wildlife Services’ legal violations, and necessary to prevent unlawful actions and irreparable harm in the interim period until Wildlife Services fully complies with law. The accompanying Declarations of leading wildlife experts Dr. Adrian Treves, Dr. James Peek, Dr. Robert Crabtree, and Carter Niemeyer and Plaintiffs’ Declarants Erik Molvar, Jon Marvel, and Bethany Cotton underscore that the relief sought is necessary to conform Wildlife Services’ predator control actions with prevailing ethical, scientific, and wildlife management norms, until it has fully analyzed the effects of its activities in a legally-valid EIS.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Wildlife Services kills more than 3,000 coyotes each year in Idaho. AR37304. It kills many of these coyotes on a “proactive” or “preventive” basis, based on the theory that killing any coyote will reduce predation upon livestock. Niemeyer Decl. ¶¶ 36–41 (filed herewith); *see also* AR37260. Particularly during the winter, when coyotes are more visible, Wildlife Services flies around southern Idaho gunning them down. Niemeyer Decl. ¶ 41. To kill coyotes and other predators, Wildlife Services also uses lethal traps and poisons like sodium cyanide M-44s, neck snares, and body-gripping (conibear) traps, which can kill other animals. Niemeyer Decl. ¶¶ 15–

32. Wildlife Services has undertaken these activities under a series of flawed Environmental Assessments (EAs); it has never analyzed its activities in Idaho in an EIS. *See* Summ. J. Or. 4.

Through the Final EA and Decision/FONSI challenged in this action, Wildlife Services sought to expand its activities to also encompass killing native predators, to purportedly enhance prey species abundance. AR37185–201 (expanded activities). The EA discussed a plan to help IDFG kill ravens to purportedly benefit sage-grouse, and also stated that Wildlife Services could kill predators to “protect” bighorn sheep, pronghorn antelope, mule and white-tailed deer, “waterfowl (ducks),” Columbian sharp-tailed grouse and others. *Id.*

Science shows, however, that these lethal methods do not work. Plaintiffs experts, each of whom has studied predator-prey relationships academically and/or on the ground for decades, agree that killing non-offending coyotes does not prevent predation on livestock, and may actually exacerbate livestock conflicts. Crabtree Decl. ¶¶ 19–32 (filed herewith); Niemeyer Decl. ¶¶ 42–48; Treves Decl. ¶ 39; (filed herewith); Peek Decl. ¶¶ 14-18 (filed herewith). Coyotes usually occupy and defend ten square kilometer (3.86 square mile) territories in packs of three to ten individuals. Crabtree Decl. ¶¶ 11–12. They mostly eat rodents and other small animals and avoid livestock. *Id.* ¶¶ 17–18. When members are indiscriminately removed from stable packs, though, it can disrupt this equilibrium. *Id.* ¶¶ 28–32, Niemeyer Decl. ¶ 45, Peek Decl. ¶ 15. Compensatory breeding occurs, meaning more, and younger, females breed and more pups survive. Crabtree Decl. ¶¶ 24–27. Packs may break up, with vacancies in packs or territories filled by “floater” coyotes that are more likely to prey upon livestock. *Id.* ¶ 31, Peek Decl. ¶ 16, Niemeyer Decl. ¶¶ 42–45. Such disruptions can cause coyotes to become desperate, making them more likely to attack livestock. Crabtree Decl. ¶ 29, Peek Decl. ¶ 18, Niemeyer Decl. ¶ 44. The evidence, both scientific and anecdotal, shows that livestock conflicts frequently

increase after indiscriminate coyote removals. Treves Decl. ¶ 20, Niemeyer Decl. ¶ 47, Fahy Decl. ¶ 39, Cole Decl. ¶ 43. Increased depredations create a continuing justification for Wildlife Services' activities. *See* AR37170–80 (justification).

Experts are skeptical that even lethal “corrective” control that occurs close in time and space to a specific predation incident and targets the predating animal can be effective. Dr. Adrian Treves, a Harvard-educated Professor who leads the Carnivore Coexistence Institute and the University of Wisconsin-Madison and has devoted almost two decades to evaluating predator control methods, explains that he believes the only lethal controls that may show effectiveness, if adequately tested, are ones that occur close in time and space to the incident and target the specific offending predator. Treves Decl. ¶ 39. Dr. Robert Crabtree, who conducted a 20-year study of unexploited coyote populations in Yellowstone, likewise explains that only in rare circumstances might lethal control be effective, in part because it is difficult to ensure the control targets the correct animal. Crabtree Decl. ¶ 38.

Because lethal controls do not resolve conflicts in the long term, experts recommend that Wildlife Services cease lethal “proactive” control and focus on corrective controls or non-lethal methods. Former Wildlife Services Supervisor and trapper Carter Niemeyer attests that lethal controls do not work and if Wildlife Services really wants to resolve conflicts it should use nonlethal methods. Niemeyer Decl. ¶ 52–53. Dr. Treves' extensive review of predator control literature, confirmed by 20 researchers in 10 countries, confirms that nonlethal controls show evidence of effectiveness while lethal controls do not. Treves Decl. ¶¶ 20–21, 39. Dr. Crabtree also recommends that Wildlife Services halt its lethal program, or else focus exclusively on removing only the offending animal. Crabtree Decl. ¶¶ 43–44. Dr. James Peek, a Professor emeritus at the University of Idaho who devoted much of his distinguished academic career to

studying predator-prey relationships, stated that targeting only the specific offending animal is consistent with wildlife management norms in Canada. Peek Decl. ¶¶ 21–40. Each expert recommends that Wildlife Services increase its focus on nonlethal controls and, at minimum, cease lethal “proactive” control. Niemeyer Decl. ¶¶ 49–56; Treves Decl. ¶¶ 36–39, 43; Peek Decl. ¶¶ 37–40; Crabtree Decl. ¶¶ 41–44.

Killing predators to benefit prey species is equally unlikely to be effective. Treves Decl. ¶¶ 34–35; *see* AR, 30281, AR32071. Relationships between predator and prey species are very complex and it takes a grasp of site-specific circumstances to predict whether eliminating predators will affect prey abundance. Treves Decl. ¶¶ 34–35; AR37183. Where experiments have evaluated the effectiveness of predator control at enhancing prey, they have generally shown little to no effect. *E.g.*, AR37184, AR32059, AR31912, AR37520. Wildlife Services did not provide site-specific information necessary to understand predator-prey interactions in the EA. *See* AR37184 (general discussion).

Wildlife Services’ EA and Decision/FONSI largely dismissed comments from sister agencies and the public raising evidence of this nature. As this Court held, “the lack of reliable data and the unconvincing responses to the serious concerns of agencies...demonstrates that the expanded [Predator Damage Management] program is controversial, and its environmental impacts highly uncertain, so that an EIS is required under NEPA.” *See* Summ. J. Or. 22. This Court also held that since Wildlife Services plans to conduct activities in Wilderness, WSAs, and an ACEC within the next five years, impacts to unique geographic areas also require an EIS. *Id.* at 22–23. The Court noted that the flawed analysis could have led the agency to overlook significant impacts, such as adverse impacts on local coyote populations. *Id.* at 18. It also observed that the agency’s dismissal of science showing the inefficacy of its intended actions to

boost prey populations was unconvincing. *Id.* at 19–21. The Court indicated that it would normally remand the EA to the agency with instructions to prepare an EIS. *Id.* at 23.

Wildlife Services’ predator killing harms Plaintiffs’ interests. Plaintiffs’ staff, members, and supporters live and recreate in Idaho, where they have encountered Wildlife Services’ traps and aerial gunning. *E.g.*, Cole Decl. ¶¶ 2, 29–36, ECF No. 18-3; Marvel Decl. ¶¶ 2–3, 50-55, ECF No. 18-4. Their interests in enjoying federal public lands in Idaho are irreparably harmed when they encounter, or fear encountering, Wildlife Services’ aerial gunning, poisons, traps, or wildlife carcasses. *E.g.*, Fahy Decl. ¶¶ 25–30, 39–40, ECF No. 18-5; Marvel Decl. ¶¶ 44, 50–55, 62–67; Cole Decl. ¶¶ 28–41; Cotton Decl. ¶¶ 14, 16 (filed herewith); Schmidt Decl. ¶¶ 6, 34–37, 40, ECF No. 18-6. Their interest in observing coyotes and other native predators in ecosystems where carnivores are allowed to play their natural role is irreparably harmed when Wildlife Services kills predators—especially because it may cause local extirpations, or create a dynamic used to justify more predator-killing over time. Marvel Decl. ¶ 64; Cole Decl. ¶¶ 40–46, 64–69; Fahy Decl. ¶¶ 39–40. Plaintiffs have interests in maintaining and enjoying the unique geographic characteristics of Wildernesses, WSAs, National Monuments, ACECs, and National Reserves, which are irreparably harmed by predator control. 2d Marvel Decl. ¶¶ 4–36. Plaintiffs’ interests will be irreparably harmed if Wildlife Services continues killing predators without adequate NEPA analysis that fully considers modern science, nonlethal methods, and opposing views. Cole Decl. ¶¶ 64–70; Marvel Decl. ¶¶ 62–70; Nokes Decl. ¶¶ 21–25, ECF No. 18-9; Greenwald Decl. ¶¶ 12–14, ECF No. 18-7.

## ARGUMENT

### **I. VACATUR AND REMAND WITH INSTRUCTIONS TO PREPARE AN EIS ARE NECESSARY TO REMEDY WILDLIFE SERVICES’ NEPA VIOLATIONS.**

Plaintiffs respectfully request that the Court vacate the EA and Decision/FONSI, and remand this matter to Wildlife Services with instructions to complete its final EIS within three years after the Court’s Remedies Order and issue a draft EIS subject to a 60-day public comment period within 18 months of the Court’s Remedies Order.

**A. Vacatur Is Appropriate.**

The Court has held Wildlife Services’ EA and Decision/FONSI violated NEPA and APA, and therefore they must be vacated and set aside. As the APA directs, “[t]he reviewing court shall ... set aside agency action ... found to be ... not in accordance with law.” 5 U.S.C. § 706(2) (emphasis added). See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414 (1971) (“[A]gency action must be set aside if the action was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law’ or if the action failed to meet statutory, procedural, or constitutional requirements”). Therefore, “vacatur of an unlawful agency rule normally accompanies a remand.” *Alsea Valley All. v. Dep’t of Commerce*, 358 F.3d 1181, 1185 (9th Cir. 2004). Although equity allows a court to remand a flawed rule or decision without vacatur in some limited circumstances, “remand without vacatur is an exception to the general rule.” *Gov. C.L. “Butch” Otter v. Salazar*, No. 1:11-cv-358-CWD, 2012 WL 12517198, at \*8 (D. Idaho Dec. 4, 2012). Indeed, the Western District of Washington previously found NEPA violations warranted vacatur of a similarly flawed Wildlife Services’ EA and Decision/FONSI for its wolf killing programs in the State of Washington. *Cascadia Wildlands v. Woodruff*, 151 F. Supp. 3d 1153, 1167 (W.D. Wash. 2015).

Here, too, Wildlife Services’ NEPA violations demand vacatur of the EA and Decision/FONSI. Under the EA’s “proposed” alternative adopted through the Decision/FONSI, Wildlife Services would expand its Idaho predator control activities to include killing predators

to “protect” prey species. But as this Court’s Summary Judgment Decision notes, Wildlife Services ignored key studies regarding the effects of expanding its activities to kill ravens to benefit sage-grouse (for example) despite receiving critical feedback from sister agency reviewers. Summ. J. Or. 19–21. Without fairly considering contrary science, the effects of killing predators to protect prey are a literal shot in the dark. Vacating the Decision/FONSI would prevent Wildlife Services from undertaking some expanded activities under the EA until it had fully considered their potential effects in a NEPA-compliant EIS.<sup>1</sup> *See Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) (the effect of vacatur is to reinstate the rule or decision that was previously in force). Not only is that result required by the APA, 5 U.S.C. § 706(2), it promotes NEPA’s purpose of ensuring informed agency action. *See Woodruff*, 151 F. Supp. 3d at 1167 (citing 40 C.F.R. § 1500.1) (granting vacatur where further consideration of flawed decision “would have better served the purpose of NEPA.”).

**B. Remand With Instructions To Prepare An EIS Is Appropriate.**

Where an agency’s reasons for its FONSI are arbitrary and capricious and the evidence in the record demonstrates that the project may have a significant impact, remand with instructions to prepare an EIS is also appropriate relief under NEPA and the APA. *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1225 (9th Cir. 2008). An unconvincing statement of reasons is grounds for ordering the agency to prepare an EIS. *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 871 (9th Cir. 2005) (requiring EIS where FONSI was unconvincing); *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 739-40 (9th Cir. 2001) (instructing district court to enjoin increase in vehicle quotas “pending...completion of an EIS.”).

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<sup>1</sup> Wildlife Services claims that under its existing program it can “respond to IDFG requests to conduct coyote predation management for the protection of mule deer, as well as, skunk,

As the Court indicated in its Summary Judgment Decision, remanding this matter to the agency with instructions to prepare an EIS is appropriate here. Summ. J. Or. 23. The Court found the agency's reasons for its FONSI unconvincing because "the lack of reliable data and the unconvincing responses to the serious concerns of agencies ... demonstrates that the expanded PDM program is controversial, and its environmental impacts highly uncertain, so that an EIS is required under NEPA." *Id.* at 22. In particular, the Court held, "Wildlife Services could easily have missed the adverse impacts on local [coyote] populations." *Id.* at 18. The Court found Wildlife Services' efforts to explain away scientific studies challenging the effectiveness of predator removal equally unconvincing. *Id.* at 19. Finally, because Wildlife Services disclosed it anticipated conducting activities in unique geographic areas, the Court found that factor also warranted an EIS. *Id.* at 22–23. Thus, the reasons for the FONSI were arbitrary and capricious and the evidence demonstrated Wildlife Services' actions "may" have a significant impact. Under these circumstances, the Court should order the agency to prepare an EIS.

Plaintiffs also request that the Court include in its Order a date certain by which Wildlife Services must prepare an EIS. The Ninth Circuit has upheld injunctive relief requiring NEPA compliance by a date certain, and that relief is warranted here. *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 644 (9th Cir. 2004). This Court has previously ordered agencies to complete NEPA analyses within specific deadlines to remedy adjudicated violations of NEPA. *See, e.g.*, Memorandum Decision and Order, *Idaho Watersheds Project v. Hahn*, No. 97-cv-0519-BLW (D. Idaho Feb. 29, 2000), ECF No. 239, *aff'd* 307 F.3d 815 (9th Cir. 2002) (permanent injunction order setting deadline for EIS and ordering interim relief); *W. Watersheds Project v. Bennett*, 392 F. Supp. 2d 1217 (D. Idaho 2005) (ordering EIS and interim relief). In Plaintiffs' experiences, Wildlife Services has avoided preparing EISs and has not prepared EAs

in a timely manner. Cotton Decl. ¶¶ 9–10. Giving Wildlife Services three years to complete the EIS, with a draft to issue within 18 months of the Court’s Remedies Order subject to a 60-day public comment period, would offer ample time for Wildlife Services to complete its analysis.

**II. NARROWLY-TAILORED INTERIM INJUNCTIVE RELIEF IS ALSO NECESSARY.**

Until Wildlife Services has completed a legally-adequate EIS, Plaintiffs also request that the Court grant them narrowly-tailored injunctive relief. Absent injunctive relief, Wildlife Services will continue its existing activities—including extensive and unscientific coyote control—while it completes the required EIS, leaving Plaintiffs with a “hollow victory.” *Sierra Club v. U.S. Fish and Wildlife Serv.*, 235 F. Supp. 2d 1109, 1140 (D. Or. 2002).

**A. Interim Relief Is An Appropriate Exercise Of The Court’s Broad Remedial Authority.**

Where action is ongoing while the agency complies with NEPA, the Ninth Circuit has held that injunctive relief and the ordering of an EIS is an appropriate remedy. *High Sierra Hikers Ass’n*, 390 F.3d at 644. Indeed, “[w]here an EIS is required, allowing a potentially environmentally damaging project to proceed prior to its preparation runs contrary to the very purpose of the statutory requirement.” *Nat’l Parks & Conservation Ass’n*, 241 F.3d at 737 (enjoining expansion of ship traffic in Glacier Bay, Alaska).

This Court has previously entered interim injunctive relief where it found NEPA violations like these. *See, e.g., Hahn*, 307 F.3d 815 (affirming this Court’s permanent injunction establishing deadlines for environmental analysis of grazing allotments after finding NEPA violations, and imposing interim management conditions); *Bennett*, 392 F. Supp. 2d 1217 (ordering BLM to prepare EIS to study grazing impacts on sage-grouse in Jarbidge Resource

Area, and entering injunctive relief); *Wilderness Watch v. Vilsack*, 229 F. Supp. 3d 1170, 1182-83 (D. Idaho 2017) (issuing injunction where agency violated NEPA and the Wilderness Act).

Other courts have also issued injunctions to protect wildlife pending NEPA compliance under similar facts to the ones here. *Sierra Club*, 235 F. Supp. 2d at 1140-43 (enjoining cougar killing because “denying injunctive relief would leave plaintiffs with a hollow victory” and “the possibility that the cougar could be irreparably harmed is real and is enough to warrant an injunction until the completion of an EIS”); *High Sierra Hikers Ass’n*, 390 F.3d at 642 (affirming district court’s grant of injunction to protect frog and toad species).

The standard for a permanent injunction is essentially the same as for a preliminary injunction, but the plaintiff does not have to show a likelihood of success on the merits because actual success has been achieved. *Amoco Production Co. v. Gambell*, 480 U.S. 531, 546 at n.12 (1987). Instead, a plaintiff seeking a permanent injunction must demonstrate that: (1) it has suffered an irreparable injury; (2) remedies available at law (i.e., money damages) are inadequate to compensate for that injury; (3) considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction. *Monsanto v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010).

When the injunction factors are met, the Court has broad discretion to craft an equitable remedy. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). “Flexibility is a hallmark of equity jurisdiction.” *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 51 (2008) (Ginsburg J., dissenting). Injunctive relief must, however, be narrowly-tailored to remedy the specific harm alleged. *Stormanns v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009).

**B. Interim Injunctive Relief Is Necessary To Prevent Irreparable Harm.**

“Harm is irreparable when... the harm cannot be undone by an award of compensatory damages.” *Battelle Energy All. v. Southfork Sec.*, 980 F. Supp. 2d 1211, 1220 (D. Idaho 2013). It is well established that “[e]nvironmental injury can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.” *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007) (quoting *Amoco*, 480 U.S. at 545). Where environmental plaintiffs assert harm to their interests in viewing, utilizing, and experiencing areas impacted by agency action in their undisturbed state, the Ninth Circuit has found they adequately demonstrate irreparable harm. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011); *All. for Wild Rockies v. Marten*, 253 F. Supp. 3d 1108, 1111 (D. Mont. 2017). *See also Vilsack*, 229 F. Supp. 3d at 1183 (issuing injunction to prevent irreparable harm to Plaintiffs’ interest in wilderness character). Impacts to wildlife may also warrant injunctive relief. *See, e.g., Sierra Club*, 235 F. Supp. 2d at 1140-43.

“[W]hen federal statutes are violated, the test for determining if equitable relief is appropriate is whether an injunction is necessary to effectuate the congressional purpose behind the statute.” *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002) (citation omitted). “In the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action.” *High Sierra Hikers*, 390 F.3d at 642. “Part of the harm NEPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about prospective environmental harms and potential mitigating measures.” *Winter*, 55 U.S. at 23.

The record before the Court demonstrates that Plaintiffs and their members have suffered, and, absent injunctive relief, will continue to suffer, irreparable harms from Wildlife Services’ predator killing. *See Fahy, Cole, Marvel, Schmidt, Nokes, Vanek, and Greenwald Decls.* (ECF

Nos. 18-5, 18-3, 18-4, 18-6, 18-9, 18-8, and 18-7); Molvar, 2d Marvel, and Cotton Decls. (filed herewith). The activities Plaintiffs seek to enjoin cause irreparable harm to their interests in several ways: first, by killing thousands of coyotes and other predators each year using poisons and traps that pose a hazard to the public, companion animals, and imperiled wildlife; second, by killing wildlife when science shows lethal methods only increase conflicts with livestock and likely will not increase prey species populations; third, because they harm unique geographic areas; and finally, because Wildlife Services undertakes activities even though it has never fully analyzed their effects. The interim injunctive relief is vital to ensure that Plaintiffs do not continue to suffer irreparable harms while Wildlife Services proceeds with predator killing.

Seeing dead coyotes, live coyotes caught in traps, aerial gunning of coyotes, traps and poisons set for coyotes (and associated warning signs), and other evidence of Wildlife Services' activities irreparably harms Plaintiffs' interests in enjoying the public lands in their natural state, where carnivores are allowed their natural role. Marvel Decl. ¶¶ 48–52, 62–65; Cole Decl. ¶¶ 30–31, 33–35, 40–46; Fahy Decl. ¶¶ 27–30, 40–42; Schmidt Decl. ¶¶ 34–39. Finding such evidence on the public lands irreparably harms Plaintiffs by making them fear for their own safety, the safety of domestic dogs they may be recreating with, and for that of sensitive wildlife in the area. Cole Decl. ¶¶ 34–35, 37; Marvel Decl. ¶¶ 52, 65. These are legitimate fears—a teenager in Pocatello was recently injured when he accidentally triggered a Wildlife Services M-44 while walking his dog on BLM lands behind his house; his dog died. Schmidt Decl. ¶¶ 37, 42; Fahy Decl. ¶ 12. Wolverine, which are vanishingly rare in Idaho, have been accidentally captured and killed in Wildlife Services' traps in Idaho. AR37373; *see also* Cole Decl. ¶ 34.

These activities irreparably harm Plaintiffs' use and enjoyment of public lands and wildlife. Marvel Decl. ¶¶ 62–69; Cole Decl. ¶¶ 44–46, 65–67. Animals may suffer in traps until

they die of exposure or are permanently maimed. Cole Decl. ¶ 37; Fahy Decl. ¶¶ 28–30. Plaintiff Predator Defense’s staff has found animals in Wildlife Services’ traps that were mummified, they had been left there so long. Fahy Decl. ¶ 30. Plaintiffs are haunted and upset when they see Wildlife Services aerial gunning or other killing methods on public lands where they recreate. Fahy Decl. ¶¶ 30, 39–40; Marvel Decl. ¶¶ 50–51; Cole Decl. ¶¶ 29–40. When control activities occur in unique geographic areas like Wildernesses, WSAs, National Monuments and ACECs, which are supposed to be managed for their natural and wild qualities, they harm Plaintiffs’ interests in maintaining and enjoying the unique geographic characteristics of those areas. 2d Marvel Decl. ¶¶ 6–36 (describing visits and injuries from multiple specially-designated areas targeted for lethal predator control); *see also* Molvar Decl. ¶¶ 30–36.

Wildlife Services’ proactive coyote killing also harms Plaintiffs’ interests because it does not reduce livestock conflicts and may actually exacerbate them. Experts agree there is no scientific justification for such broad-scale controls. Treves Decl. ¶ 39; Niemeyer Decl. ¶¶ 44, 47, 50; Peek Decl. ¶ 34; Crabtree Decl. ¶ 41. Since Wildlife Services has chosen not to grapple with contrary science, it has dismissed the potential that its indiscriminate coyote-killing may be causing depredation problems. Summ. J. Or. 17–19, 21. And because Wildlife Services does not accurately track how many coyotes it is killing in local areas, it may be temporarily extirpating local coyote populations, which is known to increase coyote-livestock conflicts. *E.g.*, Cole Decl. ¶ 41, Peek Decl. ¶¶ 15–18. This irreparably harms Plaintiffs’ interests in living and recreating in ecosystems where carnivores are allowed to play their natural role, in science-based wildlife management, in informed agency decision-making, and in seeing coyotes in the wild. Molvar Decl. ¶¶ 16–21, 23–29; Nokes Decl. ¶¶ 21–24; Marvel Decl. ¶¶ 32–55; Fahy Decl. ¶¶ 4–10, 25–42; Cole Decl. ¶¶ 21–40, 44–46, 64, 65, 67–70; Cotton Decl. ¶¶ 4–8, 11.

If the Court does not vacate the EA and Decision/FONSI, Plaintiffs will also be irreparably harmed when Wildlife Services kills predators to purportedly enhance prey species. Like proactive coyote killing, these projects are cruel, unscientific, and, as framed in the EA's general terms, unlikely to work. Treves Decl. ¶¶ 34–35. Killing predators irreparably harms Plaintiffs' interests in allowing predators to play their natural role in ecosystems. Molvar Decl. ¶¶ 22–23, 51–56; Cole Decl. ¶¶ 66–67; Marvel Decl. ¶¶ 61, 64, 67; Cotton Decl. ¶ 6; *see also* Treves Decl. ¶ 42. Local predator-prey systems will be destabilized without understanding the likely effects in advance. *See* Treves Decl. ¶ 40. Conducting projects like these allows the agencies to avoid addressing habitat loss and condition, which is often the root cause of prey population declines—further harming Plaintiffs' interests. Marvel Decl. ¶¶ 56-61; Cotton Decl. ¶ 6; Molvar Decl. ¶¶ 21, 23.

Uninformed actions, like the ones Wildlife Services will continue absent the requested injunctive relief, are exactly the types of harms NEPA is intended to guard against. “[A]llowing a potentially environmentally damaging program to proceed without an adequate record of decision runs contrary to the mandate of NEPA.” *Bosworth*, 510 F.3d at 1033. Likewise, allowing Wildlife Services to kill predators without a full, unbiased analysis of environmental consequences runs contrary to the mandate of NEPA and will cause Plaintiffs irreparable harm.

### **C. The Interim Injunctive Relief Is Narrowly Tailored.**

The interim injunctive relief Plaintiffs request is narrowly tailored to address their harms because it will not prevent all of Wildlife Services' activities. Instead, it will render only that relief necessary to prevent Wildlife Services from undertaking specific activities that harm Plaintiffs' interests. Below, Plaintiffs describe the effect of each form of injunctive relief.

1. Limit Wildlife Services to targeting only specific predating animals.

The Court should enjoin Wildlife Services from conducting lethal “proactive” (or “preventive”) coyote control in Idaho, as defined on page 93 of the EA (AR37260), and allow Wildlife Services to only conduct lethal corrective control, as defined and discussed in the EA, pages 93–94 (AR37260–61), within two miles of a confirmed depredation by the specific predator targeted. *See* Niemeyer Decl. ¶ 35. To ensure Wildlife Services’ predator control activities are limited to specific offending animals, the Court should also enjoin Wildlife Services from using the following non-selective lethal methods in Idaho: M-44 sodium cyanide ejector capsules, neck snares, and body-gripping (conibear) traps. Niemeyer Decl. ¶ 55.

This relief will prevent Wildlife Services from indiscriminately killing coyotes until it has objectively analyzed of how those activities will affect the environment. It will also limit Wildlife Services’ use of specific traps and poisons known to kill non-offending animals. *See* Niemeyer Decl. ¶¶ 15–32. As the Court noted, Wildlife Services’ dismissal of significant impacts from its broad-scale coyote killing was unconvincing. Summ. J. Or. 17–20.

The requested relief is narrowly tailored to prevent further irreparable harms to Plaintiffs’ interests in informed, science-based wildlife management, ending the self-justification for predator control, and eliminating deadly threats to pets and sensitive wildlife species on the public lands. Plaintiffs do not seek to enjoin all of Wildlife Services’ predator killing or trapping. They seek only to enjoin activities that science shows do not work and that pose an unreasonable risk to the public. The agency can still perform “corrective” control, so long as it occurs within two miles of a confirmed depredation, consistent with expert recommendations. Niemeyer Decl. ¶ 35; *see also* Treves Decl. ¶ 39. Restricting the use of lethal poisons and traps does little more than maintain the status quo, as the coyotes killed by use of these methods

comprise a minor percentage of those Wildlife Services kills each year.<sup>2</sup> Through the EA and Decision/FONSI, Wildlife Services committed to stop using M-44s on public lands in Idaho and it has since temporarily suspended use of M-44s on all lands in Idaho, so further suspending the use of that device provides certainty that the hazardous devices will not be used while posing no burden to Wildlife Services.<sup>3</sup> *See* AR37290, 37283 (describing minimal past M-44 use).

Wildlife Services will be able to kill wildlife, just not by means that are likely to kill non-predating or non-target animals—and the restrictions will alleviate some of Plaintiffs’ harms from Wildlife Services’ actions.

2. Enjoin killing predators in unique geographic areas.

The Court should enjoin Wildlife Services from killing predators discussed in the EA in “unique geographic areas” in Idaho described in the EA Appendix B (AR37586-89), specifically including Wildernesses, Wilderness Study Areas (WSAs), National Monuments, Areas of Critical Environmental Concern (ACECs), and National Reserves.

Enjoining Wildlife Services from killing wildlife in unique geographic areas until it has completed a legally-valid EIS is narrowly tailored to protect Plaintiffs’ interests in preserving the areas’ unique qualities and enjoying them undisturbed by evidence of Wildlife Services’ lethal work. 2d Marvel Decl. ¶¶ 4–36; Molvar Decl. ¶¶ 30–36; Cotton Decl. ¶ 7. The relief would affect only a tiny segment of Wildlife Services’ activities. Wildlife Services admitted that it conducts so few activities in unique geographic areas that an alternative under which it

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<sup>2</sup> *See* Wildlife Services 2017 Idaho Program Data Report, available at [https://www.aphis.usda.gov/wildlife\\_damage/pdr/PDRG\\_Report.php?fy=2017&fld=state&fld\\_val=ID](https://www.aphis.usda.gov/wildlife_damage/pdr/PDRG_Report.php?fy=2017&fld=state&fld_val=ID) (accessed August 30, 2018). The Program Data Report is a public document available on the agency’s website and this Court may take judicial notice of it under Fed. R. Evid. 201(b). *See U.S. v. 14.02 Acres of Land More or Less in Fresno County*, 547 F.3d 943, 955 (9th Cir. 2008) (judicial notice is appropriate for records and reports of administrative bodies).

<sup>3</sup> If the Court vacates the Decision/FONSI, enjoining Wildlife Services from re-commencing use of M-44s is necessary to make sure the agency does not again begin using them again.

conducted no such activities was not appreciably different from the alternative under which it did. AR37272. It projects doing relatively few actions in unique geographic areas in the next five years. AR37586-89. This relief would protect Plaintiffs' interests, but would pose little burden to Wildlife Services.

3. Enjoin Wildlife Services From Conducting "Expanded" Activities at IDFG's Request.

The Court should enjoin Wildlife Services from conducting activities to "benefit" prey species. This would prevent Wildlife Services from killing ravens and other avian predators to "benefit" sage-grouse, and from killing coyotes and other predators to "benefit" mule and white-tailed deer until it has accurately analyzed the impacts of those activities, consistent with the Court's Summary Judgment Decision. Summ. J. Or. 19–22. It would also prevent Wildlife Services from killing predators to "benefit" Columbian sharp-tailed grouse, nesting waterfowl, pronghorn antelope, bighorn sheep, Northern and Southern Idaho ground squirrel, and others.

Wildlife Services generally ignored evidence that these interventions likely will not work. *Id.* It is unethical and contrary to NEPA's purpose of ensuring informed agency action to kill wildlife without establishing that the intervention is likely to be effective. Treves Decl. ¶¶ 40–42; *Winter*, 55 U.S. at 23. Allowing Wildlife Services to kill predators without being able to judge whether its activities will work will irreparably harm Plaintiffs' aesthetic and recreational interests, as well as their interests in humane, science-based wildlife management, in allowing predators to play their natural role in ecosystems, and in informed agency decision-making. Molvar Decl. ¶¶ 21–23, 51–52; Cotton Decl. ¶¶ 5–8, 11.

This relief is also narrowly-tailored because, with the exception of predator killing for deer "protection" and some other limited activities, Wildlife Services claims it has not killed predators for wildlife or prey species protection or enhancement. AR37185, AR37266

(describing activities). Coyote killing to enhance deer populations is proven so ineffective that Wildlife Services does not anticipate receiving a request for assistance to conduct those activities. AR37520. Thus, precluding it from killing predators to “protect” prey species until it has finished an adequate analysis would affect it very little. In addition, IDFG could carry out experiments, like the sage-grouse predator-killing experiment it has begun, without Wildlife Services’ assistance. *E.g.*, AR37283. Enjoining these activities until Wildlife Services has adequately addressed their potential effects will protect Plaintiffs’ interests, but will have very little effect on Wildlife Services’ operations.

**D. The Interim Injunctive Relief is Supported By The Balance Of Harms And The Public Interest.**

In assessing the balance of hardships, the Court must weigh “the competing claims of injury . . . and the effect on each party of the granting or withholding of the requested relief.” *Nat’l Wildlife Fed’n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995). “[I]f environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment.” *Bosworth*, 510 F.3d at 1033 (quoting *Amoco*, 480 U.S. at 545).

In assessing the public interest, courts have recognized that ensuring protection of the environment serves an important public purpose. *E.g.*, *id.* at 1033-34, *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (*en banc*) (“preserving environmental resources is certainly in the public’s interest”). This Court has also previously found that the public interest in sustaining wildlife and ensuring that federal agencies comply with the law outweighs competing multiple-use interests. *Lands Council v. Cottrell*, 731 F. Supp. 2d 1028, 1056 (D. Idaho 2010).

Where, as here, Plaintiffs have suffered irreparable injury from unlawful environmental disturbance, and will continue to suffer such irreparable injury unless injunctive relief is granted, an injunction to protect the environment is warranted. *Save Our Sonoran v. Flowers*, 408 F.3d

1113, 1125 (9th Cir. 2005). Granting limited injunctive relief will not cause countervailing harms because Wildlife Services will be able to respond to requests for assistance using the only potentially effective lethal method—corrective control. Treves Decl. ¶ 39. Wildlife Services’ own analysis indicates that private citizens and IDFG may be able to largely replace its other activities. AR37435. Moreover, since “proactive” controls only increase depredations, enjoining Wildlife Services from conducting those activities will benefit Defendant-Intervenors.

The remedies requested here serve the public interest in ensuring Wildlife Services takes the “hard look” at the consequences of its actions that NEPA requires, and in protecting the environment. Allowing Wildlife Services to continue indiscriminately killing coyotes each year without fairly considering the effects of those actions will affect coyote populations, and thus, the environment. Wildlife Services’ activities on public lands pose a public safety risk and alter species composition of the lands affected. They prevent Plaintiffs from enjoying public lands and wildlife in their natural state. Where an agency has not considered environmental impacts before a project goes forward, suspending such projects “comports with the public interest.” *Cottrell*, 632 F.3d at 1138. Thus, the public interest favors interim injunctive relief here.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs request that this Court grant their Motion for Remedies, vacate Wildlife Services’ EA and Decision/FONSI and remand with instructions to prepare an EIS within a date certain, and enter the requested interim injunctive relief until Wildlife Services has completed a legally-valid EIS and ROD.

Dated this 31st day of August, 2018.

Respectfully submitted,

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