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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

HELLS CANYON PRESERVATION
COUNCIL, CASCADIA WILDLANDS,
CENTER FOR BIOLOGICAL DIVERSITY,
OREGON WILD,

Plaintiffs,

vs.

PAUL HENSON, in his capacity as Oregon
State Supervisor, United States Fish and
Wildlife Service; UNITED STATES FISH
AND WILDLIFE SERVICE, an administrative
agency of the United States Department of the
Interior,

Defendants.

Civ. Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

(Violation of Administrative Procedure Act
and National Environmental Policy Act)

INTRODUCTION

1. The United States Fish and Wildlife Service (“USFWS”) announced on May 2, 2011 that it would kill two endangered gray wolves from a statewide population of less than twenty-five. This decision comes after federal wildlife agents killed two of Oregon’s wolves in 2009, and after at least five other wolves have been killed by poachers and human-caused accidents.

2. According to Oregon’s Wolf Conservation Plan, there need to be at least four breeding pairs of wolves in eastern Oregon for three consecutive years before “the natural reproductive potential of the wolf population is not in danger of failure.” The Plan further establishes a goal of seven breeding pairs three years in a row “to ensure maintenance of the wolf population.” There are currently only two breeding pairs of wolves in Oregon, and neither has successfully bred more than twice.

3. USFWS intends to kill two endangered wolves, significantly impacting the statewide population and reducing the species’ chances for reproductive success, without considering the impacts of its actions in an environmental assessment (“EA”) or environmental impact statement (“EIS”), and without allowing the public to review the basis for the decision or provide public comment or feedback.

4. This civil action for declaratory and injunctive relief is brought under the Administrative Procedure Act (“APA”), 5 U.S.C. §§701 *et seq.*, and alleges violation of the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§4321 *et seq.*, and its implementing regulations, 40 C.F.R. §§ 1500-1508.

5. Plaintiffs Hells Canyon Preservation Council, Cascadia Wildlands, Center for Biological Diversity, and Oregon Wild (“Plaintiffs”) seek a declaration that the USFWS and its Oregon State Supervisor violated NEPA by financing, assisting, and/or conducting the lethal removal of

gray wolves (*canis lupus*), a species listed as endangered by the state of Oregon, without first considering the environmental impact of its actions and publishing an EA or EIS for public review. Plaintiffs also seek injunctive relief to redress the injuries caused by this violation of law.

6. Should Plaintiffs prevail, Plaintiffs will seek an award of costs and attorneys' fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

JURISDICTION

7. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), 1346 (United States as defendant), 2201 (injunctive relief), and 2202 (declaratory relief). Plaintiffs claim arises under the laws of the United States, including the APA and NEPA. An actual, justiciable controversy exists between Plaintiffs and Defendants. The requested relief is proper under 28 U.S.C. §§ 2201 and 2202, and 5 U.S.C. §§ 705 and 706.

VENUE

8. Venue in this court is proper under 28 U.S.C. § 1391(e). Defendant USFWS is an agency of the United States and has its Oregon office in Portland. Plaintiff Oregon Wild is headquartered in Portland, Oregon, and Plaintiff Center for Biological Diversity also has an office in Portland, Oregon. Further, all or a substantial part of the events or omissions giving rise to the federal claim herein occurred within this judicial district. Specifically, Defendants' failure to follow NEPA procedures, as alleged herein, occurred in Portland, Oregon, where Defendant has its regional office.

9. If Plaintiffs prevail, Plaintiffs will seek an award of costs and fees, including attorneys' fees, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

PARTIES

10. Plaintiff HELLS CANYON PRESERVATION COUNCIL (“HCPC”) is a non-profit organization based in La Grande, Oregon with over 1,000 members and supporters. HCPC works to protect and restore the wildlands, waters, unique habitats and biodiversity of the Hells Canyon-Wallowa and Blue Mountain ecosystems through advocacy, education and collaboration, advancing science-based policy, and protective land management. HCPC has been actively involved in regional and statewide wolf recovery efforts and played a key role in developing the Oregon Wolf Conservation and Management Plan (Wolf Conservation Plan).

11. Plaintiff CASCADIA WILDLANDS is an Oregon non-profit corporation headquartered in Eugene, Oregon that educates, agitates, and inspires a movement to protect and restore Cascadia’s wild ecosystems. Cascadia Wildlands envisions vast old-growth forests, rivers full of salmon, wolves howling in the backcountry, and vibrant communities sustained by the unique landscapes of the Cascadia Bioregion. Cascadia Wildlands has worked for over a decade on wolf recovery in Oregon and was actively involved in the development and formation of the Wolf Conservation Plan.

12. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“the Center”) is a non-profit corporation dedicated to the preservation, protection and restoration of biodiversity, native species, and ecosystems. The Center has over 42,000 members worldwide, including members within this district. The Center has offices in Tucson and Phoenix, Arizona; Silver City, New Mexico; Washington, D.C.; San Francisco, Los Angeles, and Joshua Tree, California; and Portland, Oregon.

13. Plaintiff OREGON WILD is a non-profit corporation with approximately 7,000 members and supporters throughout the state of Oregon and the Pacific Northwest. Oregon Wild and its members are dedicated to protecting and conserving Oregon’s lands, wildlife, and waters as an

enduring legacy. Oregon Wild is headquartered in Portland, Oregon, and has offices in Eugene, Oregon, and Bend, Oregon.

14. The aesthetic, recreational, scientific, educational, and religious interests of Plaintiffs' members have been and will continue to be adversely affected and irreparably injured if Defendants continue to act and fail to act as alleged and affirmatively implement the action that Plaintiffs challenge with this litigation. The wolves at stake in this litigation are members of one of Oregon's only two breeding packs. There are fewer than twenty-five confirmed wolves in the entire state. Federal wildlife officials have already killed two of Oregon's wolves, and USFWS is now in the process of trying to kill two more. The lethal removal of any wolf in Oregon, given how few wolves there are, can significantly impact the recovery of the entire species. Plaintiffs' injuries are actual, concrete, particularized injuries caused by Defendants' failure to comply with mandatory duties under federal laws. These injuries would be redressed by the relief sought.

15. Defendant PAUL HENSON is the Oregon State Supervisor for USFWS, and he is sued in that official capacity.

16. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is an agency of the United States and a division of the U.S. Department of the Interior.

LEGAL BACKGROUND

National Environmental Policy Act

17. Congress enacted NEPA in 1969, directing all federal agencies to assess the environmental impacts of proposed actions that significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C). NEPA's disclosure goals are two-fold: (1) to insure that the agency has carefully and fully contemplated the environmental effects of its action, and (2) to insure that the public has sufficient information to challenge the agency's action.

18. The Council on Environmental Quality (CEQ) promulgated uniform regulations to implement NEPA that are binding on all federal agencies. 42 U.S.C. § 4342; 40 C.F.R. §§ 1500 *et seq.*

19. NEPA requires federal agencies to prepare an environmental impact statement (“EIS”) for any “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).

20. An EIS is a “detailed statement” that must describe (1) the "environmental impact of the proposed action," (2) any "adverse environmental effects which cannot be avoided should the proposal be implemented," (3) alternatives to the proposed action, (4) "the relationship between local short term uses of man's environment and the maintenance and enhancement of long-term productivity," and (5) any "irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented." 42 U.S.C. § 4332.

21. When it is not clear whether an action requires the preparation of an EIS, the regulations direct agencies to prepare a document known as an environmental assessment (“EA”) in order to determine whether an EIS is required. 40 C.F.R. §§ 1501.4(b), 1508.9. An EA is a “concise public document” that must “briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.” 40 C.F.R. § 1508.9(a). An EA “shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.” 40 C.F.R. § 1508.9(b).

22. If, based on an EA, an agency determines that an action may have a significant environmental impact, the agency must prepare an EIS. 40 C.F.R. § 1501.4(c). If the agency

determines that the impacts will not be significant, the agency must prepare a Finding of No Significant Impact (“FONSI”). 40 C.F.R. § 1501.4(e); 40 C.F.R. § 1508.13.

23. “Major federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility.” 40 C.F.R. § 1508.18. This includes “new and continuing activities, including projects and programs entirely or partially financed, assisted, conducted, regulated, or approved by federal agencies.” *Id.*

Administrative Procedure Act

24. Judicial review of federal agency action is governed by the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.* Under the APA, courts “shall hold unlawful and set aside” agency action, findings, or conclusions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law” or “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A), (D).

Oregon Endangered Species Act and Oregon Wolf Conservation Plan

25. Gray wolves were listed as an endangered species by the state of Oregon in 1987 with the passage of the Oregon Endangered Species Act (“Oregon ESA”). ORS 496.171-496.182.

26. It is illegal to “take” an endangered or threatened species. ORS 498.026. “Take” means “to kill or obtain possession or control of any wildlife.” ORS 496.004(16).

27. The Oregon ESA further requires the “conservation” of threatened and endangered wildlife, which is defined by the goal of bringing such species “to the point at which measures under [the Oregon ESA] are no longer necessary.” ORS 496.171(1).

28. Achievement of this recovery goal is measured by five “de-listing criteria.” Removing a species from the state endangered species list is thus appropriate where: (1) the species is longer in danger of extinction in any significant portion of its range, (2) the natural reproductive

potential is not in danger of failure due to limited population numbers, disease, predation, or other natural or human-related factors, (3) the species is not undergoing imminent or active deterioration of range or habitat, (4) the species is not being over-utilized for commercial recreational, scientific, or educational purposes, and (5) existing programs and regulations are adequate to protect the species and its habitat.

29. In furtherance of its responsibilities under the Oregon ESA, the Oregon Fish and Wildlife Commission “shall establish by rule quantifiable and measurable guidelines that it considers necessary to ensure the survival of individual members of the species.” ORS 496.182(2).

30. In 2005, the Oregon Fish and Wildlife Commission adopted the Wolf Conservation Plan and promulgated regulations to implement the plan. OAR 635-110-0000 through 635-110-0040.

31. The Wolf Conservation Plan has three phases. Phase I, the most protective, applies when there are four or fewer breeding pairs of wolves in the eastern half of the state. Phase II applies when there are between five and seven breeding pairs of wolves in the eastern half of the state. Phase III, the least protective, applies when there are more than seven breeding pairs of wolves in the eastern half of the state.

32. The Wolf Conservation Plan is currently in Phase I. During this phase, the Wolf Conservation Plan focuses on methods and procedures to protect wolves so that the species can be de-listed and so a self-sustaining population can eventually persist.

33. The Wolf Conservation Plan recognizes that the re-establishment of wolves in Oregon will lead to conflicts with livestock. As a result, the Wolf Conservation Plan “necessitate[s] tolerance for wolves on both public and private lands” by developing a “range of options for livestock producers to deal with problem wolves.”

34. OAR 635-110-0010 lists and explains measures that may be taken to address wolf-livestock conflicts during Phase I of the Wolf Conservation Plan. These measures include non-injurious harassment, non-lethal injurious harassment, relocation, lethal removal of wolves caught in the act of wounding or killing livestock, and lethal removal of wolves to deal with chronic depredation. OAR 635-110-0010(2)-(6).

35. When wolf numbers are still low, the Wolf Conservation Plan places more emphasis on non-lethal control techniques.

FACTUAL BACKGROUND

36. Wolves were once abundant throughout all of North America except in extreme desert regions. With the European settlement of North America, “superstition and fears . . . led to widespread persecution of wolves” that resulted in their extirpation from more than 95 percent of their range in the lower-48 states. According to USFWS, “wolves were hunted and killed with more passion and zeal than any other animal in U.S. history.” Wolves were completely extirpated from Oregon by the mid-1940s.

37. Human attitudes towards wolves in North America have grown more in favor of species conservation over the past few decades and new scientific findings have emerged from the field of conservation biology that demonstrate wolves, as top predators and a keystone species, contribute to properly functioning ecosystems. These changes in wildlife values are embodied in the federal Endangered Species Act of 1973 and the Oregon ESA of 1987.

38. Gray wolves were federally listed as an endangered species in 1974 and have been a state-listed species since the enactment of the Oregon ESA. It was not until 1995 and 1996, however, when wolves from Canada were reintroduced into Yellowstone National Park and the

wilderness of central Idaho, that an opportunity for wolves to gradually re-colonize their native habitat in Oregon began.

39. In February 1999, a lone female gray wolf made its way across the Snake River into the John Day area. After much heated debate as to whether the wolf should be allowed to remain in the state, federal wildlife officials captured the animal and relocated it back to Idaho. In 2000, a radio-collared wolf was found dead along Interstate 84 south of Baker City, and a wolf without a radio collar was found shot between Ukiah and Pendleton. In May 2007, another gray wolf was found shot in Union County, OR. All four wolves were confirmed to have been migrants from Idaho.

40. In January 2008, Oregon Department of Fish and Wildlife (“ODFW”) confirmed that a radio-collared female wolf from Idaho was traveling throughout northeast Oregon’s Wallowa-Whitman National Forest. In November 2009, ODFW captured video footage confirming that this female had established a pack of at least ten wolves, including pups. This marks some of the first evidence of multiple wolves and wolf reproduction in Oregon in over sixty years. This pack represents one of only two breeding pairs of wolves currently known to occupy Oregon and has been named the “Imnaha pack” for its association with the Imnaha Wildlife Management Unit (east of Joseph, Oregon in Wallowa County).

41. Between April and August 2009, ODFW confirmed that two young gray wolves (not members of the Imnaha pack) were responsible for a series of livestock depredations in the Keating Valley area of Baker County, Oregon. In response, federal wildlife officials killed both of the Keating Valley wolves, and that action was carried out on September 5, 2009.

42. In May 2010, wolves were deemed responsible for the loss of six cattle calves in northeast Oregon. In response, the state of Oregon issued nine lethal take permits, pursuant to

OAR-635-110-0010(5), authorizing landowners or their designated agents to kill a wolf or wolves “caught in the act” of attacking livestock on their private property (or a legally occupied public land grazing allotment in the same basin where the wolves have been confirmed). The state also authorized a federal agency called Wildlife Services to actively hunt and kill two wolves from the Imnaha pack.

43. On July 1 2010, Plaintiffs in this action filed a lawsuit against Wildlife Services, alleging an identical claim to the one presented here (civ. case no. 10-759-BR). USFWS was not involved in the action in 2010, and was thus not a named party. Plaintiffs filed a motion for preliminary injunction in that case, but Wildlife Services agreed to withdraw their participation in the lethal removal of any wolves in Oregon unless and until an EA or EIS was prepared. A settlement agreement was filed on April 18, 2011, and stated, “Defendants and their agents [agree not to](#) knowingly or intentionally kill any wolf in the State of Oregon [from the effective date of this agreement](#), or provide funding or material support for the killing of any wolf in Oregon, unless and until an environmental assessment or environmental impact statement, as [appropriate](#), [has been prepared to analyze the effects of any such activities pursuant to NEPA and its implementing regulations](#).”

44. In 2011, wolves have been confirmed as the cause of a single livestock depredation, and one other “probable” but unconfirmed depredation. In response to this, USFWS announced on May 2, 2011 that it would kill two additional wolves from the Imnaha Pack.

FIRST CLAIM FOR RELIEF

USFWS Violated NEPA by failing to produce an Environmental Assessment or Environmental Impact Statement

45. Plaintiffs incorporate by reference all preceding paragraphs.

46. NEPA requires federal agencies to publish an EIS analyzing and documenting the environmental impacts, including direct, indirect, and cumulative impacts, of “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(c).

47. “Major federal action” includes actions with effects that may be major and which are potentially subject to federal control and responsibility. 40 C.F.R. § 1508.18. Federal actions include “projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies.” 40 C.F.R. § 1508.18.

48. When it is not clear whether an action requires the preparation of an EIS, agencies must prepare an EA to determine whether an EIS is required. 40 C.F.R. §§ 1501.4(b), 1508.9. An EA is a “concise public document” that must “briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.” 40 C.F.R. § 1508.9(a).

49. USFWS is a federal agency organized within the Department of the Interior.

50. The lethal removal of wolves in Oregon is a federal action because it is “entirely or partly financed, assisted, or conducted” by USFWS. In the past two years, federal wildlife agents have already financed, assisted and/or conducted the lethal removal of two of Oregon’s endangered gray wolves. USFWS is now actively financing, assisting, and/or conducting the lethal removal of two more of Oregon endangered gray wolves. If USFWS fulfills this plan, federal agents will have killed four of the very few wolves known to exist in the entire state of Oregon.

51. USFWS, a federal agency, is required by NEPA to prepare an EIS, or at the very least an EA, to analyze the environmental impacts of the lethal action against endangered gray wolves.

52. Without observance of mandatory NEPA procedures, USFWS's participation in the lethal removal of wolves is arbitrary, capricious, not in accordance with law, and without observance of procedures required by law. 5 U.S.C. § 706.

53. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

PLAINTIFFS' PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court:

1. Declare that Defendants violated the National Environmental Policy Act, the Administrative Procedure Act, and their implementing regulations;
2. Enjoin Defendants and their agents from proceeding with the lethal removal of gray wolves in Oregon unless and until the violations of federal law set forth herein have been corrected to the satisfaction of this court;
3. Award Plaintiffs their reasonable fees, costs and expenses associated with this litigation pursuant 28 U.S.C. §2412 or other authority; and
4. Grant Plaintiffs such other and further relief as the Court deems just and equitable.

Respectfully submitted and dated this 3rd day of May, 2011.

/s/ Daniel Kruse

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