Nos. 16-2189 (consolidated with 16-2202)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NEW MEXICO DEPARTMENT OF GAME AND FISH,

Plaintiff - Appellee,

v.

U.S. DEPARTMENT OF THE INTERIOR, *et al.*,

Defendants - Appellants,

and

DEFENDERS OF WILDLIFE, CENTER FOR BIOLOGICAL DIVERSITY, WILDEARTH GUARDIANS, AND NEW MEXICO WILDERNESS ALLIANCE,

Intervenors - Defendants - Appellants.

On Appeal from the United States District Court
District of New Mexico, Case No. 1:16-cv-00462-WJ-KBM
Honorable William P. Johnson, District Judge

BRIEF OF NEW MEXICO CATTLE GROWERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE AND IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae, New Mexico Cattle Growers Association, hereby states it is a nonprofit organization that has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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IDENTITY AND INTERESTS OF AMICUS CURIAE[1]

New Mexico Cattle Growers is an association organized to advance and protect the cattle industry in New Mexico. It has approximately 1,400 members in 32 of the State's 33 counties as well as in 19 other states. Its objective includes providing an official and united voice on issues of importance to cattle producers and feeders.

The New Mexico Cattle Growers Association advocates on behalf of its members on numerous issues related to federal laws that affect the livestock industry, including the Endangered Species Act (ESA) and its regulations. The Association lobbies on ESA issues, publishes information on ESA issues for its members, researches issues arising under the ESA, and submits comments to federal agencies addressing concerns that the ESA poses for the organization and its members. The New Mexico Cattle Growers Association and its members have a unique interest in this case.

Many members of the Association have suffered serious harm from the Mexican gray wolf reintroduction program over the past 18 years. For example, they have lost livestock to wolf depredation. As recently as March 2016, the U.S. Fish and

[1] Pursuant to Federal Rule of Appellate Procedure 29(c), amicus affirms that no counsel for any party authored this brief in whole or in part. No person, other than amicus, their members, or their counsel, made a monetary contribution to its preparation or submission. Pursuant to Federal Rule of Appellate Procedure 29(a), amicus affirms that all parties have consented to the filing of this brief.

Wildlife Service (Service) ordered the removal of a wolf from the wild due to multiple cattle depredations. *See* U.S. Fish and Wildlife Service, *Management Decision; Luna Pack* (Mar. 28, 2016). Association members have also lost income from wolves harassing livestock; running off weight gains and causing females to not breed due to stress. They have lost pets and horses to wolves and some members have had wolves follow their children home from school.

Association members receive little compensation for these federally created losses. In 2015, one member lost approximately $50,000 to direct wolf kills, but was offered compensation of only $5,000. His losses for 2016 are well over $100,000 so far.

Association members receive no compensation for weight losses and lack of breeding. Additionally, Association members incur increased labor and management expenses to protect against wolf impacts that are uncompensated.

The recent expansion of the areas wolves can roam in New Mexico will increase the number of ranchers and families affected and increase the costs associated with inevitable wolf conflicts.

The U.S. Fish & Wildlife Service has done little to cooperate with ranches or the New Mexico Department of Game and Fish throughout the history of the program. Therefore, the New Mexico Cattle Growers Association supports the preliminary injunction issued in this case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Federal defendants, Department of Interior, *et al.*, (Interior) have released Mexican gray wolves within the borders of the State of New Mexico without a state permit. Interior plans to release additional wolves into the State without the State's agreement or authorization. The district court held these actions likely violated federal and state law and issued a preliminary injunction to stop further releases. Interior now challenges the preliminary injunction as an abuse of discretion, but provides no compelling argument in support of the claim.

The law and facts support the district court's conclusion: (1) that the State will suffer irreparable harm in the absence of a preliminary injunction because unilateral and unrestricted release of wolves undermines the State's ability to exercise its power to manage wildlife for the good of its citizens; (2) that Interior will not suffer any countervailing harm of its own because the unilateral release of Mexican gray wolves is not essential to the survival of the species; (3) that the public interest in fostering federal-state cooperation and preserving the State's police power favors the State in this case; and (4) that the State will likely prevail on the merits because the only reasonable reading of federal and state law requires Interior to comply with state permit requirements.

ARGUMENT

I

STANDARD OF REVIEW

This court reviews a preliminary injunction for an abuse of discretion. *See ACLU v. Johnson*, 194 F.3d 1149, 1155 (10th Cir. 1999). This is a high bar, not easily overcome. *Id*. (A district court abuses its discretion if it "commits an error of law, or is clearly erroneous in its preliminary factual findings."). The district court did not abuse its discretion in granting the preliminary injunction in this case.

II

THE PRELIMINARY INJUNCTION IS WARRANTED BOTH LEGALLY AND FACTUALLY

A party seeking a preliminary injunction must satisfy four elements: (1) that it will suffer irreparable harm if the preliminary injunction is not issued; (2) that the threatened injury outweighs the harm the preliminary injunction might cause to the opposing party; (3) that the preliminary injunction will not adversely affect the public interest; and (4) that the party seeking the preliminary injunction has a substantial likelihood of prevailing on the merits. *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001).

A. The State and Its Citizens Will Suffer Irreparable Harm if the Preliminary Injunction Is Not Sustained.

Irreparable harm is established if the party seeking the preliminary injunction shows a significant risk of harm that cannot be compensated with monetary damages, and the harm is likely to occur before the district court rules on the merits. *See RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009).

Although "Interior recognizes that significant damage to wildlife can constitute irreparable harm in some circumstances," and does not deny that even a single wolf can cause significant damage, Interior argues the State has not demonstrated such harm because the State has not quantified the effect of future releases on ungulates in the wild. *See* Interior's Opening Brief at 24-27. But the law does not require such precision. It is axiomatic that an increase in wolves will likely result in an increase in harm to both state and private resources. As noted above, in the Identity and Interests of Amicus, Interior ordered the removal of a wolf just this year for multiple depredations. In the face of these facts, the district court's conclusion that the State would suffer irreparable harm in the absence of a preliminary injunction was not "clearly erroneous."

Also, the State did not rely on a significant risk of harm to wildlife and livestock alone. The State also asserted it would suffer irreparable harm to its sovereign power if a preliminary injunction did not issue. The district court found

New Mexico has suffered and will continue to suffer harm from the reintroduction of wolves into the State because the current and planned reintroductions violate the State's permitting laws and interfere with the State's ability to comprehensively manage wildlife within the State. And, these effects cannot be satisfied with monetary damages before or after the court rules on the merits of the claim.

New Mexico law prohibits the release of wolves and other wildlife in the State without a State permit:

> It shall be unlawful for any person or persons to release, intentionally or otherwise, or cause to be released in this state any mammal . . . except domestic mammals . . . without first obtaining a permit from the [D]epartment of [G]ame and [F]ish.

New Mexico Administrative Code (NMAC) § 19.31.10.11.

Federal defendants have promulgated regulations of their own that require Interior to comply with state law before releasing wolves into the wild. *See* 43 C.F.R. § 24.4(i)(5)(i) (stating the federal government will "comply with state permit requirements" when "carrying out . . . programs involving reintroduction of fish and wildlife.")

Federal regulations also acknowledge the sovereign right of states to control wildlife within state boundaries: "States possess broad trustee and police powers over fish and wildlife within their borders, including fish and wildlife found on Federal lands within a State." 43 C.F.R. § 24.3(a).

Complying with state law is the linchpin of cooperative federalism the ESA was designed to promote. *See* Endangered Species Act § 6: Cooperation With States. But Interior's release of Mexican gray wolves in New Mexico without a state permit, indeed, after the express denial of two state permits, does not comply with federal and state law, and threatens to undermine the acknowledged powers of the State over fish and wildlife within its borders.

The harmful effects of unsanctioned release of wolves in New Mexico are real and substantial, and undermine the traditional and sovereign rights and responsibilities of the State to enforce its laws and protect and preserve state resources. The court's finding of irreparable harm is, therefore, not an abuse of discretion.

B. The Threatened Harm to the State Outweighs Any Injury to Federal Defendants.

In weighing respective harm to the parties, the district court found the equities favor New Mexico because the preliminary injunction is only temporary, and the delay will not significantly affect Interior's conservation efforts before a ruling on the merits. The district court based this determination on two facts: (1) that the federal government has been involved in releasing wolves into the State for years, and plans to continue to do so for years to come; and (2), the wolf reintroduction program involves only a "nonessential experimental population." But Interior ignores these facts, arguing that, if this Court does not authorize immediate release of more wolves,

it will increase the "risk of inbreeding and extinction." Opening Brief at 28. This is a red herring. By definition, the loss of a "nonessential experimental population" will not put the species at risk of extinction or undermine the species' chance of recovery.

> The Act instructs us to determine whether a population is essential to the continued existence of an endangered or threatened species in the wild. Our regulations define essential experimental populations as those "whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild (50 C.F.R. 17.80(b))." The Service defines "survival" as the condition in which a species continues to exist in the future while retaining the potential for recovery (Service and National Marine Fisheries Service 1998). Inherent in our regulatory definition of essential is the impact the potential loss of the experimental population would have on the species as a whole (Service 1984). **All experimental populations not meeting this bar are considered nonessential** (50 C.F.R. 17.80(b)).

80 Fed. Reg. 2512-2550 (emphasis added)

The Mexican gray wolf is a "nonessential experimental population." Delayed release will therefore not "appreciably reduce the likelihood of the survival of the species," nor compromise the species' "potential for recovery." This conclusion is compelled by the facts and is not an abuse of discretion.

C. The Preliminary Injunction Does Not Adversely Affect the Public Interest.

The district court found that issuance of the preliminary injunction "would not be adverse to the public interest" because the injunction is not permanent and does not unduly interfere with Interior's conservation duties under the Endangered Species Act.

Nevertheless, Interior implies only it can represent the public interest in this case because in enacting the ESA, Congress afforded species protection the highest priority. *See* Opening brief at 30 (citing *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978). That is not true here, however.

"Nonessential experimental populations" do not share the same priority status as other listed species. The protections the ESA affords "nonessential experimental populations" are substantially less than those afforded "essential experimental populations." For example, the Service treats "nonessential experimental populations," such as the "endangered" Mexican gray wolf, as "threatened" when reintroduced into a National Wildlife Refuge and as "proposed for listing" outside a refuge. 80 Fed. Reg. 2519. Also, the ESA prohibits designation of critical habitat for "nonessential experimental populations," whereas critical habitat must be designated for other listed species. *Id*. Contrary to Interior's claim that Congress intended species conservation to supercede all other societal values in every case, the ESA requires the management of "nonessential experimental populations" to accommodate local needs and circumstances, particularly those affecting landowners like the New Mexico Cattle Growers:

> Our finding of whether a population is essential or nonessential is made with our understanding that Congress enacted the provisions of section 10(j) of the Act to address fears that reestablishing populations of threatened or endangered species into the wild could negatively impact

> landowners and other private parties. Congress also recognized that flexible rules could encourage recovery partners to actively assist in the reestablishment and hosting of such populations on their lands (H.R. rep. No. 97-567, at 8 (1982)). Although Congress allowed experimental populations to be identified as either essential or nonessential, they noted that most experimental populations would be nonessential (H.R. Conference Report No. 835, supra at 34; Service 1984)).

80 Fed. Reg. 2550.

> Under 50 C.F.R. 17.81(d), the Service must consult with appropriate State game and fish agencies, local governmental entities, affected Federal agencies, and affected private landowners in developing and implementing experimental population rules. To the maximum extent practicable, section 10(j) rules represent an agreement between the Service, the affected State and Federal agencies, and persons holding any interest in land that may be affected by the establishment of an experimental population.

Id. at 2518.

If the intent of Congress serves to define the public interest, as federal defendants argue, then the public interest in a case such as this calls for Interior to cooperate fully with the State and local landowners. So defined, the public interest is expressly codified in 43 C.F.R. § 24.4(i)(5)(i) that requires Interior to "comply with state permit requirements" when "carrying out . . . programs involving reintroduction of fish and wildlife." Interior undermined the intent of Congress, and therefore the public interest, when it released wolves into the wild contrary to state law.

And, of course, the State itself represents the public interest in comprehensively managing the State's wildlife and ecosystems and protecting private and state

resources from a public nuisance, such as from wolf depredation. The conflicts between wolves and New Mexico Cattle Growers, discussed above, demonstrate a need for greater federal-state cooperation than is occurring under the federal government's plan to unilaterally introduce wolves in large areas of the State.

The district court's determination that the preliminary injunction does not adversely affect the public interest is not an abuse of discretion.

D. The State Has a Substantial Likelihood of Success on the Merits.

The fourth and final element that must be satisfied to support a preliminary injunction is a substantial likelihood that the movant will prevail on the merits. *Prairie Band of Potawatomi Indians,* 253 F.3d at 1246. However, where the injunction is prohibitory—designed to stop the nonmovant acting in a manner that disturbs the status quo—as in this case, the movant is entitled to a lesser standard of proof if the first three elements are met. *See Walmer v. United States Dep't of Defense,* 52 F.3d 851, 854 (10th Cir.1995). The movant may establish the final element simply by raising questions "so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberative investigation." *Prairie Band of Potawatomi Indians,* 253 F.3d at 1246-1247. Interior ignores this aspect of the law. But the lower standard has been met.

Interior raised four arguments in support of its claim that it need not obtain a state permit to release wolves in the State of New Mexico. The district court rejected all four.

First, Interior argued it did "comply" with state permit requirements because it applied for two permits which were denied. However, the district court did not credit the argument. The court held "the clear meaning of compliance with State permit requirements requires actually receiving a permit and not merely applying for one." *New Mexico Dept. of Game and Fish v. United States Department of Interior*, 2016 WL 4536465, *8 (D.N.M. June 10, 2016).

Second, Interior argued the State's permit denial prevents the Secretary from "carrying out his statutory responsibilities" thus relieving Interior from the duty of obtaining a state permit. Under 43 C.F.R. § 24.4(i)(5)(i), Interior "shall" "comply with state permit requirements" when "carrying out . . . programs involving reintroduction of fish and wildlife," *except* "in instances where the Secretary of the Interior determines that such compliance would prevent him from carrying out his statutory responsibilities." *Id.* The district court disagreed with Interior's interpretation of "statutory responsibilities," holding the ESA (16 U.S.C. § 1539(j)(2)(A)) allowed, but did not require the Secretary to release experimental

populations into the wild as a means of conserving the species. *New Mexico Dept. of Game and Fish*, 2016 WL 4536465 at *9.

Third, in reliance on this Court's decision in *Wyoming v. United States*, 279 F.3d 1214 (10th Cir. 2002), Interior argued the State's permit requirements are preempted by the ESA. The district court observed that *Wyoming* relied on state law alone, while New Mexico relies on both state and federal law in this case. Thus, *Wyoming* is inapposite. *New Mexico Dept. of Game and Fish*, 2016 WL 4536465 at *9.

And fourth, Interior argued that under *Hancock v. Train*, 426 U.S. 167 (1976), even if a statute requires compliance with state permit requirements, the State could not interfere with federal actions under the intergovernmental immunity doctrine. The district court refused to accept this interpretation of *Hancock*, concluding *Hancock* represented "a more limited holding." *New Mexico Dept. of Game and Fish*, 2016 WL 4536465 at *9.

This Court need not determine who would prevail on these issues, under either an abuse of discretion or de novo standard. This Court need only determine whether the motion for preliminary injunction raises questions "so serious, substantial, difficult and doubtful as to make the issues ripe for litigation and deserving of more deliberative investigation." *Walmer,* 52 F.3d at 854.

The questions raised here are serious, substantial, difficult, and doubtful. Whether Interior must obtain a permit before releasing "nonessential experimental populations" into the wild is a serious matter of national importance that implicates the scope of both federal and state power, and the constitutional structure. Interior argues immediate release of more wolves into the State is necessary to the recovery of the species. In granting the preliminary injunction, the district court had to interpret several regulatory and statutory provisions, as well as distinguish a decision of this Court and the Supreme Court of the United States. This involved substantial and difficult questions of judicial precedent and deference to agency interpretation. In as much as the State prevailed on the preliminary injunction, on all counts, it is doubtful that Interior will prevail on the merits. The issues have been briefed and "are ripe for litigation and deserving of more deliberative investigation." *Id*.

CONCLUSION

Federal defendants released wolves into the wild in violation of federal and state law, creating an unnecessary conflict with the State of New Mexico, and putting private landowners at risk. They plan to release more wolves into the wild, without

state approval, exacerbating federal-state tensions. The preliminary injunction was, therefore, justified and should be upheld.

DATED: November 3, 2016.

Respectfully submitted,

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on November 3, 2016.

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