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FILED

NOV 15 2022

By ANGIE SPARKS, Clerk of District Court
Deputy Clerk

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

WILDEARTH GUARDIANS and
PROJECT COYOTE, a project of the
Earth Island Institute,

Plaintiffs,

v.

STATE OF MONTANA, by and through
the MONTANA DEPARTMENT OF
FISH, WILDLIFE, AND PARKS and the
MONTANA FISH AND WILDLIFE
COMMISSION,

Defendants.

Cause No.: DDV-2022-896

**TEMPORARY RESTRAINING
ORDER AND ORDER
TO SHOW CAUSE**

Plaintiffs WildEarth Guardians and Project Coyote, represented by Rob Farris-Olsen, David K.W. Wilson, Jr., and Jessica L. Blome, have moved the Court to issue a temporary restraining order pending a hearing on their motion for a preliminary injunction. Notice of the motion for a temporary restraining order

1 has been served on the State of Montana and counsel for the Montana
2 Department of Fish, Wildlife, and Parks (the Department), Sarah Clerget and
3 Alexander Scolavino¹. For the reasons that follow, the motion will be granted in
4 part and denied in part.

5 Plaintiffs seek to halt the 2022-2023 wolf hunting season on
6 several grounds. They contend that the State, through the Department and the
7 Fish and Wildlife Commission (the Commission), have set wolf “harvest” quotas
8 and wolf management practices based on an integrated population occupancy
9 model (iPOM) that departs from field-based methods for tracking wolves that
10 Plaintiffs contend are contemplated by the 2002 Draft Montana Wolf
11 Conservation and Management Planning Document (the 2002 Wolf Plan).
12 Plaintiffs contend use of the iPOM method has effectively amended the 2002
13 Wolf Plan without going through notice-and-comment rulemaking, depriving
14 them of public participation in rulemaking. They also contend that the iPOM
15 method is unreliable, overestimates populations, and has prompted over-
16 aggressive wolf management that, this season, could result in the loss of more
17 than 40% of the existing wolf population in Montana. They also challenge the
18 State’s failure to periodically review the 2002 Wolf Plan, asserting that the Wolf
19 Plan is scientifically outdated and fails to account for new evidence about the
20 sensitivity of wolf populations to human-caused depredation.

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24 ¹ The Montana Fish and Wildlife Commission, Montana Department of Fish, Wildlife, and Parks, and the Montana
25 Attorney General were served with the summons and complaint on November 1, 2022, but the State has not yet
entered an appearance in this matter.

1 In addition, Plaintiffs challenge several 2021 legislative
2 enactments, and the regulations implementing those enactments, on two primary
3 grounds. Plaintiffs contend that the statutes and regulations violate the public
4 trust doctrine, which they contend is enshrined in the Montana Constitution.
5 Plaintiffs also contend that these statutes and rules are preempted by federal law,
6 both by failing to protect wolves that temporarily range out of Yellowstone and
7 Glacier National Parks, and by interfering with federal wildlife management
8 policy on federally-managed lands.

9 The merits of Plaintiffs' claims are not before the Court today.
10 What Plaintiffs seek right now is a temporary restraining order (TRO), a form of
11 preliminary injunction granted in advance of a hearing. It is a narrow remedy
12 designed to "preserve the status quo until a hearing can be held to determine
13 whether an injunction should be granted." *Mont. Tavern Ass'n v. State*,
14 224 Mont. 258, 264, 729 P.2d 1310 (1986). To obtain a TRO, the plaintiff must
15 set forth material facts "establishing irreparable injury or plaintiff's right to the
16 relief sought therein." *Boyer v. Karagacin*, 178 Mont. 26, 31, 582 P.2d 1173
17 (1978). A TRO is appropriate where "immediate and irreparable injury" would
18 occur if the Court were to give the adverse party time to be heard. Mont. Code
19 Ann. § 27-19-314. Because a TRO is a species of preliminary injunction,
20 Plaintiffs must also make at least a preliminary showing that they can satisfy one
21 or more of the statutory prerequisites for a preliminary injunction under Mont.
22 Code Ann. § 27-19-201.

23 Based on the face of Plaintiffs' filings, they have made colorable
24 arguments that the State's current wolf management practices may violate state
25 or federal law. (Whether Plaintiffs will ultimately demonstrate themselves

1 entitled to a preliminary injunction *pendente lite* or to final relief, of course,
2 remains to be seen.) Plaintiffs have also colorably shown that several 2021
3 legislative enactments and implementing regulations, particularly regarding
4 extended trapping practices and lifting quotas in areas near Yellowstone National
5 Park and Glacier National Park may interfere with federal authority to manage
6 wildlife in the Parks and on federal lands.

7 Plaintiffs have also demonstrated they could suffer irreparable
8 injury if the State is not restrained pending trial. Environmental damage is
9 frequently irreparable in nature. *Amoco Prod. Co. v. Vill. of Gambell*,
10 480 U.S. 531, 545 (1987) (“Environmental injury, by its nature, can seldom be
11 adequately remedied by money damages and is often permanent or at least of
12 long duration, i.e., irreparable.”). Wolf depredation allegedly sufficient to cause
13 population loss has previously been found to be an irreparable injury. *See*
14 *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160, 1177–78 (D. Mont. 2008).
15 Plaintiffs allege that because of the use of iPOM modelling in place of field-
16 based population assessment, the Fish and Wildlife Commission has adopted
17 overly optimistic estimates of wolf populations and in turn permitted overly
18 aggressive hunting quotas for 2021 and 2022. They claim that the quota in place
19 could result in the loss of more than 40% of the existing wolf population.
20 Plaintiffs also allege that emerging evidence suggests wolf populations decline
21 when human-caused mortality rates are as low as 22%, and that the current
22 hunting season, if permitted to carry on as it has, would threaten the sustainability
23 of gray wolves in Montana. Plaintiffs emphasize that the over-hunting of wolves
24 constitutes an irreversible act.

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1 With respect to those practices that potentially interfere with
2 federal authority, Plaintiffs have averred sufficient facts demonstrating the
3 potential for immediate and irreparable injury if a TRO is not issued before the
4 State can be heard. They contend that beginning in 2021, the Commission lifted
5 wolf quotas near the national parks, and that the rate of wolves killed near
6 Yellowstone National Park has greatly increased since the lifting of those quotas.
7 They cite a December 2021 letter from the Superintendent of Yellowstone
8 National Park asking the State to close hunting near the Park because of the
9 accelerated killing of Park wolves. The timing of the December 2021 letter
10 suggests that an excessive take of wolves around Yellowstone in potential
11 conflict with federal authority could occur in the next few weeks. And, of course,
12 wolf hunting season is already underway, with trapping season set to begin
13 November 28, 2022.

14 Plaintiffs have also identified practices that may accelerate the
15 taking of wolves prior to a hearing in this matter in ways that could impede the
16 Court's ability to provide effective relief should it ultimately agree with
17 Plaintiffs. They cite the use of snares, which FWP acknowledges are the "new
18 tool most anticipated to increase harvest" and are more likely to result in non-
19 target captures. (Blome Aff. Ex. D, Dkt. 18 at 652.) They also cite the post-2020
20 increase of the "bag limit" for individual hunters to 20 wolves (10 from hunting
21 and 10 from trapping), which allows the potential for individual hunters to
22 accelerate the take of wolves.

23 Plaintiffs want the complete cessation of wolf hunting and
24 trapping. The Court's charge at this stage, however, is simply to maintain the
25 status quo, that is, "the last actual, peaceable, non-contested condition which

1 preceded the pending controversy,” pending hearing. *Flying T Ranch, LLC v.*
2 *Catlin Ranch, LP*, 2022 MT 162, ¶ 28, 409 Mont. 478, 515 P.3d 806. Moreover,
3 injunctive relief must be “no broader than necessary to cure the effects of the
4 harm caused by the violation.” *Simpkins v. Speck*, 2019 MT 120, ¶ 19,
5 395 Mont. 509, 443 P.3d 428. The complete cessation of wolf hunting appears
6 not to be the status quo. Indeed, Plaintiffs themselves acknowledge that, prior to
7 2020, wolf populations remained stable despite hunting activity.

8 More to the point, the Court is not persuaded that a complete
9 cessation of hunting is necessary to avert such *immediate* irreparable harm that
10 the Court should grant this relief without letting the State be heard. The Wolf
11 Harvest Dashboard, cited by Plaintiffs and incorporated into their briefing,
12 currently reflects only 56 harvested wolves to date, only 12% of the 456-wolf
13 quota.² Trapping season has not yet begun. This suggests that at least some
14 hunting activity can continue to proceed without severe impacts on wolf
15 populations at least long enough to afford the State an opportunity to be heard.
16 Whether that would be true in the context of a preliminary injunction pending
17 trial is another story, but today the Court considers only the TRO.

18 The Court is persuaded, however, that interim relief is necessary to
19 ensure there is no acceleration of wolf kills that would impede relief at the
20 preliminary injunction stage. Plaintiffs have sufficiently shown the imminence of
21 over-harvesting of wolves near the national parks, and that the use of snares and
22 the increase in the “bag limit” could amplify wolf kills in a way that limits the
23 Court’s ability to provide relief, should relief be found warranted. Accordingly,
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25 ² Available: <https://experience.arcgis.com/experience/34fbb4c9509e45959f6291965388c345>
(Accessed Nov. 14, 2022).

1 the Court will temporarily restrain the State from permitting wolf kills in excess
2 of the quotas in effect for the three wildlife management areas (as defined in
3 2020) bordering the national parks. The Court will also temporarily restrain the
4 State from permitting kills in excess of the bag limit in effect in 2020, and from
5 allowing snares when trapping season begins.

6 The Court notes that restraining orders entered without notice must
7 expire within ten days, although the Court may extend the expiration time for “a
8 like period” for good cause. Mont. Code Ann. §§ 27-19-316(4), 27-19-317. This
9 TRO is entered after notice was given to the State. Even if the ten-day period
10 applied, the Court notes that would result in the order expiring Friday, November
11 25, 2022, the day after Thanksgiving. Because of the timing of the request for a
12 TRO, the Court cannot set a hearing that gives the parties sufficient time to
13 prepare and ensure the attendance of witnesses if necessary for a hearing, as
14 counsel and potential witnesses alike may be unavailable. Accordingly, the Court
15 finds good cause to permit the terms of the TRO to expire November 29, 2022,
16 which will permit it to hear the matter on the afternoon of November 28, 2022.

17 The Court emphasizes that it expresses no opinion on the merits of
18 Plaintiffs’ claims. The TRO adopted today is intended to be temporary and to
19 restore aspects of the pre-2021 status quo until a hearing can be held. The relief
20 entered today should not be considered by the parties to predictive either of
21 whether a preliminary injunction should issue or the scope of any such
22 injunction. Those matters cannot fairly be assessed until the State has had an
23 opportunity to be heard.

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1 Accordingly,

2 **IT IS ORDERED:**

3 1. Plaintiffs' Motion for Temporary Restraining Order (Dkt.
4 11), filed November 10, 2022, is **GRANTED** in part and **DENIED** in part as set
5 forth in this Order.

6 2. The State of Montana, the Montana Department of Fish,
7 Wildlife and Parks, and the Fish and Wildlife Commission are temporarily
8 **RESTRAINED** and **ENJOINED** as follows:

9 a. The State may not permit any hunting or trapping of
10 wolves in areas of the State that were defined as Wolf Management Units
11 (WMUS) 110, 313, and 316 in 2020 in excess of the quotas then in place.

12 b. The State may not permit the use of snares once
13 trapping season begins.

14 c. The State may not permit individual hunters to hunt or
15 trap wolves in excess of the "bag limit" in effect in 2020.

16 3. On **Monday, November 28, 2022**, at 1:30 p.m., the State
17 shall appear and show cause, if any, why a preliminary injunction should not
18 issue.

19 4. The State will respond to Plaintiffs' motion for preliminary
20 injunction on or before **November 21, 2022**. Plaintiffs may file a reply brief on
21 or before **November 28, 2022**, at noon. Briefs and supporting materials should be
22 served by email, and a courtesy copy of any reply brief must be emailed to
23 Chance Carter, chance.carter@mt.gov.

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1 5. This Order will expire **November 29, 2022, at 5:00 p.m.**,
2 unless earlier dissolved or modified or later extended by the Court for good cause
3 or with consent of the parties.

4 DATED this 15th day of November 2022. *at 11:15 am*

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7 CHRISTOPHER D. ABBOTT
8 District Court Judge

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12 cc: Robert M. Farris-Olsen, by email at rfolsen@mswdlaw.com
13 David K.W. Wilson, Jr., by email at kwilson@mswdlaw.com
14 Jessica L. Blome, by email at jblome@greenfirelaw.com
15 Sarah M. Clerget, by email at sclerget@mt.gov
16 Alexander Scolavino, by email at Alexander.Scolavino@mt.gov