No. 18-35075

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WESTERN WATERSHEDS PROJECT, CENTER FOR BIOLOGICAL DIVERSITY, FRIENDS OF THE CLEARWATER, WILDEARTH GUARDIANS, and PREDATOR DEFENSE,

Plaintiffs-Appellants,

v.

TODD GRIMM and USDA WILDLIFE SERVICES,

Defendants-Appellees

On Appeal From the United States District Court for the District of Idaho
(Senior District Judge Edward M. Lodge)

PLAINTIFFS-APPELLANTS' OPENING BRIEF

Talasi B. Brooks (ISB # 9712) Lauren M. Rule (ISB # 6863) ADVOCATES FOR THE WEST P.O. Box 1612 Boise, Idaho 83701 (208) 342-7024 (208) 342-8286 (fax) tbrooks@advocateswest.org lrule@advocateswest.org	Kristin F. Ruether (ISB # 7914) WESTERN WATERSHEDS PROJECT P.O. Box 2863 Boise, ID 83701 (208) 440-1930 (phone) (208) 475-4702 (fax) kruether@westernwatersheds.org

Attorneys for Plaintiffs-Appellants

CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants Western Watersheds Project, Center for Biological Diversity, Friends of the Clearwater, WildEarth Guardians, and Predator Defense are all non-profit organizations that have no publicly-traded shares and no corporate parent or affiliates with publicly-traded shares.

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INTRODUCTION

The district court improperly held that Plaintiffs-Appellants Western Watersheds Project, Center for Biological Diversity, Friends of the Clearwater, WildEarth Guardians, and Predator Defense (jointly, Conservationists) lack Article III standing to challenge Defendant USDA Wildlife Services' "*Gray Wolf Damage Management in Idaho*" Environmental Assessment (EA) and Decision/Finding of No Significant Impact (Decision/FONSI) for violating the National Environmental Policy Act (NEPA).

Wildlife Services is a federal agency that killed or removed wolves in Idaho under strict federal controls after wolves were reintroduced in the mid-1990's. In 2011, as wolves were being removed from Endangered Species Act (ESA) protection and returned to state management, Wildlife Services issued the EA to assess its Idaho wolf control activities under NEPA for the first time. The EA proposed to continue Wildlife Services' wolf killing under more permissive state management, and to expand its activities to include killing wolves to "protect" elk and deer at the request of the Idaho Department of Fish & Game (IDFG).

Even though the proposal generated over 100,000 comments, alerting the agency to scientific controversy as to the size, nature, and effects of the action, Wildlife Services refused to prepare a full Environmental Impact Statement (EIS). The agency also refused to reconsider its decision after IDFG allowed extensive

wolf hunting and trapping that sharply reduced wolf populations in areas popular for wolf viewing, and peer-reviewed science was published showing such activities were likely affecting the environment in unanticipated ways.

Conservationists sued, requesting that the district court reverse and remand the EA and Decision/FONSI, and order Wildlife Services to prepare a full EIS or supplemental EA to comply with NEPA. The Conservationists' complaint, briefing, and eight standing declarations showed that the NEPA analysis they sought would improve the quality of Wildlife Services' scientific analysis and public disclosure of its activities, and could lead the agency to change its wolf control actions in Idaho. These results would redress their procedural injuries.

Disregarding Conservationists' procedural injuries under NEPA, the district court held they lack Article III standing because it presumed IDFG would kill the same number of wolves if the court enjoined Wildlife Services from doing so. The district court's reasoning is directly contrary to this Court's decision in *WildEarth Guardians v. U.S. Department of Agriculture*, 795 F.3d 1148 (9th Cir. 2015), which confirmed that procedural injuries from Wildlife Services' NEPA violations are redressed by a new NEPA analysis even if a state may conduct predator control itself. The district court erred as a matter of law in failing to apply the relaxed redressability standard for procedural claims, and this Court should reverse.

JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction under 28 U.S.C. § 1331 because Conservationists alleged violations of NEPA, 42 U.S.C. §§ 4321-4370, and sought judicial review under the Administrative Procedure Act (APA), 5 U.S.C. § 706. Compl. ¶¶ 74-92 (ER 185-91). The district court issued an Order on Cross Motions for Summary Judgment (Order) and entered final judgment on January 4, 2018. ER 1-32. Conservationists timely filed their notice of appeal on January 30, 2018. ER 33-36. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED

Did the district court err in dismissing Conservationists' claims for lack of Article III standing, contrary to this Court's holding in *WildEarth Guardians* that procedural injuries from Wildlife Services' NEPA violations are redressed by a new NEPA analysis, even when a state might also conduct predator control?

STATEMENT OF THE CASE

Conservationists filed this action on June 1, 2016, alleging NEPA and APA violations. Compl. ¶¶ 74-92 (ER 165-91). They requested that the court reverse and remand the EA and Decision/FONSI, and "order Wildlife Services to promptly comply with NEPA by preparing a legally and scientifically adequate EIS addressing its Idaho wolf management activities." Compl., Prayer for Relief (ER 190).

After Wildlife Services filed the Administrative Records for the EA and Decision/FONSI and supplemental NEPA claims, CR 14-15, the parties filed cross-motions for summary judgment. CR 16-27. Conservationists' submissions included eight standing declarations of their staff and members. ER 52-128. These individuals described specific places where they have had experiences with wolves in Idaho, and a range of injuries they and their organizations have suffered from Wildlife Services' wolf killing in Idaho. ER 52-128. They also described their injuries from the agency's failure to adequately notify the public of those actions, or to address recent science questioning the effectiveness and ecological impacts of wolf killing. ER 52-128. Conservationists' briefing directed the district court's attention to these declarations and explained why they proved Conservationists' standing under relevant precedent. CR 16, 19, 20, 26.

Without conducting oral argument, the district court issued its Order on January 4, 2018, dismissing Conservationists' claims for lack of Article III standing. ER 2-32. Citing Idaho's wolf management authority, the court presumed that IDFG would reduce the wolf population by the same amount if the court enjoined Wildlife Services from killing wolves – even though Conservationists had not moved for injunctive relief – and therefore held the Conservationists failed to prove redressability under Article III. Order 23-30 (ER 24-31). The Order acknowledged this Court's recent decision in *WildEarth*

Guardians, but distinguished it as being different factually, while disregarding its holdings on procedural injuries and standing. Order 27-29 (ER 28-30). Conservationists timely appealed. ER 33-36.

LEGAL BACKGROUND

NEPA is "essentially a procedural statute." *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1356 (9th Cir. 1994). The NEPA process ensures that an agency carefully considers information concerning significant environmental impacts, and that the public may scrutinize the information and participate in the decision-making process. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The process aims to "foster excellent action" by helping public officials understand environmental consequences and take actions that "protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c).

To this end, NEPA requires federal agencies contemplating major federal actions to prepare an EIS. 42 U.S.C. § 4332(C). NEPA analyses must discuss a proposed action's environmental effects, 40 C.F.R. § 1502.16, evaluate a reasonable range of alternatives to the proposed action, *id*. § 1502.14, and consider mitigation measures to address adverse impacts, *id.* § 1502.14(e). An agency may prepare a shorter EA to determine whether an EIS is necessary, *id*. § 1501.4, but an agency must prepare an EIS whenever a proposed action "may" have significant

environmental impacts. *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1239 (9th Cir. 2005). If the agency concludes on the basis of the EA that the proposed action will not have significant impacts, it must issue a FONSI. 40 C.F.R. § 1501.4(e).

An agency's responsibilities under NEPA do not end with completion of an EA or EIS. If a major federal action remains to occur, and significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts emerge, the agency must supplement its NEPA analysis. *See id.*§ 1502.9(c); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989).

Courts review NEPA violations under the APA, and must set aside agency conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2); *Or. Nat'l Desert Ass'n v. Jewell*, 840 F.3d 562, 568 (9th Cir. 2016).

STATEMENT OF RELEVANT FACTS

A. Wolf Reintroduction In Idaho.

The gray wolf was protected (listed) under the ESA in 1974 after it was nearly extirpated from the lower 48 states by hunting and government-sponsored eradication programs. Defs' SOF ¶ 1 (ER 38); Order 4 (ER 5).

In November 1994, the U.S. Fish & Wildlife Service (FWS) designated portions of Idaho, Montana, and Wyoming as "nonessential experimental population areas" for reintroduction of wolves into the Northern Rockies under ESA Section 10(j). 59 Fed. Reg. 60,252-81 (Nov. 22, 1994) (ER 303-33). FWS released about three dozen wolves into the Central Idaho Experimental Population Area, which encompasses the Selway-Bitterroot, Gospel Hump, and Frank Church-River of No Return Wilderness areas and adjoining public lands. Order 7 (ER 8), ER 321.

Under the Section 10(j) rule, FWS retained management authority over the wolf population in central Idaho, and private hunting or trapping of wolves was prohibited. ER 307-08. However, the 10(j) rule allowed FWS to authorize killing wolves that predated on domestic livestock, to facilitate the public acceptance of wolves by livestock producers and rural communities. ER 267.

Wildlife Services – a unit of the Animal Plant and Health Service in the U.S. Department of Agriculture, which was then called "Animal Damage Control" – was the primary federal agency authorized by FWS to remove or kill wolves. ER 267-68. The Section 10(j) rule limited this authority, however, to ensure the agency only killed wolves documented to have predated on livestock and only when non-lethal alternatives did not succeed. ER 316-18.

Under the reintroduction program, Idaho's wolf population rebounded to an estimated population of 518-732 wolves during 2005-2007. ER 251. Wolf packs became established in many parts of central and northern Idaho, including in and around the Sawtooth National Recreation Area and the Lolo/Selway zones, where "wolf watching" became a growing tourist attraction and many people – including Conservationists' members and staff – were thrilled to see or hear wolves in the wild. *E.g.*, Marvel Decl. ¶¶ 9-13 (ER 104-06), Cole Decl. ¶¶ 57-65 (ER 66-68), Hansen Decl. ¶ 7 (ER 83), Rusnak Decl. ¶¶ 9-19 (ER 123-26).

FWS revised the original Section 10j rule in 2005, and again in 2008, to provide for greater management flexibility to deal with wolf conflicts. ER 204. The 2005 10(j) rule authorized the responsible state wildlife management agencies to handle the day-to-day management of wolves within their jurisdiction after a state wolf management plan was approved by FWS and a Memorandum of Agreement (MOA) signed between the state agency and FWS. *See* ER 200 n.2 (describing 10(j) Rules); *see also* ER 238-40.

B. Idaho Management Plans And Wolf De-Listing.

In 2002, IDFG adopted an initial wolf management plan prepared by the Idaho Legislative Wolf Oversight Committee, a political body. ER 252-55. That 2002 plan set a goal of maintaining a minimal wolf population to avoid ESA listing – only 15 breeding pairs (or about 150 wolves) in the state. ER 213, 254. FWS

approved the plan in 2006, and Idaho began acting as the FWS's "designated agent" for managing wolves. ER 238-40. In 2008, anticipating wolves' removal from federal ESA protection (de-listing), and to ensure its ability to assume wolf management from the FWS, IDFG adopted a revised wolf management plan with a higher goal of maintaining Idaho's wolf population at 2005-2007 levels (518-732 wolves) for the period of 2008-2012.

FWS initially approved de-listing wolves in Idaho, Montana, and Wyoming in February 2008. 73 Fed. Reg. 10,514-15 (Feb. 27, 2008). Soon thereafter, the U.S. District Court for the District of Montana reversed and enjoined the de-listing rule, reinstating wolves as a federally protected species subject to federal FWS management and the Section 10(j) rule. *See Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160 (D. Mont. 2008).

FWS promulgated another de-listing rule in April 2009. 74 Fed. Reg. 15,123 (Apr. 2, 2009). With wolves newly under state management, IDFG immediately instituted a hunting and trapping season in 2009, during which 188 wolves were killed in Idaho, before the new de-listing decision was vacated in 2010. *See Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207, 1228-29 (D. Mont. 2010). After wolves were returned to federal management once more, the State of Idaho announced it would no longer act as the FWS's agent for managing

wolves and suspended the 2008-2012 wolf management plan. ER 199, Defs' SOF ¶ 7 (ER 41).

In 2011, Congress interceded and directed FWS to de-list wolves in Idaho and Montana. 76 Fed. Reg. 25590 (May 5, 2011). This Court affirmed the de-listing in *Alliance for the Wild Rockies v. Salazar*, 672 F.3d 1170 (9th Cir. 2012). Since then, IDFG has managed wolves in Idaho. *E.g.* Defs' SOF ¶ 7 (ER 41).

C. Wildlife Services' Idaho Wolf EA.

Prior to 2010, Wildlife Services asserted that its Idaho wolf control actions were "categorically excluded" from NEPA analysis. *See* ER 235. But with ESA de-listing on the horizon—and after it was sued and determined its practice of relying on categorical exclusions was vulnerable—Wildlife Services decided to prepare a NEPA analysis. ER 235. Wildlife Services issued a draft EA on "Gray Wolf Damage Management in Idaho" in August 2010, followed by a revised draft EA in December 2010, and solicited public comment on both drafts. ER 242-49.

The "preferred alternative" in the revised draft EA proposed to continue and expand Wildlife Services' Idaho wolf control activities, to include killing wolves when requested by livestock producers, and to carry out new wolf removal actions at IDFG's request for so-called "ungulate protection," *i.e.,* to supposedly boost elk or deer populations in areas where wolves were thought to be a factor in not meeting IDFG's ungulate population goals. ER 244.

Wildlife Services received over 100,000 comments on the draft EAs, including from Conservationists. *See* Pls' SOF ¶ 12 (ER 134-35); *see also* ER 209. The comments challenged many of the draft EAs' assumptions regarding the propriety and effects of Wildlife Services' proposed wolf control activities for scientific, ethical, and legal reasons. Pls' SOF ¶ 12 (ER 134-35); *see also* ER 209.

In March 2011, Wildlife Services issued its final EA and Decision/FONSI, adopting the preferred alternative virtually unchanged from the revised draft EA. ER 192-97. Because of the ongoing uncertainties over de-listing, the EA considered scenarios under which wolves would continue to be listed under the ESA and federally-managed, or would be de-listed and state-managed. ER 199, 212-13. However, the EA assumed that under all alternatives, a population of 500 wolves would be maintained in Idaho. ER 223, 227.

D. Idaho Wolf Management Since De-listing.

After the 2011 ESA wolf de-listing, IDFG assumed management of wolves in Idaho under its 2002 wolf plan, setting a floor of only 15 breeding pairs or 150 wolves, instead of following the 2008 plan's management objective of maintaining the wolf population in Idaho at 2005-2007 levels. *See* Answer ¶ 65 (ER 156). It swiftly instituted wolf hunting and trapping seasons with liberal bag limits, which have resulted in hundreds of wolves being killed by recreational hunting and trapping each year since in Idaho. *E.g.*, Answer ¶¶ 3, 66 (ER 144-45, 156).

IDFG also immediately requested Wildlife Services kill wolves in the Lolo zone. Answer ¶¶ 3, 67 (ER 144-45, 157). Later in 2011, it finalized a revised "predation management plan" to guide efforts at reducing wolf populations in the Lolo and Selway zones, which are within and adjacent to the Selway-Bitterroot Wilderness. ER 285. The plan noted that while "sport harvest" is IDFG's primary tool for predator reduction in the Lolo and Selway zones, IDFG may authorize predator control where hunter harvest does not sufficiently reduce predation impacts. ER 285. Between 2011 and 2016, IDFG requested assistance from Wildlife Services to kill about 103 wolves in the Lolo zone, or about 20 wolves a year. ER 287-92; *see also* ER 141. In 2013, IDFG also independently killed 14 wolves to "benefit prey species." ER 300. The public did not learn about these actions until after they were complete. *E.g.*, Haverstick Decl. ¶ 29 (ER 93).

IDFG has taken steps to expand these efforts beyond the Lolo zone. In 2014, it issued a new statewide elk plan that called for reducing wolf populations by 75 percent or more where elk were not meeting management objectives. ER 286. The same year, IDFG issued new predation management plans for the Middle Fork, Panhandle, and Sawtooth elk zones. Answer ¶ 68 (ER 157-58). Most of the Middle Fork zone is comprised of the Frank Church-River of No Return Wilderness, while the nearby Sawtooth zone covers the western half of the Sawtooth National Recreation Area. Answer ¶ 68 (ER 157-58). The plans call for

aggressive wolf reductions in an attempt to boost elk populations. Pls' SOF ¶ 30 (ER 138-39).

In addition, the Idaho Legislature provided a new funding source for wolf killing with the 2014 creation of the Idaho Wolf Depredation Control Board. Answer ¶ 69 (ER 158). The Board acts as a "conduit" to pass money to Wildlife Services to kill wolves and Wildlife Services has received over half a million dollars each year since 2014 to this end. Answer ¶ 69 (ER 158), ER 292.

The combined effects of Wildlife Services' wolf removals combined with others permitted under IDFG management caused substantial reductions in wolf populations in areas popular for "wolf watching" by Conservationists and other members of the public. Cole Decl. ¶¶ 27, 33, 35, 37, 43, 69, 73, 77 (ER 58-71); Marvel Decl. ¶¶ 12, 21-24 (ER 105, 108-09); Rusnak Decl. ¶¶ 15, 19 (ER 125-26). But despite the changes in IDFG management plans, new science concerning the environmental effects of killing predators, and the large numbers of wolves killed in Idaho each year, Wildlife Services determined in a series of 2012, 2013 and 2015 Monitoring Reports that new circumstances did not require supplementation of the 2011 EA. Defs' SOF ¶ 22 (ER 46-47).

Conservationists submitted a formal letter to Wildlife Services in 2016, requesting that Wildlife Service review its prior NEPA analysis in light of the changed circumstances, and, at minimum, supplement the 2011 EA under NEPA.

ER 269-81. With this submission and others, they included peer-reviewed studies showing that killing wolves may actually increase livestock depredations; new information regarding the effects of lethal control on wolf pack social structure; science questioning whether Idaho's wolf population can remain stable in light of the levels of wolf removals; new studies regarding the trophic cascade dynamic[1]; and publications indicating that killing predators does not increase social tolerance for predators. ER 269-81. Despite these submissions, Wildlife Services failed to supplement its 2011 EA.

E. Conservationists' Standing Declarations In The District Court.

Conservationists filed this action in June 2016, alleging Wildlife Services violated NEPA by refusing to prepare a full EIS analyzing and disclosing the environmental consequences of its Idaho wolf control or supplement the 2011 EA and Decision/FONSI after significant new information emerged. ER 165-91. The Complaint alleged procedural injury to Conservationists' concrete interests in maintaining and enjoying the presence of wolves in the wild because of Wildlife Services' NEPA violations. Compl. ¶¶ 18, 19, 23 (ER 170-72).

To document these interests and injuries, Conservationists submitted eight standing declarations with their opening summary judgment brief, from their respective members and staff. ER 50-130. These declarations described the

[1] Trophic cascade is a term used to describe how wolves affect the ecosystem by altering prey species behavior. *See* Cole Decl. ¶¶ 55-58 (ER 66-67), ER 277.

organizational interests of each group in preserving wolves in the wild in Idaho, and ensuring Wildlife Services' NEPA compliance through full disclosure of its proposed wolf control actions, their ecological and other impacts, and reasonable alternatives (particularly non-lethal controls). ER 50-130. Each declarant also described personal experiences and concrete interests in wolf conservation in Idaho by establishing geographic proximity and use of public lands in Idaho where Wildlife Services kills wolves under the EA and Decision/FONSI. ER 50-130.

For example, declarants Jon Marvel and Kenneth Cole attested that they live near and/or have observed wolves in central Idaho, including the Frank Church Wilderness, the Wood River Valley, the Sawtooth National Recreation Area and Stanley Basin, the East Fork Salmon River, and the South Pioneer Mountains, and they hope to observe wolves when they return to those places, as they regularly do. Marvel Decl. ¶¶ 3, 7-9, 12-13, 20-23 (ER 103-08); Cole Decl. ¶¶ 1, 8, 22, 24-54, 76-79 (ER 53-54, 58-65, 71-72). Declarants Greg Freistadt, Brett Haverstick, and Kelly Nokes live near wolf populations and seek wolf sign in north/central Idaho, where Wildlife Services frequently kills wolves in and around the Lolo zone, and plan to return in the hopes of seeing wolves and their sign. Freistadt Decl. ¶¶ 9-18 (ER 75-78); Haverstick Decl. ¶¶ 12-17 (ER 88-89); Nokes Decl. ¶¶ 11-16 (ER 115-17). Declarant David Hunt has extensive connections to northern Idaho, in the Selkirk Mountains, where he has often observed wolves near his cabin and intends

to return. Hunt Decl. ¶¶ 5-12 (ER 98-100). Declarant Dameon Hansen described connections to the Sawtooth National Forest and the Lochsa corridor along Highway 12 (in and around the Lolo zone), where he has plans to return in search of wolves. Hansen Decl. ¶ 6 (ER 82-83). Declarant Richard Rusnak has connections to the Frank Church-River of No Return Wilderness, the Sawtooth Wilderness, and the Stanley Basin and intends to return to Idaho's wildlands in search of wolves. Rusnak Decl. ¶¶ 6-8, 13-19 (ER 123-26).

Conservationists' Complaint and standing declarations also established that as a result of Wildlife Services' NEPA violations, Wildlife Services overlooked significant impacts of its wolf-killing. Compl. ¶¶ 74-92 (ER 185-90). As declarant Dameon Hansen stated: "I have a right to know what the impacts of killing hundreds of Idaho's wolves will be on the larger environment, and laws like NEPA ensure this occurs." Hansen Decl. ¶ 10 (ER 83-84). Declarant Jon Marvel similarly explained: "The 2011 Environmental Assessment (EA) that Wildlife Services issued for its Idaho wolf killing activities failed to provide necessary information for me and other [Western Watersheds Project] members to understand the scope, extent, and impacts of Wildlife Services' expanding Idaho wolf control actions, and it failed to thoroughly disclose and evaluate alternative management options such as non-lethal control actions." Marvel Decl. ¶ 29 (ER 110). He added, "[t]he 2011 EA was grossly deficient in failing to evaluate

impacts of Wildlife Services' wolf killing activities, including cumulative impacts with State of Idaho approved private hunting and trapping of wolves, and impacts on local wolf populations, such as in the Sawtooth, Lolo or Selway zones." Marvel Decl. ¶ 29 (ER 110).

The declarations also established that Wildlife Services' NEPA violations caused the agency to overlook risks that its activities could affect the environment in ways it had not considered, creating a likelihood of harm to Conservationists' interests in wolf presence in Idaho. As Kenneth Cole explained, "[w]olves have a large influence on ecology, which is primarily manifested by changes in vegetation as a result of changed elk behavior." Cole Decl. ¶ 55 (ER 65-66). He stated that he had not recently seen wolf sign in numerous areas of the East Fork Salmon River, Stanley Basin, and South Pioneers where he had frequently observed wolves in the past. Cole Decl. ¶ 77 (ER 71). Jon Marvel also explained, "Wildlife Services' actions in killing most of these wolves [in the Sawtooth National Recreation Area, Stanley Basin, Boulder-White Clouds, East Fork Salmon, and other areas] and destroying most of the wolf packs sets back the ecological recovery of these areas…." Marvel Decl. ¶ 20 (ER 107-08); *see also* Rusnak Decl. ¶¶ 18-23 (ER 125-27).

Conservationists' standing declarants also explained that the full NEPA analysis they sought would redress their injuries, because it could lead Wildlife

Services to adopt an alternative where it would kill fewer wolves in Idaho, and the new information would assure the public that Wildlife Services had considered the environmental impacts of its activities. Hansen Decl. ¶ 11 (ER 84). NEPA compliance ensures that the public is informed about agency actions and that the agency can make management choices that reflect public input. Hansen Decl. ¶ 11 (ER 84). Conservationists' summary judgment briefs directed the district court's attention to these declarations and explained that they confirmed Conservationists' standing under *WildEarth Guardians* and other binding Ninth Circuit precedent. CR 16, 19-20, 26.

F. District Court Order Dismissing For Lack Of Standing.

Because Wildlife Services did not dispute Conservationists' injury-in-fact for standing under Article III, the district court's Order assumed *arguendo* that Conservationists articulated adequate injury through their eight standing declarations. Order 23 (ER 24).

The court initially noted that plaintiffs alleging procedural injuries need only establish that the relief they seek *could* protect their concrete interests to show redressability. Order 20 (ER 21). But the court did not address whether the new NEPA analysis Conservationists sought could redress their procedural injuries, focusing instead on the end result of how many wolves might be killed. Order 23 (ER 24). The court held that Conservationists did not meet their burden of

establishing standing because they did not "set forth sufficient facts in the record to support a finding that eliminating Wildlife Services' wolf management activities pending a full EIS will result in fewer wolf killings or more wolves being present in Idaho for their enjoyment." Order 23 (ER 24).

The district court explained this conclusion by listing four reasons why "enjoining or restricting Wildlife Services from engaging in wolf management will do nothing to address Plaintiffs' concerns." Order 24-27 (ER 25-28). First, it reasoned that IDFG has had management authority over Idaho wolves since de-listing in 2011. Order 24 (ER 25). It noted that IDFG could obtain funding to kill wolves from the Wolf Depredation Control Board and has "independent capabilities to perform wildlife control activities through agency personnel and independent contractors." Order 24-26 (ER 25-27). The court here relied upon the Declaration of Brad Compton, IDFG Assistant Chief of Wildlife (ER 50-51), claiming that the declaration "is unrefuted and clearly supports a finding that that IDFG has, not only the authority, but also the ability to manage wolves in the same manner that Wildlife Services does without the assistance of Wildlife Services." Order 24-25 (ER 25-26). Finally, the court determined that IDFG could make up for any reduced wolf killing by Wildlife Services by increasing the number of wolves allowed to be hunted or trapped. Order 26 (ER 27).

As Conservationists explained in their briefing, however, the Administrative Record refutes the vague generalizations in the Compton Declaration. Rather than establishing that IDFG can fully replace all of Wildlife Services' activities, the Compton Declaration merely made conclusory assertions like the following:

> 4. IDFG sometimes contracts with USDA to conduct lethal wolf removals that IDFG authorizes.
>
> 5. IDFG also has independent capabilities to perform wildlife control activities, whether through state agency personnel or independent contractors. Since 2010, IDFG has conducted some activities involving lethal wolf control through use of IDFG personnel or independent contractors. IDFG has price agreements in place for aerial support services from independent contractors, and these services include services for wildlife monitoring and management activities. Some of these agreements include services that IDFG has used and may use to perform lethal wolf control.

Compton Decl. ¶¶ 4-5 (ER 50-51). The record established that IDFG only killed 14 wolves in one year (2013) on its own, while it requested assistance from Wildlife Services each year from 2011-2016 to kill at least 103 wolves in the Lolo zone. ER 287-91. In total, Wildlife Services killed hundreds of wolves at the request of livestock producers, both before and after de-listing. *E.g.*, Answer ¶ 46 (ER 153); ER 298-302. The record also reflects that Wildlife Services and IDFG both acknowledge Wildlife Services' special expertise and capabilities in wolf control actions, which neither IDFG nor independent contractors possess. Answer ¶ 23 (ER 147-48); ER 241. It also shows that IDFG only requests assistance from Wildlife Services for ungulate protection when public hunting and trapping fail to

achieve wolf population reductions. ER 287-91 (IDFG only authorizes control actions when regulated harvest has been "insufficient to meet management goals").

Not only did the district court ignore or overlook these facts, it also presumed that Conservationists would seek an injunction against further wolf killing by Wildlife Service, when they had not moved for injunctive relief. As the court's conclusion that Conservationists lack Article III redressability stated:

> Thus, on the record before it, the Court finds that an injunction banning Wildlife Services from killing wolves would not stop IDFG from killing the same number of wolves in Idaho. Wildlife Services engages in wolf damage management only at the request of the responsible management agency or at the request of property owners subject to the responsible agency's authorization. If Wildlife Services is banned from killing wolves, IDFG could make up the difference either by: (1) lethally removing wolves itself or through independent contractors or (2) increasing the total number of wolves permitted to be taken during the hunting season. In short, Plaintiffs' fundamental injury – the killing of wolves – would not be redressed by the relief they seek in this lawsuit.

Order 27 (ER 28) (emphases added).

SUMMARY OF THE ARGUMENT

The district court erred for three reasons when it held that Conservationists lack Article III standing for their NEPA claims in this case.

First, because the district court focused only on the effect of a potential future injunction barring Wildlife Services from killing wolves, the court overlooked that the relief Conservationists sought—a new NEPA analysis—could redress their procedural injuries. This Court's precedent does not require plaintiffs

alleging procedural injuries to show that the procedures they request would benefit them, only that the procedures could influence the agency's decision-making. *E.g.*, *WildEarth Guardians*, 795 F.3d at 1156. By holding that Conservationists could not prove standing unless they showed that a decision in their favor would result in fewer wolf deaths, the district court overlooked the relaxed redressability standard for procedural claims and improperly required them to demonstrate a certain substantive outcome would result.

Second, the district court erred in failing to recognize that IDFG's ability to kill wolves does not defeat redressability for Conservationists' procedural injuries. In *WildEarth Guardians*, this Court held that even if a state wildlife management agency may also conduct predator control, it does not eliminate plaintiffs' standing to challenge Wildlife Services' activities because multiple causes of injury do not defeat standing for procedural injuries. *Id*. at 1157-58. The district court's effort to factually distinguish *WildEarth Guardians* ignored that holding.

Finally, the district court's reliance on this Court's unpublished decision in *Goat Ranchers of Oregon v. Williams*, 379 Fed. Appx. 662 (9th Cir. 2010), improperly circumvents these principles and dismisses the more recent holdings of *WildEarth Guardians,* which are directly applicable here. Because the district court applied the wrong legal standards in analyzing standing for Conservationists' procedural claims, this Court should reverse.

STANDARD OF REVIEW

This Court conducts *de novo* review of the district court's determination of whether a party has standing. *Gingery v. City of Glendale*, 831 F.3d 1222, 1226 (9th Cir. 2016), *cert. denied Mera v. City of Glendale*, 137 S.Ct. 1377 (2017).

ARGUMENT

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT CONSERVATIONISTS FAILED TO SHOW ARTICLE III REDRESSABILITY.

A. The District Court Erred Because The NEPA Analysis Conservationists Sought Would Redress Their Procedural Injuries.

As the U.S. Supreme Court explained in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992), "the person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." The relaxed redressability standard means, for instance, that a person who lives next to a proposed site for a federally licensed dam has standing to challenge the licensing agency's failure to prepare an EIS, even though that analysis might not cause any changes to the decision to issue the license. *Id*.

Under this relaxed standard, a litigant asserting procedural injury has standing "if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant."

Mass. v. E.P.A., 549 U.S. 497, 518 (2007). The litigant "need not show that further analysis by the government would result in a different conclusion. It suffices that the agency's decision could be influenced by the environmental considerations that the relevant statute requires an agency to study." *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 976 (9th Cir. 2003). *See also Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.,* 789 F.3d 1075, 1083 (9th Cir. 2015) (noting no need to show that the procedures sought would lead to a different result to redress procedural injury). This is "not a high bar to meet." *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1227 (9th Cir. 2008).

Relying on this standard, this Court has repeatedly held that an improved NEPA analysis redresses plaintiffs' injuries stemming from NEPA violations. In *Cantrell v. City of Long Beach*, 241 F.3d 674, 678-82 (9th Cir. 2001), this Court held that a new EIS could redress the injury of birdwatchers who opposed destruction of an abandoned naval station that served as bird habitat, even though a revised EIS might not result in a different plan for the station and the buildings and trees they sought to preserve had already been bulldozed. The Court explained that litigants asserting procedural injury "need not demonstrate that the ultimate outcome following proper procedures will benefit them." *Id*. at 682.

Similarly, in *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001), where the plaintiff challenged the EIS for a land exchange for violating NEPA, the Court

held that "[a] plaintiff, like Hall, who asserts inadequacy of a government agency's environmental studies under NEPA need not show that further analysis by the government would result in a different conclusion."

The Court reiterated this principle on facts similar to those here in *WildEarth Guardians*, where it again explained that relaxed redressability for procedural claims is satisfied when "the relief requested—that the agency follow the correct procedures—may influence the agency's ultimate decision." 795 F.3d at 1156. There, WildEarth Guardians (a Plaintiff-Appellant in this action) sued to enjoin Wildlife Services' predator killing activities in Nevada because it relied upon an outdated programmatic environmental impact statement (PEIS) and an inadequate EA. *See id.* at 1153 (describing litigation history). The district court dismissed for lack of standing, holding that the injuries alleged were not fairly traceable to the PEIS and that claims related to the EA were not redressable because the Nevada Department of Wildlife submitted a letter indicating it would carry out predator control if Wildlife Services were enjoined from doing so. *Id*. at 1153-54. Reversing, this Court held that WildEarth Guardians' injuries satisfied the relaxed redressability standard, which applies for procedural claims at both the programmatic and site-specific implementing levels. *Id.* at 1156. It reasoned that "updating the [PEIS] *could* influence APHIS's predator damage management in

Nevada, which is sufficient to satisfy the redressability requirement for a procedural claim." *Id*.

Here, Conservationists showed their injuries were redressable, just as in *Cantrell, Hall,* and *WildEarth Guardians*, because they demonstrated that the new NEPA analysis they sought would lead to better scientific analysis, fuller public disclosure, and could influence Wildlife Services' wolf activities in Idaho. As standing declarant Dameon Hansen explained:

> If Wildlife Services properly documents the environmental impacts of its wolf killing activities in Idaho by developing an Environmental Impact Statement ("EIS"), the agency may change its planned course of action and may actually kill less wolves. If less wolves are killed, my chances of seeing wolves in the wild in Idaho will be increased. Even if less wolves are not killed as a result of the EIS, I will at least have been afforded the opportunity to know what Wildlife Services is doing and that the government properly considered the environmental impacts of its program. Environmental laws like NEPA are necessary to make sure the public is informed. When the public is informed, we can make choices that are reflective of what is best for our future generations.

Hansen Decl. ¶ 11 (ER 84).

As Hansen's declaration indicated, while the outcome of the improved NEPA analysis might be uncertain, it *could* alleviate the harms Conservationists asserted: Wildlife Services would take a closer look at its wolf control actions and the relevant science, provide better information to the public about these activities and their effects, and it might alter its methods of wolf control in Idaho. This, in turn, could protect Conservationists' concrete interests in conserving wolves in

Idaho, and the ecosystem integrity their presence supports. This showing is all that this Circuit's precedent requires to prove redressability for a procedural injury.

The district court failed to apply this relaxed redressability standard when it held Conservationists failed to meet their burden because they did not show that eliminating Wildlife Services' activities pending a full EIS would result in more wolves for their enjoyment. Under the correct legal standard for procedural injuries, even if IDFG fully replaced Wildlife Services' wolf killing while Wildlife Services completed an EIS, as the district court speculated would occur, it would not defeat redressability. Wildlife Services is a federal agency that must comply with NEPA. Requiring Wildlife Services to conduct a full NEPA analysis would redress Conservationists' procedural injuries because it *could* lead Wildlife Services to better inform the public about its activities or alter its engagement with wolf control in Idaho. Conservationists did not have to prove that the NEPA procedure they sought would certainly provide for more wolves on the landscape. An improved NEPA process could redress Conservationists' procedural injuries, regardless of the ultimate outcome of that process. The district court erred when it ignored that Conservationists had met their burden by demonstrating the new EA or EIS they requested could fully redress the procedural injuries they alleged.

B. The District Court Erred By Holding IDFG's Independent Ability To Perform Predator Control Defeated Redressability For Conservationists' Procedural Injuries.

This Court also reaffirmed in *WildEarth Guardians* that a plaintiff's injuries are redressable even if the defendant is only partially responsible for the injuries. There, the Nevada district court held that WildEarth Guardians' injuries related to the Nevada EA were not redressable because the State of Nevada could implement a predator damage management program if Wildlife Services ceased its activities in the state. 795 F.3d at 1151. This Court reversed, explaining that: "So long as the defendant is at least partially causing the alleged injury, a plaintiff may sue the defendant, even if the defendant is just one of multiple causes of the plaintiff's injury." *Id*. at 1157.

In *WildEarth Guardians*, this Court cited three cases to demonstrate this point: *Massachusetts v. E.P.A.*, *Salmon Spawning*, and *Barnum Timber Co. v. E.P.A.*, 633 F.3d 894 (9th Cir. 2011). In each case, the plaintiff's injuries were redressable even though multiple parties contributed to them. In *Massachusetts v. E.P.A.*, the State of Massachusetts' injuries from climate change caused by the Environmental Protection Agency's (EPA) failure to regulate greenhouse gas emissions were redressable, even though EPA argued that increases in emissions from other sources like developing nations would completely replace any marginal domestic decrease. 549 U.S. at 523-26. In *Salmon Spawning*, plaintiffs' injuries

from salmon harvesting were redressable by the procedural consultation sought from the U.S. government, even though Canada also conducted the harvesting. 545 F.3d at 1229. In *Barnum Timber*, a landowner's injuries from federal Environmental Protection Agency (EPA) regulations that devalued his property were redressable, even though California also regulated the property in question. 633 F.3d at 900 n.4, 900-01. Based on these cases, *WildEarth Guardians* concluded that the plaintiff's injuries there were also redressable, because Wildlife Services' predator control program of "hunting, trapping, poisoning, and other acts of predator damage management" contributed discernibly to those injuries, even if the State of Nevada were also to conduct such activities. *WildEarth Guardians*, 795 F.3d at 1158.

As in *WildEarth Guardians*, Conservationists here met their burden of demonstrating their injuries were redressable because they demonstrated that Wildlife Services is "at least partially" causing their injuries. *Id.* at 1157. Wildlife Services has killed hundreds of wolves in Idaho and continues to kill wolves in Idaho each year. Answer ¶ 46 (ER 153); ER 287-91, 298-302. IDFG has requested Wildlife Services' assistance to kill almost all of the wolves removed to "protect" wild ungulates in the Lolo zone. ER 287-91. The EA and Decision/FONSI authorize Wildlife Services to continue and expand its Idaho wolf control actions for years into the future. Thus, Wildlife Services must comply with

NEPA, and its failure to do so adequately is the sole cause of Conservationists' procedural injuries. The fact that IDFG has killed a few wolves and may cause additional wolves to be killed in the future does not defeat redressability because Wildlife Services is also contributing discernibly to Conservationists' injuries.

The Court in *WildEarth Guardians* "bolstered" its conclusion by observing that any independent predator damage management activities were hypothetical rather than actual because Nevada did not have an existing predator control program. 795 F.3d at 1157. It noted that the letter from the Nevada wildlife official only made vague statements that Nevada would implement some form of predator control without Wildlife Services. *Id*. Speculation that Nevada would replace all of Wildlife Services' activities could not defeat standing. *Id*. at 1159.

Here, the likelihood that IDFG would fully and permanently replace Wildlife Services' activities is similarly speculative to Nevada's hypothetical predator control program in *WildEarth Guardians*. The vague statements in the Declaration of Brad Compton that IDFG has "independent capabilities to perform wildlife control activities," has "conducted some activities involving lethal wolf control," and has "price agreements in place for aerial support services" do not establish IDFG's ability to fully replace Wildlife Services. Indeed, despite these capabilities IDFG continues to contract with Wildlife Services to kill wolves. Compton Decl. ¶ 4 (ER 50). It is undisputed that Wildlife Services has "special expertise" in killing

wolves by use of shooting, calling and shooting, aerial shooting, traps, and neck snares. Answer ¶ 23 (ER 147-48). IDFG requests assistance from Wildlife Services because of this expertise and because Wildlife Services has personnel available to do the work. ER 241. The record states that, "implementation of both lethal and nonlethal methods by other entities would likely not be as effective as when carried out with the assistance of [Wildlife Services]…." ER 234. It would take time for IDFG and/or other entities to attain the resources and expertise to kill wolves as effectively as Wildlife Services. ER 234. Nor can IDFG replace the need for Wildlife Services by increasing public wolf hunting and trapping—IDFG requests assistance from Wildlife Services primarily when public wolf hunting and trapping fail to achieve desired wolf population reductions. ER 285, 287-91. Thus, to the extent IDFG has an independent wolf control program, it is not fully redundant to Wildlife Services' program, and the likelihood that it could replace all of Wildlife Services' activities amounts to speculation, like in *WildEarth Guardians*.

Moreover, if Wildlife Services' aid is available, IDFG will likely continue relying on it. Evidence of past practice since IDFG assumed responsibility for wolf management shows that IDFG solicits assistance from Wildlife Services to help with wolf control activities whenever that assistance is available. ER 241, 287-91, 298-302. Indeed, IDFG has continued to request Wildlife Services' help

even though it claims to be capable of killing wolves on its own. ER 241. There is no evidence in the record to suggest that IDFG would refrain from asking for that assistance after Wildlife Services completed a new NEPA analysis. Therefore, the potential for a new NEPA process to alter Wildlife Services' engagement with wolf management could certainly change on-the-ground outcomes. For instance, Wildlife Services might focus more on nonlethal alternatives, or kill fewer wolves in areas prized by the public for recreational "wolf watching." Accordingly, even if IDFG conducts some wolf control actions on its own, Conservationists' injuries are still redressable because multiple causes of injury do not defeat redressability for procedural injuries. *WildEarth Guardians*, 795 F.3d at 1157. This Court should reject the district court's effort to factually distinguish *WildEarth Guardians* to reach a result at odds with its holding.

C. The District Court Erred By Relying On *Goat Ranchers*.

Finally, the district court also erred by relying on this Court's unpublished opinion in *Goat Ranchers of Oregon v. Williams*, 379 Fed. Appx. 662 (9th Cir. 2010), which itself failed to apply the standards for procedural standing. *See* Order 29-30 (ER 30-31).

Disregarding *Citizens for Better Forestry*, *Cantrell*, and other precedents cited above, *Goat Ranchers* held that environmental plaintiffs failed to show their alleged injury-in-fact was fairly traceable to Wildlife Services' conduct, or that it

could be redressed by a favorable decision, because Oregon had its own state-funded Cougar Management Plan and could kill cougars without federal assistance. 379 Fed. Appx. at 663-64. As the dissent observed, however, the correct inquiry in a case where plaintiffs allege NEPA violations is "whether a judgment in favor of Plaintiffs *could*" redress the harms they identified—in that case, by increasing the likelihood that they might see a cougar in Oregon. *Id*. (citing *Hall*, 266 F.3d at 977). The majority opinion did not apply that standard nor did it even acknowledge that relaxed causation and redressability are part of the standing inquiry for procedural claims.

The fact that *Goat Ranchers* is unpublished underscores its lack of precedential value here, particularly in light of this Court's subsequent decision in *WildEarth Guardians*. At least two other district courts have thus rejected the *Goat Ranchers* majority's approach, instead following the *WildEarth Guardians* opinion, on similar facts. In *Cascadia Wildlands v. Woodruff*, 151 F. Supp. 3d 1153, 1161 (W.D. Wash. 2015), the Western District of Washington rejected Wildlife Services' argument that, because the Washington state wolf plan would continue to be implemented with or without Wildlife Services' involvement, plaintiffs' injuries from Wildlife Services' wolf killing were not redressable. *Id*. at 1161-62. The *Woodruff* court reasoned that, not only did it appear that fewer wolves would be removed without Wildlife Services, at least in the short term, but

Wildlife Services could use a new NEPA process to narrow its contractual involvement with the state or to appropriately assess its discretion in wolf control. *Id.* at 1162.

The District of Oregon similarly found redressability existed in evaluating a challenge to Wildlife Services' Oregon wolf management EA. *Cascadia Wildlands v. Williams*, 251 F. Supp. 3d 1349 (D. Or. 2017). There, the court held "Plaintiffs' allegations meet the redressability requirement because Wildlife Services, if required to prepare an EIS, may choose an alternative action or refrain from engaging in wolf capture or lethal removal in Oregon." *Id*. at 1355.

As these district courts – and this Court's *WildEarth Guardians* decision – all recognize, redressability for procedural injuries like the ones at issue here does not depend on whether IDFG or other authorities could conduct wolf control activities on their own. Wildlife Services is presently conducting wolf control in Idaho and has an independent obligation to comply with NEPA. It might improve the environmental analysis and public disclosure of its actions if required to perform the NEPA analysis Conservationists request, which could lead it to alter its wolf killing activities or improve its analysis. Nothing more is required to redress Conservationists' injuries.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand the district court's Order, and hold that Conservationists have established Article III standing for their NEPA claims.

Dated: June 1, 2018.

Respectfully submitted,

s/ Talasi B. Brooks
Talasi B. Brooks (ISB # 9712)
Lauren M. Rule (ISB # 6863)
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, Idaho 83701
(208) 342-7024
(208) 342-8286 (fax)
tbrooks@advocateswest.org
lrule@advocateswest.org

Kristin F. Ruether (ISB # 7914)
WESTERN WATERSHEDS PROJECT
P.O. Box 2863
Boise, ID 83701
(208) 440-1930 (phone)
(208) 475-4702 (fax)
kruether@westernwatersheds.org

Attorneys for Plaintiffs-Appellants

STATEMENT OF RELATED CASES

Plaintiffs-Appellants are not aware of any related cases pending before this Court.

Date: June 1, 2018

s/ Talasi B. Brooks
Talasi B. Brooks

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,801 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Date: June 1, 2018

s/ Talasi B. Brooks
Talasi B. Brooks

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: June 1, 2018

s/ Talasi B. Brooks
Talasi B. Brooks