No. 17-35508

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASCADIA WILDLANDS; et al.,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; et al.,
Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
No. 6:16-cv00177-MC
Honorable Michael McShane

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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I. Wildlife Services' wolf-killing program is a major federal action.

Wildlife Services argues that its proposed actions do not comprise major federal action such that it had an obligation to analyze the environmental impacts of its proposed actions under the National Environmental Policy Act ("NEPA"). Wildlife Services' arguments, however, ignore key facts in this case and distort this Court's jurisprudence concerning what constitutes a major federal action under NEPA.

a. Wildlife Services' DN/FONSI represents final agency action subject to judicial review.

In its opening brief, Cascadia explained the "DN/FONSI is final agency action subject to judicial review under the APA." Op. Br., Doc. No. 14 at 20-21. Wildlife Services' answering brief, however, neglected to explain how a DN/FONSI–which is unquestionably final agency action–is not judicially reviewable. Instead, Wildlife Services argues that "complet[ing] a NEPA analysis in good faith, per a settlement agreement" does not mean that NEPA was triggered and, presumably, that Wildlife Services had no obligation to actually comply with the statute when seeking public comment and preparing an EA. *See* Ans. Br., Doc. No. 23 at 19. This is disingenuous, and ignores Wildlife Services' public postition throughout the administrative process that resulted in the EA and DN/FONSI challenged in this litigation.

Not once during the administrative process did Wildlife Services assert that it was preparing an EA solely to meet the requirements of the April 2011 settlement

agreement. *See* ER 86-87 (Settlement Agreement). The record reveals Wildlife Services never even mentions that it (1) had been sued in 2010 for not completing a NEPA analysis of environmental effects before attempting to kill wolves; (2) halted a wolf-killing operation as a result of the lawsuit; (3) entered into a settlement agreement with conservation organizations requiring that it prepare an EA or Environmental Impact Statement ("EIS") before killing wolves in Oregon; and (4) paid attorneys' fees to the conservation organization for the legal representation that resulted in the settlement agreement. *See* 318-326 (DN/FONSI); 327-497 (EA); 86-87 (Settlement Agreement).

To the contrary, Wildlife Services repeatedly indicated that it was complying with NEPA in preparing its EA. The EA noted "[s]coping, agency, and public input in the NEPA process for this EA were conducted *consistent* with WS NEPA procedures." ER 347 (emphasis added). Wildlife Services posted a legal notice in the Statesman's Journal notifying the public of the opportunity for public comment. *Id.* Wildlife Services also posted a legal notice in the Statesman's Journal and Regulation.gov, and further mailed notices to members of the public that commented on the pre-decision EA of the availability of the final EA and DN/FONSI. ER 348. The EA also noted Wildlife Services "complies with relevant federal and state laws" and explained "the EA has been prepared in compliance with NEPA[,]" the CEQ NEPA regulations, and the APHIS NEPA regulations. ER 350-51.

In the final EA's response to comments, Wildlife Services repeatedly noted its compliance with NEPA regulations in responding to public comments about Wildlife

Services' failure to comply with NEPA. *See* ER 471 (citing 40 C.F.R. § 1502.23 to justify not discussing certain fiscal topics); ER 494 (citing 40 C.F.R. § 1508.27 in discussing why significant effects are not likely); ER 495 (citing 40 C.F.R. § 1508.27 in explaining why it considered all of the EIS significance factors). On July 1, 2011, Wildlife Services sent the Oregon Department of Fish and Wildlife ("ODFW") a letter stating: "As you know we are currently conducting an environmental assessment (EA) to satisfy our requirements as a federal agency to comply with the National Environmental Policy Act (NEPA) should" Wildlife Services decide to participate in wolf damage management activities in Oregon. Further Excerpts of Record ("FER") 01. Wildlife Services then invited ODFW to "assist[] in this effort by becoming a cooperating agency in the development of the EA." *Id.*; *see also* ER 656 (USFS accepting cooperating agency status)*;* 40 C.F.R. §§ 1501.6, 1508.5 (regulations defining cooperating agency).

Wildlife Services acknowledged it needed to comply with NEPA in preparing the EA and attempted to do so. Wildlife Services provides no evidence other than its explanation in legal briefs indicating that the agency was merely going through the EA process to comply with the terms of the settlement agreement, but that it ultimately did not need to comply with NEPA's requirements. Indeed, there are no public documents stating this, nor are there private documents amongst Wildlife Services staff stating this.

As explained in Cascadia's opening brief, Wildlife Services' litigation position is the very definition of a post-hoc rationalization for agency action. *See* Op. Br., Doc. No. 14 at 14-15, 26-27. Creative legal theories that were not once mentioned publicly or privately prior to the DN/FONSI's issuance cannot serve as a basis for Wildlife Services to avoid judicial review of its final agency action authorizing itself to kill wolves in Oregon. *See Anaheim Mem. Hosp. v. Shalala*, 130 F.3d 845, 849 (9th Cir. 1997); *Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1049-50 (9th Cir. 2010).

Wildlife Services points to a thirty-year old, non-binding, out-of-circuit case suggesting that even if a federal agency prepares a NEPA document, the project is not necessarily a major federal action. *See* Ans. Br., Doc. No. 23 at 19 (citing *Vill. of Los Ranchos v. Barnhart*, 906 F.2d 1477, 1481-82 (10th Cir 1990)). *Vill. of Los Ranchos* is inapposite.

In *Vill. of Los Ranchos*, the State of New Mexico used federal funding to conduct a location study and accompanying EIS for a bridge, but ultimately decided to proceed with the construction of a bridge *without* federal assistance. *Vill. of Los Ranchos v. Barnhart*, 906 F.2d at 1482. The federal agency ultimately did not participate in or fund the construction of the bridge, and on that ground, the Tenth Circuit held that there was no major federal action. *Id.* That stands in stark contrast to the situation here where not only did Wildlife Services prepare an EA, but it has also remained available to kill wolves on behalf of ODFW, Indian tribes, and private landowners. Unlike the agency in *Vill. of Los Ranchos* that stopped participating in the construction

of a bridge, Wildlife Services remains willing and able to kill wolves on behalf of ODFW, a tribe, or a private landowner.

b. Wildlife Services uses federal funds to implement the DN/FONSI.

Wildlife Services argues that because it is allegedly only contributing eight percent of the total cost of wolf killing in Oregon, that the activities contemplated by the EA and authorized by the DN/FONSI cannot be major federal action. Ans. Br., Doc. No. 23 at 14-16. This argument fails for several reasons.

First, the cases Wildlife Services relies on do not address the situation here. *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323 (9th Cir. 1975), and *Ka Makani 'O Kohala Ohana Inc. v. Dep't of Water Supply*, 295 F.3d 955 (9th Cir. 2002) relate to projects where the only federal involvement was the provision of federal funding and some consultation with the federal agency during the implementation of otherwise state actions. Here in contrast, a federal agency is actually conducting the activity in question in addition to providing funding.

In *Friends of the Earth*, this Court was analyzing whether "federal and state projects [were] sufficiently interrelated to constitute a single 'federal' action for NEPA purposes" which "will generally require a careful analysis of all facts and circumstances surrounding the relationship." *Friends of the Earth*, 518 F.2d at 329. This Court did not just look at the amount of federal funding as a percentage of total funding, but rather looked at funding as one of many "considerations." *Friends of the Earth*, 518 F.2d at 329. This Court was clear that it "hold[s] only that, on this record,

appellants failed to demonstrate a reasonable likelihood of showing that the approved and anticipated airport development activities so federalized the state-funded projects in the overall plan and all work must stop pending an EIS on that plan." *Id.*

In *Ka Makani 'O Kohala Ohana*, this Court held that federal agency involvement "in the preliminary stages of the … project did not constitute major federal action." *Ka Makani 'O Kohala Ohana*, 295 F.3d at 961. There, the federal agencies were acting in an advisory role, and did not make any decisions themselves. *Id.* Cases dealing with infrastructure projects developed and implemented by a non-federal actor–such as a state remodeling an airport–with some federal funding, but otherwise no federal involvement is very different from the situation at issue in this litigation. Indeed, in those cases, a non-federal actor completed all of the work, though it did so with some federal funding and potentially some federal consultation.

Here, in contrast, we have a federal agency using federal funds to send federal employees into the field to trap or kill an animal on behalf of a non-federal actor. Wildlife Services is not providing grants to ODFW so that ODFW employees can trap and kill wolves, but rather it is sending its own federal employees into the field to conduct the operations. Further, as discussed *infra*, Wildlife Services retains considerable discretion over the activities proposed in the EA and DN/FONSI, and when all of the relevant circumstances are considered, it is clear that Wildlife Services' activities constitute major federal action such that NEPA is required.

Second, despite Wildlife Services' incorrect contention that it is "undisputed" that Wildlife Services only contributed eight percent of the costs of "implementing Oregon's [wolf] plan[,]" the record does not actually support that conclusion. Ans. Br., Doc. No. 23 at 14. Cascadia explained that the contract between ODFW and Wildlife Services capped ODFW's contribution towards expenses at $100,000 for an entire two-year period, and that only $86,095.56 of that amount was dedicated to paying "personal services, supplies, and travel." Op. Br., Doc. No. 14 at 21 (quoting and citing ER 498, 507). Cascadia also noted that the contract did not just cover wolf-related activities, but that it also covered all Wildlife Services activities in Oregon related to black bear, cougar, and furbearers in addition to its wolf-related activities on behalf of ODFW. ER 498.

In its answering brief, Wildlife Services simply asserts its belief that the district court was correct in accepting Wildlife Services' calculation that Wildlife Services' funding contribution towards implementation of Oregon's wolf plan was approximately eight percent in fiscal years 2012 and 2013. *See* Ans. Br., Doc. No. 23 at 16. For support, Wildlife Services cites to the district court opinion and its erroneous statement that "federal funding contributed approximately eight percent of the cost of implementing the Oregon Wolf Plan in 2012 and 2013." *Id.* (citing ER 16). Wildlife Services also cites a series of pages from interagency and Oregon-specific wolf reports without explaining how its calculations were made. *Id.* (citing SER 223-26). Even if

Wildlife Services' calculations are correct for 2012 and 2013, they are ultimately not relevant.

Wildlife Services did not kill any wolves on behalf of any party in 2012 or 2013. Indeed, in 2011, Wildlife Services agreed to not kill any wolves in Oregon until it had complied with NEPA, and it ultimately did not complete the NEPA process until 2014. *See* ER 86-87 (Settlement Agreement); 326 (DN/FONSI). Furthermore, ODFW was prohibited from killing wolves in Oregon from November 15, 2011 until July 12, 2013 as a result of a court stay, and no evidence in the record suggests ODFW killed any wolves between July 12, 2013 and December 31, 2013. ER 336. Because there was no wolf-killing occurring during this period, concurrent budget numbers reflecting expenditures to kill wolves are simply not helpful in determining how much federal contribution there would be in years where wolves are killed and expenses are considerably higher. Given the reality of the contract between Wildlife Services and ODFW, it simply is not possible that Wildlife Services' funding contribution towards wolf activities in Oregon would remain at such a low level in years where it kills wolves on behalf of ODFW.

Additionally, Wildlife Services answering brief fails to explain how the time periods represented in the Interagency documents–SER 223, 225–corresponded to the time periods in the ODFW documents–SER 224, 226. The Interagency documents refer to years such as 2012 or 2013, but do not indicate if it is a calendar year, fiscal year, or other part of a year. The ODFW documents, however, explicitly

note that the funding corresponds to the state biennium, which covers a two-year period beginning on July 1. *See, e.g.* OR CONST Art. IX, § 14(1). Wildlife Services does not explain how the numbers from these various documents covering different time frames match up, why simply dividing a budgetary allotment for a year in half to cover a biennium year is a reasonable assumption, or how the numbers ultimately support its conclusion on Wildlife Services' total financial contribution to the implementation of Oregon's wolf plan. While it may be reasonable to assume that the cost to run a widget factory is the same for every day of operation during a year, the same assumption for wolf management–which inherently involves vastly different operations and costs on a day-to-day basis–is unreasonable.

Third, as discussed *supra*, it is undisputed that under the DN/FONSI, Wildlife Services can trap and kill wolves–and therefore expend federal funds–on behalf of tribes and private landowners. As Cascadia explained in its opening brief, the record is silent as to how much tribes or private landowners will reimburse Wildlife Services–if anything–to conduct wolf damage management activities on their behalf. Unlike the Intergovernmental Agreement between Wildlife Services and ODFW, *see* ER 498-508, there is no contract between Wildlife Services and any tribe or landowner in the record to illuminate to what extent Wildlife Services will be reimbursed for providing such services to tribes or landowners, and Wildlife Services neglects to even mention or explain this dynamic in its answering brief. Even assuming, *arguendo*, that Wildlife Services is correct about the amount of its contribution towards ODFW-requested

wolf killing, it was an error for the district court to ignore that Wildlife Services can provide wolf damage management services to tribes and private landowners as a component of the EA and DN/FONSI at issue here. Wildlife Services clearly proposed spending federal funds on a variety of activities related to wolf damage management in Oregon on behalf of a variety of non-federal actors.

c. Wildlife Services retains discretion over the proposed activities.

Wildlife Services admits in its answering brief that although ODFW makes the decision as to when a wolf is to be killed, Wildlife Services still retains the discretion to decide whether or not to accept a request to kill wolves. *See* Ans. Br., Doc. No. 23 at 17; ER 345. This decision constitutes significant discretion left to Wildlife Services, and the agency provides no explanation as to why this amount of deference is not sufficient for major federal action other than to agree with the district court's conclusion. *See* Ans. Br., Doc. No. 23 at 17-18.

As Cascadia explained in its opening brief, Wildlife Services also has wide discretion on how best to execute a kill-order, and those decisions can have serious repercussions in terms of the effectiveness of the operation and risk to non-target species. *See* Op. Br., Doc. No. 14 at 23-24. Wildlife Services responds, without citation, that Cascadia's "argument ignores that the tools and methods available to the agency in the field are determined by the state's plan." Ans. Br., Doc. No. 23 at 17. This statement is simply not supported by the record–*see* ER 123-317 (Oregon wolf

plan showing that methods of lethal removal are not discussed in the plan[1])–and is indeed contradicted by Wildlife Services' EA, which notes Wildlife Services may use foot-hold traps, foot snares, neck snares, shooting, and aerial shooting to implement a kill-order. ER 365. The EA also notes that Wildlife Services will consider a number of factors in selecting the appropriate method to trap and kill a wolf, including

> whether or not a collared or breeding wolf could be affected, location and land jurisdiction; land uses (such as proximity to urban or recreation areas); possible presence of humans, pets and non-target wildlife; feasibility of implementation of the various techniques; wolf movement patterns and life cycle; local environmental conditions such as terrain, vegetation, and weather; potential legal restrictions such as availability of tools or management methods; humaneness of the available options; and costs of control options….

Id. This represents a tremendous amount of discretion left with Wildlife Services in implementing a kill order on behalf of ODFW.

Wildlife Services' assertion that the district court also correctly concluded Wildlife Services' action is limited to a particular wolf identified by ODFW is incorrect. *See* Ans. Br., Doc. No. 23 at 17-18. The district court cites to a page in the EA to support this conclusion, but nowhere on that page, or elsewhere in the EA, does it state that Wildlife Services' implementation of a kill-order is limited to a particular wolf. ER 16 (citing AR 28, located at ER 345). Indeed, the EA explicitly notes that Wildlife Services only lacks discretion in deciding "where or when to

[1] Indeed, conducting a word search of the Oregon wolf plan reveals that terms associated with lethal removal methods such as "snare," "gunning," and "aerial gunning" do not appear in the plan.

remove problem wolves" on behalf of ODFW and private landowners. ER 345. Importantly, this also highlights that Wildlife Services' only arguments in its answering brief related to its discretion relate to responding to wolf-killing requests from ODFW, and ignores that it can also act at the request of tribes and private landowners. *See* Ans. Br., Doc. No. 23 at 17-18. The EA is also clear that the Oregon wolf plan does not apply to activities on sovereign tribal lands that are managed pursuant to sovereign tribal authority, and contains little beyond generic statements about what standards or regulatory schemes would actually apply to its activities there. ER 343-46.

d. Wildlife Services ignores that it can provide wolf-killing services to sovereign Indian tribes and private landowners.

In addition to the points above, Wildlife Services does not contest that there is major federal action as it relates to killing wolves for tribes and private landowners. In its opening brief, Cascadia repeatedly explained that Wildlife Services not only proposed to provide wolf-killing services to ODFW, but that it also proposed providing such services to sovereign Indian tribes and private landowners. *See* Op. Br., Doc. No. 14 at 15, 18, 22, 23. Wildlife Services answering brief, however, only attempts to explain why its provision of wolf-killing services–amongst other services–to ODFW is not a major federal action. *See* Ans. Br., Doc. No. 23 at 13-21. Nowhere does Wildlife Services explain why the provision of such services to tribes and private landowners is not major federal action. *See id.* Wildlife Services failed to address an

important component of Cascadia's arguments for why the district court erred in concluding that Wildlife Services' Oregon wolf-killing program was not a major federal action under NEPA, and by default, therefore, concedes that its proposed operations in Oregon are major federal action subject to NEPA's requirements.

e. Cascadia did not waive any arguments.

Wildlife Services argues that Cascadia waived portions of its major federal action arguments because they were not presented to the district court in this litigation. *See* Ans. Br., Doc. No. 23 at 15, 19, 20. Wildlife Services is incorrect both in its view of what occurred in the district court and in what this Court's jurisprudence on waiver says. This Court has never required that each and every argument on appeal be presented in exactly the same manner in which it was argued in district court. If this were the rule, there would be no need for appellate briefing.

Instead, this Court has long recognized that it is only claims, and not arguments, that can be waived by a failure to raise them in the district court. *U.S. v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004) ("As the Supreme Court has made clear, it is claims that are deemed waived or forfeited, not arguments."). Indeed, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise argument they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992). This Court has resolved similar allegations of argument waiver in the same manner time and time again. *See, e.g. Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 908 (2004) (concluding only claims, not

arguments, can be waived on appeal); *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1243 (9th Cir. 2014) (same); *U.S. v. Lloyd*, 807 F.3d 1128, 1174-75 (9th Cir. 2015) (same); *Weissburg v. Lancaster School Dist.*, 591 F.3d 1255, 1259 n.3 (9th Cir. 2010) (same); *Sheikh v. Holder*, 379 Fed. Appx. 697, 698 n.1 (9th Cir. 2010) (same).

This Court has also recognized that in addition to the general rule that only claims, not arguments, can be waived by failing to raise them in the district court, "an exception to waiver exists when 'the issue is purely one of law, does not affect or rely upon the factual record developed by the parties, and will not prejudice the party against whom it is raised.'" *Weissburg*, 591 F.3d at 1259 n.3 (citation omitted). This Court has explained that issues with the factual record and prejudice to a party relate to a party's ability to develop factual evidence in response to an argument. *Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 888 n.4 (9th Cir. 2002). Further, the ability to develop the factual record is irrelevant when resolving a legal issue does not depend on the district court factual record or the record has already been fully developed. *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 834 n.2 (9th Cir. 2002) (citation omitted).

In record review cases arising under the Administrative Procedure Act ("APA"), an appellate court reviews the case from the same position as the district court, and "may direct that summary judgment be granted to either party based upon [its] de novo review of the administrative record." *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005). Because this is a record review case arising under the APA, there would not have been any opportunity for Wildlife Services to further develop

the factual record below. Here, the Court's review is limited to the documents contained in the administrative record, and fact-finding does not occur in the district court. *See Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769-70 (9th Cir. 1985). As such, the record has already been fully developed.

Wildlife Services first asserts that Cascadia waived its arguments that (1) Wildlife Services can kill wolves more cheaply than ODFW; (2) that economies of scale from a federal agency purchasing equipment represented a cost savings for ODFW; and (3) the 2013-2015 contract between Wildlife Services and ODFW capped the amount that ODFW would reimburse Wildlife Services for performing a variety of actions related to black bears, cougars, furbearers, and wolves. *See* Ans. Br., Doc. No. 23 at 14-15. These are arguments; they are not new claims raised for the first time on appeal. As repeatedly recognized by this Court, Cascadia has the right to present its arguments in a new light on appeal so long as they do not represent new claims. *See Pallares-Galan*, 359 F.3d at 1095. And because this is an APA record review case, Wildlife Services would not have been able to develop new factual evidence in response and therefore cannot be prejudiced by their inclusion in Cascadia's opening brief.

Regarding the arguments that it is cheaper for Wildlife Services to kill wolves than ODFW and that the economies of scale related to a federal agency purchasing equipment represent a cost savings for ODFW, Cascadia explicitly raised both issues in its second brief filed in the district court:

> Nowhere in the record is there probative evidence that ODFW or the Confederated Tribes are in fact able to provide personnel, equipment, vehicles, supplies, and training at the same level and at the same cost as Wildlife Services. Indeed, given economies of scale and the massive size of Wildlife Services' operations across the United States, ODFW and the Confederated Tribes simply cannot match Wildlife Services' ability to provide these tools at a lower cost.

SER 76. Admittedly, this language appeared in the brief in reference to Cascadia's standing, however that does not matter. It was sufficiently raised in the district court to allow the district court to consider the argument in reaching its conclusion on major federal action. As to Cascadia's argument regarding the payment cap included in the 2013-15 Interagency Agreement, or contract, between Wildlife Services and ODFW, this is exactly the type of argument that this Court has repeatedly allowed to expand on and clarify arguments made in the district court. *See Pallares-Galan*, 359 F.3d at 1095. Here, Wildlife Services explicitly raised the 2013-15 contract at oral argument in the district court to support its argument that Wildlife Services was bound by the requirements of the Oregon wolf plan. *See* SER 11. Furthermore, Cascadia cited to the 2013-15 contract in its district court briefing, although admittedly not in the context of the major federal action argument. *See* SER 184. Both Wildlife Services and the district court was well aware of the 2013-15 contract in the lower court proceedings. And importantly, because this is an APA record review case, Wildlife Services would not have been able to develop new factual evidence related to the 2013-15 contract below and therefore cannot be prejudiced by discussion of it in Cascadia's opening brief on appeal.

Next, Wildlife Services asserts Cascadia waived its argument related to the fact that Wildlife Services' Section 7 consultation with the U.S. Fish and Wildlife Service under the Endangered Species Act supported the conclusion that there was major federal action subject to NEPA. Ans. Br., Doc. No. 23 at 19. As discussed, *supra*, even if Cascadia had not raised this argument in the district court, it would still be appropriate for Cascadia to raise it here. *See Pallares-Galan*, 359 F.3d at 1095. However, Cascadia did explicitly raise this issue in the district court in its argument on major federal action. SER 80 (Wildlife Services "consulted with the U.S. Fish and Wildlife Service under Section 7 of the Endangered Species Act to ascertain the level of impacts from the proposed action on threatened and endangered species").

Next, Wildlife Services asserts Cascadia waived its argument that U.S. Department of Agriculture regulations require an EA, and therefore lend support to the argument that Wildlife Services' proposed wolf-related activities in Oregon constitute major federal action under NEPA. Ans. Br., Doc. No. 23 at 20. As discussed, *supra*, expanding on its argument for why Wildlife Services' activities constitute major federal action is permissible, especially when the argument is merely citing and applying binding federal regulations. *See Pallares-Galan*, 359 F.3d at 1095.

II. Wildlife Services did not take a hard look at the environmental impacts of its wolf-killing program.

Wildlife Services primary argument responding to Cascadia's claim that Wildlife Services failed to disclose, analyze, and otherwise take a "hard look" at the effects of

killing wolves on wolf populations is that wolf populations are expected to expand in range and grow in size. Ans. Br., Doc. No. 23 at 21-22. Similarly, Wildlife Services also argues that there would be no additional effects from Wildlife Services involvement in wolf-killing in Oregon because ODFW and sovereign tribes would kill wolves in Wildlife Services' absence. Ans. Br., Doc. No. 23 at 23. Cascadia explained why it is unreasonable to assume that ODFW and sovereign tribes will be able to replace Wildlife Services' proposed activities, *see* Op. Br., Doc. No. 14 at 35-36, and Wildlife Services provides no response to those arguments aside from reiterating its original conclusion, *see* Ans. Br., Doc. No. 23 at 23.

Wildlife Services' answering brief ignores that Cascadia explicitly asked that the effects of lethal removal in Washington and Idaho be considered and analyzed on Oregon's wolf population, along with the cumulative impacts from other known threats to wolves. ER 582-83. Wildlife Services simply responds that it has discretion to determine the physical scope to analyze effects. Ans. Br., Doc. No. 23 at 26 (citing *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957, 973 (9th Cir. 2002)). But Wildlife Services ignores *Rittenhouse's* holding. In *Rittenhouse*, this Court stated: "Ordinarily, an agency has the discretion to determine the physical scope used for measuring environmental impacts. However the choice of analysis scale must represent a reasoned decision and cannot be arbitrary." *Rittenhouse*, 305 F.3d at 973. In the context of that case, this Court ultimately held that for one of the projects at issue there, the geographic scope chosen by the Forest Service to measure effects was arbitrary. *Id.* at

974. Here, given that Cascadia explained that because Idaho was Oregon's source population for migrating wolves, the NEPA analysis needed to include an assessment of the cumulative effects of killing wolves in Idaho on Oregon's wolf population in the context of the proposed action. ER 582-83. Failure to do so is arbitrary.

In response to Cascadia's argument that "the EA fails to quantify the past, present, or reasonably foreseeable killing of wolves in neighboring states," Wildlife Services merely directs the Court to a purportedly "extensive" cumulative effects analysis that lists known wolf mortality in Oregon. Ans. Br., Doc. No. 23 at 24. While the cumulative effects does list wolf deaths in Oregon, it does not address lethal wolf removal in other states, including Washington and Idaho.

As to effects on ecosystems, Wildlife Services again fails to respond to Cascadia's arguments. It provides no response to the fact that the discussion on effects to ecosystems is included in a section titled "Issues Not Analyzed in Detail." ER 372. Wildlife Services also explains its belief that killing wolves will not result in *significant* adverse effects related to ecosystems, Ans. Br., Doc. No. 23 at 24, but as Cascadia explained in its opening brief, this conflates two separate NEPA requirements: (1) the requirement to assess significance of effects when determining whether to prepare an EIS; and (2) the independent duty to take a hard look at all direct, indirect, and cumulative effects, Op. Br., Doc. No. 14 at 34. Furthermore, this ignores NEPA's requirement that *all* effects, including potentially beneficial effects, be disclosed and analyzed, not just adverse effects.

Cascadia's opening brief also noted that the Forest Service expressed similar concerns about the EA's lack of analysis on "the role of wolves in the ecosystem." Op. Br., Doc. No. 14 at 32 (quoting ER 657). In response, Wildlife Services states it addressed the Forest Service's concerns in the final EA, but does not explain how. Ans. Br., Doc. No. 23 at 24. Indeed, the citation provided by Wildlife Services is to the district court opinion section on whether an EIS is required, and only mentions the Forest Service in terms of when wolf-killing might be authorized on certain lands. *See* ER 19. But the district court was merely referring to a portion of the EA discussing Forest Service Manual requirements for predator killing requiring Regional Forester approval. *See* ER 374. It in no way relates to the Forest Service's concerns about the lack of analysis pertaining to ecosystems in the EA.

Wildlife Services' arguments about its non-target animal analysis are equally unavailing. Although Wildlife Services does point to certain data about non-target animal capture rates, *see* Ans. Br., Doc. No. 23 at 32, the data is incredibly limited, not provided in any context, and the data is not actually explained in terms of where it comes from and what it means. Importantly, because this incredibly limited and unhelpful data was provided in the Response to Comments, the public never had an opportunity to review and comment on it before the DN/FONSI was issued. Wildlife Services also erroneously states that this Court does not require quantified NEPA analysis where possible. *Id.* Wildlife Services quotes authority cited by Cascadia, but neglects to actually include the entire relevant discussion from this Court's

jurisprudence on quantification in NEPA documents. *Id. Klamath-Siskiyou Wildlands Ctr.* explains that "some quantified or detailed" information is required, but clarifies that "general information about possible effects and some risk do not constitute a hard look." *Klamath-Siskiyou Wildlands Ctr. v. U.S. Bur. of Land Mgmt.*, 387 F.3d 989, 993-94. This Court also explained that for some variables, quantification is not possible, but for other variables, it is not just possible, but required. *Id.* at 994 n.1. In addition to a description of possible effects, Wildlife Services needed to include meaningful and significantly more quantified data that is actually applied in the NEPA analysis. Failure to do so renders the NEPA analysis arbitrary and capricious.

III. Wildlife Services' wolf-killing program requires an Environmental Impact Statement.

Wildlife Services' wolf-damage management program in Oregon clearly requires an EIS, and the EA and DN/FONSI's statement of reasons as to why an EIS is not required is insufficient. As Cascadia explained in its opening brief, the NEPA significance factors can be met by consideration of a single significance factor, or through consideration of multiple significance factors. *See* Op. Br., Doc. No. 14 at 43-44. This is uncontested.

With regards to the significant direct and cumulative impacts presented by the proposed action, Wildlife Services primarily argues that any effects would be "minimal" and not greater than the "status quo." Ans. Br., Doc. No. 23 at 35-36. As Cascadia explained throughout its opening brief and this brief, this is not true, and

importantly, even if this significance factor individually does not require the preparation of an EIS, it certainly can contribute to the overall need to prepare one when considered with other significance factors. *See Anderson v. Evans*, 371 F.3d 475, 494 (9th Cir. 2004) (requiring EIS based on consideration of multiple significance factors).

As to the wolf damage management program's significant effects to public safety, Wildlife Services complains that Cascadia's did not allege public safety issues. Ans. Br., Doc. No. 23 at 38. Wildlife Services raised this same issue in the district court, yet the district court addressed public safety. *See* ER 18. In the district court, Cascadia explicitly asked the Court for the opportunity to amend its complaint if the court had any issue with the state of the complaint, but the district court saw no need. *See* SER 89. Wildlife Services did not file a cross-appeal challenging this aspect of the district court's decision.

Furthermore, Cascadia's complaint did sufficiently allege its broader claim that Wildlife Services should have prepared an EIS based on the significance factors when considered individually and when considered cumulatively, ER 45, and this was sufficient to put the agency on notice of Cascadia's *claim*. *Wedges/Ledges of California v. City of Phoenix*, 24 F.3d 56, 64-65 (9th Cir. 1994). The authority relied on by Wildlife Services to support its argument is unavailing given that it related to a pertinent situation where a court denied a motion to amend a pleading and the party did not appeal that order. *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1079 (9th Cir.

2008) (noting that district court did not rule on claim at issue and appellant failed to appeal denial of a motion to amend to include entirely separate NEPA claim).

Wildlife Services asserts that Cascadia waived its argument pertaining unique characteristics because its comment letter did not include the phrase "unique characteristics" in discussing the requirement to prepare an EIS. But this argument ignores that even if a plaintiff's administrative comments do not specifically raise an issue, the issue may still be litigated if some party did raise the issue during the administrative process. *Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010) (noting that it is sufficient if issue is raised and agency has opportunity to address or resolve the issue). Here, even if Cascadia's general statement that an EIS was required was insufficient, other commenters undeniably raised the issue of impacts to geographic areas with unique characteristics. *See* ER 656-57 (letter from USFS informing Wildlife Services that its EA needed a discussion of effects to ecosystems and expressing concern about impacts to wilderness areas). Importantly, although Cascadia believes that its comments were sufficiently detailed to put Wildlife Services on notice of the deficiencies in its draft EA, even if they were not, "comments submitted by third parties may form the basis of a NEPA lawsuit, so long as the comments brought sufficient attention to the issue." *Pacific Coast Fed'n of Fishermen's Assn's v. U.S. Dept. of the Interior*, 929 F. Supp. 2d 1039, 1046 (E.D. Cal. 2013) (summarizing district court cases stating the same).

The agency attempts to explain that it addressed the Forest Service's concerns regarding impacts to designated wilderness areas, but ultimately, this is undercut by the fact that the EA explicitly recognizes that "[w]olf removals may occur in federally designated wilderness areas." ER 374. Even if the Regional Forester must approve those actions, it does not mean that there will be no effects to the unique characteristics of such wilderness areas. And while the agency will not kill wolves in National Parks or National Monuments, Wildlife Services admits that its wolf killing activities could have a an effect on users of National Parks or National Monuments by reducing the opportunity to view wolves in those areas. *Id.*

Wildlife Services faults Cascadia for asserting it could act throughout Oregon and insists it could only kill wolves in eastern Oregon where wolves are managed by ODFW. *See* Ans. Br., Doc. No. 23 at 40. But this is incorrect. Although currently wolves retain federal ESA protections in western Oregon–and therefore cannot be killed there by Wildlife Services–the agency explicitly contemplated that it would be able to kill wolves in western Oregon should federal delisting occur. ER 331; *see also* ER 510 (Wildlife Services' activities will only occur in eastern Oregon "unless and until federal protections for wolves are lifted in other parts of the State"). While true that Wildlife Services cannot kill wolves in western Oregon currently, that does not mean that during the life of the EA Wildlife Services will not begin doing so. Wildlife Services itself described this possibility as "not unreasonable." ER 331.

With regards to the highly controversial and uncertain nature of Wildlife Services wolf-killing activities in Oregon, Wildlife Services asserts it can rely on "studies it deems reliable" and that ultimately any controversy is mitigated by the fact that there is no controversy amongst federal and state agencies that manage wolves. Ans. Br., Doc. No. 23 at 42-43. But this is the incorrect metric. Controversy must be judged through a much broader lens, as explained in Cascadia's opening brief, including through the conclusions of the scientific literature. Op. Br., Doc. No. 14 at 54. Additionally, that Wildlife Services may have reviewed and discussed the various scientific studies Cascadia referenced in its opening brief does not change the fact that the conclusions of those studies indicate a broader controversy with regards to Wildlife Services' proposed actions.

Wildlife Services' also faults one of the appellants in this appeal for a blog post issued prior to the decision at issue here related to a settlement agreement to resolve a lawsuit against ODFW. Ans. Br., Doc. No. 23 at 44. But a settlement agreement in state court cannot preclude a party from challenging an entirely different action by a different defendant under federal law, as Cascadia is attempting to do here under NEPA, which only applies to federal actors. Furthermore, the majority of the appellants here were not parties to the referenced settlement agreement, and should not be prejudiced in that regard by the independent decisions of others in this case.

In its opening brief, Cascadia referred to Washington's wolf management plan. Op. Br., Doc. No. 14 at 50. Wildlife Services' objects to this, but its argument lacks

merit. In the district court, Cascadia asked that the court take judicial notice of the document. SER 205. Although Wildlife Services may have objected to its inclusion as extra-record evidence, it did not object to the ability of the district court to take judicial notice of the document. SER 92. The district court did not officially rule on the propriety of taking judicial notice of the document as a government document posted on agency website, *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 727 n.3 (9th Cir. 2015), cert. denied, 136 S. Ct. 823 (2016), but it did indeed consider the document in deciding the case. *See* SER 4 (district court explaining that it had reviewed the Washington wolf plan). Wildlife Services did not object to the consideration of the wolf plan at the argument, and has not provided any explanation for why the district court could not consider the document pursuant to Cascadia's request that the district court take judicial notice of the document. This argument is also disingenuous given that Wildlife Services provided the district court with and continues to rely on extensive extra-record materials. *See* SER 48-54; Ans. Br., Doc. No. 23 at 44, 45.

Finally, regarding impacts to endangered or threatened species, Wildlife Services discounts possible effects contemplated by its proposed wolf-killing activities in Oregon. The plain conclusion in its DN/FONSI that the actions are "not likely to jeopardize federally listed…species," ER 326, blatantly ignores that an activity can still have an adverse effect on a species even if it does not jeopardize its continued existence.

Again, any one of the significance factors can require the preparation of an EIS, and certainly when considered together, Wildlife Services had an obligation to analyze the impacts of its proposed activities in an EIS here.

CONCLUSION

For the foregoing reasons, and those articulated in its opening brief, Cascadia respectfully requests that this Court reverse the judgment of the district court.

Respectfully submitted this 1st day of May, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on May 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.

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Date: May 1, 2018

/s/ John R. Mellgren
John R. Mellgren

Counsel for Appellants

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Signature of Attorney or Unrepresented Litigant: /s/ John R. Mellgren

Date: May 1, 2018

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