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**FILED**

NOV 29 2022

ANGIE SPARKS, Clerk of District Court  
BY LISA KALLIO Deputy Clerk

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

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

Plaintiffs,

v.

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

Defendants.

Cause No.: DDV-2022-896

**OPINION AND ORDER ON  
MOTION FOR PRELIMINARY  
INJUNCTION**

Plaintiffs WildEarth Guardians and Project Coyote represented by Rob Farris-Olsen, David K.W. Wilson, Jr., and Jessica L. Blome, have moved the Court for a preliminary injunction. Defendant the State of Montana, represented by Alexander R. Scolavino, III, and Sarah M. Clerget, opposes the motion.

1 This matter came before the Court for hearing on November 28,  
2 2022. The Court heard testimony from Elizabeth Pennock, Dr. Michelle Lute, Dr.  
3 Francisco Santiago-Avila, Justine Gude, and Quentin Kujala, and received  
4 Exhibits A–Z<sup>1</sup> and 1–13.

5 Based on the briefing and supporting affidavits<sup>2</sup>, the testimony and  
6 evidence presented, and the arguments of counsel, the motion for preliminary  
7 injunction will be denied, and the temporary restraining order will be dissolved.

### 8 **FACTS**<sup>3</sup>

9 After near eradication between the 1880s and the 1930s, the gray  
10 wolf was reintroduced to Montana several decades ago. Originally protected by  
11 the Endangered Species Act of 1973, 16 U.S.C. §§ 1531, *et seq.*, wolves were  
12 initially delisted by the United States Fish and Wildlife Service (USFWS) in  
13 2009, before Congress finally delisted them in 2011. Since then, management of  
14 wolves has been the State’s responsibility.

15 Since reintroduction, wolves have inspired everything from  
16 admiration or abhorrence, depending on who you ask. Dr. Michelle Lute, Ph.D, is  
17 the National Carnivore Conservation Manager for Project Coyote. As she  
18 explained, wolves have long been a part of Montana’s ecosystem. Managed well,  
19 they have positive ecological effects by regulating prey species populations,  
20 thereby contributing to the health of the soil and plant life, and reducing conflict  
21 between prey species and humans. Those who find beauty in the sights and  
22 sounds of wolves come to Montana to see them, bringing their tourism dollars

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23  
24 <sup>1</sup> Subject to reserved objections to Exhibits M, W, and X.

25 <sup>2</sup> Subject to reserved objections to the Declaration of Dr. Santiago-Avila.

<sup>3</sup> Pursuant to Mont. R. Civ. P. 52(a)(2), the following constitutes the Court’s findings of fact.

1 with them. In the greater Yellowstone National Park area alone, wolves represent  
2 an estimated \$30–\$40 million in tourism revenue. And there is no question that  
3 their very existence—as is true of any species—carries value independent of their  
4 effect on humanity.

5 Others, however, experience wolves quite differently. In particular,  
6 farmers and ranchers bear the psychic and economic shocks of seeing animals  
7 they have painstakingly raised killed, often in a grisly fashion, by wolves.  
8 Hunters—who are an integral component of Montana’s heritage, culture, and  
9 economy—not unreasonably fear declines in elk and other game animals due to  
10 wolf predation. And while reasonable minds can disagree on the ethics, many  
11 value the opportunity to hunt or trap wolves, also bringing their dollars with them  
12 in the process.

13 The unhappy task of balancing these competing interests falls to  
14 the State. This case concerns the State’s formulation of a strategy for managing  
15 wolves, its adherence to that strategy, and the potential for conflict with federal  
16 objectives in wolf management.

### 17 **The Montana Wolf Management Plan**

18 The State’s overarching strategy for gray wolf management is  
19 contained in two documents generated while wolves were still listed as an  
20 endangered species. The first is the 2002 Montana Wolf Conservation and  
21 Management Planning Document (2002 Planning Document) (Ex. E), generated  
22 based on recommendations from the Governor’s Wolf Management Advisory  
23 Council. The second is the 2004 Amended Record of Decision and Final  
24 Environmental Impact Statement (2004 EIS) (Ex. F), adopting the Planning  
25

1 Document with several updates upon delisting. The Court refers to these  
2 collectively as the Wolf Plan.

3 The Wolf Plan's stated purpose is "to describe the regulatory  
4 framework for wolf conservation and management in Montana, under the  
5 direction of MFWP" and to "describe[] the programmatic direction and a  
6 spectrum of management activities that maintain viable wildlife populations,  
7 resolve wolf-human and wolf-livestock conflicts, and gain the support of people  
8 with diverse interests." (Ex. E at 2.) Consistent with current legislative policy of  
9 maintaining a "sustainable" population of at least fifteen breeding pairs, Mont.  
10 Code Ann. § 87-1-901(1) (2021), the Wolf Plan calls for Montana to "maintain at  
11 least 14-17 packs statewide" and recognizes that fifteen packs should define the  
12 threshold between "conservative" and "liberal" management of the wolf  
13 population (including lethal control). (Ex. E at 22.) Importantly, the Wolf Plan is  
14 not a static list of prescriptives; to the contrary, it embraces adaptive  
15 management, which explicitly recognizes that "[m]anagement actions change  
16 through time based on current resource status and how that compares with the  
17 original objectives." (*Id.*, Ex. B at 22, Dkt. 15 at 87.)

18 Of particular importance to this case is the Wolf Plan's discussion  
19 of population monitoring. It provides, in relevant part:

20 *The [wolf population] monitoring program will balance scientific*  
21 *precision with cost effectiveness. Costs of data collection typically*  
22 *go up in proportion to their precision and the rigor required from the*  
23 *data. Financial and personnel limitations may sometimes preclude*  
24 *the most precise, reliable techniques. MFWP will rely on a*  
25 *combination of radio-telemetry and non-invasive techniques. As the*  
*number of wolf packs increases, the need for precision decreases*  
*proportionally.*

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The term “non-invasive” monitoring implies that information can be gathered without actually live-capturing and handling animals. *Examples* of non-invasive methods are track counts, howling surveys, observation report summaries, remote photography, and profiling of genetic material obtained passively from hair or scat samples. These methods can yield valuable information; however, for some monitoring objectives, validation using a radio-collared wolf pack is required for accuracy.

....

Each monitoring protocol has its own advantages and disadvantages. No single method will be suited to all packs, either. MFWP will consider any and all methods, *including new methods as they are developed*. Corroborating evidence will be gathered using multiple methods, but specific protocols will be tailored to the pack, setting, and appropriate season for collecting that type of data. This will facilitate a balance between monitoring responsibilities, information needs, cost effectiveness, and scientific rigor.

(Ex. E at 29–31 (emphasis added).)

Two overarching conclusions can be drawn. First, the Wolf Plan plainly expects the Department to use (and at the very least consider) both traditional and new counting methods. And second, the Wolf Plan emphasizes not only precision, but innovation, flexibility, and cost, with the latter more often winning the day as time passes and populations rebound.

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1                   Also relevant to this action is the Wolf Plan’s provisions for  
2 periodic review. The Wolf Plan provides:

3                   As with any wildlife management program, MFWP anticipates that  
4 the wolf program will evolve through time. MFWP will undertake a  
5 thorough, formal review of the wolf management program following  
6 the five-year USFWS oversight period required by ESA.  
7 Cooperating state and federal agencies will also participate. Findings  
8 of the review will be incorporated. The wolf management program  
9 will be subsequently reviewed at least every five years and modified  
10 to insure that the document will be as current as is practical and that  
11 the management activities originating from it are effective and  
12 appropriate.

(Ex. E, at 74.)

11                   In 2013, the Governor’s Wolf Management Advisory Council  
12 reconvened and recommended that the Wolf Plan remain unchanged. It is unclear  
13 from the present record the extent of the review, the degree to which partner state  
14 and federal agencies participated in that review, and whether the review was  
15 sufficiently rigorous to constitute a “thorough, formal review.” Since 2013, the  
16 Wolf Plan has been incidentally addressed through Commission deliberations on  
17 seasonal hunting and trapping regulations and through information published in  
18 the annual Wolf Reports, but the periodic thorough five-year reviews  
19 contemplated by the Wolf Plan appear not to have occurred<sup>4</sup>.

**Wolf Population Estimation**

21                   As anticipated by the Wolf Plan, the methods of population  
22 monitoring have changed over time. Initially, the Department relied primarily on

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24 <sup>4</sup> The Court disagrees with the State’s suggestion that publication of the Annual Report, which is information largely  
25 generated internally by the Department as a description of the status of wolves and wolf management, constitutes a  
“review” of the plan. *See* Black’s Law Dictionary 1579 (11th ed. 2019) (“review” means “[c]onsideration,  
inspection, or reexamination of a subject or thing.”).

1 field observations to develop minimum counts of wolves. By approximately  
2 2006, however, wolf populations had increased to the point that the Department  
3 found it unable to keep up with direct counts of a growing wolf population  
4 spanning thousands of square miles. The Department worked on developing a  
5 less resource-intensive method to accurately estimate wolf populations.

6 After considering and rejecting several alternatives—including, for  
7 example, aerial track surveillance (unworkable in heavily forested areas or  
8 locations without consistent snow cover), howl surveys (highly resource-  
9 intensive), and genetic scat analysis (also highly resource-intensive)—the  
10 Department turned to developing a statistical model for reliably estimating wolf  
11 populations. In collaboration with the University of Montana and Idaho Fish and  
12 Game, the Department developed the patch occupancy model (POM). Explained  
13 simply, POM purports to estimate wolf populations by determining the total area  
14 occupied by wolves, the mean pack territory size, and the mean pack size. The  
15 POM model was subjected to both peer critique and resulted in peer-reviewed  
16 publications. POM first began appearing in the annual Wolf Reports in 2009, was  
17 presented to the Governor’s Wolf Management Advisory Council in 2013, and  
18 was put into use that same year.

19 Justin Gude, a wildlife biologist, is the Research and Technical  
20 Services Bureau Chief for the Department. According to him, even after POM  
21 was implemented, the Department continued conducting and reporting minimum  
22 counts using direct field observation from field technicians. After several years of  
23 experience with POM, the Department identified several issues with POM, many  
24 related to variations in wolf populations throughout the State. Accordingly, the  
25 Department, again in consultation with the University of Montana, began

1 developing the integrated patch occupancy model (iPOM) that is the subject of  
2 today's controversy. The underpinnings of the iPOM model have been peer-  
3 critiqued. Research on iPOM has generated two doctoral dissertations, has been  
4 presented to the public in numerous ways, and has been modified based on  
5 feedback from the scientific community, stakeholders, and the community.

6 The iPOM model uses the same basic approach as POM in  
7 estimating population from area occupancy, territory size, and pack size. Among  
8 other changes, however, iPOM applies a mean territory size by region rather than  
9 a statewide mean territory size, it accounts for gaps and overlap in pack territory,  
10 and it accounts for changes in pack size based on the degree of human mortality.  
11 It uses predictive models to determine the territory and pack size based on several  
12 variables. Gude testified that many of the modifications to iPOM resulted from  
13 comparing POM-estimated pack counts to verified minimum pack counts based  
14 on field observation. Some factors—for example, the gap/overlap factor—were  
15 incorporated based on findings that POM estimates that failed to account for gaps  
16 and overlaps were falling below minimum verified pack counts identified by field  
17 technicians. To the Department, this suggested POM was undercounting wolves.  
18 Crucially, Gude testified that although direct field observation is no longer the  
19 primary basis of the Department's population estimates, field technicians still  
20 engage in direct field observation and pack counts, and that data continues to be  
21 used to verify the reliability of iPOM.

22 Plaintiffs dispute the reliability of iPOM. Dr. Santiago-Avila,  
23 Ph.D, is the Heartland Rewilding Science and Conservation Manager for Project  
24 Coyote and the Rewilding Institute. He testified to concerns about the iPOM  
25 model, many of which came from the work of MSU biologist Dr. Scott Creel,



1 whose work Dr. Santiago-Avila extensively, and favorably, cited.<sup>5</sup> Dr. Santiago-  
2 Avila contends that the iPOM model's reliance on three sequential models for  
3 estimating territory occupancy tends to compound error from each model to the  
4 next, and that various assumptions built into iPOM systematically overestimate  
5 wolf populations. Dr. Santiago-Avila noted that iPOM estimates have been  
6 greater than POM estimates for every year in which the two can be compared. He  
7 criticizes the State for choosing a less-conservative model (iPOM) over a more-  
8 conservative model (POM), and for adopting iPOM in the absence of evidence  
9 that POM was unreliable.

10 Although this will continue to be an issue of dispute in the case, for  
11 today's purposes and on today's record, the Court is not persuaded that iPOM is  
12 so unreliable or so substantially tending to overestimate wolf populations that the  
13 Department and Commission's reliance on it while this litigation pends is likely  
14 to trigger irreparable harm to wolf sustainability. First, Gude's testimony rebutted  
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16 <sup>5</sup> The State objects to Dr. Santiago-Avila's incorporation of Dr. Creel's research into his  
17 declaration and testimony. The Court overrules that objection. Dr. Santiago's citation to Dr. Creel's research is  
covered by the learned treatise exception to the hearsay rule, which provides:

18 To the extent called to the attention of an expert witness upon cross-examination or relied upon  
19 by the expert witness in direct examination, statements contained in published treatises,  
20 periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as  
a reliable authority by the testimony or admission of the witness or by other expert testimony or  
by judicial notice. If admitted, the statements may be read into evidence but may not be received  
as exhibits.

21 Mont. R. Evid. 803(18).

22 The State suggested that Dr. Creel's work cannot be relied upon because it is not peer-  
23 reviewed. All the exception requires, however, is that the material be "published," and here, Dr. Creel has clearly  
24 generated a report that has been publicly disseminated and made part of the public debate over Montana's method  
25 of population estimation. Dr. Santiago-Avila's testimony laid sufficient foundation that Dr. Creel's work, even if  
not published in a peer-reviewed journal, is nevertheless reliable authority. The inclusion of "pamphlets" in the  
exception suggests strongly that the Rule is not intended to limit itself to formal peer-reviewed publications. The  
Court, however, will sustain the objections to admitting Exhibits M, W, and X on grounds that the learned treatise  
exception does not permit treatises to be admitted themselves as exhibits.

1 the contention that iPOM was adopted in the absence of concerns about POM's  
2 reliability. Second, Gude had superior factual knowledge of the workings of  
3 iPOM; although Dr. Santiago-Avila has reviewed the published information  
4 about iPOM, it appears there has been nothing done so far to reach out to the  
5 Department to get more information about the workings of iPOM or to closely  
6 review the algorithm. Third, the Court credits the fact that aspects of the iPOM  
7 model have been peer-reviewed and critiqued and developed through a  
8 cooperative approach with outside agents and researchers. And finally—and  
9 perhaps most importantly—a key component of the Creel/Santiago-Avila critique  
10 of iPOM is the contention that it is conducted without direct field observation.  
11 Gude, however, credibly testified that, in fact, the Department continues to  
12 conduct minimum pack counts and to incorporate that data into its assessment of  
13 iPOM.

14           These were not Dr. Santiago-Avila's only criticisms. He testified  
15 that iPOM may be inaccurate because it predicted an increase in wolf populations  
16 despite substantial mortality, and that the decreased take of wolves in the 2021-  
17 2022 season suggests that wolf populations are actually lower than estimated.  
18 There was no evidence, however, that human-caused mortality can predict the  
19 population change for a single year.<sup>6</sup> The relationship between anthropogenic  
20 mortality and human populations is a matter of scientific dispute and appears  
21 quite uncertain. And, the Department persuasively showed that the decreased  
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24 <sup>6</sup> As a matter of basic common-sense, relationship between human-caused mortality and wolf populations is a  
25 general one that will vary from year-to-year based on numerous factors. Thus, the Court cannot say in any particular  
year that a certain amount of wolf kills will result in a particular wolf population.

1 2021-2022 take may very well be explained by reduced overall hunter and  
2 trapper effort.

3 Dr. Santiago-Avila testified as well about the effects of poaching  
4 on wolf populations. He expressed concern that poaching is greatly  
5 underestimated by wolf managers. He also testified to research suggesting that  
6 poaching rates are dynamic: as lawful lethal control of wolves is liberalized,  
7 unlawful killing of wolves also increases. He did not provide, however, any  
8 reason that persuaded the Court that the Department’s method of estimating  
9 population will not detect changes in mortality due to increased poaching or other  
10 wolf mortality.

11 **Wolf Hunting and Trapping in Montana**

12 Since the first hunt in 2009, with a harvest of seventy-five wolves,  
13 the wolf harvest has generally increased along with wolf populations. Between  
14 2012 and 2019, hunters and trappers harvested an average of 242 wolves per  
15 year, with total harvests steadily increasing to 293 in 2019. During this time, wolf  
16 populations also remained stable, with population estimates around 1,150 wolves  
17 and 190 packs. The largest harvest occurred in 2020, when 329 wolves were  
18 killed by hunting and trapping. Nevertheless, for 2021 the iPOM estimate of wolf  
19 populations remained stable, at 1,144 wolves. As a condition of remaining  
20 delisted, Montana’s wolf population may not fall below fifteen breeding pairs or  
21 150 wolves.

22 The rules, regulations, and annual quotas for wolf hunting are not  
23 contained in the Wolf Plan, but they are rather annually established by the  
24 Commission in its seasonal hunting and trapping regulations. As the hunting and  
25 trapping regulations are a critical aspect of its “responsib[ility] for the status,

1 conservation, and management of the gray wolf population,” the Commission’s  
2 seasonal regulations must be “guided by the Montana Gray Wolf Management  
3 Plan, administrative rules, and statutes.” Admin. R. Mont. 12.9.1303(3). As the  
4 rule acknowledges, however, the Commission is primarily responsible to the  
5 policy direction set by the legislature. And in 2021, the legislature modified  
6 statute to provide as follows:

7       The commission *shall* establish by rule hunting and trapping  
8 seasons for wolves *with the intent to reduce the wolf population* in  
9 this state to a sustainable level, but not less than the number of  
10 wolves necessary to support at least 15 breeding pairs. Trapping  
11 seasons *must* allow for the use of snares by the holder of a trapping  
12 license.

13 Mont. Code Ann. § 87-1-901(1) (2021) (emphasis added).

14 Quentin Kujala, the Department’s Chief of Staff, testified that in the  
15 Department’s view, this provided clear direction that the Commission was to  
16 adapt its seasonal hunting rules with an eye to reducing populations.

17       Accordingly, in 2021, the Commission established a wolf quota for  
18 each of seven regions, with a total wolf quota of 450 wolves. The Commission  
19 also increased the “bag limit” (the number of wolves that can be taken by an  
20 individual hunter or trapper) from five to twenty (ten wolves by hunting; ten by  
21 trapping), and allowed snares during trapping season. Despite these measures,  
22 which Kujala characterized as the most liberal measures ever adopted by the  
23 Commission, only 273 wolves were killed.

24       Prior to 2022, wolves were cartographically divided into various  
25 wolf management units (WMUs), each with its own quota. Three of these units  
26 closely regulated wolf hunting and trapping near national parks: WMU 110  
27 encompassed a backcountry area along the west border of Glacier National Park;

1 and WMU 313 and 316 run along the northern border of Yellowstone National  
2 Park. In 2021, the Commission eliminated the quota for WMU 110, 313, and  
3 316. This caused a substantial increase in wolf kills to twenty-one wolves  
4 (compared to fourteen wolves for the entire period from 2016 to 2021), including  
5 an entire pack of Yellowstone wolves. The large number of kills led to the early  
6 termination of the season in WMU 313 and 316 and prompted a letter from the  
7 Yellowstone National Park Superintendent in December 2021 asking the State to  
8 close the season in WMU 313 and 316.<sup>7</sup>

9           Following the 2021 season, the State published its 2021 Wolf  
10 Report in June 2021, followed by the draft seasonal hunting regulations for the  
11 2022-2023 season. The Department opened a thirty-day comment period for the  
12 draft regulations, and in August 2022, the Commission met to discuss the  
13 comments. Among many others, WildEarth Guardians and Yellowstone National  
14 Park submitted written comment. The Commission expressly noted that it had  
15 read the written comments, and referred to several written comments specifically.  
16 Based on the Yellowstone comments, the Commission—which had originally  
17 proposed a quota of ten wolves in the combined WMU 313/316 area—adopted  
18 an amendment of the WMU 313/316 quota to six wolves. The Commission  
19 appears not to have made changes adopting WildEarth Guardians’s comment,  
20 although the State correctly noted there is a difference between considering a  
21 comment and agreeing with it. The Commission also heard extensive oral public  
22 comment at their August meeting, including from Yellowstone National Park  
23 wildlife biologist Doug Smith (who indicated the Park appreciated the

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24  
25 <sup>7</sup> By contrast, there was no evidence presented of any wolf take in WMU 110. Kujala testified that kills in WMU 110 are rare because the area is rugged backcountry that is difficult to access.

1 Commission lowering the quota from ten to six), before adopting the 2022 draft  
2 regulations with the amended WMU 313/316 quota. The 2022 regulations call for  
3 a total quota of 456 wolves.

4 In 2022, Gude and David Messmer published a report forecasting  
5 the impact of the quotas on wolf populations. According to their forecast, if  
6 harvests remained at the average of 279 wolves per year, then populations would  
7 remain generally stable or decline slightly. Assuming the 450-wolf quota were  
8 actually reached, then by 2026, Gude and Messmer forecast populations  
9 declining before the 150 wolves/fifteen breeding pairs threshold. Notably, the  
10 2026 forecast had significant uncertainty, it assumed a constant quota of 450  
11 wolves over all of those years, and it assumed complete success in meeting that  
12 quota. Notably, even if the quota were reached this year, the model does not  
13 predict a decline below sustainability in the first year.

14 The quota for 2022 represents roughly forty percent of the wolf  
15 population if the iPOM estimate is adopted. The parties dispute how drastically  
16 this would affect wolf populations, with the work of Dr. Creel cited as suggesting  
17 anthropogenic mortality of twenty-two percent will cause a decline, and the  
18 Department's own research suggesting decline at an anthropogenic mortality rate  
19 between twenty-eight percent and forty-eight percent. All agree the 450-wolf  
20 quota is designed to cause some population decline. Dr. Santiago-Avila  
21 expressed concern that if iPOM is unreliable, then it is unknown how many  
22 wolves are currently present, and that mortality may be even higher.

23 Nevertheless, the Court is persuaded by two considerations. First,  
24 as Quentin Kujala (the Department's Chief of Staff and a former wildlife  
25 biologist himself) noted, wolf populations are not calculated simply by taking the

1 wolves currently alive and subtracting mortality. Wolves reproduce and migrate,  
2 and although populations decline during hunting and trapping season, they  
3 increase again over the course of the year. A forty percent mortality rate—  
4 assuming that all 456 authorized tags are used—does not necessarily mean a  
5 population of 1,144 wolves today will be 688 wolves this time next year. Second,  
6 and most importantly, no witness presented *any* evidence that wolf populations  
7 are such that this hunting and trapping season—if permitted to continue as  
8 established by the Commission—will cause a decline of wolves to anything near  
9 the sustainability levels. To the extent Dr. Santiago-Avila expressed such  
10 concerns, they were conjectural at best, as it would require the Court to agree  
11 with (a) the most liberal estimate of population decline due to anthropogenic  
12 mortality; (b) the assumption that the 456-wolf quota will be achieved; and (c)  
13 that the iPOM is drastically overestimating wolf counts in the state. For the time  
14 horizon of this litigation, the Court finds the confluence of the most pessimistic  
15 scenarios for all three factors to be unlikely.

### 16 **Snares and Bag Limits**

17 Earlier this month, this Court issued a temporary restraining order,  
18 primarily motivated by concerns about the impact of hunting and trapping on  
19 Yellowstone wolves, and with measures intended to slow harvest rates long  
20 enough for the matter to be heard. In particular, the Court prohibited use of  
21 snares and reduced the bag limit back to 2020 levels.

22 With respect to snares, the Court heard testimony describing the  
23 harm from trapping and snares specifically, both on wolves and other animals.  
24 Plaintiffs raise legitimate policy objections to their use. Nevertheless, the 2021  
25 legislation unequivocally directs the State to establish a trapping season, and to

1 allow holders of trapper licenses to use snares. Although the TRO’s restriction  
2 was justified as a limited status-quo preserving measure in aid of the Court’s  
3 jurisdiction until the Court could hold a hearing, the Court is persuaded that it  
4 lacks authority to continue that prohibition going forward in light of the clear  
5 legislative direction that snares be allowed.

6 With respect to the bag limit, the Department presented data, not  
7 refuted by Plaintiffs, that even with a high bag limit, the vast majority of  
8 successful hunters and trappers take far fewer wolves. The twenty-wolf bag limit  
9 was in effect in 2021, but only one hunter took ten wolves. The vast majority take  
10 only one.

### 11 **DISCUSSION<sup>8</sup>**

12 Because the law abhors Pyrrhic victories, courts have jurisdiction  
13 to afford preliminary relief until a case can be fully developed, presented, and  
14 decided. Litigation takes time—sometimes years—and so there must be a  
15 mechanism in the law to ensure that by the time the Court *can* decide the merits  
16 of a claim, intervening events have not made a favorable judgment effectively  
17 worthless to the prevailing party. And so enters the preliminary injunction, a tool  
18 to minimize harm to *all* parties until that judgment can be reached. In short, the  
19 Court’s limited function is “to so protect the rights of all parties to this suit, that,  
20 whatever may be the ultimate decision of these issues, the injury to each may be  
21 reduced to the minimum.” *Atkinson v. Roosevelt County*, 66 Mont. 411, 423,  
22 214 P. 74, 77 (1923) (quoting *Denver & R.G.R. Co. v. United States*, 124 F. 156,  
23 159 (8th Cir. 1903)).

24  
25 <sup>8</sup> Pursuant to Mont. R. Civ. P. 52(a)(2), the following constitutes the Court’s conclusions of law.



1 In Montana, preliminary injunctions are governed by a statute  
2 dating back to territorial days, *BAM Ventures, LLC v. Schiffman*, 2019 MT 67,  
3 ¶ 13, 395 Mont. 160, 437 P.3d 142, that nevertheless remains good law today, *see*  
4 *Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶ 37, 409 Mont. 378,  
5 515 P.3d 301. The statute provides that a preliminary injunction may issue upon a  
6 showing of the following (in relevant part):

7  
8 (1) when it appears that the applicant is entitled to the relief  
9 demanded and the relief or any part of the relief consists in  
10 restraining the commission or continuance of the act complained of,  
either for a limited period or perpetually;

11 (2) when it appears that the commission or continuance of some  
12 act during the litigation would produce a great or irreparable injury  
13 to the applicant;

14 (3) when it appears during the litigation that the adverse party is  
15 doing or threatens or is about to do or is procuring or suffering to be  
16 done some act in violation of the applicant's rights, respecting the  
subject of the action, and tending to render the judgment ineffectual;  
17 Mont. Code Ann. § 27-19-201.

18 The statute is phrased disjunctively; thus, the applicant need only  
19 satisfy one subsection to obtain relief. *BAM Ventures*, ¶ 14. Nevertheless, there  
20 are certain core requirements that must be present regardless of the subsections  
21 under which an applicant proceeds. For instance, under any provision of the  
22 statute, “all requests for preliminary relief require some demonstration of  
23 threatened harm or injury.” *BAM Ventures*, ¶ 16. Thus, “a preliminary injunction  
24 should not issue absent an accompanying prima facie showing, or showing that it  
25 is at least uncertain, that the applicant will suffer irreparable injury prior to the

1 final resolution on the merits.” *Netzer Law Office, P.C. v. State*, 2022 MT 234,  
2 ¶ 17, \_\_ Mont. \_\_, \_\_ P.3d \_\_ (Nov. 16) (quoting *Davis v. Westphal*,  
3 2017 MT 276, ¶ 24, 389 Mont. 251, 405 P.3d 73)

4 Additionally, “it is the court’s duty to minimize the injury or  
5 damage to *all* parties to the controversy,” *BAM Ventures*, ¶ 16 (emphasis added)  
6 (quoting *Porter v. K & S P’ship*, 192 Mont. 175, 182, 627 P.2d 836, 840 (1981)).  
7 Thus, the Court must apply this statute mindful of the fact that preliminary  
8 injunctions are a form of equitable relief, governed by the rules of equity, that  
9 require a balancing of the equities present in a given case. *See Netzer*, ¶¶ 17, 20.

10 Finally, the Supreme Court has repeatedly emphasized that district  
11 courts are not to decide the merits when deciding a request for preliminary  
12 injunction. *See, e.g., Weems v. State*, 2019 MT 98, ¶ 18, 395 Mont. 350,  
13 440 P.3d 4. There is no obligation to demonstrate that the applicant will  
14 ultimately prevail on the merits at trial. *See Planned Parenthood*, ¶ 30. The  
15 applicant, however, must make “a sufficient case to warrant preserving a right in  
16 status quo until a trial on the merits can be had.” *Weems*, ¶ 18. This reflects the  
17 commonsense proposition that no party can obtain an injunction—and here,  
18 upending state policy—without at least some showing that the challenge has  
19 potential merit.

20 Plaintiffs’ claims for the purposes of the preliminary injunction  
21 motion<sup>9</sup> can be grouped in three claims: (1) that the use of iPOM contravenes and  
22 effectively amends the Wolf Plan; (2) that the State has failed to periodically  
23 review the Wolf Plan as required; and (3) that the State’s wolf management  
24

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25 <sup>9</sup> Plaintiffs have asserted a public trust doctrine claim, but they do not rely on it in their motion for preliminary injunction.

1 practices in the vicinity of Yellowstone National Park and Glacier National Park  
2 conflict with—and are therefore preempted by—federal policy over wolves in the  
3 national parks. With the foregoing considerations in mind, each of these claims is  
4 examined in turn.

### 5 1. Adoption of iPOM

6 The Court does not agree that, at this juncture, Plaintiffs have met  
7 their burden of establishing a *prima facie* case. As framed in the Complaint,  
8 Plaintiffs contend that the State inflicted a procedural injury on them by adopting  
9 iPOM, effectively amending the Wolf Plan without affording public comment  
10 required by MAPA. Even if the Court assumes that the Wolf Plan is a rule,  
11 however, Plaintiffs have not established that iPOM contravenes or amends the  
12 Wolf Plan.

13 Importantly, the Wolf Plan does not prescribe any specific method  
14 for monitoring wolf populations. It gives *examples* of appropriate tracking  
15 methods, but it specifically endorses an adaptive management approach whereby  
16 the State may substitute less reliable methods for the more reliable methods (for  
17 example, radio telemetry—i.e., collars) as populations increase. And indeed,  
18 populations have increased beyond the most optimistic predictions of the 2002  
19 Planning Document. Consistent with the Wolf Plan, the Department began  
20 looking at statistical methods when direct minimum counts proved increasingly  
21 infeasible due to financial and personnel constraints. It developed new  
22 methods—which the Wolf Plan expressly anticipates—and continues to use pack  
23 counts and direct observation to test the reliability of those methods. Perhaps  
24 discovery will reveal problems with iPOM that call into question its consistency

25 ////

1 with the Wolf Plan, but today Plaintiffs have not made even a *prima facie*  
2 showing.

3           The Court must then consider whether a preliminary injunction is  
4 nevertheless required to avert “great or irreparable injury.” Mont. Code Ann.  
5 § 27-19-201(1). Plaintiffs claim that because iPOM systematically overestimates  
6 wolf populations, it leads to unsustainable killing. As observed above, however,  
7 there is no evidence that *this* season is the pivotal season for Montana’s wolves;  
8 even if 450 wolves are killed, no witness presented evidence that this year will  
9 plunge Montana wolf populations below a sustainable level. Gude and  
10 Messmer’s projections certainly counsel dispatch in resolving this case, but they  
11 do not require a preliminary injunction at this stage to avert great or irreparable  
12 injury or ensure effective judgment can be issued.

13           The Court recognizes the strong moral and ethical arguments  
14 persuasively advanced by Plaintiffs about the intrinsic value of wolves. The  
15 legislature, however, has required the Commission to establish hunting and  
16 trapping seasons to reduce wolf populations in Montana, suggesting the policy of  
17 the State of Montana is to permit the killing of individual wolves so long as  
18 *populations* remain sustainable. That is a matter of policy the Court cannot  
19 second-guess in the absence of a demonstrated conflict with the Constitution.  
20 Thus, the Court finds persuasive the District of Montana’s reasoning that  
21 “irreparable injury requires harm ‘significant’ to the ‘overall population,’” a pre-  
22 delisting case where there was a strong federal policy against all but incidental  
23 takes of wolves. *Defenders of Wildlife v. Salazar*, 812 F. Supp. 2d 1205, 1210  
24 (D. Mont. 2009) (quoting *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Gutierrez*,  
25 606 F. Supp. 2d 1195, 1210 (E.D. Cal. 2008)). The Court also agrees with the

1 State that adopting Plaintiffs’ reasoning would completely confound the State’s  
2 ability to manage wildlife populations if any allegedly unlawful loss of any  
3 animal—and there is no reason to believe wolves have a *greater* intrinsic value  
4 than other species—could trigger the standard for a preliminary injunction.

5 Finally, the Court considers under Mont. Code Ann.  
6 § 27-19-201(3) whether failure to enjoin all or part of wolf hunting or trapping  
7 activities would tend to render judgment ineffectual. Because there is nothing to  
8 suggest that wolf populations will be rendered unsustainable in the very short  
9 term, the Court is not persuaded that an injunction is necessary to preserve its  
10 jurisdiction to finally determine on the merits whether the Department’s adoption  
11 of iPOM violates the law.

12 **2. Failure to Review the Wolf Plan**

13 Plaintiffs contend that the State has not periodically reviewed the  
14 Wolf Plan as the Wolf Plan contemplates. The Court tends to agree that Plaintiffs  
15 have made such a preliminary showing. The Court also agrees that the Plaintiffs  
16 may be able to succeed on their claim that the Wolf Plan is a rule within the  
17 meaning of MAPA—that is, that the Wolf Plan is an “agency regulation,  
18 *standard, or statement of general applicability* that implements, interprets, or  
19 prescribes law or policy or describes the organization, procedures, or practice  
20 requirements of an agency.” A *prima facie* case is merely a claim that appears  
21 valid “on first appearance but subject to further evidence or information.”  
22 *Weems*, ¶ 18. Plaintiffs’ arguments are reasonable and debatable on first  
23 appearance.

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1 But Plaintiffs must show not just a *prima facie* case that there is a  
2 violation; they must show a *prima facie* case for the “relief demanded.” Mont.  
3 Code Ann. § 27-19-201(1). Plaintiffs’ request for preliminary relief—either a  
4 cessation or modification of the wolf hunting and trapping season—is at best  
5 tangentially related to its objections to the Wolf Plan. For one, as the State points  
6 out, the specific policies Plaintiffs assert are causing injury are the seasonal  
7 hunting regulations, which are expressly excluded from the definition of a rule  
8 under MAPA. Mont. Code Ann. § 2-4-102(11)(b)(iv). Those regulations are  
9 “guided” by the Wolf Plan, Admin. R. Mont. 12.9.1303(3), but they are not  
10 dictated by it. Second, the evidence suggested that the Commission’s  
11 establishment of the 2022 hunting regulations is an attempt to implement *statute*,  
12 which the Commission is not free to disregard.<sup>10</sup> And finally, the remedy for the  
13 failure to review the Wolf Plan is to order the State to review the Wolf Plan, not  
14 to halt hunting and trapping. The Court can order that relief in a year just as  
15 easily as it can today.

16 Additionally, the Court’s charge is to minimize the harm to *all*  
17 parties while the case is pending. As discussed above, Plaintiffs have not  
18 established irreparable injury to wolf populations if a preliminary injunction does  
19 not issue. And the Court must also be mindful that there is real harm to judicial  
20 interference in executive enforcement of legislative policy, and that it should not  
21 be done lightly. The State has a legitimate interest in managing wolves and being  
22 able to do so in a manner that is efficient, consistent, and understandable to the  
23

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24  
25 <sup>10</sup> The Court does not agree with the suggestion made by Elizabeth Pennock, the carnivore co-existence advocate for WildEarth Guardians, that the Commission could thumb its nose at the legislature by, for example, setting a hunting or trapping season of a single day. Administrative agencies must implement legislative direction in good faith.

1 public, and that accounts for all the interests at stake, including those of hunters  
2 and ranchers. Plaintiffs have not demonstrated that a preliminary injunction  
3 pending a determination whether to order a review of the Wolf Plan would truly  
4 minimize harm to all parties.

### 5 3. Conflict with Federal Policy

6 Plaintiffs' final challenge is the claim that the State's wolf hunting  
7 and trapping is preempted by the Organic Act for the National Park System. This,  
8 too, does not warrant a preliminary injunction on this record.

9 Plaintiffs assert "conflict preemption," that is, that the state's  
10 hunting and trapping policy stands as "an obstacle to the accomplishment and  
11 execution of the full purpose and objectives of congress. *Bohmker v. Oregon*,  
12 172 F. Supp. 3d 1155, 1162 (D. Or. 2016). What is considered a sufficient  
13 obstacle is a matter of judgment that is informed by examining the federal statute  
14 as a whole and identifying its purpose and intended effects:

15 For when the question is whether a Federal act overrides a state  
16 law, the entire scheme of the statute must of course be considered  
17 and that which needs must be implied is of no less force than that  
18 which is expressed. If the purpose of the act cannot otherwise be  
19 accomplished -- if its operation within its chosen field else must be  
20 frustrated and its provisions be refused their natural effect -- the state  
law must yield to the regulation of Congress within the sphere of its  
delegated power.

21 *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

22 Accordingly, there is a high threshold which must be met if a state law is to be  
23 pre-empted for conflicting with the purposes of a federal Act. *Chamber of*  
24 *Commerce of the United States v. Whiting*, 563 U.S. 582, 607 (2011).

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1           The United States Supreme Court has made clear that states  
2 “undoubtedly” retain some jurisdiction over federal land within their territory.  
3 *Cal. Coastal Com v. Granite Rock Co.*, 480 U.S. 572, 580, 107 (1987).  
4 Accordingly, preemption of state environmental laws does not turn on whether  
5 their “fundamental character” is “prohibitory” or “regulatory.” *Bohmker v.*  
6 *Oregon*, 903 F.3d 1029, 1047 (9th Cir. 2018). Instead, they turn on whether they  
7 “create an obstacle to the *full* accomplishment of Congressional purposes.” *Id.*  
8 (emphasis added).

9           The National Parks Organic Act provides simply that:

10           The service thus established *shall promote and regulate the use of*  
11 *the Federal areas known as national parks*, monuments, and  
12 reservations hereinafter specified by such means and measures as  
13 conform to the fundamental purpose of the said parks, monuments,  
14 and reservations, which purpose is to conserve the scenery and the  
15 natural and historic objects and the wild life *therein* and to provide  
16 U.S.C. § 1 (emphasis added).

17           The Park Service has “broad discretion in determining which avenues best  
18 achieve the Organic Act’s mandate.” *Bicycle Trails Council v. Babbitt*,  
19 82 F.3d 1445, 1454 (9th Cir. 1996). The Park does not permit hunting or trapping  
20 of wolves within its boundaries. The State’s hunting and trapping regulations,  
21 however, do not authorize hunting or trapping within the boundaries of the Park.

22           Plaintiffs argue that by allowing the killing of wolves in WMU  
23 313/316 that are “Yellowstone” wolves—i.e., those wolves identified as  
24 belonging to packs in Yellowstone and only occasionally range outside the Park’s  
25 borders—the State is interfering with the Park’s policy of preservation of its



1 wolves. But whatever impact the 2021 hunt may have had on federal policy in the  
2 Park, 2022 is not 2021. In response to the concerns that arose last year, the  
3 Commission reinstated a quota near the Park—and indeed, it lowered the  
4 proposed quota further at the Park’s request.

5 The Court agrees that the Yellowstone National Park written and  
6 oral comments on the 2022 regulations do not *endorse* the killing of that number  
7 of Yellowstone wolves that wander outside the Park, but that does not mean the  
8 contrapositive is true: that federal policy *opposes* the wolf kills in WMU 313/316  
9 within the quota established. To make a *prima facie* case for conflict preemption,  
10 Plaintiffs needed to establish this quota—as opposed to the wide-open 2021  
11 season—as an obstacle to the Park Service’s fulfillment of its Congressional  
12 objectives. They did not.

13 Similarly, Plaintiffs have not shown irreparable injury. If the  
14 situation were as it existed in 2021, Plaintiffs may have a point. But they have not  
15 shown anything more than speculation that a loss of 6 wolves wandering outside  
16 Yellowstone—an estimated take of only five percent of the Yellowstone wolf  
17 population assuming all six wolves harvested are indeed Yellowstone wolves—  
18 will cause significant damage to the Yellowstone population such that hunting in  
19 WMU 313/316 must be further restricted while this litigation plays out.

## 20 CONCLUSION

21 The attention this case has garnered so far might lead one to  
22 believe the Court is deciding the fate of the gray wolf in the Northern Rockies  
23 today. It is not. Gray wolf management is principally a matter for the political  
24 branches; at most, this Court’s role is simply to ensure those branches of  
25 government are coloring within the lines set by Constitution and statute. And

1 even *that* is not truly before the Court today: here, the Court considers only a  
2 request for a preliminary injunction.

3 Plaintiffs have raised significant policy considerations and  
4 presented several arguments that could potentially prevail in the litigation. The  
5 Court's task, however, is not to decide what Montana's policy should be or to  
6 predict the outcome of this case. The Court must simply ask whether Plaintiffs  
7 have demonstrated a need for a preliminary injunction to minimize harm and  
8 avert irreparable injury until this case can be finally decided. For the reasons  
9 stated above, the Court concludes that they have not. Accordingly,

10 **IT IS ORDERED:**

11 1. Plaintiffs' Motion for Preliminary Injunction (Dkt. 11), filed  
12 November 10, 2022, is **DENIED**.

13 2. The Temporary Restraining Order issued November 16,  
14 2022 (Dkt. 18), is **DISSOLVED**.

15 DATED this 29<sup>th</sup> day of November 2022.

16  
17 

18 **CHRISTOPHER D. ABBOTT**  
19 District Court Judge

20  
21 cc: Robert M. Farris-Olsen, by email at rfolsen@mswdlaw.com  
22 David K.W. Wilson, Jr., by email at kwilson@mswdlaw.com  
23 Jessica L. Blome, by email at jblome@greenfirelaw.com  
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CDA/sm/DDV-2022-896 Wildearth Guardians and Project Coyote v State of Montana et al