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

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

16 Petitioners,

17 v.

18 STATE OF MONTANA, by and through the
19 MONTANA DEPARTMENT OF FISH,
20 WILDLIFE, AND PARKS and the MONTANA
21 FISH AND WILDLIFE COMMISSION,

22 Respondents,

Case No. BDV-2022-896

**PETITIONERS' BRIEF IN SUPPORT
OF THEIR MOTION FOR
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION**

23 Comes now, Petitioners WildEarth Guardians and Project Coyote, a project of the Earth
24 Island Institute, through counsel, and submit this brief in support of their motion for a temporary
25 restraining order and preliminary injunction.
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9 **IV. ARGUMENT 10**

10 A. Petitioners are entitled to the relief demanded. 10

11 1. Respondents' violated MAPA and the Montana Constitution by amending the

12 2002 Wolf Plan without going through rulemaking procedures. 10

13 2. Respondents acted ultra vires in violation of the principal of Separation of

14 Powers enshrined in the Montana Constitution by failing to comply with Montana

15 ESA, 2002 Wolf Plan, and 2004 EIS. 13

16 3. Respondents' extreme wolf policies impermissibly conflict with and are

17 preempted by the National Parks Organic Act. 15

18 B. Allowing the hunt to proceed until the end of the season will cause great or

19 irreparable injury to Petitioners. 17

20 C. An injunction is necessary to preserve the status quo. 19

21 **V. CONCLUSION..... 20**

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2 **I. INTRODUCTION**

3 This motion carries high stakes for the future of Montana's gray wolves, as the Montana
4 Department of Fish, Wildlife & Parks (MFWP) and Montana Wildlife and Wildlife Commission
5 (Commission) plan to kill up to 456 wolves this winter. *See* Declaration of Jessica Blome (Blome
6 Decl.), Exh. A, p. 15. MFWP arrived at its kill quota by estimating the Montana wolf population using
7 a novel wolf population modeling method. This new model was not reviewed by the scientific
8 community before MFWP began using it in 2020, relies on secretive assumptions never disclosed or
9 analyzed in a public process as required by the Montana Administrative Procedure Act (MAPA) and
10 Montana Constitution, and conflicts with existing wolf regulation and policies. Experts agree that
11 Respondents more-than-likely over-estimated the number of wolves in Montana in advance of the
12 hunt by using this model, principally because the model does not account for known wolf mortality.
13 *See* Declaration of Dr. Francisco Santiago-Ávila (Santiago-Ávila Decl.), ¶¶ 19-24. Indeed, Montana
14 lost 318 wolves to human-caused mortality in 2021, yet this new model paradoxically estimates that
15 the wolf population *increased* over the last year. Without an accurate population estimate, Montana
16 cannot sustainably and legally manage the species through another wolf hunt this winter.

17 As of the filing of this Motion, 55 wolves have died at the hands of Montana hunters,
18 including one near the border of Yellowstone National Park. *See* MFWP Wolf Harvest Dashboard,
19 *available at* <https://experience.arcgis.com/experience/34fbb4c9509e45959f6291965388c345> (last
20 visited November 10, 2022). When the trapping season opens on November 28, this killing will
21 accelerate, as new dispatch methods enter the field. To protect Montana's wolf population from an
22 unscientific, unsustainable hunt and to enforce Petitioners' rights to public participation, Petitioners as
23 interested persons under §§ 2-4-102(5) and 2-4-506, MCA, request that the Court issue a temporary
24 injunction prohibiting the hunting and trapping of wolves until this Court can fully consider the merits
25 of Petitioners' request for a preliminary injunction. Petitioners further request that the Court issue a
26 preliminary injunction until the Court can fully consider the merits of Petitioners First, Second, and
27 Fourth Causes of Action alleging that Respondents have violated MAPA and the Montana
28 Constitution by amending the 2002 Wolf Plan without complying with rulemaking procedures.

1 **II. STATEMENT OF FACTS**

2 **A. Wolves are Beneficial to Ecosystems and Human Populations**

3 Wolves play an important role in the ecosystem. *See* Declaration of Dr. Michelle Lute (Lute
4 Decl.), ¶¶ 9-16. The restoration of the wolf in the United States has revitalized ecosystems, including
5 riparian corridors, which in turn have restored the health of America’s navigable waters. *Id.* ¶ 14.

6 Wolves are regarded as a keystone species, whose presence is vital to maintaining the health,
7 structure, and balance of ecosystems. *Id.* ¶¶ 9-16. This phenomenon is referred to as a trophic cascade,
8 which occurs when predators limit the density and/or behavior of their prey and thereby enhance
9 survival of the next lower trophic level, including plant species and healthy waterways. *Id.* ¶¶ 10-11.

10 For example, rampant ungulate overpopulation can lead to a 40% decline in plant species. *Id.* ¶ 14.

11 Wolves help to control ungulate populations, allowing forests to regenerate and mature. *Id.* ¶ 11.

12 Wolves also benefit ungulate populations by culling sick animals, and controlling conditions such as
13 chronic wasting disease. *Id.* ¶ 14. As such, the presence (or absence) of a healthy, sustainable wolf
14 population has a direct and lasting impacts on the health of Montana’s environment. *Id.* ¶¶ 9-16.

15 A healthy wolf population also directly benefits humans. Lute Decl. ¶ 14. For example, a
16 recent study estimated that wolves reduce deer-vehicle collisions by 24%, both by thinning the deer
17 population and by causing deer to avoid travel corridors such as roads. *Id.* In Wisconsin, where the
18 wolf population also totals roughly 1,000 animals, researchers estimate that wolves have saved
19 residents \$10.9 million a year by reducing collisions with deer, in addition to reducing human injuries
20 and fatalities. *Id.*

21 **B. Wolf Regulation in Montana**

22 Gray wolves are indigenous to Montana and once thrived here as part of the state’s natural
23 ecosystems. *See* Blome Decl., Exh. B, p. 3. Upon the advent of statehood in the 1880s, Montana
24 adopted a policy of wolf eradication and enacted bounty laws that led to the virtual elimination wolves
25 by the 1930s. *Id.* at p. 3-4. Notably, this took place before the emergence of ecological science and
26 modern wildlife biology, at a time when regulating wildlife meant little more than killing predators in
27 the belief that this would increase game for hunters and clear the range for imported cattle and sheep.
28 *Id.* It remained legal to kill wolves in Montana until 1973, when the gray wolf was listed as an

1 endangered species under the federal Endangered Species Act, 16 U.S.C. § 1531, et seq. *Id.* at p. 4. In
2 the 1980s, wolves from Canada established dens in the area in and near Glacier National Park. *Id.*

3 After the wolf was listed as an endangered species, the U.S. Fish and Wildlife Service
4 (USFWS) developed a federal recovery plan to restore wolves to the Northern Rockies and Greater
5 Yellowstone ecosystems. *See* Blome Decl. Exh. B, p. 4. In 1995 and 1996, the USFWS authorized the
6 reintroduction of 66 wolves from Alberta and British Columbia into the wilderness areas of Central
7 Idaho and Yellowstone National Park, establishing the Central Idaho Recovery Area and Greater
8 Yellowstone Recovery Area. *Id.* After reintroduction, Montana focused its management effort on
9 achieving sufficient recovery to warrant delisting, which would allow the state to manage wolves with
10 greater flexibility, including through public hunts. *Id.*

11 Twenty years ago, MFWP developed its Draft Montana Wolf Conservation and Management
12 Planning Document (2002 Wolf Plan) to account for the eventual recovery of gray wolves in the state.
13 *See* Blome Decl. Exh. B. The 2002 Wolf Plan was meant to govern wolf management when federal
14 ESA protections were lifted and MFWP and the Commission assumed management responsibility for
15 the species. *Id.* at p. i. Under the 2002 Wolf Plan, MFWP committed to monitoring the state wolf
16 population using physical, “non-invasive methods,” such as track counts, howling surveys,
17 observation report summaries, remote photography, and profiling of genetic material obtained
18 passively from hair or scat samples. *Id.* at p. 30. The 2002 Wolf Plan details MFWP’s plans to
19 conduct track surveys to confirm presence or absence of wolves during periods of snow cover, when
20 such surveys are most accurate, and in conjunction with USFWS and the U.S. Forest Service. *Id.* The
21 2002 Wolf Plan is incorporated by reference into Admin R. Mont. 12.9.1303 and is posted to the
22 MFWP website as the current and applicable “Conservation & Management Plan,” governing state
23 wolf management. *See* MFWP’s Gray Wolf Management webpage, available at
24 <https://fwp.mt.gov/conservation/wildlife-management/wolf> (last visited on Nov. 9, 2022.)

25 In 2004, MFWP issued its Amended Record of Decision and Environmental Impact Statement
26 (2004 EIS) in which MFWP analyzed and adopted certain amendments to the 2002 Wolf Plan under
27 the Montana Environmental Policy Act (MEPA), § 75-1-102(3)(a), MCA. *See* Blome Decl. Exh. C, p.
28 xvii (selecting Alternative 5 on an interim basis until the gray wolf was delisted at which point

1 Alternative 2 would spring into effect). The 2004 EIS largely mirrors the 2002 Wolf Plan, but it
2 includes some important amendments related to how MFWP will monitor and manage “boundary
3 packs” that range across state borders, including a provision that such packs “shall not be counted by
4 more than one state.” *Id.* at Table 2. MFWP did not amend Admin R. Mont. 12.9.1303 to incorporate
5 the 2004 EIS.

6 The 2002 Wolf Plan and 2004 EIS both require that MFWP undertake “a thorough, formal
7 review after the first five years [after the delisting of wolves in Montana]” and that “[t]he wolf
8 management program will be subsequently reviewed at least every five years.” *See Blome Decl. Exh. B*,
9 p. vi, Exh. C, p. 79. The 2002 Wolf Plan and 2004 EIS further provide that:

10 Upon delisting and with adequate funding secured, MFWP will
11 implement the Wolf Conservation and Management Plan. This plan
12 will guide MFWP managers and others responsible for the planning
13 and policy decisions that affect wolf management in Montana. It will
14 also guide decision-making at the field level. MFWP personnel will
use this plan to prioritize field activities, manage time/budgets,
formulate wolf management recommendations, and coordinate with
personnel of other state and federal agencies.

15 *Id.* at Exh. B, p. 73, Exh. C, p. 54.

16 MFWP last formally reviewed the Wolf Plan in 2004, but it never updated the 2002 Wolf Plan
17 or incorporated it into Admin R. Mont. 12.9.1303 even though the science of wolf conservation and
18 carnivore ecology has developed significantly since 2002. *See Santiago-Ávila Decl. Section A*
19 (describing myriad advancements in predator ecology and conservation science over the last twenty
20 years); *see also Lute Decl. Section A*.

21 The USFWS eliminated ESA protections for wolves in Idaho and Montana in 2009, returning
22 wolf management to the states. *See 74 Fed. Reg. 15,123, 15,148 (Apr. 2, 2009)*. Though this action
23 was subsequently declared unlawful by a federal court, Congress codified it through an amendment to
24 the 2011 budget bill. *See Department of Defense and Full-Year Continuing Appropriations Act of*
25 *2011, H.R. 1473, 112th Cong. § 1713 (2011); Defs. Of Wildlife v. Salazar, 729 F. Supp. 2d 1207 (D.*
26 *Mont. 2010)*. As a result of federal delisting, MFWP has maintained regulatory authority over wolf
27 management in the state for the past 11 years.

1 During the 2021 Legislative session, the Montana Legislature passed a series of bills aimed at
2 reducing the number of wolves harvested in Montana from more than 1,160 animals (Blome Decl.
3 Exh. G) to just 15 breeding pairs. *See* MCA § 87-1-901 (2021 Wolf Statute). In addition, the
4 Legislature prohibited MFWP from imposing a hunting exclusion zone around the borders of
5 Yellowstone National Park and Glacier National Park, which resulted in the killing of 19 Yellowstone
6 wolves and an unknown number of Glacier wolves during the 2021 wolf season. *See* Lute Decl. ¶ 22.
7 Several provisions of the 2021 Wolf Statute directly conflict with existing wildlife management policy
8 in Montana, including the 2002 Wolf Plan and 2004 EIS.

9 **C. Wolf Population Modeling**

10 “Animal populations can almost never be counted completely or without error (i.e., one
11 cannot conduct a true ‘census’), so population size usually must be estimated. Because inferences
12 about population size are central to conservation and management, methods to estimate population
13 size are well-developed.” *See* Santiago-Ávila Decl. ¶ 27 (citing Blome Decl. Exh. G, p. 2). Reliable
14 population estimates are based on observed data, such as those required for estimating wolf
15 populations in the 2002 Wolf Plan and 2004 EIS. *Id.* at ¶ 28. Such credible estimates form the basis of
16 conservation decisions about how many wolves can be killed without negatively impacting the wolf
17 population and ecosystem. *Id.* They also are necessary to assess the impact of changes in wolf
18 management policies. *Id.* Because inferences about population size are central to conservation and
19 management, methods to estimate population size are “well-developed, and there is broad consensus
20 that accurate estimates of population size have three properties.” *See* Blome Decl. Exh. G, p. 1. First,
21 “they rely on methods that provide independent information about number of individuals detected
22 [sic] and the probability that an individual will be detected” to ensure the number of animals counted
23 reflects a “real change in population size,” rather than “a change in survey methods or effort, changes
24 in animal behavior or location, or changes in counting conditions.” *Id.*; *see also* Santiago-Ávila Decl.
25 ¶ 18. Second, they are “based on enough data to provide precise information,” in the sense that “the
26 upper and lower bounds on an estimate of population size are not too far apart.” *See* Blome Decl. Exh.
27 G, p. 1. Third, they are based on “data that were collected in a manner that matches the assumptions of
28

1 the statistical model that is used to estimate population size and provides data that are representative of
2 the broader population about which inferences will be made.” *Id.*

3 According to MFWP estimates based on the credible physical population counts required by
4 the 2002 Wolf Plan and 2004 EIS, the wolf population remained steady in Montana between 2012 and
5 2019, stabilizing at approximately 190 packs, or 1,150 individual wolves. *See* Blome Decl. Exh. D, p.
6 6; *see also* Exh. E, p. 5, Fig. 1. During this period, hunters and trappers killed an average of 242
7 wolves per year from 2012 and 2019 and 328 wolves in 2020. *Id.* at Exh. D, p. 1. The United States
8 Department of Agriculture (USDA) Wildlife Services program also killed 60 wolves in 2020, so
9 Montana lost a total of 387 wolves to known human-caused mortality that year, reflecting a 40%
10 increase in mortality over prior years. *See* Blome Decl. ¶ 2.

11 In 2021, MFWP used a novel method of modeling the Montana wolf population, commonly
12 referred to as an integrated population occupancy model or “iPOM,” to estimate the population based
13 on availability of suitable habitat, average pack size, and average territory size. *See* Santiago-Ávila
14 Decl. ¶¶ 19-24; *see also* Blome Decl. Exh. G, p. 9. According to MFWP’s own analysis, iPOM
15 “purports to *eliminate* the need for intensive field-based monitoring” but “still provide a means to
16 reliably estimate wolf abundance.” *Id.* ¶ 20; *see also* Blome Decl. Exh. F, p. 5. The iPOM model,
17 therefore, does not account for wolf known mortality, including mortality resulting from public
18 hunting, Wildlife Service’s depredation, poaching, or known pack elimination. *Id.* Using the iPOM
19 model in 2021, even though 387 wolves died in 2020, more than two hundred deaths over the
20 previous annual average, MFWP estimated that the wolf population remained steady at 1,150 wolves.
21 *See* Blome Decl. Exh. D, p. 1, 6. Based on that information, the Commission set a killing quota of 450
22 wolves for 2021, which it codified in the 2021 Wolf Trapping and Hunting Regulations. Blome *See*
23 Decl. Exh. A-21, p. 6. During the 2021 wolf season, hunters and trappers killed 273 wolves. *See*
24 Blome Decl. Exh. D-1, p. 1. Wildlife Services killed an additional 45 wolves, for a total of for a total
25 of 318 wolves killed in 2021. *See* Blome Decl. ¶ 2.

26 Despite this compounding increase in wolf mortality, MFWP again used the iPOM model to
27 estimate Montana’s wolf population in 2022. As a result, MFWP’s model assumed an increase in the
28 2022 wolf population to 1,160 wolves despite two years of significantly above-average killing in the

1 state. *See* Blome Decl. Exh. E, p. 5. Based on the iPOM estimate, the Commission voted to kill 456
2 wolves in 2022, which it codified in the 2022 Wolf Furbearer Trapping and Hunting Regulations
3 (2022 Quota and Regulations). *See* Blome Decl. Exh. A-22.

4 Experts have shown that the iPOM model is unreliable and incapable of detecting important
5 changes in the wolf population. *See* Santiago-Ávila Decl. ¶ 18-24; Blome Decl. Exh. G. According to
6 a scientific assessment, the iPOM model uses inadequate data and unreliable methods at each step of
7 its analysis (e.g. estimation of area occupied by wolves, territory size, and pack size) as well as the
8 modeling as a whole, compounding uncertainty in each step by combining poor data with poor
9 methodology. *See* Santiago-Ávila Decl. ¶ 18; Blome Decl. Exh. G. The study concluded: “I am aware
10 of no examples other than the Montana iPOM suggesting that population size can be estimated
11 reliably in the absence of direct demographic data and/or population counts.” *See* Blome Decl. Exh.
12 G, p. 8. MFWP cannot make scientifically sound predictions about the impact of wolf hunting and
13 trapping on the sustainability of wolf populations without accurate population data, at a minimum. *See*
14 Santiago-Ávila Decl. ¶¶ 25, 27, 28; Blome Decl. Exh. G. If MFWP reviewed and updated their wolf
15 planning documents to include an analysis of the integrity of the new wolf population model,
16 disclosed analyzed data, and made public employed methods, MFWP would provide an opportunity
17 for scientists and members of the public to contribute to the discussion. *Id.*, ¶ 26. MFWP would then
18 have better information allowing it to accurately estimate wolf populations and fulfill their mandate to
19 sustainably manage wolves. *Id.*

20 **D. National Parks Wolves**

21 The National Park Service has determined that wolves in Yellowstone’s northern range spend
22 an estimated 5% of their time outside the park. *See* Blome Decl. Exh. H. In the fall, these wolves
23 follow migrating elk out of the park or leave their birth pack and enter Montana in search of a mate or
24 new territory. *Id.* Many of the wolves that leave the park from the northern range enter Montana Wolf
25 Management Unit (WMU) 313 and WMU 316, which are adjacent to the park’s northern boundary
26 and located within hunting Region 3. *Id.* Prior to 2021, those two units each had a quota that limited
27 the number of wolves that could be killed. *Id.*; *see also* Blome Decl. Exh. D, p. 4-5, Exh. G, p. 21.
28 Similarly, prior to 2021, MFWP assigned a quota to WMU 110 in Region 1 adjacent to Glacier

1 National Park to limit the number of Glacier National Park wolves killed during seasonal hunts.
2 Blome Decl. Exh. D, p. 4-5.

3 In 2021, MFWP eliminated the quotas for WMU 110, WMU 313, and WMU 316. *See* Blome
4 Decl. Exh. D, p. 5. Of the 450 wolves the Commission voted to kill in 2021, the Commission
5 authorized the killing of 195 wolves in Region 1 bordering Glacier National Park and 82 wolves in
6 Region 3 within which WMU 313 and 316 are located. *See* Blome Decl. Exh. A-21, p. 6; *see also* Exh.
7 I. Abolishing the quotas led to a significant increase in the killing of Yellowstone wolves compared to
8 previous years as the table below shows, in WMU 313 and 316 more Yellowstone National Park
9 wolves were killed during the 2021-22 hunting season than in the five previous seasons combined.

10 **Yellowstone Wolves Killed by Unit and Season**

Wolf Hunt Season	WMU 313	WMU 316	Total
2016-2017	3	3	6
2017-2018	0	2	2
2018-2019	1	1	2
2019-2020	2	0	2
2020-2021	2	0	2
2016-2021 (with quota)	8	6	14
2021-2022 (no quota)	18	3	21

16 *See*, Blome Decl. Exh. I.

17 In the middle of Montana’s 2021-22 wolf trapping season, on December 16, 2021,
18 Yellowstone National Park Superintendent Cameron H. Sholly wrote to Montana Governor Greg
19 Gianforte advising him that “in the span of less than three months, at least 12 Yellowstone National
20 Park wolves have been killed within Montana’s wolf management units 313 (Gardiner) and 316
21 (Cooke City) just north of the park boundary.” *See* Blome Decl. Exh. I. Superintendent Sholly asked
22 the governor to close WMU 313 and 316 “due to the extraordinary number of Yellowstone wolves
23 already killed” and the “high probability of even more park wolves being killed in the near future.” *Id.*
24 Superintendent Sholly explained that the state’s data shows “little to no wolf-related depredation
25 incidents occurring in northern Yellowstone” and also shows that the elk population in northern
26 Yellowstone is at the population objectives set by MFWP.” *Id.* Despite the Superintendent’s request,
27 Respondents did not close WMU 313 or 316, and in 2022, the Commission authorized the killing of
28 195 wolves in Trapping District 1 bordering Glacier National Park, 82 wolves in Trapping District 3

1 within which former WMU 313 is located, and 6 wolves in WMU 313. *See* Blome Decl. Exh. A-22,
2 p. 15.

3 III. LEGAL STANDARD

4 Temporary restraining orders (TROs) are a form of injunctive relief “made upon notice or an
5 order to show cause, either before or after answer, . . . [and] may enjoin the adverse party until the
6 hearing and decision of the application.” Section 27-19-314, MCA. TROs generally precede an
7 injunction and are intended to last only until a hearing is held and a decision is made on the injunction
8 application. *Marketing Specialists v. Service Mktg of MT, Inc.*, 214 Mont. 377, 388, 693 P.2d 540, 546
9 (1985). A district Court has a high degree of discretion in maintaining the status quo, *Shammel v.*
10 *Canyon Res. Corp.*, 2003 MT 372, ¶ 12, 319 Mont. 132, 82 P.3d 912, but must minimize the injury to
11 all parties in the controversy, *Benefis Healthcare v. Great Falls Clinic, Ltd. Liab. P’ship*, 2006 MT
12 254, ¶ 14, 334 Mont. 86, 146 P.3d 714.

13 A preliminary injunction may be granted in the following circumstances:

- 14 1) when it appears that the applicant is entitled to the relief demanded and the relief or
15 any part of the relief consists in restraining the commission or continuance of the act
complained of, either for a limited period or perpetually;
- 16 2) when it appears that the commission or continuance of some act during the litigation
17 would produce a great or irreparable injury to the applicant;
- 18 3) when it appears during the litigation that the adverse party is doing or threatens or is
19 about to do or is procuring or suffering to be done some act in violation of the
20 applicant's rights, respecting the subject of the action, and tending to render the
judgment ineffectual.

21 Section 27-19-201, MCA; *see also*, *Four Rivers Seed Co. v. Circle K Farms*, 2000 MT 360, ¶ 13, 303
22 Mont. 342, 345-46, 16 P.3d 342, 344. These sections are in the disjunctive, and the district court is not
23 required to make a finding that each circumstance exists. *Four Rivers Seed Co.*, ¶ 13. In other words,
24 “An applicant for a preliminary injunction must establish a *prima facie* case, or show that it is at least
25 doubtful whether or not he will suffer irreparable injury before his rights can be fully litigated.” *Porter*
26 *v. K & S P’ship*, 192 Mont. 175, 181, 627 P.2d 836, 839 (1981). Once the applicant meets this burden,
27 courts are “inclined to issue a preliminary injunction to preserve the status quo.” *Id.*

1 This Court has the power to strike down agency policies that do not comply with rulemaking
2 procedures. In *Vainio*, for example, the Supreme Court reversed a man's conviction for Medicaid
3 fraud because his conviction was based on a violation of Medicaid policies the Department of Public
4 Health and Human Services had not adopted in compliance with MAPA rulemaking procedures.
5 *Vainio*, ¶ 71. The Supreme Court reached a similar conclusion in two earlier cases. In *Northwest*
6 *Airlines v. State Tax Appeal Board*, 221 Mont. 441, 720 P.2d 676 (1986), the Supreme Court
7 invalidated a Department of Revenue auditor's unilateral decision to include airline carriers' nonstop
8 "flyover" miles in the agency's tax apportionment formula for determining a carrier's corporate
9 license tax. The Supreme Court concluded that the standard inclusion of "flyover" miles constituted a
10 rule under MAPA. *Nw. Airlines*, 221 Mont. at 445, 720 P.2d at 678. Similarly, in *Rosebud County v.*
11 *Department of Revenue*, 257 Mont. 306, 849 P.2d 177 (1993), the Montana Supreme Court
12 invalidated a Department of Revenue decision to alter the default method for assessing the market
13 value of heavy equipment. The Department had sent a letter to all county assessors directing them to
14 use the new method. *Rosebud Cnty.*, 257 Mont. at 308, 849 P.2d at 178. Although the Department
15 later conducted rulemaking to adopt this new method as a rule, the Supreme Court held that the
16 rulemaking process was a "sham" because the Department had originally denied "the public, the
17 Legislature, and certain affected agencies" their "right to participate effectively in the governmental
18 process." *Rosebud Cnty.*, 257 Mont. at 311, 849 P.2d at 180.

19 The 2002 Wolf Plan is incorporated into ARM as a substantive rule,¹ per § 2-4-307, MCA,
20 and is referenced in several wolf management statutes. See Admin R. Mont. 12.9.1303; see also §§

21
22 ¹ MAPA categorizes "substantive rules" as either "legislative rules" or "adjective or interpretive rules."
23 Section 2-4-102(14), MCA. "Legislative rules" have the force of law and are invalid unless adopted via rulemaking.
24 Section 2-4-102(14)(a), MCA. "Adjective or interpretive rules," in contrast, lack the force of law, § 2-4-102(14)(b),
25 MCA, and may be adopted with publication of a statement of the advisory nature of the rule in the Administrative
26 Rules of Montana. Section 2-4-308, MCA. Respondents failed to follow either process, as they did not conduct
27 rulemaking, so the amendment to the 2002 Wolf Plan do not meet the requirements for a "legislative rule." Section 2-
28 4-102(14)(a), MCA. With respect to the 2002 Wolf Plan itself, Respondents appear to have followed the requirements
for adjudicative rulemaking by incorporating the Plan into the Administrative Rules of Montana. Section 2-4-307,
MCA. But Respondents failed to adopt the iPOM amendment to the rule "in accordance with" MAPA's requirements
for adopting or amending an "adjective or interpretive rule." Sections 2-4-102(14)(b), -308, MCA. Respondents,
therefore, violated the MAPA in either instance and must be immediately enjoined from allowing the further hunting

1 87-1-901(3), 87-5-131, 87-5-132, and 87-1-901, MCA. The Plan provides “the foundation for wolf
2 conservation and management upon delisting and describes a spectrum of management activities that
3 maintain viable populations of wolves and their prey, resolve wolf-human and wolf-livestock
4 conflicts, and gain the support of the people with diverse interests.” *See* Blome Decl., Exh. A, p. 3. At
5 the time of its adoption, MFWP announced it would honor the “diverse perspectives and interest of
6 our citizens and the national public” by considering this spectrum of interests “in designing and
7 implementing a balanced, responsive program that recognizes the opportunities and addresses the
8 challenges faced by people directly affected by wolves.” *Id.* Much of the 2002 Wolf Plan is, therefore,
9 “based on the comments and recommendations of a diverse 12-member citizens group, the Montana
10 Wolf Management Advisory Council, and an Interagency Technical Committee.” *Id.*

11 There can be no doubt that the 2002 Wolf Plan, and following 2004 EIS, require that MFWP
12 develop its wolf population estimate using several co-determinant physical wolf tracking metrics as
13 analyzed and adopted in the 2002 Wolf Plan and 2004 EIS. *See* Blome Decl. Exh. B, p. 4, Exh. 22;
14 Santiago-Ávila Decl. ¶ 28. These “standards of general applicability” were intended to “implement”
15 MFWP’s wolf management policies, and MFWP must comply with MAPA’s rulemaking procedures
16 to amend them. *See* § 2-4-302(1)(a), MCA. When MFWP discarded its obligation to develop a wolf
17 population with these physical metrics in 2021, it illegally amended the 2002 Wolf Plan to allow the
18 use of the iPOM model, which does not appear in the 2002 Wolf Plan or 2004 EIS. MFWP
19 compounded its continuing violation of MAPA in 2022 when it again used the iPOM to estimate the
20 wolf population without amending the 2002 Wolf Plan. *See* Santiago Ávila Decl. ¶¶ 27, 28. MFWP’s
21 illegal amendment has had damaging consequences for gray wolves, and Respondents will continue to
22 cause irreparable injury to Plaintiffs and the gray wolf population if not enjoined from killing wolves
23 pursuant to the illegal iPOM amendment. Section 2-4-102(11)(a), MCA. This Court has the authority
24 to prohibit the use of the iPOM model as an invalid rule amendment, as well as the 2022 Wolf Quota

25
26
27 and trapping of wolves, until they can comply with rulemaking procedures for amending the 2002 Wolf Plan and
28 2002 EIS.

1 and Regulations which were principally informed by the illegal iPOM amendment, under MAPA and
2 the Montana Constitution. *See* Mont. Const. Art. II, § 8; §§ 2-3-114, 2-4-506, MCA.

3 **2. Respondents acted ultra vires in violation of the principal of Separation of**
4 **Powers enshrined in the Montana Constitution by failing to comply with**
5 **Montana ESA, 2002 Wolf Plan, and 2004 EIS.**

6 The Montana Constitution divides the power of government in Montana into three distinct
7 branches—legislative, executive, and judicial. Mont. Const. Art. III, § 1. “No person or persons
8 charged with the exercise of power properly belonging to one branch shall exercise any power
9 properly belonging to either of the others . . .” *Id.* The Legislature may delegate certain power to an
10 administrative agency, but “it is essential that the Legislature fix some standard by which the officer
11 or board to whom the power is delegated may be governed and not left to be controlled by caprice.”
12 *Douglas v. Judge*, 174 Mont. 32, 40, 568 P.2d 530, 534 (1977). Indeed, to avoid the unlawful
13 delegation of pure legislative power, the Legislature “must set limits on such agency’s power and
14 enjoin on it a certain course of procedure and rules of decision in the performance of its function.” *Id.*
15 at 39, 534. The Legislature requires compliance with MAPA rulemaking procedures, in part, to ensure
16 protection of the principal of separation of powers by providing “the executive and judicial branches
17 of government with statutory directives.” Section 2-4-101, MCA. In developing administrative
18 policies and taking other actions, agencies must respect their own procedural rules and regulation as a
19 guardrail to ensure the proper application of delegated legislative authority to the executive branch
20 and to protect the constitutional separation of powers. *See generally Morton v. Ruiz*, 415 U.S. 199
21 (1974). To this end, the courts retain broad authority to check agency policymaking for procedural
22 compliance and for arbitrariness, and an administrative agency must comply with its own
23 administrative rules. *Mont. Solid Waste Contrs. V. Mont. Dep’t. of Pub. Serv. Reg.*, 338 Mont. 1, 161
24 P.3d 837 (2007).

25 Here, the Legislature, “mindful of its constitutional obligations under Article II, section 3, and
26 Article IX of the Montana Constitution” has enacted The Nongame and Endangered Species
27 Conservation Act, or “Montana ESA,” to prevent the unreasonable depletion and degradation of
28 wildlife resources. Section 87-5-103(1), MCA. Wolves are managed under the Montana ESA as a
“species in need of management,” and MFWP regulations provide that MFWP “is dedicated to the

1 conservation of wolf populations within the state of Montana . . . and will implement conservation and
2 management strategies to make sure that wolves continue to thrive and are integrated as a valuable
3 part of Montana’s wildlife heritage.” Mont. Const. Art. IX, § 1, Art. II, § 3; *see also* Admin. R. Mont.
4 12.9.1301; § 87-5-131(2), MCA.

5 Respondents carry out their statutory duty to manage the wolf population in accordance with
6 the Montana ESA, as well as the 2002 Wolf Plan, which is incorporated by reference into the
7 Montana ESA, the 2004 EIS, and MFWP’s own rules. *See* Admin R. Mont. 12.9.1303; *see also* §§
8 87-1-901(3), 87-5-131, 87-5-132, and 87-1-901, MCA. The 2002 Wolf Plan and 2004 EIS impose
9 important limitations on MFWP’s discretion and prescribe certain procedures for wolf management,
10 including the development of a population estimate based on certain physical tracking methods and a
11 requirement that the planning document be reviewed every five years. *See* Blome Decl. Exh. B, p. vi,
12 73, Exh. C, p. 78-79. Respondents’ complete failure to review their planning documents to
13 incorporate new science has had potentially significant consequences for wolves that may not be fully
14 known or understood until the Court compels Respondents to update the 2002 Wolf Plan and 2004
15 EIS to incorporate the iPOM model, at a minimum.

16 Modeling methodology aside, however, there can be no doubt that conservation science
17 regarding wolf management has changed dramatically over the last twenty years, especially in the
18 areas of anthropogenic impacts to wolf populations. *See* Santiago-Ávila Decl. ¶¶ 9-. For example,
19 research has revealed that anthropogenic, or human-caused, mortality is additive or super-additive for
20 wolf populations, meaning it reduces growth at even low levels. *Id.* The 2002 Wolf Plan and 2004 EIS
21 allow human-caused mortality at rates up to 35%, but this new data indicates wolf populations will
22 decline in the event of human-caused mortality at a rate as low as 22%. *Id.* Alongside this research,
23 other studies have evidenced the systemic underestimation of poaching within wolf populations, “to
24 the extent that corrected estimates of poaching point to illegal killing as the main source of
25 anthropogenic mortality for wolves.” *Id.* at ¶ 10. In the past two decades, various independent, peer-
26 reviewed studies have also associated reductions in legal protections for wolves “with more intolerant
27 attitudes and behaviors, including increased inclinations to poach, towards wolves.” *Id.* at ¶ 11.

1 Despite the clear requirements contained in Respondents' own rules to review and update their
2 wolf management policies every five years and these known advances in conservation science,
3 Respondents have never reviewed or updated the 2002 Wolf Plan or 2004 EIS. Respondents have a
4 mandatory, non-discretionary duty to comply with the Montana ESA as well as their own regulations
5 requiring that wolf management be set in accordance with a wolf management plan that has been
6 reviewed and updated at least every five years. In failing to follow their own rules, Respondents have
7 acted in excess of delegated authority in violation of the principal of Separation of Powers enshrined
8 in the Montana Constitution. The Court must invalidate any decisions based on the 2002 Wolf Plan
9 and 2004 EIS, including the 2022 Wolf Quota and Regulations, as unconstitutional as applied, issue
10 an injunction prohibiting Respondents from allowing any additional wolf killing until they have
11 complied with Montana law, and mandate that Respondents review and update the 2002 Wolf Plan
12 and 2004 EIS before authorizing another wolf season. *See* Sections 27-19-101, 27-26-102, MCA.

13 **3. Respondents' extreme wolf policies impermissibly conflict with and are**
14 **preempted by the National Parks Organic Act.**

15 Pursuant to the National Park Service Organic Act (Organic Act), the National Park Service
16 manages and administers the nation's National Park System, which began with establishment of
17 Yellowstone National Park in 1872 and has since grown to include the "superlative natural, historic,
18 and recreation areas in every major region of the United States and its territories and possessions." 54
19 U.S.C. § 100101(b)(1) (2018). Pursuant to a preservationist mandate, the National Park Service is
20 required to "conserve the scenery, natural and historic objects, and wildlife" within the parks and to
21 leave them "unimpaired for the enjoyment of future generations." *See* 54 U.S.C. § 100101(a) (2018).
22 The National Park Service has broad discretion in determining which avenues best achieve the
23 Organic Act's mandate and does not allow wolf hunting or trapping in the national parks (except on
24 non-federal inholdings within Grand Teton National Park). *Bicycle Trail Council of Marin v. Babbitt*,
25 82 F.3d 1445, 1454 (9th Cir. 1996); *see also* 36 C.F.R. § 2.2 (prohibiting hunting and trapping on park
26 lands unless mandated by federal statute). Accordingly, the National Park Service recognizes that
27 wolves are integral to the parks' native ecosystem.
28

1 Under conflict preemption principles, a state law that stands as an obstacle to or substantially
2 interferes with the accomplishment and execution of the full purposes and objectives of a federal law
3 or regulatory objective is preempted, and thus void. *See Bonito Boats v. Thunder Craft Boats*, 489
4 U.S. 141 (1989) (finding Florida statute preempted due to conflict with federal patent policy when it
5 restricted manufacturers' use of unpatented boat hull design); *Geier v. Am. Honda Motor Co.*, 529
6 U.S. 861, 884-85 (2000) (clarifying that conflict preemption does not require a federal agency's
7 specific expression of preemptive intent and holding that state tort suit premised on mandatory airbag
8 duty was preempted by DOT regulation allowing different kinds of passive restraint devices).

9 Though the 2022 Wolf Quota and Regulations reduced the quota within WMU 313 in
10 Trapping District 3 to six wolves, Respondents have taken no steps to ensure the survival of
11 Yellowstone wolves and continue to promote and encourage the killing of wolves in the area. In
12 addition, the 2022 Wolf Quota and Regulations do nothing to protect wolves living in former WMU
13 110 in Trapping District 1 bordering Glacier National Park where the kill quota is 195 wolves, nearly
14 half of the 2022 Wolf Quota for the entire 2022-23 wolf season. The 2021 Wolf Statute, moreover,
15 prohibits the establishment of a wolf hunting exclusion zone bordering the national parks to protect
16 park wolves, which is regarded as the best way to protect federal interests. *See Lute Decl.* ¶ 22.

17 When wolves that occupy territory within Yellowstone National Park and Glacier National
18 Park are killed in accordance with state hunting laws because they travel outside park borders, the
19 wolves who die and the ecosystems of the national parks in which they live are directly and negatively
20 impacted. *Id.*, ¶¶ 22-23. Killing national park wolves, therefore, harms federal interests, and the 2021
21 Wolf Statute and 2022 Wolf Quota and Regulations act as an obstacle to or substantially interfere with
22 the National Park Service's ability to fulfill the preservation mandate of the Organic Act. The 2021
23 Wolf Statute and 2022 Wolf Quota and Regulations, as applied, interfere with federal policy in the
24 management and administration of Yellowstone National Park and Glacier National Park and are thus
25 preempted by the Organic Act.

26 The Court should issue a declaratory judgment, pursuant to section 27-8-201, MCA, declaring
27 that the 2021 Wolf Statute and 2022 Wolf Quota and Regulations are preempted by the National
28

1 Parks Organic Act because they serve as an obstacle to and substantially interfere with the National
2 Park Service's ability to fulfill its preservation mandate.

3 **B. Allowing the hunt to proceed until the end of the season will cause great or**
4 **irreparable injury to Petitioners.**

5 Environmental injuries are often irreparable by their very nature. *Amoco Prod. Co. v. Village*
6 *of Gambell*, 480 U.S. 531, 545 (1987). For this reason, reducing a species' population through state
7 action has often been recognized by courts to cause irreparable harm justifying injunctive relief. *See*
8 *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 219-22 (D.D.C. 2003) (enjoining a state plan to kill
9 525 mute swans from a state population of 3,600); *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14
10 (D.D.C. 1998) (enjoining a bison hunt); *Fund for Animals v. Espy*, 814 F. Supp. 142, 151 (D.D.C.
11 1993) (same).

12 Wolves killed pursuant to an illegal policy, including National Parks wolves, cannot be
13 revived—they are dead forever. The potential for irreparable harm, however, may go beyond the loss
14 of individual wolves and create permanent consequences for the entire ecosystem. “When apex
15 predators are reduced or removed, we see the complex manifestations in the forms of disease outbreaks
16 (novel and otherwise), irruptions of species (non-native and native), and even changes to the dynamic
17 of wildfire, carbon sequestration, and biogeochemical processes[.]” *See* Lute Aff. ¶ 18. Moreover,
18 trapping and snaring cause great injury to non-target species. According to a 2018 FWP report, snares
19 and leghold traps captured a reported 349 non-target animals from 2012 to 2017. *See* Blome Decl. Exh.
20 J. Forty-five percent of those trappings resulted in the animals' death. *Id.* Of those that survived, 33%
21 were reported to have been injured. *Id.* Since these numbers largely predate widespread wolf-trapping
22 in Montana, most of those non-target captures were the result of traps set for coyotes, but 10% were
23 attributed to wolf traps. *Id.* Mountain lions and domestic dogs are particularly prone to incidental
24 capture. Of the 99 mountain lions that were caught in traps or snares from 2012 to 2017, 67% were
25 killed or euthanized. *Id.* Dogs were trapped 148 times over that six-year span. *Id.* Seven of them died.
26 *Id.* Other non-targeted animals caught in traps or snares included protected Canada Lynx, wolverines,
27 grizzly bears, bobcats, elk, and deer. *Id.*

1 In turn, this damage to the wildlife populations and the larger ecosystem irreparably damage
2 the aesthetic interests of Petitioners. *See, e.g.*, Declaration of Lizzy Pennock, ¶ 13 (Pennock Decl.)
3 (describing her fear of safely recreating on public lands due to the increase in trapping and snaring);
4 *Id.* at ¶ 15 (“The failures of the State of Montana, FWP, and the Commission directly impact
5 Guardians’ interests in ensuring the restoration of a healthy and sustainable gray wolf population,
6 science-based wildlife management, and public participation, and have forced us to invoke this legal
7 action to correct these wrongs.”); Declaration of Matthew Koehler, ¶ 16 (Koehler Decl.) (“The
8 regulations are aimed at eradicating this native species that I love, and snaring and baiting, among
9 other approved hunting methods, are unethical and cruel and it frustrates me that this is how our
10 wolves are being managed. As a hunter, I am saddened to see the hatred of a species governing its
11 management without full public participation, and I feel that the allowance of this indiscriminate
12 hunting and trapping has led to worse hunter behavior in general. I am disappointed by this, because
13 for myself and those I hunt with, we hunt with a great respect for the wildlife and take great care to
14 hunt ethically and with integrity, and I am seeing that degrade in the general hunting community since
15 aggressive wolf hunting regulations have been put in place”); Declaration of Norman Bishop, ¶ 20-28
16 (Bishop Decl.) (describing fears for safety and concern that wolf hunt will prevent him and his
17 grandchildren from having the opportunity to see, experience, and photograph Montana wolves in the
18 wild).

19 Respondents’ reliance on the outdated 2002 Wolf Plan, 2004 EIS, and illegal iPOM
20 amendment also harms the recreational and aesthetic interests of Petitioners and their members and
21 supporters, who recreate on public lands in Montana and value the ecological integrity and
22 biodiversity of the National Parks, wilderness, and other wildlands. *See* Pennock Decl. ¶ 13, 18;
23 Koehler Decl. ¶ 11, 14; Bishop Decl. ¶ 9, 15, 16. These policies significantly increase the
24 likelihood that wolves will be killed by over-estimating the number of wolves in the state which
25 supports an artificially high and unscientific quota. They also allow trapping within and near popular
26 recreational areas and trails, lands adjacent to National Parks and wildlife refuges, within wilderness
27 areas, and within lands comprising critical habitat for other endangered species. *See* Blome Decl. Exh.
28 A, p. 8. Once trapping season begins, trappers will be allowed to set live traps and baited snares on

1 public lands that will pose a risk of injury to members of the public who recreate in these areas, and
2 risk of physical injury and death to domestic pets and non-targeted wildlife, including protected
3 species. Respondents must be enjoined from relying on the 2002 Wolf Plan, 2004 EIS, and unlawful
4 iPOM amendment to support a public wolf hunt to prevent irreparable injury to wolves, wolf
5 populations, native ecosystems, and Petitioners' interests in aesthetic, recreational, and personal
6 safety.

7 **C. An injunction is necessary to preserve the status quo.**

8 The requirement of irreparable harm is also met by a showing that a temporary injunction is
9 necessary to preserve the status quo until the parties can fully litigate their case. *Flora v. Clearman*,
10 2016 MT 290, 385 Mont. 341, 384 P.3d 448. "Upon the requisite showing, a preliminary injunction is
11 issued to maintain the status quo pending trial, which has been defined as "the last actual, peaceable,
12 non-contested condition which preceded the pending controversy." *Id.*, ¶ 21. Courts considering
13 preliminary injunctions should in no manner anticipate the ultimate determination of the questions of
14 right involved. *See Sandrock v. DeTienne*, 2010 MT 237, 358 Mont. 175, 179, 243 P.3d 1123, 1128
15 (granting a preliminary injunction prohibiting a landlord from entering the tenant's property pending
16 the outcome of litigation over the landlord's eviction action). "Rather, findings and conclusions
17 directed toward the resolution of the ultimate issues are properly reserved for trial on the merits." *Id.*

18 A district Court has a high degree of discretion in maintaining the status quo, *Shammel*, ¶ 12,
19 but must minimize the injury to all parties in the controversy, *Benefis Healthcare*, ¶ 14. If a party has
20 an adequate remedy at law, equitable relief is improper. A party lacks an adequate remedy at law for
21 redress of injuries if damages are difficult or impossible to measure. *Est. of Mandich v. French*, 2022
22 MT 88, 408 Mont. 296, 509 P.3d 6. Environmental injury, "by its nature, can seldom be adequately
23 remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If
24 such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an
25 injunction to protect the environment." *Amoco Prod. Co.*, 480 U.S. at 545. The loss of wildlife,
26 including wolves, is an irreparable harm that "[m]oney damages would not compensate." *See Habitat*
27 *Educ. Center, Inc. v. Bosworth*, 363 F. Supp. 2d 1090, 1113 (E.D. Wis. 2005) (granting a preliminary
28

1 injunction where “[m]oney damages would not compensate for the loss of goshawk, red-shouldered
2 hawk, marten, and their habitat.”).

3 To preserve the status quo and maintain the existing wolf population pending resolution of
4 Petitioners’ claims, this Court must grant a temporary restraining order and preliminary injunction
5 prohibiting the hunting of wolves until Respondents comply with Montana law. Absent such relief,
6 Petitioners’ rights will be irrevocably and irreversibly injured.

7 **V. CONCLUSION**

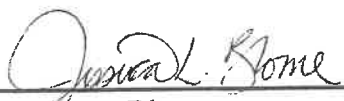
8 Petitioners respectfully request that the Court issue a temporary injunction prohibiting the
9 hunting and trapping of wolves until the Court can fully consider the merits of Petitioners’ Motion for
10 a Preliminary Injunction. Petitioners further request that the Court issue a preliminary injunction
11 prohibiting the hunting and trapping of wolves until the Court can fully consider the merits of
12 Petitioners’ First, Second, and Fourth Causes of action alleging that Respondents have violated
13 MAPA and the Montana Constitution by amending the 2002 Wolf Plan and 2004 EIS to permit the
14 use of the iPOM model without complying with rulemaking procedures, by failing to comply with
15 statutory and regulatory limitations on their discretion in violation of the Separation of Powers, and by
16 impermissibly interfering with the National Parks Organic Act’s preservation mandate.

17
18 Dated this 10th day of November 2022.

MORRISON SHERWOOD WILSON DEOLA, PLLP

19
20 By: 
Rob Faris-Olsen

21 GREENFIRE LAW, PC

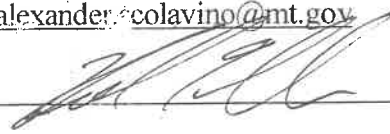
22
23 By: 
24 Jessica L. Blome
Pro hac vice application pending

25 *Attorneys for Petitioners WildEarth Guardians and*
26 *Project Coyote of the Earth Island Institute*

1 CERTIFICATE OF SERVICE

2 I hereby certified that on the 10th day of November 2022, a true copy of the foregoing
3 document was served via U.S. Mail, postage prepaid, and email upon the following:

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11 _____