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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

WESTERN WATERSHEDS PROJECT,
CENTER FOR BIOLOGICAL DIVERSITY,
WILDEARTH GUARDIANS, and
PREDATOR DEFENSE,

Plaintiffs,

v.

USDA WILDLIFE SERVICES,

Defendant.

NO. 1:17-CV-206-BLW

**PLAINTIFFS' COMBINED
RESPONSE/REPLY BRIEF ON
CROSS-MOTIONS FOR SUMMARY
JUDGMENT
[DKT 18 & 24]**

INTRODUCTION

Wildlife Services' summary judgment brief, ECF No. 24-1, asks the Court to disregard all the scientific criticism in the Administrative Record, as well as Plaintiffs' showing that the Final EA misrepresented or avoided key facts about Wildlife Services' predator killing in Idaho. The Court should decline that request. The record confirms that Wildlife Services violated its NEPA duties to take an objective "hard look" at its Idaho predator killing, which risks significant environmental impacts.

As shown in Plaintiffs' opening brief, ECF No. 18-1, the record is filled with critical comments from the Forest Service, Bureau of Land Management (BLM), and others about the one-sided and unscientific nature of Wildlife Services' analysis in the Draft EA. Wildlife Services cites various passages in the Final EA to argue it fully addressed all the critical feedback, which is incorrect. In truth, as shown below, the Final EA brushed off the criticisms or only superficially altered its discussion, without making substantive changes in its analysis. The critical comments from other agencies and Wildlife Services' failure to meaningfully address that criticism confirm that a full EIS is required, as in *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9th Cir. 2011) and *National Parks & Conservation Association v. Babbitt*, 241 F.3d 722 (9th Cir. 2001).

Wildlife Services also asks the Court to simply accept the Final EA's assertion that it cannot assess the effects of its activities at a site-specific level because it supposedly does not know what those activities will be. Yet the record shows that Wildlife Services can anticipate specific activities, like "proactive" coyote killing it conducts year after year in the BLM's Twin Falls and Idaho Falls districts, and killing sage-grouse predators at the request of the Idaho Department of Fish & Game (IDFG). NEPA requires agencies to disclose site-specific direct

and cumulative impacts, but Wildlife Services has shirked that duty here. Remarkably, Wildlife Services submits the extra-record Yeary Declaration, ECF No. 22-3, to argue that its own reports about the extent of coyote killing in southern Idaho are wrong – that uncertainty about the intensity of its actual coyote killing only underscores that an EIS is required.

Wildlife Services also asserts the Court should disregard the agency documents Plaintiffs submitted. The records show that the Final EA misrepresented how Wildlife Services conducts predator damage management on public lands, when it claims to engage in annual work plan (AWP) meetings with the BLM and Forest Service that do not happen in a timely manner or at all. NEPA requires factual accuracy and scientific integrity, not misrepresentations or omissions to avoid disclosing agency actions and their impacts. The agency thus deserves no deference, and the Court should hold that Wildlife Services violated NEPA by failing to take a “hard look” at its Idaho predator control actions.

Accordingly, the Court should grant summary judgment for Plaintiffs, deny Defendant’s summary judgment motion, and reverse and remand the Final EA and Decision/FONSI with instructions to prepare a legally adequate EIS.

ARGUMENT

I. WILDLIFE SERVICES HAS NOT REFUTED PLAINTIFFS’ SHOWING THAT AN EIS IS REQUIRED HERE.

A. Scientific Controversy And Uncertainty Required An EIS.

As Plaintiffs have demonstrated, the Administrative Record is filled with critical comments from Forest Service, BLM, and the public faulting the Draft EA for its one-sided and unscientific presentation, and pointing out numerous areas of scientific controversy and uncertainty about the impacts of Wildlife Services’ predator control actions. *See* Pls’ SJ Br. 12-15; Pls’ SOF ¶¶ 22-29, ECF No. 18-2. These criticisms include: (a) the effects and efficacy of

Wildlife Services' predator control activities are scientifically controversial and uncertain; (b) Wildlife Services wrote off impacts to trophic cascades and biodiversity in "too broad and unsubstantiated ways," and ignored "years of research on the nature of complex predator/prey relationships"; (c) Wildlife Services' coyote-killing would not reduce depredations; (d) Wildlife Services failed to consider site-specific impacts, and (e) the ineffectiveness of raven poisoning in aiding sage-grouse populations, among others. *Id.*

Wildlife Services assures the Court that its Final EA responded to all of the critical comments it received on the Draft EA, repeatedly asserting – in a single-spaced chart in its brief – that it "elevated," "revised," and "updated" various issues. Def's SJ Br. 6-8. In truth, the Final EA sidestepped the comments' substance. For example, the Final EA simply brushed aside the Forest Service's comment that the "effectiveness and efficiency" of Wildlife Services' activities are quite controversial, saying:

The failure of any particular special interest group to agree with every act of a federal agency does not create a controversy and the NEPA does not require the courts to resolve disagreements among various scientists as to the methodology used by an agency to carry out its mission (*Marsh vs. Oregon Natural Resource Council*, [490] USC 360, 378 (1989)).

AR 37241; Def's SJ Br. 6 (citing same). By belittling the Forest Service as a "special interest group" and claiming it merely disagrees on methodology, Wildlife Services gave "short shrift" to these concerns in violation of NEPA. *See Kraayenbrink*, 632 F.3d at 493.

The Ninth Circuit has made clear that where, as here, comments demonstrate there may be a substantial dispute about the size, nature, or effect of a proposed action, the agency must "come forward with a well-reasoned explanation demonstrating why those responses disputing the EA's conclusions do not suffice to create a public controversy based on potential environmental consequences." *Nat'l Parks*, 241 F.3d at 736. In that case, the Park Service

received extensive negative feedback that its EA's analysis was incomplete, the mitigation it relied upon uncertain, and substantial questions existed regarding the agency's methodology and data. *Id.* The Park Service responded that the extent of the effects was unknown. *Id.* at 737. The Ninth Circuit held that the existing data were insufficient to support the agency's conclusion of non-significance, and the agency's promise to rely on after-the-fact monitoring to collect missing data did not resolve the controversy, so an EIS was required. *Id.*

Here, too, Wildlife Services' dismissal of controversy and uncertainty is unconvincing because it writes off comments outlining potential impacts too broadly without responding to their substance. For example, rather than answering the BLM's many questions concerning predator/prey relationships, AR 31292, 31341, the Final EA simply concluded: "Research to precisely define all factors needed to fully understand site-specific predator/prey systems is often expensive, complex, and may take years to complete," and implied that research was the province of state wildlife management agencies. AR 37184. It dismissed any impacts to *local* ecological systems, AR 37526, 37245, 37221, while rejecting the need for any site-specific analysis, AR 37221, 37240-41, 37248-49. Then it suggested that Wildlife Services would be asked to participate in state-run predator-killing experiments intended to gather the missing information about the activities' effects. AR 37184. As in *National Parks*, the Final EA's generalizations about predator-prey relationships do little to resolve the controversy and uncertainty surrounding the missing information about the effects of Wildlife Services' anticipated activities. *E.g.*, 37183-85.

Wildlife Services similarly dismissed impacts to trophic cascades in the Final EA using the same rationale the Forest Service critiqued as "too broad and unsubstantiated" in the Draft EA, AR 31071, even though the Final EA purportedly "elevated" trophic cascades to an issue

“considered in detail.” *Contrast* AR 31071-72 (Draft EA dismissing impacts to trophic cascades) *with* AR 37389 (Final EA dismissing impacts to trophic cascades). Agency reviewers criticized Wildlife Services’ assumptions,¹ yet the Final EA repeated them in dismissing potential impacts stating: “WS-Idaho does not strive to eliminate or remove predators from any area on a long term basis, no predators or prey would be extirpated and ... impacts are generally only on a temporary basis and in relatively small or isolated geographic areas.” AR 37387 (Final EA rationale). The Final EA discounted potential for any impacts to biodiversity and ecosystem resilience using a similarly unconvincing rationale to the one it relied upon to dismiss impacts to trophic cascades. AR 37381 (“WS-Idaho damage management activities would occur in localized areas of Idaho and would not be conducted throughout the year, but would occur for short periods....”).

The Final EA did not convincingly address concerns that lethal predator control does not work. Wildlife Services stated that it would rely on its Wildlife Decision Model, an “analytical thought process” precluding public input, to select the most effective method of control at the site-specific level. AR 37247; *see also* Def’s SJ Br. 14. Wildlife Services, however, cannot rely on an “analytical thought process” conducted with no NEPA analysis as a substitute for site-specific consideration of different predator control methods’ efficacy. *E.g., Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062, 1073-74 (9th Cir. 2002) (agency could not rely on a “promise of a later site-specific analysis” to substitute for an adequate effects analysis).

Likewise, to respond to comments that no scientific basis exists for killing ravens to “benefit” sage-grouse, Wildlife Services punted the decision of whether to conduct predator

¹ *See* AR 31341 (“What about predator removal operations that occur during the same season at the same location for several years in a row?”; “180 days is half the year, so not a ‘short period.’”); AR 31336 (rationale “dismisses a large body of evidence that predator removal can have indirect effects on local ecological systems”); *see also* Pls’ SJ Br. 14-17.

control to IDFG, but admitted that “[t]he question remains as to whether or not predator management can be an effective conservation tools, and if so, under what conditions it may be appropriate to use it (Hagen 2011).” AR 37250-52; *but see* 49816 (Hagen (2011) stating lethal predator control is highly controversial). This underscores the proposed raven control’s controversial or uncertain effects, especially given the critical comments. Wildlife Services cannot avoid its NEPA duties by relying on IDFG to evaluate the need for predator control and whether it can be an effective tool under site-specific circumstances. As an email from a supervisor at Wildlife Services concerning a previous raven killing proposal acknowledged:

It is not sufficient to say that this is IDFGs project on these terms. We can say that we cannot change the design, but we do have to give a hard look at the project. In this instance, the valid question for WS is whether the project will do what it is intended to do (i.e., provide information of sufficient quality to guide future management).

AR 74244 (underscore added).

Plaintiffs’ Opening Brief demonstrated several ways in which Wildlife Services’ own data revealed potentially significant impacts on local coyote populations (and thus, biodiversity and ecological systems) that Wildlife Services ignored because it failed to do any site-specific analysis more narrow than the statewide level. Pls’ SJ Br. 14, 16, 18, 26-29. This echoed comments from agency reviewers and members of the public that more specificity is necessary for an adequate analysis. AR 31341-43, 31292, 33660, 33662, 33677. Rather than provide that specificity in the Final EA, Wildlife Services has now muddied the waters even further by advising that *its own records* on coyote killing on the Twin Falls and Idaho Falls Districts are inaccurate, with discrepancies between reported numbers and actual killing that range in the hundreds. *See* Yeary Decl. ¶¶ 6-9, ECF No. 22-3 (“2013 coyote take was between 155 and 629, rather than the 629 that was originally reported”). That Wildlife Services’ own records cannot be

trusted further highlights the substantial questions concerning the agency's methodology and data. *Nat'l Parks*, 241 F.3d at 736.

As noted in Plaintiffs' Opening Brief, two recent federal district court decisions held that controversy concerning the nature and effect of predator control required an EIS under similar circumstances. In *Wildlands v. Woodruff*, 151 F. Supp. 3d 1153, 1165 (W.D. Wash. 2015), the court held that "significant disagreement among experts regarding the effectiveness of removal to address depredation, a question summarily dismissed by Wildlife Services," warranted an EIS due to controversy. Similarly, in *Sierra Club v. U.S. Fish & Wildlife Service*, 235 F. Supp. 2d 1109, 1134 (D. Or. 2002), the court applied *National Parks* to hold that, where an agency failed to convincingly address concerns that it lacked critical information on cougar density in a project area in which cougars were slated for removal, the controversy factor again required an EIS.

Wildlife Services responds that these cases presented "different facts," but the analogies are very close – both involved predator killing actions that were scientifically controversial and uncertain, and both held the failure to prepare an EIS was arbitrary and capricious because of those factors. The Court should similarly hold that Wildlife Services violated NEPA in failing to prepare an EIS in the face of scientific controversy and uncertainty, here.

B. Wildlife Service's Cumulative Impacts Analysis Ignores Significant Effects.

Wildlife Services argues that Plaintiffs are wrong to suggest that Wildlife Services' activities may have significant cumulative effects requiring an EIS. Def's SJ Br. 19. It claims that its activities are dispersed throughout the state, target predator species that have large ranges, and the Court should defer to its choice to analyze impacts on a statewide geographic scale. *Id.* at 22-24. Yet the available information establishes that Wildlife Services' activities pose significant localized impacts, and without considering these impacts, Wildlife Services'

cumulative effects analysis fails to take the required hard look.

Wildlife Services miscasts Plaintiffs' argument. Plaintiffs did not argue that it was necessarily wrong for Wildlife Services to conduct its cumulative impact analysis on a statewide scale, but that more site-specific detail was required for the analysis to provide a useful understanding of the actions' cumulative effects. *E.g., Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 603-07 (9th Cir. 2010) (vague and generic cumulative effects analysis that lacked any quantified or detailed information about an anticipated mining project in the cumulative effects area was insufficient for failure to take a hard look). The decision in *Sierra Club* is squarely on point. It held that where an EA assumed that the cougar population could withstand a 50% annual mortality rate, but the cougar population for one affected area was unknown and the removals contemplated combined with other sources of mortality could eliminate more than 50% of the population, a substantial question existed as to the significance of cumulative impacts. *Sierra Club*, 235 F. Supp. 2d at 1130-32.

Here too, Wildlife Services dismisses potentially significant cumulative impacts without any quantified and detailed information about effects associated with individual activities and without estimating effects on local coyote populations. Wildlife Services' analysis concludes its activities will not have significant cumulative impacts on coyote populations because it determines only about 20% of the *statewide* coyote population would be removed from all mortality sources, less than the 60% the population can withstand. AR 37307. Thus, it rejects any significant effect on coyotes by looking at impacts only at a statewide scale.

Simultaneously, however, it stresses that its activities are actually conducted on only 11.6% or less of the State each year, and therefore affect only a small geographic area. AR 37306. It dismisses numerous environmental impacts based in part on the small geographic area

to be affected and relatively small number of coyotes to be removed. *E.g.*, AR 37381-82, 37387. The Final EA never acknowledged that the intensity of its activities is likely much greater than its analysis reveals because they are not evenly “dispersed throughout the State,” Def’s SJ Br. 19, but are concentrated on 11.6% of the State, and in particular, on the Twin Falls and Idaho Falls BLM Districts, where they occur in the same areas year after year. Pls’ SJ Br. 16, 28-30. It never evaluated the size of the coyote populations in the areas where it performs work or what proportion of those populations may be removed, and what the effects of those local removals might be, particularly combined with others nearby or adjacent.

Defendant vigorously disputes Plaintiffs’ use of extra-record evidence to make this point—even though the extra-record evidence consists of Wildlife Services’ own records—but information in the Administrative Record also confirms it. The six-year coyote killing data that the Final EA reported reveals that over 50% of its coyote killing occurred in the counties comprising the Twin Falls District. AR 39982 (listing counties); AR 37602-09. Adding mortality from additional counties on the adjacent Idaho Falls District, the percentage of Wildlife Services’ statewide coyote killing climbs to 76%. Idaho Falls District Map²; AR 37602-09. Wildlife Services’ activities are not actually dispersed throughout the state, as Defendant claims, and Wildlife Services has made no effort to evaluate the impacts on the much smaller area where its coyote killing primarily occurs.

Plaintiffs also used this six-year data in their Opening Brief to illustrate that significant percentages of county coyote populations may have been removed. Pls’ SJ Br. 29. With private

² This map is publicly available on BLM’s website, at <https://www.blm.gov/documents/idaho/public-room/map/idaho-falls-district-map> (accessed 2/25/18). The Court may take judicial notice of it. *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998-99 (9th Cir. 2010) (taking judicial notice of information made publicly available on a government website).

hunting and trapping factored in, coyote killing on the county level is likely much higher than those numbers reflect, but Wildlife Services did not consider cumulative effects at the county level. *E.g.*, AR 39051-39204 (IDFG reports showing reported take from hunting and trapping by county). That coyotes are highly mobile exacerbates these impacts because it means killing a large proportion of a county's coyote population could affect a large area outside of the county.

By looking only at the statewide coyote population for its cumulative impacts analysis, the Final EA diluted the true effects to dismiss their significance. Similar to *Sierra Club*, the affected coyote populations in the areas where Wildlife Services operates are unknown, the cumulative effects of Wildlife Services' activities along with private hunting and trapping on those local populations have never been estimated, and potential for annual removals in excess of 60% exists but has not been evaluated. Wildlife Services' activities may be causing significant reductions, or even local extirpations, of coyote populations each year, and impacts on coyote populations may in turn be affecting other species and resources. Pls' SJ Br. 28-29. Wildlife Services has never considered these risks. Because Wildlife Services' coyote killing risks having significant cumulative effects, it triggers the need for an EIS.

C. Wildlife Services Plans to Conduct Activities in Unique Geographic Areas, Threatening Violations of Other Laws.

Wildlife Services' plan to conduct activities in unique geographic areas also implicates a NEPA significance factor, especially because the Final EA did not discuss the unique characteristics of those special places. *Wilderness Watch v. Vilsack*, 229 F. Supp. 3d 1170, 1180-81 (D. Idaho 2017); *cf. Native Fish Soc'y v. Nat'l Marine Fisheries Serv.*, 992 F. Supp. 2d 1095, 1109 (D. Or. 2014) (addressing unique characteristics of the specific unique geographic area at issue).

The record contradicts Wildlife Services' arguments that the Final EA adequately

addressed the characteristics of unique geographic areas where it expects to conduct predator control activities, predator control occurs infrequently in unique geographic areas, and its activities do not affect the physical environment. Def's SJ Br. 30. First, the primary extent of its consideration of unique characteristics is a three-page checklist predicting likelihood of activities, which does not describe any area's unique geographic characteristics. AR 37586-89 (checklist). Second, the checklist—which only considers likelihood of activities within the next five years—reveals that there is an “extremely high” likelihood Wildlife Services will kill predators by use of shooting, traps, or snares in the Boulder-White Clouds Wilderness Complex. AR 37586. Wildlife Services also anticipates a “high” likelihood of killing predators in the Snake River Area of Critical Environmental Concern, the King Hill Creek Wilderness Study Area (WSA), and the Deer Creek WSA, by use of traps, aircraft, shooting, or snares. AR 37587-88. Finally, to argue that killing predators does not affect the environment ignores the mountain of scientific evidence that demonstrates otherwise. *E.g.*, AR 37380-88.

Instead of discussing the areas' unique geographic characteristics and explaining how killing predators might affect them, Wildlife Services relies upon vague and conclusory statements that it complies with other laws and will ensure it complies with management mandates through its AWP process. Def's SJ Br. 31-32. This is not an adequate substitute for a discussion of unique geographic characteristics. Neither is it an analysis of how or whether predator control is (or is not) consistent with preserving those characteristics, particularly since neither the AWPs nor standard operating procedures allow for consideration of alternatives or public involvement. *See Native Fish Soc'y*, 992 F. Supp. 2d at 1109; *see also* AR 33679-81 (Plaintiffs' comments on wilderness analysis in Draft EA).

Wildlife Services' reliance on the AWP process for ensuring compliance with unique

geographic areas' management mandates is particularly troubling in light of Plaintiffs' extra-record evidence showing the AWP meetings do not occur or do not occur in a timely manner, and that Wildlife Services attempts to use them as a "check-the-box" authorization for all of its activities. Brooks Decl., ECF No. 19-1, Exs. 1-8. The Final EA flatly misrepresented how Wildlife Services supposedly ensures compliance with legal mandates for unique geographic areas through the AWP process, when in fact such promised coordination often has not occurred.

As this Court has explained, that activities are slated to occur in a Wilderness and other unique geographic areas is sufficient to invoke the unique geographic characteristics significance factor, requiring an EIS. *Vilsack*, 229 F. Supp. 3d at 1180-81. Defendant tries to distinguish *Vilsack* because the landing of aircraft in Wilderness is not at issue here, but killing native predators will also affect unique geographic characteristics (like naturalness, for example) protected by the Wilderness Act and/or other statutes, and thus the holding in *Vilsack* is still applicable. Because several of the NEPA significance factors occur here, Wildlife Services must complete an EIS.

II. WILDLIFE SERVICES' IMPROPERLY SEGMENTED ITS NEPA ANALYSIS TO AVOID AN EIS.

Wildlife Services must also complete an EIS to assess all of its predator control actions in Idaho and avoid improperly segmenting the impacts of those combined actions. Wildlife Services attempts to controvert Plaintiffs' argument that Wildlife Services improperly segmented analysis of its Idaho wildlife-killing into several EAs by pointing to the agency's determination that differences between the species, needs for the action, and methods used warranted separate analysis. Def's SJ Br. 29; *see also* AR 37528. None of these contentions are true. The species involved are similar; as Defendant quotes from the EA, "Gray wolves (*Canis lupus*) are associated with similar conflicts as those that may occur with the predator species listed above."

Id. at 28 (quoting AR 37169-70). The stated needs for the actions are to address economic impacts on agricultural producers, reduce predation on desired game species, and alleviate purported threats to public health and safety. AR 62109-16 (Bird EA); AR 62429 (Rodent EA); AR 62764-74 (Wolf EA); AR 37168, 37170-204 (Final EA at issue here). The methods used include the same array of traps, poisons, firearms, and explosives. AR 66493-98. The combined impacts of these actions certainly may have significant effects on the environment, and segmenting the analysis into separate EAs to avoid that significance is unlawful.

As Plaintiffs indicated in their Opening Brief, this case is similar to *Western Watersheds Project v. Bennett*, 392 F. Supp. 2d 1217, 1223-24 (D. Idaho 2005), where this Court held that BLM improperly segmented its analysis in violation of NEPA by relying on four separate EAs to approve livestock grazing authorizations that all affected sage-grouse habitats, summarily dismissing potential cumulative impacts. Here, too, Wildlife Services relies on separate EAs to assert there are no significant cumulative impacts from different aspects of its statewide predator-killing activities, without providing any analysis of the cumulative effects of its activities under all of the EAs. Instead, it points to a table showing how many coyotes it purports to kill statewide, and a table listing the non-target species it kills each year.³ Def's SJ Br. 29. This does not consider effects from removing both coyotes and wolves from the same locations, or any of the synergistic effects associated with apex predator removal that Plaintiffs highlighted in their Opening Brief. Pls' SJ Br. 18-19. Indeed, Wildlife Services elected not to consider numerous studies about trophic cascades specifically *because* they concerned wolves. AR 37509. Thus, here, like in *Bennett*, Wildlife Services' decision not to prepare a single EIS analyzing its statewide predator control activities is arbitrary. *See Kleppe v. Sierra Club*, 427

³ As the U.S. Fish & Wildlife Service pointed out, the chart also does not account for nontarget take that Wildlife Services is not aware of. AR 32076.

U.S. 390, 412 (1976) (Plaintiffs must show failure to prepare a single EIS was arbitrary).

III. WILDLIFE SERVICES' FINAL EA FAILED TO TAKE A HARD LOOK AT DIRECT, INDIRECT, AND CUMULATIVE EFFECTS.

Even if Wildlife Services was not required to complete an EIS, it still violated NEPA because its Final EA failed to take a hard look at all of the effects of its actions by not conducting site-specific analysis of effects and failing to establish an adequate environmental baseline.

A. Wildlife Services Must Consider Impacts To Coyote Populations From Killing It Can Anticipate At the Site-Specific Level.

An agency must fully evaluate the site-specific impacts of a proposed action at the time it makes the critical decision to act. *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050-51 (9th Cir. 2013); *State of Cal. v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). Although an agency may prepare a single NEPA document to support both programmatic and site-specific proposals, the review should “address both the broad impacts of the proposed broad Federal action and provide sufficiently detailed environmental analyses for specific decisions, such as determining the locations and designs of one or more proposals to implement the broad Federal action.” Council on Environmental Quality, *Effective Use of Programmatic NEPA Reviews* 15 (Dec. 18, 2014). *See also 'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1095-97 (9th Cir. 2006) (where decision to act was made in a programmatic EIS, site-specific analysis should have been undertaken in the EIS). Once site-specific impacts are identifiable, the agency must address them. *See Block*, 690 F.2d at 761 (detailed analysis required when “a concrete development proposal crystallizes the dimensions of a project’s probable environmental consequences.”)

Wildlife Services’ analysis fails that standard. As other agencies pointed out in comments on the Draft EA, Wildlife Services *can* predict the location of proactive coyote killing. AR 31078, 31341. But rather than “providing detailed environmental analyses” for the decision

to conduct these future activities, as NEPA requires, Wildlife Services simply claimed that “the issues that pertain to predator damage and resulting management are the same, for the most part, wherever they occur and are treated as such.” AR 37221. It concluded: “In some local areas of Idaho, coyote removals may be conducted annually over a period of several years, but this is not likely to result in depleted coyote populations.” AR 37305.

This analysis does not include “locations or designs” for individual projects. It does not describe how many coyotes will be removed, from which areas, for how many years; how success will be measured; site-specific alternatives to the proposed lethal control; or how its activities might interact with other similar projects in the same general vicinity, including private hunting and trapping. Because that information is available, Wildlife Services must analyze it. *Pacific Rivers Council v. Kern*, 689 F.3d 1012, 1026-27 (9th Cir. 2012) *vacated as moot* 570 U.S. 901 (2013) (if it is “reasonably possible” to analyze environmental consequences, agency must perform that analysis). This case is not like *Te-Moak Tribe*, where the specific locations of the activities could not be ascertained until the project was approved. 608 F.3d at 600. Here, Wildlife Services can predict where it will conduct proactive coyote killing based on years of repeated projects, but failed to provide any detailed information about those operations.

Nor can Wildlife Services evade this requirement by purporting to consider site-specific effects through its non-NEPA “Wildlife Decision Model” or AWP. *E.g.*, Def’s SJ Br. 27. Because it is “reasonably possible” to perform the analysis, Wildlife Services must do so, here. *See Pacific Rivers Council*, 689 F.3d at 1028-30 (compliance with “reasonably possible” requirement avoids “shell game”).

B. Wildlife Services Did Not Take A Hard Look At Effects Of Using Lead Shot Or Humaneness, Despite Concerns Raised By Reviewers.

Wildlife Services argues that its failure to respond to comments highlighting serious

environmental concerns associated with its use of lead shot and the cruelty of its methods should have “no bearing” on its obligation to prepare an EIS. This Court and the Ninth Circuit have rejected similar arguments. *W. Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302 (D. Idaho 2008) *aff’d* 632 F.3d 472 (9th Cir. 2011). Wildlife Services alternatively claims that it adequately responded to those concerns, but in truth, it gave them the same treatment it did other agency feedback—largely ignoring them and only making superficial changes.

For example, despite “elevating” lead toxicity to an issue considered in detail in the Final EA, Wildlife Services dismissed its risks to eagles using an identical rationale to the one in the Draft EA. *Compare* AR 30823-28 (Draft EA lead toxicity discussion) *with* AR 37354-55 (Final EA lead toxicity discussion). Its discussion of impacts to eagles largely duplicated analysis in the Draft EA, which reviewers had critiqued, expanding it mainly by explaining why adverse impacts to eagles from lead toxicity are not harming eagles at the population level. AR 37354-55 (Final EA); *see also* AR 30294-99 (Agency review Draft EA). This does not address, and indeed seems to contradict, the U.S. Fish & Wildlife Service’s (FWS) concern that “lead exposure is thought to be one of the leading anth[r]opogenic causes of death to eagles and other scavenging raptors.” AR 32076. Wildlife Services’ new commitment to using only non-toxic shot to kill migratory birds in the Final EA was nothing laudable—FWS explained that “take of migratory birds is REQUIRED to be nontoxic shot.” AR 32075 (emphasis original). Wildlife Services’ made hollow commitments to make carcasses filled with lead shot inaccessible to scavengers “when possible” and to use non-toxic shot alternatives if they “are developed and become reliably available,” stating elsewhere that “burial or off-site disposal is not a safe or practical option” and that non-toxic shot does not meet Wildlife Services’ safety standards. AR 37354, 37375-76. These platitudes fail to meaningfully respond to the comments, rendering the

EA an “exercise in form over substance.” *Kraayenbrink*, 632 F.3d at 492-93.

The Final EA’s analysis of animal suffering reflects a similar effort to paper over agency criticisms. Its discussion simply re-packaged the Draft EA’s framing, based on Schmidt (1989) that, the “determination of what is unnecessary suffering is subject to debate.” *Contrast* AR 30382 *with* AR 37397 (individual value systems influencing views on ethics of wildlife management are “highly variable.”). Indeed, it cited Schmidt (1989) to describe value systems around wildlife despite receiving comments that the citation was outdated. AR 37397, 37405-06. It then concluded: “WS...believes that these activities are being conducted as humanely and responsibly as practical,” even while refusing to commit to a specific trap-check interval, meaning that animals could suffer for weeks in painful leghold traps and strangulation snares. AR 37405, 37284, 37289. As with other issues identified by reviewers, Wildlife Services’ discussion of trap-check intervals and suffering focused on why the status quo is acceptable, not on making changes to respond to feedback. AR 37511.

Thus, here, like in *Kraayenbrink*, Wildlife Services has offered no meaningful response to serious and considered comments by experts, rendering “the procedural requirement meaningless and the [analysis] an exercise in form over substance.” 632 F.3d at 492-93.

C. Wildlife Services Failed To Establish An Adequate Environmental Baseline.

Wildlife Services reliance on its *statewide* analysis inadequately responds to Plaintiffs’ contention that it failed to establish an adequate baseline because it did not describe *local* predator populations or other environmental conditions for specific project areas. Def’s SJ Br. 20. This continues Wildlife Services’ pattern of ignoring local impacts and relying instead on broad statewide generalizations, then rejecting potential for significant impacts by stating its activities are “localized” in nature. *E.g.*, AR 37509.

Wildlife Services' sage-grouse predator killing is a perfect illustration. Presumably, killing sage-grouse predators is intended to have a significant effect on the environment by enhancing sage-grouse populations at the local level. *Contra* Def's SJ Br. 25 (claiming Plaintiffs cannot show significant impact). Wildlife Services' own analysis establishes that predator control can only be an effective tool in localized areas 1) with low sage-grouse nest success, 2) when sage-grouse populations are subjected to high densities of ravens, and 3) in conjunction with other long-term solutions like reducing supplemental food sources and perch structures used by ravens. AR 37187-91, 37251. Predator control should only be considered where habitat quality and quantity are compromised. AR 79417, 37187, 37190-92, 66080. However, the Final EA's approach precluded considering these factors because it did not disclose any site-specific details of the anticipated activities.

Without any of this site-specific information, the Final EA failed to establish an adequate baseline. It did not disclose sage-grouse populations in areas targeted for predator control, describe habitat conditions affecting those populations and their lifecycles, or explain whether sage-grouse nest success is limiting populations and why. Neither did it evaluate whether the populations are subject to high densities of ravens or why, evaluate different methods of predator-control and how their effectiveness will be measured, or describe measures like perch deterrents to be implemented post-project. In sum, it did not provide enough information to measure its activities' effects. Baseline information like this is crucial if activities like these are intended to be part of an "adaptive" process. *See e.g.*, 37190, 49819 (Hagen (2011)). This is particularly true since the limited evidence IDFG has collected so far suggests "[i]t is unlikely we will be able to demonstrate benefits to sage-grouse" from similar raven killing. AR 32059.

Wildlife Services claims not to "offer an opinion" on whether removal of ravens to

benefit sage-grouse is an appropriate management tool, stating that it responds to requests for assistance from IDFG. Def’s SJ Br. 25. But Wildlife Services has an independent obligation to take a hard look at the environmental consequences of its activities, including whether they will produce the intended effect. AR 74244, 37190. To do this, it must provide an adequate baseline to judge its activities’ environmental effects. *Or. Natural Desert Ass’n v. Jewell*, 840 F.3d 562, 568 (9th Cir. 2016); *W. Watersheds Project v. U.S. Forest Serv.*, No. CV 05 189 E BLW, 2006 WL 292010, at *7 (D. Idaho Feb. 7, 2006). Its failure to do so here violates NEPA.

Wildlife Services tries to avoid the need to provide sufficient information in the environmental baseline by relying on after-the-fact population monitoring it believes IDFG will conduct. For example, it states that the sage-grouse predator killing project with which it intends to assist IDFG is an experiment designed to “evaluate the effectiveness of raven removal,” which implies the effectiveness of the activities will be measured through the project—as was the case with the previous unsuccessful mule deer study. AR 37184. It also claims it will avoid adverse cumulative effects by coordinating with IDFG and reviewing wildlife population size and trends. AR 37241, 37238, 37285. As Plaintiffs explained in their Opening Brief, NEPA does not permit this approach. Pls’ SJ Br. 23-25.

IV. WILDLIFE SERVICES FAILED TO ESTABLISH ITS NEW, EXPANDED ACTIVITIES ARE WITHIN ITS STATUTORY AUTHORITY.

Wildlife Services appears to contend either 1) that predators are injurious simply because they eat prey, or 2) that a species is injurious if it may harm some resource. Def’s SJ Br. 9-11. Both arguments are untenable and Wildlife Services’ decision to kill predators without establishing they are injurious is *ultra vires*.

That predators eat prey does not mean they are injurious to prey. *See* AR 31299 (“It is no mystery that predators consume prey—are we supposed to be convinced that this is a bad

thing?"). Sage-grouse, for instance, "co-evolved with a variety of predators." AR 66077 *accord* 51872. A 2010 literature review found that predation only decreased sage-grouse nest success in two of nine studies reviewed, and the low nest success was due to poor nesting habitat. AR 66079. "[I]n areas of intensive habitat alteration and fragmentation, sage-grouse ... populations could be negatively affected by increasing predation...[but] [w]here habitat is not limited and is of good quality, predation is not a significant effect to the species." AR 66080 *accord* AR51876-79. Thus, while sage-grouse nest predators may be "injurious" to sage-grouse populations under certain circumstances, to establish they are "injurious," a careful review of the factors affecting the specific sage-grouse population at issue is required. Wildlife Services refused to undertake such a review here and has not established sage-grouse predators are "injurious."

Moreover, the latter rationale would give Wildlife Services carte blanche to kill any wildlife species identified as a predator for any reason, effectively eliminating the requirement that the species be "injurious." *Lowe v. Id. Transp. Dep't*, 878 F. Supp. 2d 1166, 1174 (D. Idaho 2012) (Court must attempt to give effect to *all* the words in a statute). Wildlife Services could deem beavers "injurious" because they sometimes cause flooding, then use that label to kill beavers in wild areas causing no harm at all. Such a broad reading does not comport with the purpose of the statute and this Court should reject Wildlife Services' reading. *See id.* at 1171-72.

CONCLUSION

For these reasons and those previously briefed, the Court should grant Plaintiffs' motion for summary judgment, deny Defendant's cross-motion for summary judgment, and reverse and remand Wildlife Services' Final EA and Decision/FONSI with instructions to prepare a full, NEPA-compliant EIS.

Dated: March 9, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March, 2018, I filed the foregoing PLAINTIFFS' COMBINED RESPONSE/REPLY BRIEF ON CROSS-MOTIONS FOR SUMMARY JUDGMENT electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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