IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

NO. 2:13-CV-60-BO

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| RED WOLF COALITION, et al. | ) |
| | ) |
| Plaintiffs, | ) |
| | ) |
| v. | ) |
| | ) |
| NORTH CAROLINA WILDLIFE RESOURCES COMMISSION, et al. | ) |
| | ) |
| Defendants. | ) |
| _____ | ) |

**PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

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## INTRODUCTION

It is undisputed that (1) gunshot is the leading cause of wild red wolf mortality, resulting in the death of up to 10% of the population annually in recent years, Pls.' Br. at 7; (2) there have been at least five cases of mistaken identity in the past two years where red wolves were mistakenly shot by people thinking they were coyotes, id.; and (3) the vast majority of red wolf gunshot deaths detected by the U.S. Fish and Wildlife Service ("FWS") are not reported, id. at 20-21. It is also undisputed that gunshot mortality of both red wolves and coyotes disrupts red wolf breeding. Id. at 8. Rather than address these facts, which demonstrate that illegal take of red wolves caused by Defendants' authorization of coyote hunting is reasonably certain to occur going forward, Defendants instead repeatedly ask this Court to rewrite the law. This invitation should be rejected and Plaintiffs' Motion for Preliminary Injunction should be granted.

### I. Red Wolves Are Treated as Threatened for Purposes of ESA Section 9 and Defendants Are Liable for Takes They Have Caused To Be Committed.

Defendants attempt to rewrite the law that applies to this case in three ways, arguing that: (1) they cannot be liable for take of members of an experimental population; (2) further flexibility should be read into existing regulations; and (3) Plaintiffs must *prove* liability for past takes. If these arguments were accepted, endangered red wolves would receive only the barest of protections, a result not intended by Congress when it enacted Section 10(j) of the Endangered Species Act ("ESA" or "the Act"), or by FWS when it used the flexibility Congress granted to design a regulatory scheme for red wolves.

First, Defendants' argument that experimental populations are treated as a third category – separate from threatened and endangered species – for purposes of *take liability*, Defs.' Br. at 3, is simply wrong. Experimental populations are treated *exactly the same* as threatened species under ESA Section 9. See 16 U.S.C. § 1539(j)(2)(C); 51 Fed. Reg. 26564, 26565 (July 24,

1986) (noting increased discretion "on matters regarding incidental or regulated takings" of threatened species). For both experimental populations and threatened species, the ESA's statutory prohibition on take does not automatically apply, but FWS is authorized to promulgate special rules "necessary and advisable to provide for the conservation of [the] species." 16 U.S.C. § 1533(d). The red wolf special rule *fully* extends the take prohibition except in "limited circumstances." See Gibbs v. Babbitt, 214 F.3d 483, 488 (4th Cir. 2000).[1]

Government liability for takes it has "caused to be committed" is widely recognized wherever the take prohibition applies. See, e.g., Animal Prot. Inst. v. Holsten, 541 F. Supp. 2d 1073 (D. Minn. 2008) (finding Minnesota's trapping authorization caused take of threatened lynx); Animal Welfare Inst. v. Martin, 588 F. Supp. 2d 70 (D. Me. 2008) (same as to Maine's trapping authorization); Loggerhead Turtle v. Cnty. Council of Volusia Cnty., Fla., 896 F. Supp. 1170 (M.D. Fla. 1995) (finding county regulations caused take of threatened sea turtles). This rule does not come from Strahan v. Coxe, 127 F.3d 155 (1st Cir. 1997), as Defendants imply, but from the plain language of the ESA: "It is unlawful for any person … to … *cause to be committed* [] any offense defined in this section." 16 U.S.C. § 1538(g) (emphasis added).[2] Offenses defined in that section include violation of threatened species regulations. Id. at § 1538(a)(1)(G). Further undermining Defendants' argument, the red wolf 10(j) rule itself includes a provision making it "unlawful for any person to … *cause to be committed* [] any offense defined" in the regulation. See 50 C.F.R. § 17.84(c)(8) (emphasis added).

[1] Designation of a population as "essential" or "non-essential" affects ESA consultation and critical habitat development, 16 U.S.C. § 1539(j)(2)(C), but is irrelevant to take liability.

[2] Notably, Defendants fail to cite a single case rejecting this plain language reading of the ESA. See Defs.' Br. at 18-20.

Second, while it is true that Section 10(j) is designed to provide flexibility to manage experimental populations, FWS already exercised this flexibility when it developed the red wolf regulatory scheme. While FWS *could have* chosen to allow expansive take of red wolves, it declined that opportunity. Instead, it chose to extend *all* take prohibitions to red wolves, unless the requirements for limited exceptions are met: "[n]o person may take this species, except as provided in paragraphs (c)(3) through (5) and (10) of this section." 50 C.F. R. § 17.84(c)(2). Thus, Defendants' assertions that red wolf takes are legal unless they are intentional or willful, see, e.g., Defs.' Br. at 10, are patently false. Rather, to be legal, red wolf takes must fully satisfy one of the specific exceptions in the 10(j) rule.

Because red wolf takes are almost never reported, Defendants are left attempting to downplay this essential requirement that is repeated *five* times in the 10(j) rule and applies to *each* of the landowner and incidental take exceptions, regardless of whether on private or public land. 50 C.F.R. § 17.84(c)(4)(i)-(v). Defendants offer no explanation of why this element should be severed from the rest of the regulation, and do not respond to Plaintiffs' arguments about why it is necessary to ensure that the take exceptions do not swallow the rule.[3] See Pls.' Br. at 20-21. Without meeting this essential element of the take exceptions, Defendants'

[3] Defendants also offer no explanation for their theory that the reporting requirement warranted its own notice of violation. Defs.' Br. at 10-11. Plaintiffs need only identify a violation with sufficient particularity that it can be corrected. See Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1073 (9th Cir. 1996); San Francisco BayKeeper, Inc. v. Tosco Corp., 309 F.3d 1153, 1158 (9th Cir. 2002) (plaintiffs need not "list every specific aspect or detail of every alleged violation") (internal quotation omitted). Plaintiffs notified Defendants that their authorization of coyote hunting was violating 50 C.F.R. § 17.84(c). The reporting requirement is part of *exceptions* from liability under that rule's take prohibition, and not part of Plaintiffs' claim. Moreover, the reporting requirement is mentioned twice in Plaintiffs' letter. See Dkt. # 1, Ex. 1, at 8, 9.

arguments about hunter intent are irrelevant. See Defs.' Br. at 8-10.[4] See A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945) ("To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people."). See also Pls.' Br. at 21, fn. 4.

The reporting requirement of the 10(j) rule also does not break the chain of causation. Again, reporting is only an element of an *exception* to take liability, not an element of a violation that Defendants must cause. Even if causation of non-reporting were required, however, similar claims of breaks in the causal chain have been consistently rejected. In Holsten, the court explained: "An independent intervening cause 'is one the operation of which is not stimulated by a situation created by the actor's conduct. An act of a human being or animal is an independent force if the situation created by the actor has not influenced the doing of the act.'" 541 F. Supp. 2d at 1079 (quoting Restatement (Second) of Torts § 441(1965)). As there, Defendants' authorization of coyote hunting is the "stimulus" for conduct by hunters that violates the 10(j) rule, including the killing of red wolves without reporting. Id.; see also AWI v. Martin, 588 F. Supp. 2d at 99 ("[B]y authorizing trapping, Maine creates the likelihood that lynx – along with the preferred animal – will find its way into a trap."); Greenpeace Found. v. Mineta, 122 F. Supp. 2d 1123, 1135-36 (D. Haw. 2000) (holding that fishing authorization caused take of endangered monk seals by prompting the *intentional* shooting or clubbing of seals taking fish off hooks). Defendants need not control all elements of the legal violation to be liable.

[4] Defendants rely upon the preamble to 50 C.F.R. § 17.84(c), rather than the regulation itself, in making their arguments about FWS's intent behind the red wolf rule. But preamble language can only be used to explain ambiguous regulations. See White v. Investors Mgmt. Corp., 888 F.2d 1036, 1042 (4th Cir. 1989) ("It is hornbook law … that recitals or preambles in statutes, ordinances, or corporate resolutions are to be looked at at best only when the language of the enacting language is unclear or ambiguous."). Here, the regulatory language is clear.

Furthermore, to the extent Defendants have declared open season on coyotes, day and night, with no limits or reporting requirements, hunters have no reason to investigate what they shoot, making the causal connection between Defendants and non-reporting of take even stronger. It is of no consequence that the state regulations "do[] not allow or otherwise condone intentional and willful taking of red wolves." Defs.' Br. at 10. In none of the cases where state agencies have caused take to occur have these agencies allowed or condoned such action either.

Finally, Defendants seem to demand that Plaintiffs *prove* that particular past red wolf takes were the result of coyote hunters acting in specific violation of the 10(j) rule's intent requirements, again ignoring that these are elements of *exceptions* to take liability. But even if Defendants had not asked this Court to turn the regulatory scheme on its head, Plaintiffs must only show that it is *reasonably certain* an ESA violation will occur in the future. See Pls.' Br. at 21; Animal Welfare Inst. v. Beech Ridge Energy LLC, 675 F. Supp. 2d 540, 564 (D. Md. 2009) (requiring absolute certainty "would frustrate the purpose of the ESA" and "effectively raise the evidentiary standard above a preponderance of the evidence."). Plaintiffs have demonstrated that the elements of an ESA violation have occurred regularly in recent years and can be expected to occur in the future. It is irrelevant that Beech Ridge involved a development that had not yet been built. Defs.' Br. at 15. Once built, it would not have killed every Indiana bat that flew through the area. Nor would every gillnet have killed a whale in Strahan. The "risk of violating the ESA" is present with regard to red wolves, just as it was in those cases. See Strahan, 127 F.3d at 164; Holsten, 541 F. Supp. 2d at 1081 (granting injunction in the absence of recent takes because "the risk of incidental takings of lynx ha[d] [not] disappeared" and it was "likely that

additional takings may occur …."); Loggerhead Turtle, 896 F. Supp. at 1180 ("the future threat of a even [sic] single taking is sufficient to invoke the authority of the Act.").[5]

## II. Defendants Do Not Dispute the Facts on Which Plaintiffs Rely.

Defendants admit that gunshot mortalities have increased in the past 3 years. See Defs.' Br. at 5 (citing Cobb Aff., ¶ 10).[6] Yet, Defendants entirely fail to respond to the significance of gunshot versus other types of mortality. Pls.' Br. at 8. Not only is gunshot the leading cause of mortality for red wolves, but more importantly, it is the leading cause of gunshot mortality for *breeders*. The death of these animals has the greatest impact on the population due to their importance in sustaining the species and in preventing hybridization with coyotes. Id. at 5 (citing Waits Decl., ¶¶ 13-15 and Waits Decl., Ex. M (5-year status review) at 18-19, 28-29).

Plaintiffs have not argued that night hunting contributed to the recent increase in mortality, Defs.' Br. at 6 (citing Myers Aff., ¶ 9), but rather that night hunting will exacerbate the existing problem of gunshot mortality by increasing the risk of mistaken identity. See Pls.' Br. at 17-18. That night hunting permits have yet to be issued, Defs.' Br. at 6-7, only supports Plaintiffs' argument that the risk of illegal take is substantial and imminent.

In addition to direct mortality, take through harm and harassment caused by breeding disruptions is also clearly being caused by Defendants' authorization of coyote hunting. While Defendants question the "placeholder theory," Defs.' Br. at 16-17, they do not contest that it has been a fundamental part of FWS's adaptive management plan since 1999 and remains the best

[5] Defendants also entirely fail to address Plaintiffs' claims about harm by harassment, which by definition includes only a likelihood of harm. Pls.' Br. at 13.

[6] Despite this admission, Defendants misrepresent Dr. Cobb's interpretation of the FWS mortality chart. Compare Cobb Aff., ¶10, and Wheeler Decl., Ex. G, with Defs.' Br. at 5. It shows that, in recent years, overall mortality has annually averaged about 20 animals, while gunshot mortality has averaged about 10; 2013 was consistent with that trend.

available science. See, e.g., Waits Decl., Exs. J, K, M. Rather, they provide a single article noting that further research is necessary and that sterilization is not ideal. See Cobb Aff., Ex. C. This same article also says that red wolf conservation is being hindered by the indiscriminate shooting of coyotes.[7] Id. at 735.

## III. Plaintiffs Will Be Irreparably Harmed by Coyote Hunting in the Red Wolf Recovery Area and the Balance of Harms Supports a Preliminary Injunction.

Defendants again misrepresent the facts and the law related to Plaintiffs' claims of irreparable harm. If accepted, Defendants' arguments would raise the bar for showing irreparable harm to impossible heights.

The irreparable harm inquiry should focus on harm *to plaintiffs*, rather than the species. Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008). Gunshot deaths of red wolves harm Plaintiffs' interests in enjoying these animals in the wild, and this harm is irreparable because it cannot be undone or remedied by money damages. See Pls.' Br. at 22-25. Even if this Court considers harm to red wolves, however, threat of extinction is not required. Rather, courts have supported injunctive relief when there is ongoing or reasonably certain future illegal take of a listed species. See, e.g., Pls.' Br. at 24; Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781 (9th Cir. 1995) (injunction for harm to spotted owls); Defenders of Wildlife v. EPA,

[7] Defendants inexplicably claim that there are no cases involving take of unlisted species harming protected species. Defs.' Br. at 17. This is incorrect. See, e.g., Defenders of Wildlife v. Jackson, 791 F. Supp. 2d 96 (D.D.C. 2011) (holding that EPA must complete ESA consultation on impacts of rodenticide targeting prairie dogs on endangered black-footed ferrets); Greenpeace v. Nat'l Marine Fisheries Serv., 80 F. Supp. 2d 1137 (W.D. Wash. 2000) (invalidating ESA consultation that failed to adequately consider impact of fishery on prey of threatened sea lions).

882 F.2d 1294 (8th Cir. 1989) (injunction for take of black-footed ferrets); Defenders of Wildlife v. Martin, 454 F. Supp. 2d 1085 (E.D. Wash. 2006) (injunction for harm to woodland caribou).[8]

Defendants' cases *do not* support the proposition that the deaths of individual animals may never constitute irreparable harm. Defs.' Br. at 22. For example, Water Keeper Alliance v. U.S. Dep't of Defense held that irreparable harm requires "a concrete showing of probable deaths during the interim period and of how these deaths may impact the species …." 271 F.3d 21, 34 (1st Cir. 2001); see also Animal Welfare Inst. v. Martin, 623 F.3d 19, 27, 29 (1st Cir. 2010) (finding that the "death of a single animal may call for an injunction in some circumstances."). Plaintiffs have shown that the gunshot deaths of even a few red wolves and coyotes causes irreparable harm to the red wolf population by reducing population numbers and increasing the threat of hybridization. See Pls.' Br. at 25-26; Gibbs, 214 F.3d at 498.

Plaintiffs have also demonstrated that irreparable harm to both their interests and the red wolf population would occur because further gunshot deaths can be expected while the Court resolves the merits of this case. Coyote hunting is allowed year-round, and indeed, another red wolf breeder was killed by gunshot during briefing on this Motion. See Suppl. Decl. of Kim Wheeler, ¶ 9, Pls.' Att. 1, Ex. G.[9] See Pls.' Br. at 25-26. Moreover, Section 9 cases often take close to a year for resolution. See, e.g., Pls.' Att. 2 (scheduling order in Friends of the Wild Swan v. Vermillion, Civ. No. 13-66 (D. Mont., filed Mar. 21, 2013), establishing year-long pre-trial schedule); Pls.' Att. 3 (first scheduling order in API v. Holsten, Civ. No. 06-3776 (D. Minn., filed Sept. 20, 2006), establishing 11-month pre-trial schedule). Such timing would again take us

[8] Although this case is listed in the Table of Authorities for Plaintiffs' opening brief, it appears the case cite was inadvertently deleted from the discussion of that case. See Pls.' Br. at 19.

[9] In addition to misinterpreting the standard for irreparable harm, Defendants improperly rely on parsing Plaintiffs' harm and arguing that each type is not irreparable harm on its own. Defendants do not offer any support for this novel approach or explain how it is consistent with the "whole population" approach to irreparable harm they seek to impose on Plaintiffs.

through the historical red wolf mortality spike in September-January. See Wheeler Decl., Ex. G. In addition, Defendants plan to begin permitting coyote night hunting on public lands, which can be expected to drive takes higher throughout the year.

Defendants have also failed to present any evidence related to the balance of harms and public interest that would outweigh the fact that the "'language, history, and structure' of the ESA demonstrates Congress' determination that the balance of hardships and the public interest tips heavily in favor of the protected species." Nat'l Wildlife Fed'n v. Burlington N. R.R., 23 F.3d 1508, 1511 (9th Cir. 1994) (citing TVA v. Hill, 437 U.S. 153, 174 (1978)). The red wolf's experimental, non-essential designation does not affect this balance. Defs.' Br. at 26-27. FWS decided that protection against take was necessary to provide for the conservation of the species. By arguing that take prohibitions for red wolves should be treated less stringently than take prohibitions for other species, Defendants are again asking this Court to rewrite the law. The Court should reject this plea. See, e.g., Fund for Animals v. Norton, 365 F. Supp. 2d 394, 428 (S.D.N.Y. 2005) ("[I]t is not the Court's job to supplant an agency's area of expertise."); Pac. Rivers Council v. Thomas, 936 F. Supp. 738, 751 (D. Idaho 1996) (declining to supplant agency duty "to issue an informed opinion" regarding impact to a listed species).

Defendants' approach to the balance of harms wrongly equates irreparable harm with harm that is reparable. Red wolves benefit society as a whole, in ways that cannot be quantified in monetary terms. Pls.' Br. at 27. In contrast, Defendants argue that economic harm to area landowners would result from an injunction because landowners would no longer be able to shoot nuisance coyotes. Defs.' Br. at 27. Not only is this economic harm not irreparable, it is

also highly speculative.[10] Defendants presume that the only effective method of controlling coyotes is an open hunting season, yet there is ample evidence that indiscriminate shooting of coyotes may increase the coyote population and nuisance behavior. See Suppl. Wheeler Decl., Pls.' Att. 1, Ex. C; Pls.' Br. at 27-28. At the same time, landowners in the five-county area would still be able to kill any coyotes responsible for damage to their property under the existing depredation permit system if this Court were to issue an injunction against the Defendants' authorization of coyote hunting. See N.C. Gen. Stat. § 113-274.

Defendants also argue that an injunction would harm red wolves by "eroding landowner support" for the program. Defs.' Br. at 28-30. In effect, they argue that the law should not be enforced because people would not like it. It is not surprising that Defendants find no legal support for this proposition. If FWS were to determine that enforcing red wolf protections was harming the success of the wild population, they could revisit the regulations. Until then, this Court must enforce the law as written.

**CONCLUSION**

At base, Defendants' arguments hearken back to those rejected in Gibbs v. Babbitt, where the court declined to rewrite the commands of Congress and FWS to provide more "flexibility" to landowners. As the Fourth Circuit found, "Section 17.84(c) aims to reverse threatened extinction and conserve the red wolf for both current and future use in interstate commerce." 214 F.3d at 496. "The specific needs of individual species, as well as the balance to be struck with landowners in or near the species' habitats, present a classic case for legislative balancing." Id. at 498. The Court should grant Plaintiffs' Motion for Preliminary Injunction.

[10] The speculative nature of this harm is further emphasized by the experience of individuals who live within the 5-county Red Wolf Recovery Area and who were not allowed to participate in consideration of the pro-coyote hunting resolutions Defendants attach to the Myers Affidavit as Exhibits E-H. See Suppl. Wheeler Decl., ¶ 2-8.

Respectfully submitted, this the 31st day of January 31, 2014.

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## CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2014, I electronically filed the foregoing **Plaintiffs' Reply in Support of Motion for Preliminary Injunction** with the Clerk of the Court using the CM/ECF system, which will automatically send notification of such filing to counsel for Defendants. A paper copy is being provided to Judge Boyle via overnight mail.

This the 31st day of January, 2014.

/s/ Sierra B. Weaver
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