

No. 13-35253

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALLIANCE FOR THE WILD ROCKIES

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF AGRICULTURE, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3
FOR INJUNCTION PENDING APPEAL

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(2) Fact showing the existence and nature of the claimed emergency:

As set forth with full citations in the motion below, Appellant challenges the unpermitted take of Yellowstone grizzly bears listed under the Endangered Species Act (ESA) via harm and harassment from low-altitude helicopter hazing operations that are intended to haze other wildlife (bison) out of certain areas but incidentally also haze threatened ESA-listed grizzly bears out of their preferred spring feeding habitat, and otherwise disturb, displace, and harass those grizzly bears during the most sensitive period of their year.

There is significant documentation of grizzly bear presence in the area where helicopter hazing operations have commenced. There is also a significant body of scientific evidence indicating that helicopters cause grizzly bears to panic and flee from preferred habitat. Defendant National Park Service's Report to Congress on the effects of overflights on wildlife finds that grizzly bears "never become tolerant"

of low altitude flights, and may “abandon” their preferred habitat because of these flights. Defendants have also expressed multiple prior opinions that displacement may cause incidental take of grizzly bears, and that it is important to avoid disturbing grizzly bears during the spring bear season (April 1 - June 15) in spring grizzly habitat. Three prior opinions from the U. S. District Court for the District of Montana all enjoined low-altitude helicopter activity in occupied grizzly bear habitat.

Defendants commenced helicopter hazing operations today, May 13, 2013, without any advance notice to Appellant. Helicopter hazing operations could continue throughout May, and into June and July. Implementation of annual spring/summer helicopter hazing operations began in 2000. In the period from 2002-2011, Yellowstone grizzly bear rates of fecundity (female bears with cubs) have declined. In the same period, juvenile Yellowstone grizzly survival rates have declined. In the same period the population growth of Yellowstone grizzly bears inside the Yellowstone Grizzly Bear Recovery Zone may have ceased. Outside the Yellowstone Grizzly Bear Recovery Zone, the population of Yellowstone grizzly bears continues to decline. In 2011, Yellowstone grizzly bears exceeded mortality limits for both male and female adult bears.

If the Defendants do not use helicopters for hazing operations, they can

implement less disturbing hazing operations with riders on horseback.

(3) Counsel for the other parties were notified of Appellant's intent to file the motion on May 13, 2013 via email. Appellant requested their position on the motion at that time. All counsel will be served with the motion via the CM/ECF appellate filing system. Appellant also contacted the Ninth Circuit motions attorney prior to filing this motion.

(4) All grounds advanced in support of the motion were submitted to the district court. The district court issued judgment against Appellant on March 26, 2013. On March 28, 2013, Appellant filed its appeal. Appellant filed a motion for injunction pending appeal on April 1, 2013 in the district court. Briefing on that motion was complete on April 26, 2013. In briefing, Appellant notified the district court that the activity could commence as soon as May 1, 2013. The challenged activity commenced today, May 13, 2013. Appellant immediately notified the district court of commencement of the activity. The district court has failed to rule on the motion and failed to afford the relief requested.

I hereby certify the foregoing is correct and Appellant requires relief in less than 21 days.

/s/ Rebecca K. Smith
Rebecca K. Smith
Attorney for Plaintiff

TABLE OF CONTENTS

CIRCUIT RULE 27-3 CERTIFICATE. i

TABLE OF CONTENTS. v

TABLE OF AUTHORITIES. vii

I. INTRODUCTION. 1

II. STATEMENT OF RELEVANT FACTS. 2

III. STANDARD OF REVIEW. 10

IV. ARGUMENT. 12

 A. The public interest and balance of the equities tip sharply in favor of Alliance. 12

 B. There is a likelihood of irreparable harm in the absence of preliminary relief. 13

 C. Alliance raises serious questions on the merits. 16

V. CONCLUSION. 20

CERTIFICATE OF COMPLIANCE. 22

CERTIFICATE OF SERVICE. 23

TABLE OF AUTHORITIES

CASES

<i>Alliance for the Wild Rockies v. Bradford</i> , 720 F.Supp. 2d 1193 (D. Mont. June 29, 2010).....	7, 17, 19
<i>Alliance for the Wild Rockies v. Cottrell</i> , 632 F.3d 1127 (9th Cir. 2011).....	10, 14, 15
<i>Amoco Production Company v. Village of Gambell, AK</i> , 480 U.S. 531,543 (1987).....	11
<i>Animal Protection Inst. v. Holsten</i> , 541 F. Supp. 2d 1073 (D. Minn. 2008).....	17
<i>Biodiversity Legal Foundation v. Badgley</i> , 309 F.3d 1166 (9th Cir. 2002).	11
<i>Connor v. Burford</i> , 848 F.2d 1441 (9th Cir. 1988).	16
<i>Ctr. for Biological Diversity v. Bureau of Land Mgmt</i> , 422 F. Supp.2d 1115 (N.D. Cal. 2006).	16
<i>Forest Conservation Council v. Rosboro Lumber Company</i> , 50 F.3d 781 (9th 1995).	12, 15
<i>Greater Yellowstone Coalition, Incorporated v. Servheen</i> , 665 F.3d 1015 (9th Cir. 2011).....	16
<i>Loggerhead Turtle v. Volusia County</i> , 148 F.3d 1231 (11th Cir. 1998).....	17
<i>Lopez v. Heckler</i> , 713 F.2d 1432 (9th Cir. 1983).....	10

Marbled Murrelet v. Pacific Lumber Company, 83 F.3d 1060 (9th Cir. 1996). . . 15

Motor Vehicle Mfrs. Association v. State Farm Mutual Auto. Insurance Company,
463 U.S. 29 (1983).. 20

National Wildlife Federation v. Burlington Northern Railroad., Inc.,
23 F.3d 1508 (9th Cir. 1994).. 12

Sierra Club v. Bosworth, 510 F.3d 1016 (9th Cir. 2007).. 13

Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987). 11, 13

Strahan v. Coxe, 127 F.3d 155 (1st Cir. 1997). 17

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).. 16

Thomas v. Peterson, 753 F.2d 754 (1985). 11

U.S. v. Plymouth, 6 F.Supp. 2d 81 (D. Mass 1998).. 17

Wash. Toxics Coalition v. Environmental Protection Agency,
413 F.3d 1024 (9th Cir. 2005).. 11

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).. 11

Winter v. Nat. Resources Defense Council, 129 S.Ct. 365 (2008). 10, 11, 12

STATUTES

16 U.S.C.§1532. 17, 18

16 U.S.C. § 1538. 17, 19

REGULATIONS

50 C.F.R. § 17.31(a)..... 17

50 C.F.R. §17.3..... 17, 18

I. INTRODUCTION

This is a civil action for judicial review under the Endangered Species Act and Administrative Procedure Act. Plaintiff Alliance for the Wild Rockies (Alliance) attests that Defendants' decisions to fund, authorize, allow, permit, participate in, implement, and execute low-altitude helicopter wildlife-hazing operations in occupied habitat for the Yellowstone grizzly bear during the spring and summer bear season are arbitrary and capricious, an abuse of discretion, and/or otherwise not in accordance with law. The activities violate the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.*, National Environmental Policy Act (NEPA), 42 U.S.C. 4331 *et seq.*, the National Forest Management Act (NFMA), 16 U.S.C. § 1600 *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.*

Alliance requests that this Court temporarily enjoin Defendants from authorizing, allowing, permitting, participating in, implementing, and executing low-altitude helicopter hazing operations in occupied habitat for the threatened ESA-listed Yellowstone grizzly bear until the Court has the opportunity to issue a final decision on the merits of Alliance's appeal in this case. Although the district court ultimately issued judgment against Alliance on jurisdiction and justiciability grounds, Exhibit 1, prior to that ruling, the district court had granted a temporary restraining order in Alliance's favor. The district court granted that temporary

restraining order because it found that “[t]his situation presented serious questions under the Endangered Species Act, the likelihood of irreparable harm, and the public interest and a balance of the equities tipping in favor of the temporary restraining order.” Exhibit 2.

II. STATEMENT OF RELEVANT FACTS

The Yellowstone grizzly bear is a sub-population of grizzly bear that is currently listed under the ESA. Exhibit 3. Grizzly bears historically ranged in the United States from the mid-plains west to the California coast and south into Texas and Mexico, and numbered over 50,000 in population. Exhibit 4 at 9. In a historical blink of an eye – from 1800-1975 – humans reduced bear numbers and habitat by 98% and restricted their range to a few remnant islands of wild country, including the Greater Yellowstone Ecosystem. Exhibit 4 at ix, 10-11. When the grizzly bear was originally listed under the ESA in 1975, perhaps 1,000 individuals remained. Exhibit 4 at 9; *see also* Exhibit 5.

The number of breeding Yellowstone grizzly bears has been estimated at near or slightly over 100 individuals. *See e.g.* Exhibit 6 at 4338. The best available science indicates that hundreds of breeding individuals are necessary to prevent extinction from inbreeding in the long term. *See e.g.* Exhibit 7 at 1859. Defendant U.S. Fish and Wildlife Service (FWS) recognizes that the effective population size (i.e. breeding individuals) of the Yellowstone grizzly bear is "lower than

recommended for evolutionary success” Exhibit 8 at 14895. Additionally, the most recent review of Yellowstone grizzly bear population status indicates that both independent males and females exceeded mortality limits in 2011. Declaration of Michael Garrity ¶ 7, Attachments 6-7 (May 13, 2013). The best available science also finds that grizzly bear fecundity (female cub production) is declining inside the Yellowstone Grizzly Bear Recovery Zone. *Id.* Juvenile grizzly bear survival rates are also declining, and sub-adult grizzly bear survival rates may be declining. *Id.* “[T]he population increase that occurred during 1983-2002 had evidently slowed or stopped during 2002-2011.” *Id.* The population of grizzly bears outside the Recovery Zone continues to decline. *Id.*

When bears emerge from their dens in the spring, they are famished from a five to six month-long period without food. *See* Exhibit 4 at 8. The Yellowstone grizzly bears heavily depend on their opportunity to consume winter-killed ungulates to nourish themselves and their cubs after den emergence. Exhibit 9 at 13, 24. Accordingly, disruption of grizzly bears during spring feeding activities can have significant detrimental effects on grizzly bears. As the 1993 Grizzly Bear Recovery Plan states, “[g]rizzly bears must avail themselves of foods rich in protein or carbohydrates in excess of maintenance requirements in order to survive . . . post-denning periods.” Exhibit 4 at 7. Although the majority of grizzly bear mortalities are human-caused and occur in the autumn, most “natural” grizzly bear deaths occur

in the spring period. Exhibit 9 at 40.

Thus, Defendants FWS and U.S. Forest Service (Forest Service) recognize the importance of limiting grizzly bear disturbance in spring grizzly bear habitat. For example, in at least two recent incidental take statements for Yellowstone grizzly bears, FWS states: “where grizzly bear use is known or likely to occur and where practicable, delay disturbing activities during the spring in spring habitats to minimize displacement of grizzly bears.” Garrity Declaration ¶6, Attachments 1, 3. Likewise, in a FWS memorandum on grizzly bear management, FWS states: “Due to the limited and restrictive nature of spring range and its importance to the bear, the group supported spring seasonal restrictions on spring ranges.” Garrity Declaration ¶6, Attachment 5. Similarly, in a biological assessment on grizzly bear impacts, the Forest Service states: “[a]ll proposed project activities that take place in spring bear range would avoid the spring bear use period (4/1-6/15).” Garrity Declaration ¶6, Attachment 4.

Motorized vehicle use, usually associated with roads in grizzly habitat, displaces bears and stresses them biologically. FWS states that “[f]emales with cubs displaced into marginal habitat may experience physiological stresses related to decreased nutrient and energy intake, resulting in lower cub survivorship.” Exhibit 4 at 146. One type of motorized use that negatively affects grizzly bears is low-altitude helicopter use. In its formal Report to Congress on the effects of

overflights on wildlife, Defendant National Park Service (Park Service) finds the following: (a) grizzly bears “have been noted to abandon areas in response to small aircraft overflights, even when overflights were infrequent;” (b) “[g]rizzly bears run away from aircraft flying at altitudes as high as 3,000 feet;” (c) “grizzly bears . . . never became tolerant of aircraft, despite very frequent exposure;” (d) there is concern among wildlife biologists that “disturbance from overflights could cause sensitive animals to abandon their habitats;” and (e) “the consequences of habitat abandonment can be serious, particularly for species whose high-quality habitat is already scarce.” Exhibit 10 at 37, 39, 40.

Likewise, the Forest Service acknowledges that “[g]rizzly bears have been noted to panic and flee areas from over-flights in nearly all cases where they have been observed.” Exhibit 11 at 10 (citing the Report to Congress). The Forest Service finds that helicopter use may result in grizzly bears avoiding the area where the helicopter is, as well as avoiding the surrounding drainage. Exhibit 11 at 6. It also acknowledges that the negative effects “may include disturbance resulting in behavioral changes, such as fleeing from the disturbance; physiological changes, such as increased heart rate; displacement to lower quality habitat; and increased energetic demands.” Exhibit 12 at 4. The Forest Service acknowledges that “[i]n areas with relatively dense grizzly bear populations, the physiological cost to a bear caused by moving from preferred habitat (i.e., displacement) may be high because of

the social intolerance of other bears.” Exhibit 13 at 5.

The Forest Service summarizes the findings of numerous studies addressing the impact of overflights on grizzly bears: (a) Harper and Eastman (2000): “Risk of impact to grizzly bear from helicopters is very high;” (b) Interagency Grizzly Bear Committee (1987): “Grizzly bears react strongly to both fixed-wing aircraft and helicopters” and “Bears already fleeing aircraft when first spotted, including 1.0 miles distance and several at ½ mile;” (c) Larkin (undated): “Grizzly bears react very strongly to aircraft, often starting to run while the aircraft was some distance away;” (d) Schoen et al (1987): “in an area that receives intensive aircraft traffic, especially helicopter traffic, bears could be negatively affected by disturbance;” (e) Park Service (2003): “Low level flights have the potential to displace and/or disrupt normal behavior patterns of grizzly bears present along flight paths;” (f) McCourt et al (1974): “authors recommend avoiding low level flights over areas with known grizzly bear concentrations, and avoiding circling or hovering over bears with helicopters. They also recommend a 1,000-foot [above ground level] minimum altitude for aircraft flying over open habitats;” and (g) Aune and Kasworm (1989): “Aircraft flying within 1 km of a collared bear caused the bear to react.” Exhibit 13 at 16-19.

In three prior cases, the U.S. District Court for the District of Montana consistently set aside, as arbitrary, agency authorizations of low-altitude helicopter

use in ESA-listed grizzly bear habitat. *Alliance for the Wild Rockies v. U.S. Forest Service*, CV-07-150-M-DWM, Order at 19-26 (D. Mont. July 30, 2008)[Exhibit 14]; *Alliance for the Wild Rockies v. Tidwell*, CV-08-168-M-JCL-DWM, Findings and Recommendations of United States Magistrate Judge at 16-23 (Dec. 23, 2009)[Exhibit 15], *adopted in full by Alliance for the Wild Rockies v. Tidwell*, CV-08-168-M-JCL-DWM, Order at 2 (March 30, 2010)[Exhibit 16]; *Alliance for the Wild Rockies v. Bradford*, 720 F.Supp. 2d 1193, 1213-1215 (D. Mont. June 29, 2010). None of those decisions were appealed.

Yellowstone grizzly bears share habitat in the Greater Yellowstone Area with Yellowstone bison. Yellowstone bison are managed, in part, according to a 2000 interagency document called the Interagency Bison Management Plan, hereinafter referred to as the “bison management plan.” *See* Exhibit 17. The bison management plan is the formal authorization document for helicopter bison hazing operations.¹ Exhibit 18 at 33:1-4. The bison management plan Record of Decision states that the agencies will execute hazing operations that haze bison off the Gallatin National Forest and into Yellowstone National Park. Exhibit 17 at 11. Defendants Park Service, Forest Service, Animal Plant Health Inspection Service

¹Video footage from helicopter hazing operations is available online: <http://www.youtube.com/watch?v=y9Yklq469hs> (May 9, 2012). Video footage from May 13, 2013 will be available shortly on <http://www.youtube.com/user/BFCMEDIA> under the title “May 13 2013 Bison Helicopter Haze.”

(APHIS), U.S. Department of the Interior (USDI), and U.S. Department of Agriculture (USDA) all signed and authorized the implementation of the bison management plan. Exhibit 17 at 46. The State of Montana adopted the federal agencies' Environmental Impact Statement (EIS). Exhibit 17 at 3.

Defendant State of Montana Department of Livestock (DOL) owns two helicopters. Exhibit 19. DOL does not employ any of its own DOL helicopter pilots. Exhibit 19. When DOL's own helicopter is used for bison helicopter hazing, the pilot is a federal employee of USDA. Exhibit 19. From 2000 - 2011, when DOL contracted with a private helicopter company to do helicopter hazing, the federal government provided all of the funding for helicopter hazing operations. Exhibit 20 ¶ 4. In response to this litigation, Federal Defendants refused to fund helicopter hazing operations in 2012. *See* Exhibit 20 ¶ 5.

Over the past several years there have been numerous observations of significant amounts of grizzly bear activity prior to and during hazing operations in the Hebgen Basin near West Yellowstone, Montana.. For example, in 2010, a grizzly bear was incidentally caught on film fleeing from a hazing helicopter. Exhibit 21. On May 13, 2011, the Forest Service issued a joint press release with partner agencies that states: "Bears are out and active this time of year in the Greater Yellowstone area, including the Gallatin National Forest . . . Numerous sightings of bears feeding on carcasses have already occurred . . . on the Horse

Butte Peninsula just north of West Yellowstone, Montana, and throughout Yellowstone National Park. Exhibit 22. The same press release states that grizzly bears had “emerged from their dens and are feeding primarily on ungulate carcasses and early spring green-up” and that “their primary springtime food source [is] wildlife carcasses.” Exhibit 22; *see also* Exhibit 23 and 24 (documenting grizzly presence in the area in 2011).

In 2012, there was a grizzly bear sighted approximately ½ mile from the helicopter hazing route prior to helicopter hazing operations that day. Exhibit 18 at 25:12-25, 26:1-2. A distance of ½ mile is within the range in which aircraft can cause grizzly bear displacement. Exhibit 13 at 16. This year there has also been abundant evidence of grizzly bear sign in the Hebgen Basin at the same time planned for hazing operations. Declaration of Stephany Seay (May 13, 2013).

Helicopter hazing operations may last until July if there are still bison that the Defendants want to move. For example, in 2010, hazing operations occurred until July 29, and the helicopter was used to haze bison during 15 operations. Exhibit 25 at 3350, 3335. The Park Service admits that “[d]uring several hazing events in [Yellowstone National Park] the helicopter flew over grizzly bears” Exhibit 26 at 3328. The Park Service admits that “[a]lthough the helicopter works well for hazing bison, it has a negative impact on visitor experience and disturbance of other wildlife, i.e. bears and wolves.” Exhibit 26 at 3330.

III. STANDARD OF REVIEW

The standard of review for an injunction pending appeal is essentially the same standard that applies to a motion for preliminary injunction. *See Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). In general, “[a] plaintiff seeking a preliminary injunction must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Defense Council*, 129 S.Ct. 365, 374 (2008). This Court applies a sliding scale test to these factors, which does not require absolute surety as to the “likelihood of success on the merits” prong. Instead, if the plaintiff can at least raise “serious questions going to the merits,” and demonstrate “a balance of hardships that tips sharply towards the plaintiff,” the plaintiff is entitled to preliminary injunctive relief “so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

In ESA cases, a plaintiff’s request for a preliminary injunction is reviewed with a strong presumption in favor of granting the injunction:

Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities. . . . the *balance of hardships and the public interest tip heavily in favor of endangered species*. [citation omitted]. *We may not use equity's scales to strike a*

different balance.

Sierra Club v. Marsh, 816 F.2d 1376, 1383 (9th Cir. 1987)(emphasis added). This presumption applies for both substantive and procedural violations of the ESA: a plaintiff “is entitled to injunctive relief if the [defendant] violated a substantive or procedural provision of the ESA” *Id.* at 1383-84, 1389; *see also Thomas v. Peterson*, 753 F.2d 754, 764 (1985); *Wash. Toxics Coalition v. Env'tl. Prot. Agency*, 413 F.3d 1024, 1029, 1034-35 (9th Cir. 2005); *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177-78 (9th Cir. 2002).

In *Weinberger v. Romero-Barcelo*, the U.S. Supreme Court noted that requests for injunctions under the ESA were not subject to the traditional equitable discretion afforded to requests for injunctive relief under the Clean Water Act:

In *TVA v. Hill*, we held that Congress had foreclosed the exercise of the usual discretion possessed by a court of equity. There, we thought that ‘[o]ne would be hard pressed to find a statutory provision whose terms were any plainer’ than that before us. [citation omitted] . . . The purpose and language of the statute limited the remedies available to the District Court; only an injunction could vindicate the objectives of the Act.

456 U.S. 305, 313-14 (1982); *see also Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 543 n.9, 544 (1987)(requests for injunctions under Alaska National Interest Lands Conservation Act are subject to equitable discretion not afforded to requests for injunctions under the ESA).

Moreover, this Court has held that if a plaintiff brings a challenge under § 9

of the ESA, the standard for injunctive relief is that the plaintiff must simply show that prospective harm is likely. *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 786 (9th 1995)(citation omitted); *National Wildlife Federation v. Burlington Northern R.R., Inc.*, 23 F.3d 1508, 1512 (9th Cir. 1994). Past takings are instructive in this determination. *National Wildlife*, 23 F.3d at 1512. A plaintiff in a § 9 case does not need to show *certainty* of future harm, nor does it need to show a threat of *extinction* from the challenged activity, before an injunction will be granted. *National Wildlife*, 23 F.3d at 1512, 1512 n.8.

In the context of the ESA, Congress has stated:

Injunctions provide greater opportunity to attempt resolution of conflicts before harm to a species occurs.... The ability to enjoin a violation of the Act rather than the ability only to prosecute a completed violation will better serve the interests of the public, the potential violator and the potentially harmed species.

Forest Conservation, 50 F.3d at 786 (citing Congressional documents).

IV. ARGUMENT

Alliance is entitled to an injunction pending appeal because the public interest and balance of equities tip sharply in its favor, there is a likelihood of irreparable harm, and there are serious questions on the merits.

A. The public interest and balance of the equities tip sharply in favor of Alliance.

The Supreme Court holds that Congress foreclosed a reviewing court's

equitable discretion regarding the public interest and the balancing of the equities when addressing claims under the ESA: “only an injunction [can] vindicate the objectives of the Act.” *Weinberger*, 456 U.S. at 313-14. Thus, “the balance of hardships and the public interest tip heavily in favor of endangered species . . . [and a reviewing court] may not use equity's scales to strike a different balance.” *Marsh*, 816 F.2d at 1383 (citations omitted). This case involves imminent harm to a species that is protected under the ESA. For this reason, the balance of hardships and public interest tip sharply in Alliance’s favor.

Although the district court ultimately dismissed Alliance's complaint on jurisdiction and justiciability grounds, prior to final judgment the district court did grant a temporary restraining order to Alliance and explicitly stated that "the public interest and a balance of the equities tip[] in favor of the temporary restraining order." Exhibit 2 at 2-3.

B. There is a likelihood of irreparable harm in the absence of preliminary relief.

As this Court has stated, "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007) (internal quotations and citations omitted). In this case, Alliance's members use occupied Yellowstone grizzly bear habitat for vocational and recreational

purposes. Garrity Declaration ¶¶ 2-9. Alliance asserts that the challenged activities will irreparably harm its members' interests in the naturally functioning ecosystems of the Greater Yellowstone Area, in particular their interests in viewing, studying, and enjoying Yellowstone grizzly bears undisturbed in their natural surroundings this spring and summer bear season. Garrity Declaration ¶¶ 2-9. The challenged activities will prevent Alliance's members' use and enjoyment of occupied Yellowstone grizzly bear habitat in its undisturbed state for this purpose. Garrity Declaration ¶¶ 2-9. This Court holds that this type of harm to Alliance's members' interests satisfies the irreparable harm prong of the preliminary injunction test. *Cottrell*, 632 F. 3d at 1135.

Additionally, in incidental take statements in other cases, Defendant FWS recognizes that displacement of Yellowstone grizzly bears during spring feeding activities could cause take under the ESA: “avoidance of otherwise suitable habitat that may occur in some areas *constitutes incidental take* of grizzly bears through ‘harm’ as a result of significant habitat alteration that disrupts breeding, feeding and/or sheltering.” Garrity Declaration ¶ 6 (emphasis added); *see also id.* (“incidental take of grizzly bears [may result] due to displacement of some grizzly bears, specifically female bears, from essential habitat. This displacement is likely to cause some level of impairment of breeding and feeding, especially during the spring period.”) Thus, in prior incidental take statements, FWS recommends that “where

grizzly bear use is known or likely to occur and where practicable, *delay disturbing activities during the spring in spring habitats to minimize displacement of grizzly bears.*” *Id.* (emphasis added). In this case, Defendants do not have a permit for take and are not delaying helicopter hazing operations during the spring bear season in spring bear habitat. Thus, the challenged activity presents the irreparable harm of unpermitted take. *See e.g. Marbled Murrelet v. Pac. Lumber Co.*, 83 F.3d 1060, 1067-68 (9th Cir. 1996); *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 787-88 (9th Cir. 1995) (impairing the behavioral patterns of a single pair of protected owls constituted harm requiring an injunction).

As discussed above, Yellowstone grizzly bears occupy the same area planned for helicopter hazing activities during the same time as those activities. As also discussed above, the science, prior agency analyses, and prior legal precedent on the impact of low-altitude helicopters on grizzly bears, and the impact of disturbance in grizzly bear spring habitat, all establish that low-altitude helicopter use displaces, harms, and adversely affects grizzly bears. Accordingly, there is a likelihood of irreparable harm to grizzly bears, in addition to the irreparable harm to Alliance's members' interests, and the irreparable harm of unpermitted take.

Although the district court ultimately dismissed Alliance's complaint on jurisdiction and justiciability grounds, prior to final judgment it did grant a temporary restraining order to Alliance and explicitly stated that "[t]his situation

presented . . . the likelihood of irreparable harm" Exhibit 2 at 1-2.

C. Alliance raises serious questions on the merits.

The long-standing legal interpretation of the ESA, as established by our highest court, holds that Congress “clearly [] viewed the value of endangered species as ‘incalculable.’” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 187(1978). The statute reflects “a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.” *Id.* at 185. In order to ensure that ESA-listed species receive the highest priority, this Court requires that reviewing courts “give the benefit of the doubt to the species.” *Connor v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988)(citation omitted). As one district court has noted, this standard should be applied “[t]o the extent that there is any uncertainty as to what constitutes the best available scientific information” *Ctr. for Biological Diversity v. Bureau of Land Mgmt*, 422 F. Supp.2d 1115, 1127 (N.D. Cal. 2006). As this Court recently noted in the case affirming ESA protections for Yellowstone grizzly bears, an agency “cannot take a full-speed ahead, damn-the-torpedoes approach . . . especially given the ESA’s ‘policy of institutionalized caution.’” *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015, 1030 (9th Cir. 2011).

For the purposes of this motion, Alliance will only address its ESA Section 9 claim, which applies to all parties, and cannot be deemed moot by any stretch of the

imagination. Section 9 of the ESA prohibits any person from “taking” an endangered species. 16 U.S.C. § 1538(a)(1)(B). This prohibition applies equally to threatened species, unless otherwise indicated by a species-specific rule promulgated pursuant to Section 4(d) of the ESA. 50 C.F.R. § 17.31(a); *Loggerhead Turtle v. Volusia County*, 148 F.3d 1231, 1237 (11th Cir. 1998); *U.S. v. Plymouth*, 6 F.Supp. 2d 81, 90 (D. Mass 1998). “Take” is defined to include “harass.” 16 U.S.C. § 1532(19). “Harass” is defined as an “intentional or negligent act . . . which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. Defendant FWS may allow, under certain terms and conditions, the taking of a threatened or endangered species that is “incidental” to the purpose of an otherwise lawful activity. To escape liability, however, the person must have received an “Incidental Take Permit.” 16 U.S.C. § 1539(a)(1)(B); *see Bradford*, 720 F. Supp. 2d at 1210 - 1211.

The ESA broadly defines “person” to explicitly include states, state officers, and state agencies and departments. 16 U.S.C. § 1532(13); *see also Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997); *Pacific Rivers Council v. Brown*, 2002 WL 32356431 (D. Or. 2002); *Seattle Audubon Soc’y v. Sutherland*, 2007 WL 1577756 (W.D. Wash. May 30, 2007); *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073

(D. Minn. 2008). The ESA “not only prohibits a party from directly causing take, but also prohibits a party . . . from bringing about the acts of another party that exact a taking.” *Seattle Audubon v. Sutherland*, 2007 WL 1300964 at*8 (W.D. Wash. 2007), *citing Strahan*, 127 F.3d at 163. As the court noted in *Sutherland*: “Courts have repeatedly held government officers liable for violating the take prohibition when the officers authorized activities undertaken by others that caused take.” *Sutherland*, 2007 WL 1300964 at *9.

None of the Defendants have received an incidental take permit for the helicopter hazing operations that they allow, permit, authorize, fund, conduct, or participate in during the months of May, June, and July. Helicopter hazing operations cause take due to harm from harassment and displacement from critical post-den emergence feeding activities. Consistently and repeatedly causing grizzly bears to panic, flee, and hide from helicopters constitutes the type of displacement from spring feeding activities that is a significant disruption of normal behavioral activities. *See* 16 U.S.C. §1532(19); 50 C.F.R. §17.3. As noted above, in other cases the agencies have issued incidental take statements and other analysis documents that admit that they should avoid disturbing grizzly bears in their spring habitat (April 1 to June 15). Garrity Declaration ¶ 6. The agencies have also admitted that displacement, especially displacement of female grizzly bears, can cause take. *Id.*

Moreover, as discussed above, the record in this case is replete with scientific documentation that grizzly bears never become tolerant of helicopters, that helicopters cause grizzly bears to panic and flee in nearly all cases, and that grizzly bears may run from helicopters at distances as far away as one mile. Exhibits 10, 11, 13. Defendant National Park Service even presented a Report to Congress that contains these type of findings. Exhibit 10. Likewise, the Forest Service has also compiled a review of similar studies, which indicates that helicopters pose a “very high” risk of impact to grizzly bears and finds that “authors [of one study] recommend avoiding low level flights over areas with known grizzly bear concentrations” Exhibit 13. One incident of take via harassment has even been documented on film. *See* Exhibit 21 (authenticating video showing grizzly bear fleeing from hazing helicopter, which is available online at <http://www.youtube.com/watch?v=fY9uCZbmGtU>). Defendants’ conduct allowing, permitting, funding, authorizing, conducting, implementing, and participating in helicopter hazing operations that are causing past and ongoing unpermitted take of threatened Yellowstone grizzly bears violates Section 9 of the ESA. 16 U.S.C. § 1538(a)(1)(B); *Sutherland*, 2007 WL 1300964 at *8; *Bradford*, 720 F. Supp. 2d at 1210 -1211.

The unpermitted take of even one individual is prohibited under Section 9. 16 U.S.C. §1538(a)(1)(B). Thus, in order to avoid Section 9 liability, the agencies

must argue that these helicopter hazing operations will never harass a single grizzly bear. In light of the best available scientific information, and the fact that the helicopter operations are in fact expressly intended to displace wildlife via harassment, such a position is “counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Accordingly, Alliance raises serious questions on the merits of its ESA Section 9 claim. Although the district court ultimately dismissed Alliance's complaint on jurisdiction and justiciability grounds, prior to final judgment the court did grant a temporary restraining order to Alliance and explicitly stated that “[t]his situation presented serious questions under the Endangered Species Act” Exhibit 2.

V. CONCLUSION

For all of the above-stated reasons, Alliance requests that this Court temporarily enjoin Defendants from authorizing, allowing, permitting, funding, participating in, and executing low-altitude helicopter hazing operations in occupied habitat for the threatened Yellowstone grizzly bear until this Court has the opportunity to issue a final decision on the merits of Alliance's appeal in this case. Respectfully submitted this 13th Day of May, 2013.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion includes the required Rule 27-3 Certificate directly following the caption and is no more than 20 pages excluding the captions, signature blocks, Rule 27-3 Certificate, Certificates of Compliance and Service, and Tables of Contents and Authorities. Additionally, I notified opposing counsel and the Court's motions attorney prior to filing this motion.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 13, 2013. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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