

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CASCADIA WILDLANDS, CENTER FOR BIOLOGICAL DIVERSITY, and OREGON
WILD,
Petitioners,

v.

DEPARTMENT OF FISH AND WILDLIFE and FISH AND WILDLIFE COMMISSION,
Respondents.

and

THE OREGON CATTLEMEN'S ASSOCIATION,
Intervenor-Respondent.

Court of Appeals No. A149672

**ORDER STAYING ENFORCEMENT OF RULE PENDING JUDICIAL REVIEW
CONDITIONED ON PROVIDING SECURITY**

Petitioners have petitioned under ORS 183.400 for judicial review of OAR 635-110-0010(6)-(8), administrative rule provisions adopted by respondent Oregon Department of Fish and Wildlife (ODFW)¹, and have moved to stay implementation of the rule pending disposition of the judicial review.

The court granted a temporary stay. Intervener Oregon Cattlemen's Association has moved for reconsideration of the order granting a temporary stay and opposes the motion for stay pending judicial review. The motion for reconsideration of the temporary stay is denied. For the reasons that follow, petitioner's motion for a stay is granted, conditioned on petitioners posting security in the amount of \$5,000.

Administrative Rule Provisions Sought To Be Reviewed

In material part, subsections (6) and (8) of OAR 635-110-0010 provide:

(6) Lethal take² to deal with chronic depredation.

(a) ODFW may authorize its personnel, authorized agents, or Wildlife Services, to use lethal force on wolves at a property

¹ In this order, "ODFW" refers to both the Oregon Department of Fish and Wildlife and the Fish and Wildlife Commission.

² "Take" means "to kill or obtain possession or control of any wildlife," ORS 496.004(16), "lethal take" presumably means to kill.

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owner or permittee's request if:

(A) ODFW confirms either:

- (i) Two confirmed depredations by wolves on livestock in the area; or
- (ii) One confirmed depredation followed by three attempted depredations (testing or stalking) in the area;

(B) The requester documents unsuccessful attempts to solve the situation through non-lethal means;

* * * * *

(b) When authorized, lethal take under this paragraph will be taken only by ODFW, authorized ODFW agents, or Wildlife Services personnel.

(7) * * * * *

(8) "In the area" means where ODFW has determined the presence of the depredating wolves.

Petitioners seek to stay application of the challenged rule provisions pending judicial review because ODFW has issued a "take order" pursuant to those rule provisions, to kill two wolves that are part of the Imnaha pack located near Joseph in Wallowa County, Oregon.³

Court's Authority to Stay Enforcement of a Rule Pending Judicial Review

The parties dispute whether the court has authority to stay enforcement of an administrative rule pending a judicial review under ORS 183.400, which authorizes a facial challenge to the validity of a rule and does not authorize an "as applied" challenge.

Although *Northwest Title Loans v. Division of Finance*, 180 Or App 1, 10, 42 P3d 313 (2002), ultimately was vacated as moot, the court determines that the holding of that case remains persuasive, namely, that this court, like any court of law, has the inherent authority to issue such orders as are necessary to preserve the court's jurisdiction or to prevent irreparable harm, including in an administrative rule challenge under ORS 183.400.⁴ Petitioners do not contend that a stay is necessary to preserve

³ No party has produced a copy of the "take order," but ODFW does not dispute its existence.

⁴ See *Lovelace v. Board of Parole*, 183 Or App 283, 288 n 3, 51 P3d 1269 (2002)

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this court's jurisdiction; rather, they contend that a stay is necessary to prevent irreparable harm to themselves and to wolves as an endangered species in Oregon.

The court agrees with intervenor The Oregon Cattlemen's Association (OCA) that, if the court undertakes to stay enforcement of a rule based on a claim of irreparable harm, the court should consider factors in addition to whether the failure to grant a stay will result in irreparable harm to petitioners or, in this case, an endangered species. Whether a stay of enforcement of an administrative rule should be granted is akin to issuing a preliminary injunction; therefore, the court also will consider the likelihood that the petitioner will prevail on judicial review, and the harm that will result to other parties to the case or to the public if a stay is granted. See *Winters v. Natural Resources Def. Council*, 555 US 7, 20, 129 S Ct 365, 172 L Ed 2d 249 (2008) (setting forth that standard).⁵

It is not necessarily sufficient for a party seeking to stay enforcement of a rule merely to show "colorable claim of error." Rather, the court determines the likelihood of the petitioner prevailing on judicial review and weighs that likelihood, however weak or strong it may be in any given case, against the weight of other factors (harm to the moving party, harm to other parties, and harm to the public). Thus, for instance, a stronger showing of likelihood of prevailing on judicial review may offset a weaker showing of irreparable harm, and a stronger showing of irreparable harm may offset a weaker showing of likelihood of prevailing on judicial review.⁶

(notwithstanding that *Northwest Title Loans* has been withdrawn, court may refer to parts of decision that remain persuasive).

⁵ Although not applicable to a judicial review under ORS 183.400, the following statutes indicate that, when the legislature has considered the possibility of a court granting a stay in other contexts, in addition to considering harm to the party seeking a stay, it has required the courts to consider, to one extent or another, the merits of the case, or the possibility of harm to other parties and to the public, or both: ORS 183.482(3)(a) (on judicial review of orders in contested cases, requiring petitioner seeking stay to show colorable claim of error); ORS 19.350(3) (on appeal from circuit court decisions, where appellant seeks discretionary stay, requiring court to consider whether there is support in fact and in law for appeal, likelihood of appellant prevailing on appeal, and the harm that likely will result to other parties or the public depending on whether a stay is granted or denied).

⁶ OCA cites *Jewett v. Deerhorn Enterprises, Inc.*, 281 Or 469, 575 P2d 164 (1978), for the proposition that the need for provisional relief requires a showing of "clear and convincing proof." That case is inapposite because, at issue in that case was whether the plaintiff was entitled to a permanent injunction; at issue here is whether the court should order relief in the nature of a temporary injunction. More to the point is *Arlington Sch. Dist. No. 3 v. Arlington Ed.Assoc.*, 184 Or App 97, 102, 55 P3d 546 (2002) (showing of irreparable injury means demonstrating that irreparable injury is at least probable if a stay is denied).

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Petitioners challenge rule provisions that are part of the Oregon Wolf Conservation and Management Plan adopted in February 2005. Typically, a party seeking a preliminary injunction seeks to restore the recent *status quo ante*, that is, the state of affairs that existed immediately before the action being challenged in court. Here, by moving to stay implementation of rule provisions adopted years ago, petitioners seek to restore the state of affairs that existed at that time. During the time since the challenged rule provisions were adopted, the agency and, more importantly, those affected by the challenged rule, have adjusted their affairs in reliance on the rule. Thus, the longer that a rule has been in effect before a party undertakes a facial challenge under ORS 183.400, the heavier the burden of persuasion borne by the party seeking to stay its enforcement pending judicial review to show that a stay is necessary to prevent irreparable harm and that the party is likely to prevail on judicial review.⁷

The administrative rules challenged in this case were adopted consistent with the Oregon Wolf Conservation and Management Plan (the Wolf Plan). The Wolf Plan, in turn, was adopted after a lengthy process that began in 2002, in which many interest groups, including the interests represented by petitioners, intervenor OCA, and *amici*,⁸ participated. It appears that ODFW attempted to balance diverse interests and strongly held views. The Wolf Plan itself emphasizes that the plan will serve the interests of Oregon “only if implemented in its entirety.” A person does not forfeit the right to challenge the validity of a rule merely because the person has participated in the rulemaking process and was unsuccessful in having the agency adopt the position for which that person advocated. Nevertheless, the process by which the rule provisions in question here were adopted suggests that the court should show restraint in staying enforcement of a small part of a complex and interdependent set of rules that were adopted after a full and fair opportunity to be heard by the parties now challenging the rule provisions.

Factual Background

The gray wolf is a species native to Oregon and other states, including Montana and Idaho. Gray wolves were extirpated in Oregon in the early 20th century. As a result

⁷ The court observes that ORS 183.400(6) contains a time limit of two years within which a party may challenge the process by which a rule was adopted, which reinforces the concept that the court should consider the passage of time since a challenged rule has been adopted before a party seeks to stay its enforcement. Respecting reliance by the agency and the public on the existence of the challenged rule, the court also observes that, apparently in May of this year, ODFW killed two other wolves under the authority of the challenged rule provisions. OCA observes that petitioners did not challenge the administrative rule in question at that time or in the ensuing months.

⁸ The court has granted leave to the following to appear as *amici curiae* respecting the motion to stay: Wallowa, Grant, Umatilla, Union, Baker, Gilliam, Crook, Morrow, and Harney Counties; the Oregon Hunters Association and the Oregon Chapter of the Foundation for North American Wild Sheep; and the Rocky Mountain Elk Foundation.

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of a federal program to reintroduce gray wolves into their former habitat beginning in Yellowstone National Park in 1995 and 1996, the wolf population has been well-established in the Northern Rocky Mountain Area, of which Montana, Idaho, and Oregon east of Highway 395 are a part, to the point that the federal government has delisted the gray wolf from the federal endangered species list as to that region. However, in part because of the central Oregon habitat (high desert, open prairie, fewer ungulates), which acts as a barrier to westward dispersal of wolves, habitat suitable for wolves is largely limited to the eastern one-third of the state.⁹ As a result, notwithstanding their migration into Oregon in approximately 2008,¹⁰ wolves do not appear to be re-establishing themselves in Oregon as rapidly as they have in Montana and Idaho. The gray wolf has been on the Oregon endangered species list since enactment of the Oregon Endangered Species Act in 1987 and remains on that list.

The parties differ concerning the number of wolves presently in Oregon. In their motion to stay, petitioners contend that there are only about 14; ODFW has determined that there are at least 23, and OCA believes that there are at least 34, including nine or ten lone wolves. The court notes that petitioners' original estimate does not include the members of a fourth pack of wolves (the Snake River pack), whose presence in Oregon has been documented only in the last weeks; petitioners in their reply appear to acknowledge the presence of the Snake River pack in Oregon. For the purpose of this order, the court finds that, more likely than not, there are at least 23 grey wolves in the State of Oregon, in addition to the members of the Snake River pack and an undetermined number of lone wolves not a member of any of the identified packs.

Apart from total number of wolves, the focus must be on breeding pairs of wolves. Under Phase I of the Wolf Plan, ODFW will consider delisting gray wolves as an endangered species only when Oregon has a minimum of four breeding pairs producing at least two pups per year over a period of three consecutive years. The ultimate goal under Phase III of the Wolf Plan is seven breeding pairs producing two pups per year over a period of three years. However, as *amici* counties point out, the Wolf Plan contemplates that it may take one to two decades to achieve the breeding pair goal.

Regarding the packs currently in Oregon, the Imnaha pack has a breeding pair, an alpha male and a female. The parties differ regarding the current size of that pack; petitioners contend that, in addition to the alpha male and the female, the pack consists of a sub-adult wolf of undetermined gender and a pup; OCA contends that the pack has eight or nine members. The alpha male has a radio collar affixed to it; it is not clear

⁹ The court proposes to take judicial notice of recent news reports to the effect that a collared male wolf formerly part of the Imnaha pack has traveled approximately 250 miles from Wallow County, across central Oregon, and now is in the eastern part of Douglas County, Oregon.

¹⁰ According to petitioners, three wolves migrated from Idaho to Oregon in 1999 and 2000, but one was shot and killed, one was hit by a vehicle and killed, and the third was captured and returned to Idaho.

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whether the female or the sub-adult in the pack have radio collars. Based on information provided by ODFW, the court finds that, more likely than not, the Imnaha pack at this time consists of an alpha male, a female, a pup, and a sub-adult of undetermined gender. The Weneha pack has six members and no documented breeding pairs or pups. The Walla Walla pack of four wolves has two pups, suggesting that it has a breeding pair. No determination has been made whether the recently discovered Snake River pack, which apparently has five members, has a breeding pair or any pups.

The current effort by ODFW to kill two particular wolves was precipitated by a confirmed kill by one or more wolves of a calf on September 22, 2011, on private land near Joseph, Oregon. The OFDW authorization to kill two wolves apparently identifies the alpha male and the sub-adult member of the Imnaha pack. It is not clear why ODFW has targeted those two specific wolves. Although the kill occurred in the area where the Imnaha pack lives, ODFW states that no radio-collared wolves were in the area of the kill, thus presumably excluding the alpha male from culpability. ODFW speculates that other wolves may have joined the pack.

The Imnaha pack has a two-year history of killing cattle; before May 2011, there were 10 confirmed killings of cattle, mostly calves, which led to ODFW killing two members of the pack in May 2011. Since then, the pack has been responsible for four additional killings of cattle. During the two year period, cattle producers in the area have engaged in various non-lethal means to prevent killing of their cattle, such as use of fladry (strips of cloth attached to fencing), increasing the number of riders checking on herds, and moving herds away from areas with a history of wolf-cattle contact.

As noted, there are currently only two documented breeding pairs of wolves in Oregon, including the alpha male and female in the Imnaha pack. Killing the alpha male will destroy that breeding pair.¹¹

Irreparable Harm to Petitioners

“Irreparable harm” means harm for which there is no adequate remedy at law. *LeVasseur v. Armon*, 240 Or App 250, 259, 246 P3d 1171 (2010); irreparable injury means injury that cannot reasonably be remedied in a court of law. *Arlington Sch. Dist. No. 3 v. Arlington Ed. Assoc.*, 184 Or App 97, 101-02, 55 P3d 546 (2002). “Environmental 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. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.” *Amoco Production Co. v. Village of Gambell*, 480 US 531, 107 S Ct 1396, 94 L Ed 2d 542 (1987)

¹¹ OCA speculates that the female member of the Imnaha pack likely will choose another mate, and that the pack likely will reestablish itself from wolves migrating from Idaho or individual wolves dispersing themselves from existing packs in Oregon.

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Petitioners contend that, if a stay is not granted, they will be irreparably harmed because members of their organizations wish to have the “profound and exhilarating” experience of viewing wolves in the wild, including the particular wolves targeted for killing. Further, they contend that, if a stay is not granted and the wolves are killed, the nature of that harm is such that it cannot be remedied by money damages.¹² Petitioners also contend that, as membership advocacy organizations representing the views of thousands of Oregonians, they have a substantial interest in the reestablishment of a viable wolf population in Oregon, which interest will be irreparably harmed because, given the small size of the existing wolf population, as well as the small size of the particular pack of which the targeted wolves are members, killing even two wolves will decimate the pack and irreparably harm reestablishment of a viable, self-sustaining wolf population in Oregon.

ODFW argues that the court should consider only whether the proposed killing of two wolves will cause irreparable harm to the gray wolf species in Oregon, and that killing two wolves will not cause irreparable harm to the recovery of the species. Consistently with that proposition, OCA offers persuasive evidence that, when not hunted and killed by humans, wolves breed and reproduce at a rate that insures that the population of wolves is maintained, if not increased, notwithstanding culling of some of its members due to natural death or dispersal.

OCA also asserts that, in addition to being highly reproductive, wolves also are highly mobile. OCA observes that the gray wolf population, re-introduced into the Northern Rocky Mountain Area in 1995 and 1996, has recovered in Montana and Idaho to the point that the federal government has delisted wolves from the federal endangered species list. OCA also observes that the migration of at least five packs into Oregon since 2008 demonstrates that wolves can and readily do migrate into Oregon. Lastly, OCA argues that a pack can arise from the remnants of a former pack by the addition of one or more lone wolves -- often males that dispersed themselves from their former packs seeking to establish their own packs. OCA suggests that, even if the Imnaha pack is reduced to one female and a pup, likely they will join up with other wolves not presently part of a pack and thereby reestablish the pack. However, winter approaches in Oregon, and it would be speculative to assume that the remaining female and her pup will survive the winter without an alpha male or other wolves, or that, if they

¹² As noted, ODFW has targeted for killing the alpha male and sub-adult member of the Imnaha pack. OCA observes that petitioners have not identified anything about those two specific wolves that distinguish them from other wolves in the pack or in other packs in Oregon. That is, presumably, the experience in viewing wolves in their natural habitat will not be diminished if they view wolves other than the two particular wolves in question. *Amici* Oregon Hunters Association and Oregon Chapter of the Foundation for North American Wild Sheep make the same point, and also argue that sightings of wolves in the wild are sufficiently rare that it would be speculative whether the members of the petitioner organizations will see any wolf in the wild, regardless of whether the two currently targeted wolves are killed.

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survive, they will be joined by other wolves to replenish the pack.

According to petitioners, a similar effort to reintroduce wolves into eastern Arizona has gone poorly, putting the population at risk of failure due to, among other factors, the lethal taking of wolves who have killed livestock and the illegal shooting of wolves. Moreover, as petitioners emphasize, the focus under the Wolf Plan is not on sheer numbers of wolves, but on breeding pairs of wolves. Petitioners argue that, despite the migration of wolves into Oregon, there are only two documented breeding pairs, including the alpha male and the female in the Imnaha pack, which will be destroyed if the current ODFW authorization to kill is carried out.

As petitioners argue, as predators at the top of the food chain, wolves play a unique and important role in maintaining the balance and health of Oregon's natural environment, and contribute to biological diversity. The court also recognizes that neither petitioners nor their members can be compensated by money damages for the killing of even one wolf. Petitioners also have shown that denying a stay likely will cause irreparable harm to the Imnaha pack itself for the immediate future, and may cause irreparable harm to reestablishment of the species as a whole in Oregon, at least for the reasonably foreseeable future. To that extent, petitioners have established irreparable harm.

Likelihood of Prevailing On Judicial Review

Generally, the "taking" of a member of an endangered species in Oregon is unlawful under ORS 498.026:¹³

(1) Except as provided in subsection (2) of this section, *no person shall take*, import, export, transport, purchase or sell, or attempt to take, import, export, transport, purchase or sell, *any threatened species or endangered species*, or the skin, hides or other parts thereof, or any article made in whole or in part from the skin, hide or other parts of any threatened species or endangered species.

(2) Nothing in subsection (1) of this section is intended to prevent the taking, importation, transportation or sale of any threatened species or endangered species in such manner as may be authorized in ORS 496.172, 497.218 to 497.238, 497.298 or 497.308.

(3) Nothing in this section applies to the resale of used skins, hides or other parts of a threatened species or endangered species or an article

¹³ As noted in footnote 2, "take" means "to kill or obtain possession or control of any wildlife." The motion to stay seeks to stay ODFW's announced intention to kill two specific wolves, not merely to obtain possession or control of them; therefore, generally, this order uses the verb "kill" instead of "take."

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made in whole or part thereof if the seller acquired the item sold prior to October 5, 1973.

[Emphasis added.] Petitioners argue that the challenged administrative rule provisions run afoul of ORS 498.026, because ORS 498.026(1) bars ODFW from “taking,” that is, killing, any individual member of an endangered species.¹⁴ The parties dispute whether the reference to “person” in ORS 498.026 applies to ODFW. ODFW argues that “person” does not include ODFW, because of the definition of “person” in ORS 174.100(5), which does not include governmental entities:

As used in the statute laws of this state, unless the context or a specially applicable definition requires otherwise:

* * * * *

(5) "Person" includes individuals, corporations, associations, firms, partnerships, limited liability companies and joint stock companies.

In their reply, petitioners cite cases for the proposition that, because ORS 174.100 refers to “context,” appellate courts have interpreted other statutory references to “person” to include a governmental entity. See, e.g., *Beaver v. Pelett*, 299 Or 664, 668, 705 P2d 1149 (1985) (notwithstanding ORS 174.100(5), the state is a “person” within the meaning of ORS 18.440). Petitioners also observe that ORS 496.182(5) uses the phrase “a person other than a state agency,” which suggests that, at least in the context of that statute, and perhaps the wildlife laws generally, “person” does include ODFW as a state agency.

Petitioners also argue that, to the extent the challenged rule provisions would permit the killing of a wolf other than on the land on which a wolf killed livestock by a person other than the landowner (here, ODFW), they are likely to prevail on judicial review of the challenged rule provisions because of ORS 498.012(1), which provides:

Nothing in the wildlife laws is intended to prevent any person from taking any wildlife that is causing damage, is a public nuisance or poses a public health risk *on land that the person owns or lawfully occupies*. However, no person shall take, pursuant to this subsection, at a time or

¹⁴ None of the exceptions in ORS 498.026(2) are applicable here. ORS 496.172(4) authorizes ODFW to take endangered species for “scientific” purposes and for “incidental” takings; ORS 497.298 authorizes ODFW to issue permits for the taking of endangered species for scientific purposes; ORS 497.218 to 497.238 address ODFW licensing of persons engaged in the businesses of buying skins and pelts, propagating game birds or game animals for sale, or taxidermy; and ORS 497.308 authorizes ODFW to issue permits for removal of wildlife from its natural habitat or holding wildlife in captivity. Subsection (3) also has no application here.

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under circumstances when such taking is prohibited by the State Fish and Wildlife Commission, any game mammal or game bird, fur-bearing mammal or nongame wildlife species, unless the person first obtains a permit for such taking from the commission.

[*Emphasis added.*] Petitioners argue that the emphasized words permit a person to kill wildlife only if the animal is causing damage, is a public nuisance, or poses a health risk on land owned or occupied by the person, and would not authorize ODFW to adopt a rule that would allow killing wildlife, especially an endangered species, that was not engaging in one of the proscribed acts, or on land not owned or occupied by ODFW.

Petitioners and ODFW again dispute whether ODFW is a “person” within the meaning of that statute.¹⁵ Petitioners have shown a reasonable possibility of prevailing on this issue, but it is more likely than not that the court ultimately will conclude that ORS 498.026 and 498.012 are neither a grant of authority to ODFW, nor a limitation on ODFW’s authority, in its role as the administrator of the wildlife laws generally or with respect to the Endangered Species Act specifically.

Of course, even if ODFW is correct that ORS 498.026 and 498.012 do not bar ODFW from adopting rules authorizing the taking of wolves engaged in depredation, that does not address the broader question of the authority of ODFW to adopt the challenged rule provisions. In that respect, ODFW argues that petitioners are unlikely to prevail on judicial review because OAR 635-110-0010(6)-(8) are within the authority granted to it by the Oregon Endangered Species Act itself.

ODFW argues, first, that nothing in the ESA prohibits it from authorizing the killing of wolves. That is true, but it is equally true that nothing in the ESA explicitly authorizes the killing of wolves. Other than inclusion of “gray wolf” in the definition of “game mammal” in ORS 496.004(9), one searches the wildlife laws in vain for any special provisions applicable to gray wolves. That omission is telling in light of statutes that address other species: ORS 496.201 to 496.221 (addressing salmon); ORS 496.280 to 496.291 (fish generally); ORS 496.303(4), (5), (6), (9), (10), (11), and (12) (respectively, migratory waterfowl, halibut, upland birds, marine shellfish, mountain sheep, antelope, mountain goat); ORS 496.430 to 496.465 (salmon and trout); ORS 496.705 (referring to moose, mountain sheep, mountain goat, elk, deer, antelope, silver gray squirrel, wild turkey, sturgeon, “fur-bearing mammal” generally, bobcat, fisher, bald eagle, golden eagle, goshawk, osprey, peregrine falcon, and “any other raptor”); ORS 497.112 (referring to various game animals already mentioned, but also black bear and cougar); ORS 498.012(2) and (4) (cougar, bobcat, red box, bear, and any species whose survival is endangered); ORS 498.164 and 498.166 (black bear, cougar), ORS 498.182 (feral swine); ORS 498.242 (walking catfish, piranha); ORS 498.247

¹⁵ OCA and *amici* posit various interpretational arguments why petitioners are not likely to prevail based on the administrative rules being inconsistent with ORS 498.012 or ORS 498.026, but the court is unlikely to find those arguments persuasive.

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(cormorants); and ORS 498.279 (black bass, walleye).

ODFW argues that the authority to adopt rules providing for killing of wolves is implicit in the requirement for “conservation” of species, which is defined in ORS 496.171(1) as “the use of methods and procedures necessary to bring a species to the point at which the measures provided under [the ESA] are no longer necessary.” ODFW also relies on ORS 496.012 (set out below), particularly the emphasized parts:

It is the policy of the State of Oregon that *wildlife shall be managed to prevent serious depletion of any indigenous species and to provide the optimum recreational and aesthetic benefits for present and future generations of the citizens of this state.* In furtherance of this policy, the State Fish and Wildlife Commission shall represent the public interest of the State of Oregon and implement the following coequal goals of wildlife management:

- (1) *To maintain all species of wildlife at optimum levels.*
- (2) To develop and manage the lands and waters of this state in a manner that will enhance the production and public enjoyment of wildlife.
- (3) To permit an orderly and equitable utilization of available wildlife.
- (4) To develop and maintain public access to the lands and waters of the state and the wildlife resources thereon.
- (5) *To regulate wildlife populations* and the public enjoyment of wildlife in a manner that is compatible with primary uses of the lands and waters of the state.
- (6) To provide optimum recreational benefits.
- (7) To make decisions that affect wildlife resources of the state for the benefit of the wildlife resources and to make decisions that allow for the best social, economic and recreational utilization of wildlife resources by all user groups.

It is not self-evident that killing individual members of an endangered species promotes conservation of the species within the meaning of ORS 496.171(1); indeed, the second sentence of that provision provides that methods and procedures for conservation include “activities associated with scientific resource management such as research, census taking, law enforcement, habitat acquisition and maintenance, propagation and transplantation.” No mention is made of killing endangered species. Nor is it apparent that killing members of an endangered species provides the “optimum recreational and aesthetic benefits for present and future generations of the citizens of

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this state” within the meaning of ORS 496.012. Conceivably, “maintain[ing] all species of wildlife at optimum levels” or “regulat[ing] wildlife populations * * * in a manner that is compatible with primary uses of the lands and waters of this state” within the meaning of ORS 496.012(1) and (5) could refer to killing members of an endangered species. However, there is no indication in the ESA that the legislature considered killing members of any specific endangered species, including gray wolves, as necessary to maintain the species at an optimum level or to “regulate” the species.

ODFW argues that killing individual members of an endangered species can promote conservation of that species by increasing human tolerance of the species, such as, here, where livestock producers are more likely to tolerate reestablishment of a wolf population in Oregon if they can be assured that individual wolves shown to have engaged in chronic depredation of livestock are lethally removed. However, once again, one searches the legislative scheme for any indication that the legislature considered the need to kill individual members of an endangered species to promote the economic interests of livestock producers in order to increase human tolerance of a species. ORS 496.172(4) confers specific authority on ODFW to issue permits for the “taking” of threatened and endangered species for scientific purposes and for “incidental” takings, but, there is no mention of takings for the purpose of increasing human tolerance or as a means of addressing the economic losses of livestock producers. That is not to say those would not be legitimate purposes; it is to say only that the legislature has not expressed those purposes. Indeed, the legislature, by adopting House Bill 3560 (discussed in greater detail later in this order), which establishes a program for compensating livestock producers for losses due to wolf depredation, has expressed a preference for providing compensation to livestock producers as a response to depredation rather than lethal removal by ODFW.

Petitioners concede that ORS 496.012 may confer authority to kill endangered wildlife under limited circumstances. However, they go on to argue that they are likely to prevail on judicial review because subsections (6) to (8) of OAR 635-110-0010 are overly broad in that those provisions, on their face, allow ODFW to kill wolves that have never harmed livestock, and to kill wolves in the area of livestock depredation regardless of whether the targeted wolves did so, without limitation in time (“whether it is moments, weeks, or years after the depredations have occurred”), and without regard to whether the wolves are found on the land of the owner of the livestock that has been killed.¹⁶

At this stage of the proceedings, it is not necessary that petitioners show definitively that they will prevail on judicial review; it is sufficient for petitioners to show, as they have, a substantial likelihood of prevailing on appeal.

¹⁶ OCA asserts that a court may consider these arguments only in an as-applied challenge, and will not consider the arguments in a facial challenge under ORS 183.400. The department of the court that hears and decides this case on its merits likely will not find that argument persuasive.

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Harm to the Public

The “public” here includes cattle and sheep producers (and, potentially, persons who raise goats, horses, llamas, alpacas, etc.) whose livestock is subject to being killed by wolves and Oregon hunters who compete with wolves for the opportunity to hunt and kill ungulates on which wolves also prey. OCA alleges that, since the Imnaha pack moved into the area east of Joseph, Oregon about two years ago, livestock producers have suffered 16 confirmed kills of livestock, and that other potential kills by wolves have been reported, but not confirmed. ODFW issued a “lethal removal order” in May 2011 directed at two other members of the Imnaha pack, which was carried out. Since then, there have been four confirmed kills of livestock by the Imnaha pack. OCA alleges that these kills have occurred notwithstanding the ranchers’ efforts to use non-lethal means to prevent depredation, including changes in calving procedures, use of firecrackers, delay in moving cattle to public lands, installation of fladry, and hiring additional riders to manage livestock. OCA believes that reduction of the Imnaha pack is the only remaining means to reduce wolf kills and harassment of their livestock.

According to OCA, wolf depredation on livestock is a learned behavior that will be taught to other pack members. Thus, the longer a pack has members that are allowed to prey on livestock, the more likely that behavior will perpetuate itself within the pack, and possibly, expand as members of the pack, particularly males that are not the alpha male of a pack, disperse either as lone wolves or as alpha males of their own packs. OCA argues, persuasively, that the history of the Imnaha pack in particular shows that it has acquired “an ingrained predisposition to prey on cattle.”

OCA also asserts that the presence of wolves in ranching area, especially areas with a history of wolves actual killing livestock, negatively affects the cattle with regard to fertility, the ability successfully to procreate, and responsiveness to herding. OCA further asserts that granting a stay would result in emotional harm to its members because the presence of wolves that prey on cattle causes increased stress arising from worries about the health and safety of their cattle as well as economic loss engendered by the loss of livestock on which their livelihood and prosperity depends.

On the other hand, according to petitioners, since 2006, there were approximately 65,000 cattle and calf deaths in Oregon, 94% of which were from non-predator causes (such as digestive and respiratory problems, calving problems, weather, theft, and poisoning), 3.5% were attributed to coyotes, 2.3% attributable to mountain lions, and the remainder unknown. So far in 2011, according to petitioners, there have been less than 20 confirmed cattle deaths attributed to wolves in Oregon.

Petitioners argue that, even if livestock producers suffer some loss of livestock, the legislature has adopted a plan for compensating them for those losses. The 2011 Oregon Legislative Assembly adopted House Bill 3560. HB 3560 requires the Department of Agriculture to establish a “wolf depredation compensation and financial assistance” program to fund grants to counties to provide financial assistance to

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ranchers who implement livestock management techniques or non-lethal wolf deterrence techniques, and to compensate ranchers who suffer loss of livestock due to wolf depredation. It is not clear whether the Department of Agriculture has implemented that program, or whether Wallowa County has received grant funds that could be used during the pendency of this judicial review to compensate cattle producers for losses due to wolves killing livestock. Apparently one cattle producer received some compensation from another organization, Defenders of Wildlife.

OCA argues that, even if and when a compensation program is established, it is difficult to meet the “probable cause” standard in HB 3560 that wolf depredation caused the loss. OCA also argues that, because HB 3560 only provides compensation for the fair market value of the livestock at the time it was killed, cattle producers are not fully compensated for their economic losses, such as lost profits when a calf is killed, reduced weaning rates, reduced conception rates, increased aggressiveness in cattle rendering them more difficult to herd, and increased labor, nor does it compensate for the stress incurred by cattle producers arising from concern about their livestock.¹⁷ Lastly, OCA argues that, even when paid, compensation is received long after the loss has been incurred.

The court determines that, if the court grants a stay, harm likely will result to livestock producers as members of “the public.” However, at least some of that harm is not “irreparable”; that is, livestock producers apparently may receive some compensation for their direct economic losses.

Earlier in this order, the court stated that, in addition to other factors, it would consider that the challenged rules were adopted in 2005 and that ODFW and other persons may have relied on the existence of the challenged rules in taking certain action or foregoing other action. That factor is important here, because the legislative scheme does not appear to confer authority on ODFW to target individual wolves as members of an endangered species for lethal removal to accommodate the interests of livestock producers or hunters. However, ODFW and other interested parties, including livestock producers or hunters, may have sought that specific legislative authority but for adoption in 2005 of the challenged rules purporting to recognize ODFW as having that authority.

Therefore, the court will grant a stay, but condition the stay on petitioners posting

¹⁷ In a declaration in support of OCA’s opposition to the motion for stay, one cattle producer has stated that, so far this year, he has lost two pregnant cows, one bull, and two yearlings to wolves, but only two have been confirmed wolf kills. He also states that he received compensation from Defenders of Wildlife in the amount of \$800 for the loss of one calf, and that his total uncompensated wolf loss is \$6,600. He also states that, if his increased labor and other costs are included, the economic impact is over \$18,000. Another cattle producer estimated fair market value losses of cattle due to wolf depredation at \$4,900 (not including lost profits), and increased management costs of \$19,500.

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security for confirmed livestock losses due to wolf depredation while this judicial review is pending, as detailed below.

Security

As previously determined, staying enforcement or implementation of an administrative rule pending a facial challenge to the rule under ORS 183.400 is akin to a preliminary injunction and, as such, the court has the ancillary inherent authority to require security. *Egge v. Lane County*, 276 Or 889, 556 P2d 1372 (1976). The court chooses to exercise that authority here, because OCA members may lose additional livestock to wolf depredation while this judicial review is pending. Although the court recognizes that livestock producers may incur economic and other losses due to killing of their livestock by wolves, the legislature has indicated its preference that compensation for those losses be limited to the fair market value of the animal at the time it is killed. HB 3560 (2011).

Further, it appears that livestock producers may have other sources of compensation, such as county grant programs established pursuant to HB 3560 and Defenders of Wildlife.

Therefore, in determining the amount of security petitioners must provide, the court has determined that petitioners should be liable only for (1) the fair market value OCA members' cattle, (2) that are the victims of wolf kills confirmed by ODFW or the federal Wildlife Services, (3) during the pendency of this judicial review, (4) by the two targeted members of the Imnaha pack, or by a member of any other pack based on a showing that, but for this stay order, ODFW would have issued a lethal take order under OAR 635-110-0010(6)-(8), and (5) for which the claimant has not received and is not eligible to receive compensation from any other source. Given that potential liability, the court determines that \$5,000 will provide sufficient security. The security may be in any of the forms described in ORS 22.020.

Conclusion

Petitioner's motion to stay enforcement or implementation of OAR 635-110-0010(6)-(8) pending disposition of this judicial review is granted, conditioned on petitioners providing security in the amount of \$5,000. The temporary stay now in effect will remain in effect for a period of 21 days to give petitioners time to provide the required security. If petitioners provide the prescribed security within the time allowed, the stay will remain in effect pending disposition of this judicial review or further order of this court. If petitioners do not provide the prescribed security within the time allowed, the stay will be dissolved and ODFW may proceed with its lethal take order.

 11/15/2011
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JAMES W. NASS
APPELLATE COMMISSIONER

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