



April 2, 2009

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VIA E-MAIL AND CERTIFIED MAIL

Re: Notice of Violations of the Endangered Species Act in Designating and Delisting the Northern Rocky Mountain Population of Gray Wolves

Dear Secretary Salazar and Acting Director Gould:

On behalf of Defenders of Wildlife, Natural Resources Defense Council, Sierra Club, Center for Biological Diversity, The Humane Society of the United States, Jackson Hole Conservation Alliance, Friends of the Clearwater, Alliance for the Wild Rockies, Oregon Wild, Cascadia Wildlands Project, Western Watersheds Project, Wildlands Project, and Hells Canyon Preservation Council, we write to provide you notice, pursuant to 16 U.S.C. § 1540(g), that the U.S. Fish and Wildlife Service's ("FWS" or "Service") decision to designate the northern Rocky Mountains population of the gray wolf as a distinct population segment ("DPS") and to remove portions of that DPS from the federal list of endangered and threatened wildlife, 74 Fed. Reg. 15,123 (April 2, 2009) (Delisting Rule), is arbitrary, capricious, an abuse of discretion, and contrary to the requirements of the Endangered Species Act ("ESA") and its regulations. The groups listed above submitted extensive comments on the proposed delisting regulation. We attach a subset of those comments and incorporate them by reference.

As outlined below and in the attached comments, in designating and delisting a Northern Rocky Mountain DPS ("NRM DPS") of the gray wolf, the Service has flouted the purposes and mandates of the ESA, disregarded its own policies, departed from past agency practice, and ignored fundamental principles of conservation biology.

In July 2008, the United States District Court for the District of Montana reinstated ESA protections for northern Rockies wolves, concluding that FWS's attempt to delist the population in February, 2008 was arbitrary, capricious, and "disingenuous." Defenders of Wildlife v. Hall, 565 F. Supp. 2d 1160, 1169, 1173, 1178 (D. Mont. 2008); see also 73 Fed. Reg. 10,514 (Feb. 27,

2008) (final delisting rule). In a meticulous, 40-page opinion, the Court documented a series of substantial deficiencies afflicting FWS's effort to delist the region's wolves—among them, a lack of the “genetic exchange” FWS deemed essential to the population's recovery, and state regulatory mechanisms that left wolves in “serious jeopardy.” *Defenders of Wildlife*, 565 F. Supp. 2d at 1172, 1175. In response, FWS abandoned the challenged delisting rule and the rule was remanded and vacated in October 2008.

FWS's new Delisting Rule fails to correct the fatal defects identified by the Montana federal court, and instead seeks to “paper over” those defects with additional, but still unconvincing, rationale. The Delisting Rule adds to the problems that the plaintiffs cited in their challenge to the previous rule by, among other things, failing to account for essential new information about the northern Rockies wolf population and state management. For the reasons set forth below and in the attached comment letters, FWS's decision to adopt the Delisting Rule is arbitrary, capricious, and in violation of the ESA.

I. THE DELISTING RULE FAILS TO ACCOUNT FOR NEW INFORMATION

FWS finalized the Delisting Rule without fully analyzing and accounting for essential information about the size and health of the northern Rockies wolf population. While FWS continues to rely on the mistaken assumption that the population will continue to grow at a rate of at least 20 percent each year, the agency's recent estimate of the wolf population reveals that the population declined in the Yellowstone ecosystem and overall grew by only 8 percent in 2008. FWS failed to fully analyze the cause or causes of the declining growth rate and the potential effect of the change on the northern Rockies wolf population. Further, these recent developments undermine key assumptions in the Delisting Rule about the wolf population's anticipated future growth rate and allowable human-caused mortality. FWS has made no attempt to evaluate the impact of planned wolf hunts and high wolf mortality quotas in Idaho and Montana in light of the new information. The agency's decision to delist without undertaking this essential analysis is arbitrary and capricious and violates the ESA. *See* 16 U.S.C. § 1533(a).

II. FWS HAS FAILED TO PROVIDE A MEANINGFUL OPPORTUNITY FOR PUBLIC COMMENT ON ITS RENEWED DELISTING PROPOSAL

The Delisting Rule violates public participation requirements of the ESA and the Administrative Procedure Act (“APA”) because FWS failed to inform the public of its actual delisting proposal. First, while the Delisting Rule retains ESA protections for wolves throughout Wyoming, FWS never presented this approach for public comment. The proposed rule invited comment on Wyoming's wolf management laws and regulations, yet it did not indicate any intent to delist wolves everywhere but Wyoming. *See* 73 Fed. Reg. 63,926, 63,932 (Oct. 28, 2008). The February 2007 proposed rule indicated that “if Wyoming fails to modify its management regime to adequately conserve wolves, ... wolves in the significant portion of the range in northwestern Wyoming, outside the National Parks, will retain their nonessential experimental status under section 10(j) of the Act[,]” but wolves throughout the rest of Wyoming would be delisted. 72 Fed. Reg. 6,106, 6,106 (Feb. 8, 2007). Accordingly, the public had no notice or opportunity to comment on the Delisting Rule's approach that leaves wolves throughout Wyoming listed. Under principles of administrative law, a proposed rule must state

with specificity what the agency is considering and the final rule must be a “logical outgrowth” of the proposal. Shell Oil Co. v. EPA, 950 F.2d 741, 751 (D.C. Cir. 1991). The Administrative Procedure Act (“APA”) requires transparency; interested parties must not be expected to “divine [the Agency’s] unspoken thoughts.” Ariz. Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1299 (D.C. Cir. 2000). To satisfy the APA’s requirements for notice and comment rulemaking, FWS should have issued a new proposed rule describing the specific delisting proposal that the agency considered, rather than reopening the comment period on the 2007 proposed rule that was rejected by the court.

Similarly, FWS offered the public no opportunity to comment on regulatory mechanisms to facilitate genetic exchange between northern Rockies wolf subpopulations. The proposed rule invited comment on the “additional management, protections, and regulatory mechanisms [that] may be needed to facilitate genetic exchange.” 73 Fed. Reg. at 63,927. However, until such “additional ... protections” are identified, see id., the public is unable to comment upon their adequacy. Likewise, the Delisting Rule references for the first time new purported evidence of genetic exchange into the greater Yellowstone wolf population. No such evidence has been made publicly available. Accordingly, the public has not had any opportunity to comment on whether such genetic exchange satisfies FWS’s recovery goals. For all of these reasons, FWS failed to comply with mandatory public participation requirements of the ESA and APA.

III. FWS’S DECISION TO DESIGNATE AND DELIST A NORTHERN ROCKY MOUNTAIN DPS IS ARBITRARY AND VIOLATES THE ESA

The ESA provides for the listing of endangered and threatened “species,” a term that “includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16); id. § 1533(a)(1). Under the Service’s “Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act” (“DPS Policy”), the Service must consider three elements in determining whether to designate a DPS: first, the “[d]iscreteness of the population segment in relation to the remainder of the species to which it belongs[;]” second, “[t]he significance of the population segment to the species to which it belongs[;]” and, third, “[t]he population segment’s conservation status in relation to the Act’s standards for listing[.]” 61 Fed. Reg. 4,722, 4,725 (Feb. 7, 1996). Through use of the DPS mechanism, the Service is “allow[ed] ... to protect and conserve species and the ecosystems upon which they depend before large-scale decline occurs that would necessitate listing a species or subspecies throughout its entire range.” Id.

In 1978, the Service listed the gray wolf as endangered (or, in Minnesota, threatened) throughout the conterminous United States and Mexico, citing a devastating reduction in the wolf’s historic range and the inadequate protection afforded wolves that wandered outside identified subspecific ranges. 43 Fed. Reg. 9,607 (Mar. 9, 1978). Now, the Service has elected to identify a “distinct” northern Rocky Mountains population of the gray wolf and declare it recovered—irrespective of the status of the entity listed in 1978. The Service’s designation of a NRM DPS cannot be squared with biology, prior agency actions, existing agency policy, or the ESA:

- In simultaneously designating and delisting the NRM DPS, FWS has declared the DPS recovered without ever having made the prerequisite findings that the DPS is threatened or endangered, in violation of the ESA. See 16 U.S.C. §1533(c)(2)(B); Humane Soc’y of the U.S. v. Kempthorne, 579 F. Supp. 2d 7 (D.D.C. 2008).
- In designating and delisting the NRM DPS, the Service arbitrarily disregarded the status of the larger, listed entity and failed to explain its apparent determination that the conterminous United States was no longer the appropriate measure of the gray wolf’s condition.
- The Delisting Rule effectively revised the FWS 1978 listing of the gray wolf throughout the conterminous United States. The Service, however, ignored this revision, addressing only the scope and status of the northern Rocky Mountain population. The Service revised the gray wolf’s “lower-48” listing without first complying with the procedural and substantive requirements of the ESA, including the requirement to assess threats to the non-DPS remnant population and designate critical habitat. See 16 U.S.C. § 1533(a).
- In establishing the bounds of the NRM DPS, the Service ignored biology and its own DPS Policy in order to draw “boundaries of convenience” along state lines. The boundaries of the NRM DPS do not correspond to the present or likely future location of wolves, nor are they based on the habitat needs of a recovered wolf population. See Defenders of Wildlife v. Sec’y, U.S. Dep’t of Interior, 354 F. Supp. 2d 1156, 1172 (D. Or. 2005) (holding that FWS’s creation of DPSs for gray wolves “violated DPS policies” because the DPS boundaries were “not supported by sound biological principles”).
- Rather than drawing a line around a wolf population with a conservation status different from that of other populations of the species, as required under the ESA, the NRM DPS includes large expanses presently unoccupied by wolves. The Service’s action, therefore, eliminates protections beyond the currently occupied range, though the wolf’s conservation status in those areas has not changed. See Defenders, 354 F. Supp. 2d at 1170.
- By including within the NRM DPS unoccupied portions of Oregon, Washington, and Utah, the Service has ensured that wolves will be unable to disperse from existing core recovery areas—which sit at the center of the DPS—to historic range where the wolf is still protected by virtue of its ESA listing status outside the northern Rockies gray wolf DPS. Rather than promoting the continued recovery of wolves outside the DPS, therefore, the Service’s action severs crucial dispersal corridors by removing federal protections from dispersing wolves and leaving them subject to inadequate state mechanisms and intensive federal, state and private predator control actions within the DPS but outside core recovery areas. The Delisting Rule therefore violates FWS’s ESA duty to conserve. See 16 U.S.C. § 1531(b), (c).

The Service’s decision to designate the NRM DPS was both arbitrary and in contravention of the ESA.

IV. FWS'S DECISION TO DELIST A PORTION OF THE NORTHERN ROCKY MOUNTAIN WOLF POPULATION DESPITE SIGNIFICANT THREATS TO ITS SURVIVAL IS ARBITRARY AND VIOLATES THE ESA

Under the ESA, the Service is required to make listing and delisting determinations “solely on the basis of the best scientific and commercial data available[.]” 16 U.S.C. § 1533(b)(1)(A). In deeming the northern Rocky Mountains gray wolf population “recovered,” the Service violated this requirement, disregarding science and otherwise acting arbitrarily.

A. The Service Premised its Decision to Delist on a Biologically Inadequate Recovery Standard

In electing to delist wolves in the northern Rocky Mountains, the Service relied upon the population's attainment of a two-decades-old recovery goal—10 breeding pairs in each of three recovery areas—known to be biologically inadequate. Biologists have established that in order to remain genetically viable, animal populations must number in the thousands. Under the internationally accepted IUCN “Red List Criteria,” for instance (previously relied upon by the Service as persuasive authority, but inexplicably disregarded by the agency here), a species must be listed as “vulnerable” when its population falls below 1,000 “mature” individuals. With respect to wolves in particular, scientists have calculated that a minimum population of 2,000 to 5,000 (including both mature and immature animals) is required to ensure viability. In light of this science, the Service's conclusion that a population of 30 breeding pairs of wolves in Idaho, Montana, and Wyoming would somehow be sustainable is simply arbitrary. See, e.g., Virginia Morell, Wolves at the Door of a More Dangerous World, *Science*, Feb. 15, 2008, at 891-92 (noting view of Ed Bangs, FWS northern Rocky Mountains wolf recovery coordinator, and independent scientists that the Service's recovery standards are inadequate to ensure a viable wolf population in the region).

FWS has acknowledged that small, isolated populations of only 100-150 wolves—as contemplated by the Delisting Rule—are not sustainable. Thus, FWS has repeatedly stated that the establishment of a metapopulation dynamic among the three recovery areas and Canada is essential to the long-term viability of the northern Rockies wolf population. A functioning metapopulation requires substantial genetic and demographic connectivity. However, even with five times the number of wolves provided for by the Service's recovery standards as stated in the Delisting Rule, the northern Rocky Mountains population has yet to establish the necessary connectivity—wolf dispersal between the recovery areas and Canada is poor; existing dispersal corridors do not provide suitable habitat; and further development threatens only to worsen connectivity in the region. Wolves in the greater Yellowstone area have been relatively isolated since reintroduction. As emphasized by Montana's federal district court, the genetic isolation of wolves within the northern Rocky Mountains threatens the species' survival. See Defenders of Wildlife, 565 F. Supp. 2d at 1168-72. Even with recent evidence suggesting that some wolves have traveled into the Yellowstone area from central Idaho—evidence cited for the first time in the final Delisting Rule—there is no reason to believe that such dispersals happen with the regularity needed to establish necessary demographic and genetic connectivity. Further, as FWS conceded in the announcement resurrecting its delisting proposal, “State management practices for delisted wolves could preclude or significantly reduce the opportunity for natural genetic exchange between core recovery segments.” 73 Fed. Reg. at 63,930.

Notwithstanding FWS's previous, longstanding position that connectivity is required for wolf recovery in the northern Rockies, the agency now asserts that the population is recovered without it. This assertion is insufficient to justify delisting for several reasons. First, this purported justification controverts FWS's long-established recovery standard requiring an effective northern Rockies wolf metapopulation. See 72 Fed. Reg. at 6,107; 1994 FEIS, App. 9 at 42; see also *Defenders of Wildlife*, 565 F. Supp. 2d at 1170 ("Although the Service now says genetic exchange is unnecessary, it provides no persuasive reasons for this change of course that were not known in 1994, when the new criteria were established, or in 2001 and 2002, when the criteria were reaffirmed."). Second, FWS's about-face finding that a metapopulation dynamic is not essential to wolf recovery directly contradicts the best available scientific evidence. FWS likens the NRM DPS to an allegedly healthy, small, and isolated wolf population on Alaska's Kenai Peninsula. At the same time, FWS asserts that wolves within the NRM DPS will not suffer deleterious effects of inbreeding depression similar to those recently reported to be afflicting the wolf population on Isle Royale National Park in Michigan. However, FWS pointed to Isle Royale as an example of a healthy, isolated wolf population just last year. See 73 Fed. Reg. at 10,553 (Feb. 27, 2008). Because FWS has not provided any current information on the genetic status of Kenai wolves or examined the Kenai wolves' genetic trends, FWS's assertion that Kenai wolves are a valuable indicator of NRM wolves' genetic future, while Isle Royale wolves are not, is arbitrary and capricious.

While FWS acknowledges that the northern Rockies wolf population is not likely to establish a metapopulation dynamic absent concerted management efforts to promote natural dispersal, FWS has refused to undertake such activities or to require that states adopt regulatory mechanisms to promote dispersal as a condition of delisting. Instead, FWS suggests that genetic problems may be addressed by the states after delisting through intensive, voluntary translocation efforts. This approach is legally unsupportable. First, the ESA requires recovery of species in a functioning ecosystem, not artificial maintenance of a captive or heavily manipulated population. Further, no such wolf translocation program—which would be experimental in any event—has been established or funded.

In short, the Service's decision to delist the northern Rockies wolf population, notwithstanding ongoing risks due to the population's small size and failure to establish a functioning metapopulation, disregards the "best scientific ... data available[.]" contrary to the requirements of the ESA. See 16 U.S.C. § 1533(b)(1)(A).

B. The Service Failed to Acknowledge and Assess the Threats Confronting the Northern Rocky Mountains Wolf Population

Under the ESA, the Service must determine, based on the "best scientific ... data available," whether a species is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. §§ 1532(20), 1533(b)(1)(A). The Delisting Rule violates this requirement by failing to recognize or meaningfully address key threats to the future of gray wolves in the northern Rockies.

- The Delisting Rule failed to analyze wolf imperilment in the foreseeable future by evaluating most threats only over a 30-year time frame, rather than the one-hundred-year time frame regularly employed in FWS, NMFS, and IUCN viability analyses.
- The Service's decision ignored the dramatic loss of the gray wolf's historic range—the first of the five factors FWS is required to consider under the terms of the ESA. See 16 U.S.C. § 1533(a)(1)(A).
- The Service failed to meaningfully address whether wolves remained threatened or endangered within a “significant portion” of their range. See 16 U.S.C. § 1532(6). Rather than considering the wolves' historic range, as required by the statute, the Service limited its “range” analysis to that portion of the DPS known to be presently occupied by the species—thereby discounting the large unoccupied (and rarely occupied) region where wolves were once viable.
- In concluding that the northern Rocky Mountains wolf population is recovered across a “significant portion” of its range, the Service failed to justify the “insignificance” of the potential habitat lying outside the wolves' core recovery areas. Contrary to the Service's reasoning, the purported viability of the population within core recovery areas cannot justify the conclusion that the remainder of the wolves' range is somehow “insignificant” for listing purposes. Moreover, the Service's contention that human population growth and activity have rendered most of the region unsuitable for wolves and therefore “insignificant” is inconsistent with the ESA, which seeks to protect species from such threats. Finally, the Service's determination that portions of Oregon are unoccupied and therefore unsuitable arbitrarily disregards the fact that several wolves have dispersed to Oregon from central Idaho, one of which was returned by the Service to a core recovery area.
- The Service erred in failing to assess the impact of future road development on the wolf population and the potential benefits of road closures on public lands.
- In reaching its delisting decision, the Service gave inadequate consideration to the continued threats within the DPS posed by illegal killing of wolves by humans openly hostile to wolves' presence in the region, excessive state-sanctioned killing, the impacts of disease, and the expanded use of M-44s, other poisons, aerial gunning, and other highly effective extermination tools that collectively were responsible for the near-extirpation of wolves from the western United States.

The Service's determination that the northern Rocky Mountains wolf population is now secure, in short, is both arbitrary and contrary to the ESA.

C. The Northern Rocky Mountain Wolf Population Remains Threatened by Inadequate Regulatory Mechanisms

FWS further violated the ESA in delisting wolves notwithstanding the inadequacy of regulatory mechanisms in Idaho and Montana. 16 U.S.C. § 1533(a)(1)(D). State laws not only

fail to protect the existing wolf populations; they ensure that the NRM population will be reduced far below its already inadequate size.

First, while the Delisting Rule relies heavily on aspirational state wolf management plans, the Montana and Idaho plans are largely vague and unenforceable, making no representations as to the number of wolves that will be protected and offering few guarantees as to the actions that will (and will not) be taken in pursuit of the states' management goals. Second, the states' management schemes lack guaranteed sources of funding, bringing into doubt the states' ability to carry out the conservation efforts required to ensure the wolves' viability. Indeed, each of the states has declared an expectation that the federal government will continue to fund wolf conservation once management authority is returned to the states. See, e.g., Idaho Plan, at 23 ("If the Idaho Congressional delegation is unsuccessful at providing ongoing adequate funding to cover the cost of wolf management, the State of Idaho is under no obligation to manage wolves. Provided, however, the State of Idaho is not precluded from using state resources to eliminate or control wolf related conflict."). Finally, the states' management plans unequivocally provide that the maintenance of a viable wolf population is secondary to the protection of private property and recreational interests. In light of these common deficiencies—and the states' outright hostility toward wolves—the Service's determination that existing regulatory mechanisms provide adequate protection for northern Rockies wolves was both arbitrary and contrary to the ESA.

The unlawfulness of the Service's determination is underscored by an examination of the states' individual management schemes. As evidenced by Governor Otter's declared intention to personally assist in killing all but 100 of the state's wolves and the Idaho Fish and Game Commission's action establishing an excessively high annual wolf mortality quota, Idaho's regulatory framework is inadequate to ensure the continued viability of the state's wolves:

- As Idaho's 2002 wolf management plan makes clear, Idaho remains committed to removing wolves from the state. The plan incorporates as "the official position of the State of Idaho" House Joint Memorial No. 5, which resolved that "wolves be removed [from Idaho] by whatever means necessary." See Idaho Plan, at 4; House Joint Memorial No. 5 (2001), at <http://www3.state.id.us/oasis/2001/HJM005.html>. Idaho's regulatory scheme is inadequate to ensure that the state does not succeed in this aspiration.
- While generally classifying wolves as a "big game" animal subject to state hunting laws and regulations, Idaho law affords individuals essentially unlimited authority to kill wolves in defense of person or property. See Idaho Code § 36-1107. Idaho law is accordingly unable to guarantee that a viable population of wolves will be maintained.
- Idaho law further authorizes the Fish and Game Commission to classify and reclassify the gray wolf within the state. See Idaho Code § 36-201. As a result, the protection afforded to Idaho's wolves largely lies in the discretion of the state's Fish and Game Commission.

- Whatever the classification assigned to wolves by the Fish and Game Commission, Idaho law makes clear that “all methods of take” are to be authorized for use in “the management” of the state’s wolves. See Idaho Code § 36-201. Idaho’s regulatory scheme, therefore, imposes no limitation on methods of wolf killing, and could conceivably include broadcast application of poisons.
- While Idaho’s management plan suggests that lethal controls will not be used in response to “depredation” when the state’s wolf population falls below ten “packs,” it nonetheless provides that lethal controls would be appropriate at such population levels under “unusual circumstances.” See Idaho Plan, at 5. As Idaho’s plan declines to define “unusual circumstances,” it does not effectively constrain the use of lethal control on the state’s wolves even when the population falls below levels that the states and the Service argue would require relisting as an endangered species.
- While Idaho’s management plan makes no representations as to how many wolves will be protected or killed, it provides that an expansion of the wolves’ range is to be allowed only when “unacceptable conflict” will not result. See Idaho Plan, at 4.
- Idaho’s management plan stresses the need to maintain viability of “big game” animals deemed essential to the state’s recreation community, undermining any stated commitment to the viability of the state’s wolf population.
- As approved by the Service, Idaho’s plan protects “packs” rather than “breeding pairs,” and accordingly fails to ensure that the Service’s recovery standard—that is measured, appropriately, in terms of “breeding pairs”—will be met. See Idaho Plan, at 5.
- Despite its intention to reduce the state’s wolf population to minimum levels, Idaho has failed to demonstrate how it will go about monitoring the population to ensure that it does not fall below FWS recovery standards.

Montana’s regulatory scheme is similarly inadequate to ensure that the state’s wolves meet either the Service’s recovery targets or biologically sound demographic levels:

- Under Montana’s wolf statute, wolves remain subject to a number of predator control provisions authorizing the state Department of Livestock, county commissioners, and landowners to use lethal control measures. See Mont. Code Ann. §§ 81-7-104, 81-7-302, 81-7-505, 81-7-602.
- Montana law declares that no one may be criminally liable for killing wildlife, including wolves, that merely “threaten[]” to kill livestock. See Mont. Code Ann. § 87-3-130. Montana’s wolves will not be managed for recovery, therefore, but rather to reduce impacts on ranching and hunting. Further, Montana Department of Fish, Wildlife and Parks lacks authority under Montana law to stop such defense-of-property wolf killings, even if the wolf population were to fall below FWS recovery levels.

- Montana Fish, Wildlife and Parks recently removed the gray wolf from the state list of endangered species and wolves are now classified as a “species in need of management.” See Mont. Code Ann. § 87-5-131. Under Montana law, “management” is broadly defined, allowing the use of lethal controls. See id. § 87-5-102.
- Montana law provides Montana Fish, Wildlife and Parks and the Montana Fish, Wildlife and Parks Commission with discretion to redesignate the gray wolf as a “game animal” and to determine the conditions under which game animals may be taken. See Mont. Code Ann. § 87-5-131. Few, if any, substantive sideboards constrain the Commission’s discretion to allow excessive wolf killing.
- In addition to being vague and unenforceable, Montana’s wolf management plan calls for the adoption of laws and regulations that have yet to be promulgated. Montana Plan, at 79, 138. Such a plan cannot be considered an “existing” and adequate regulatory mechanism under the ESA. See 16 U.S.C. § 1533(a)(1)(D).
- Montana’s plan anticipates an increase in the use of lethal controls as a means of reducing wolf “depredation” rates within the state. Montana Plan, at 135. Montana has historically killed a large number of wolves in response to perceived “conflicts” with cattle. As an example, Montana authorized the killing of the entire 27-member Hog Heaven pack near Kalispell, Montana last year, including 19 Hog Heaven wolves that were killed over just three days in December 2008. Any post-delisting increase in such lethal control would undoubtedly result in a marked reduction of the state’s wolf population.
- According to Montana’s management plan, the state eventually intends to monitor not breeding pairs but groups of four wolves, effectively reducing numeric recovery standards. Montana Plan, at 94, 132.
- While Montana’s plan asserts that a different management approach will be taken if the state’s wolf population falls below fifteen breeding pairs, the plan largely fails to specify what actions will be taken under such circumstances. The plan provides only that hunting, trapping, and special kill permits relating to livestock on public lands are not to be allowed when the state’s population drops below fifteen breeding pairs. Montana Fish, Wildlife and Parks is otherwise afforded broad discretion in choosing among management options.
- Montana’s plan states without explanation or limitation that wolves may be killed in order to reduce their impacts on ungulate populations. Montana Plan, at 81.

The Service has also failed to assess the threats posed by numerous county ordinances declaring wolves unacceptable within the DPS. As Idaho and Montana laws provide counties with a role in post-delisting wolf management, the Service violated the ESA in failing to consider the threat posed by county ordinances openly hostile to the continued presence of wolves in the region.

State regulatory mechanisms, in short, fall far short of those required to ensure the recovery and viability of the northern Rocky Mountains wolf population. FWS acted unlawfully in declaring otherwise.

V. THE ESA DOES NOT PERMIT PIECEMEAL DELISTING OF A DPS

The Delisting Rule eliminates ESA protections for wolves throughout the newly designated DPS, except for Wyoming, where wolves retain their nonessential, experimental status. The ESA does not permit this piecemeal approach to delisting. Under the ESA, FWS must determine whether a “species,” including a DPS, is endangered or threatened “throughout all or a significant portion of its range.” 16 U.S.C. §§ 1532(6), 1532(16), (20); see 16 U.S.C. § 1533(a). The Delisting Rule acknowledges that Wyoming contains a significant portion of the wolf’s northern Rockies range. Because, as FWS concedes, wolves remain imperiled in Wyoming, the entire “species” or DPS remains endangered and its delisting violates the ESA. See 16 U.S.C. § 1533(a); see also Alsea Valley Alliance v. Evans, 161 F. Supp. 2d 1154, 1162 (D. Or. 2001) (“Listing distinctions below that of subspecies or a DPS of a species are not allowed under the ESA.”).

FWS’s piecemeal delisting also violates ESA section 10(j), 16 U.S.C. § 1539(j). FWS designated the Yellowstone non-essential experimental population in 1994. Final Rule, 59 Fed. Reg. 60,252 (Nov. 22, 1994). The designation “non-essential experimental” applies to populations that are reintroduced for purposes of species conservation. 16 U.S.C. § 1539(j)(1). Consistent with this statutory definition, FWS’s decision to delist only a portion of the Yellowstone non-essential experimental population is unlawful. Further, Wyoming wolves no longer qualify for “non-essential experimental” status. Wyoming wolves do not meet the statutory criteria for an “experimental” population because they are not “wholly separate geographically” from non-Wyoming wolves in the new northern Rockies wolf DPS. Id. Wyoming wolves also do not meet the criteria for “non-essential,” because, as FWS acknowledges, Wyoming wolves are “essential to the continued existence” of the new DPS. Id. § 1539(j)(2)(B).

FWS’s decision to bifurcate the northern Rockies wolf population to achieve delisting is an arbitrary and capricious departure of the agency’s former determinations that the ESA does not allow such an approach. See, e.g., 70 Fed. Reg. 1,286, 1,296 (Jan. 6, 2005) (“at this time the Act does not allow wolves to be delisted on a State-by-State basis”); 68 Fed. Reg. 15,804, 15,825 (affirming that “[d]elisting can occur only when a species (or subspecies or DPS) is recovered,” and further stating that “[t]he DPS boundaries must contain the biological grouping and cannot subdivide it”) (emphases added) (Apr. 1, 2003). The agency has not, and cannot, justify this departure from its longstanding, and correct, interpretation of the ESA’s delisting requirements.

CONCLUSION

For the reasons set forth above and in the attached comment letters, the Service’s decision to designate the northern Rocky Mountain gray wolf population as a DPS and to remove that DPS from the federal list of endangered and threatened wildlife is arbitrary, capricious, an abuse of discretion, and contrary to the Endangered Species Act and its regulations. With this

letter, we are notifying the Service that we will file suit to enforce the Act and thereby protect the wolves of the northern Rocky Mountains unless the Service withdraws its Delisting Rule within sixty days.

Sincerely,

A handwritten signature in black ink, appearing to read "Doug Honnold". The signature is fluid and cursive, with the first name "Doug" and last name "Honnold" clearly distinguishable.

Douglas L. Honnold
Jenny K. Harbine