November 26, 2008

Public Comments Processing, Attn: RIN 1018-AW37
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, Suite 222
Arlington, VA 22203

Re: RIN 1018-AW37

Comments on the Renewed Proposal to Designate the Northern Rocky Mountain Gray Wolf Population a Distinct Population Segment and Remove This Distinct Population Segment from the Federal List of Endangered and Threatened Species

Dear Fish and Wildlife Service:

On behalf of Defenders of Wildlife, Natural Resources Defense Council, Sierra Club, Center for Biological Diversity, Hells Canyon Preservation Council, The Humane Society of the United States, Wildlands Project, Oregon Wild, Jackson Hole Conservation Alliance, Western Watersheds Project, Cascadia Wildlands Project, Friends of the Clearwater, Alliance for the Wild Rockies, and Endangered Species Coalition, we submit the following comments on the U.S. Fish and Wildlife Service’s (“FWS”) proposal to disregard law, science, public opinion, and the decision of a federal district court by again designating the northern Rocky Mountain gray wolf population a distinct population segment (“DPS”) and removing it from the list of endangered and threatened species. See 73 Fed. Reg. 63,926 (Oct. 28, 2008). This comment letter supplements the comments we previously submitted on May 8, 2007 and August 6, 2007, as well as the plaintiffs’ legal pleadings and evidence filed in Defenders of Wildlife v. Hall, Civ. No. 08-056 (D. Mont.), all of which are incorporated here by reference.¹

Four months ago, the United States District Court for the District of Montana reinstated the Endangered Species Act’s (“ESA”) protections for the northern Rocky Mountains’ wolves, concluding that FWS’ attempt to delist the population appeared little more than 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’ 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. Rather than challenging the Court’s conclusions, FWS abandoned its 2008 delisting rule. The reinstatement of federal protections offered FWS an opportunity to renew its commitment to the

¹ Plaintiffs’ pleadings and evidence in Defenders of Wildlife v. Hall, Civ. No. 08-056 (D. Mont.), should be included in the agency’s administrative record. To ensure that they are included, a CD containing the materials is included with these comments.
establishment of a viable wolf population in the northern Rocky Mountains, as required by the Endangered Species Act.

On October 28, 2008, however—two weeks after the agency’s final delisting regulation was vacated and remanded by the Montana court—FWS “announce[d] the reopening of the comment period for [the] February 8, 2007, proposed rule” that launched the judicially discredited February 2008 delisting of gray wolves in the northern Rocky Mountains. See 73 Fed. Reg. at 63,927. With its announcement, FWS offered no new information indicating that the region’s wolf population has, in fact, achieved viability. Nor did FWS identify new state laws that are sufficiently protective of wolves to allow the removal of federal protections. Rather, the agency’s announcement confirmed that the status of the gray wolf in the northern Rocky Mountains worsened during FWS’ brief experiment with state management: between September 2007 and September 2008, the region’s wolf population declined by almost a hundred—even without the three wolf hunts authorized in Idaho, Wyoming, and Montana. Id. at 63,928.

Because FWS’ resurrected delisting proposal retains the deficiencies of its predecessor, it, too, must be abandoned in order to ensure the long-term viability of the northern Rockies’ iconic wolf population and the ecosystems upon which the population depends. As Montana’s federal district court made clear, to do otherwise would be arbitrary, capricious, and contrary to the Endangered Species Act.

I. FWS MUST EVALUATE DELISTING AND STATE WOLF MANAGEMENT IN LIGHT OF NEW INFORMATION ABOUT THE NORTHERN ROCKIES WOLF POPULATION

FWS’ resurrected approach to delisting and its approval of state management schemes depends on the accuracy of the agency’s assumption that the northern Rockies wolf population will continue to grow at a rate of at least 20 percent each year. While FWS will not have an accurate population estimate until next year, when official population estimates are released, the agency’s recent estimate of the wolf population reveals that the population has decreased this year—from approximately 1,544 wolves in mid-September 2007 to approximately 1,463 wolves in mid-September 2008. See 73 Fed. Reg. at 63,928.

FWS’ delisting proposal entirely fails to address this population decline or evaluate the reasons behind it. Indeed, Yellowstone Park biologist Doug Smith has stated that the reason for increased wolf mortality within the Park will not be known until wolves are trapped and tested this winter. See Brett French, Wolf Decline Thought To Be Disease-Related, Billings Gazette (Oct. 25, 2008) (attached). Currently, Yellowstone National Park may have only three or fewer breeding pairs, a precipitous decline from prior years. FWS’ Wyoming wolf report for November 10 through November 21, 2008 indicates that the Yellowstone wolf population may
have decreased due to increased adult and pup mortality and mange.² To date, mange has been documented in four Yellowstone Park wolf packs; the full dimensions of the problem are not known. FWS and the public cannot meaningfully evaluate whether the northern Rockies wolf population is threatened by disease or other natural or manmade factors, as required by the ESA, see 16 U.S.C. §§ 1533(a)(1)(C), (E), without information about the extent and cause or causes of the wolf population decline. FWS’ proposal to delist in the absence of this information is premature; its failure to examine this key biological issue is illegal.

Furthermore, FWS’ analysis of allowable human-caused mortality is grounded upon the agency’s erroneous assumption about wolf population growth. For example, the proposed rule states, “[i]f the [northern Rockies] wolf population were to be delisted, State management would likely increase the mortality rate outside National Parks, National Wildlife Refuges, and Tribal reservations, from its current level of about 26 percent annually (Smith 2005). Wolf mortality as high as 50 percent annually may be sustainable (Fuller et al. 2003, p. 185).” 72 Fed. Reg. at 6,125; see also id. at 6,126 (“Human-caused mortality would have to remove 34 percent or more of the wolf population annually before population growth would cease (Fuller et al. 2003, pp. 184-185). Preliminary wolf survival data from radio-telemetry studies suggests that adult wolf mortality resulting from conflict could be doubled to an average of 14–20 percent annually and still not significantly impact wolf population recovery (Smith 2005).”). Such estimates of sustainable wolf mortality cannot be reconciled with actual population data for the northern Rocky Mountains population, which shows an apparent decline from 2007 to 2008.

Based on similar erroneous assumptions, Idaho and Montana established excessive human-caused wolf mortality quotas for 2008. Idaho set a 2008 quota of 428 wolves from all causes of mortality statewide. In its notice reopening public comment on the 2007 delisting proposal, FWS stated that, “[h]ad the hunting season occurred, this level of wolf mortality would have likely resulted in a remaining wolf population in Idaho of at least 518 wolves by mid-winter 2008.” 73 Fed. Reg. at 63,932. However, FWS merely repeats an assertion from the Idaho Department of Fish and Game (“IDFG”) analysis, which assumed a growing wolf population. See Idaho Wolf Population Management Plan (2008-1012), at 29, 34. Likewise, FWS erroneously relies on a growing wolf population in asserting that Montana’s hunter harvest quota of 75 wolves in the fall 2008 season “would likely still result in a Statewide increase in the total wolf population and the number of breeding pairs from the previous year.” 73 Fed. Reg. at 63,932. FWS makes no attempt to reevaluate the consequences of this level of human-caused mortality in light of a recently declining population. FWS has failed to confront the apparent significant decline in wolf fecundity and increase in wolf mortality that occurred in 2008 in the northern Rocky Mountain population.

² In the Great Lakes, disease has reduced early pup survival by 40 to 60 percent and may be harming wolf dispersal. L. David Mech, et al., Demographic Effects of Canine Parvovirus on a Free-Ranging Wolf Population Over 30 Years, J. Wildlife Diseases 44(4): 824-36 (2008) (attached). This study demonstrates the devastating impact that disease can have on wolf recovery and provides support for further study of the impacts of disease on the northern Rockies wolf population.
FWS must reevaluate its assumptions about sustainable wolf mortality rates and state wolf hunting seasons in light of significant new information that the wolf population is declining. FWS must also determine the extent and cause of the wolf population decline to allow the agency and the public a meaningful opportunity to assess whether the population should remain listed. The agency’s failure to do these things before proposing wolf delisting 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

Its numerous substantive inadequacies aside, FWS’ resurrected delisting proposal fails as a procedural matter because FWS has neglected to provide the requisite opportunity for public comment. FWS offers no detail whatsoever regarding the agency’s delisting proposal or its implications, no more than inviting the public to ruminate on possible approaches to delisting and their consequences. As a result, the public has been denied the opportunity to meaningfully comment on the proposed action and its implications, contrary to the requirements of the ESA and the Administrative Procedure Act.

First, FWS is required under the ESA to solicit and evaluate comments on all of the statutory listing factors, including whether a species is at risk of extinction due to the “inadequacy of existing regulatory mechanisms.” See 16 U.S.C. § 1533(a)(1)(D). Here, the “regulatory mechanisms” that will govern wolf management in the wake of delisting remain uncertain, making it impossible for the public to address their “adequacy” at this time. With respect to Wyoming in particular, the state’s existing laws leave wolves in “serious jeopardy” within the state, Defenders of Wildlife, 565 F. Supp. 2d at 1175, and it is not known what actions Wyoming will take in order to remedy the clear deficiencies of its regulatory scheme. Wyoming’s laws and regulations must be finalized before FWS solicits public comment on wolf delisting. See 73 Fed. Reg. at 63,927 (inviting public comment on what protections Wyoming law should afford in the wake of delisting).

Similarly, while inviting comment on the “additional management, protections, and regulatory mechanisms [that] may be needed to facilitate genetic exchange … including the actions outlined in the draft memorandum of understanding regarding the protection of genetic diversity of NRM gray wolves[,]” id., the referenced memorandum—an unsigned draft—is sufficiently vague as to prevent meaningful public discussion of its provisions. Though asserting that “human-assisted techniques can be used to accomplish the … goal of preserving genetic diversity[,]” the memorandum identifies no such “techniques[.]” Draft Memorandum of Understanding, Maintenance and Enhancement of Gray Wolf Recovery in the Northern Rocky Mountains (“Draft MOU”), at 2; see also, e.g., id. (“The States, in coordination with the FWS, will jointly assure gene flow among the three population areas of gray wolves by natural or human-assisted techniques.”). Until “additional … protections” are identified, see 73 Fed. Reg. at 63,927, the public is unable to comment upon their adequacy.

Finally, the public is incapable of commenting on the status of the northern Rockies’ wolves relative to FWS’ recovery standard until the agency determines “[w]hether it is appropriate or necessary to revise [its] recovery goal” downward in a manner allowing “managed
III. FWS HAS AGAIN FAILED TO ADDRESS SIGNIFICANT REMAINING BIOLOGICAL THREATS TO THE NORTHERN ROCKIES WOLF POPULATION THAT PRECLUDE DELISTING

In addition to preventing an opportunity for meaningful public comment, FWS’ resurrected delisting proposal again disregards a number of significant threats to the northern Rocky Mountain wolf population, each of which precludes their removal from the list of endangered and threatened species.

A. The Northern Rockies Wolf Population Has Not Achieved Demographic Characteristics Essential To Recovery

While raising the possibility of a weakened recovery standard for wolves in the northern Rocky Mountains, FWS’ delisting proposal ignores the inadequacy of the agency’s existing numerical requirement of only “300+ wolves” across Wyoming, Idaho, and Montana. See 73 Fed. Reg. at 63,927, 63,929-30.

1. There Are Not Enough Wolves In The Northern Rockies To Ensure Population Viability

Even with numbers in excess of FWS’ present recovery standard, wolves have not yet rebounded to the point of recovery in the northern Rocky Mountains. Well-established principles of conservation biology instruct that populations need robust numbers of individuals to remain viable over time. To avoid the adverse genetic effects of inbreeding, early studies estimated that a minimum viable population (“MVP”) requires an effective population size (“N_e”) of 500 individuals (Soule and Wilcox (1980), Frankel and Soule (1981), Soule (1986)). Soule and Simberloff (1986) concluded that “estimates of MVPs for many animal species are rarely lower than an effective size of a few hundred.” Since effective population sizes are generally 10 to 20 percent of the census population, this means that a total population count of 2,500 to 5,000 individuals is necessary to ensure population viability.

Since these early estimates, there have been a number of theoretical and empirical developments in the field of population biology demonstrating that thousands of individuals are needed to maintain healthy, viable populations. Lande (1988) criticized the blanket application of N_e = 500 because it does not consider species-specific demographic data. Lande concluded that demographic parameters may require populations to have even larger numbers than an effective population of 500. A number of researchers have also explored these earlier estimates with empirical data. C. D. Thomas (1990) estimated that MVPs should number in the thousands—ideally, 10,000 individuals for populations that experience fluctuations. Reed et al. (2003) estimated the specific MVP for over 100 vertebrate organisms. The mean population value for these vertebrates to maintain viability was estimated to be greater than 7,000 individuals. As part of the analysis, Reed et al. estimated the MVP for adult gray wolves (i.e., effective population size) to be 1,403. When these data were corrected for 40 generations worth of data, the MVP for gray wolves was estimated to be 6,332.
Significant advancements have also been made in the field of conservation genetics since FWS established its recovery standard for the northern Rockies’ wolves. Genetic data shows that, historically, wolves in the western United States numbered in the several hundreds of thousands (Leonard et al. (2005)). Additionally, the genetic diversity of the extirpated North American gray wolves was twice that of the current population. Thus, the current assemblage of gray wolves in the northern Rocky Mountains is a profound under-representation both numerically and genetically of the original gray wolf population that once occupied the western landscape.

In short, at the time the gray wolf recovery plan was drafted, FWS had reason to know that it was setting inadequate goals for population size. Since 1987 and 1994—and even since FWS reviewed the recovery plan in 2001—the science of population biology and genetics has advanced significantly, providing further support for a wolf recovery standard in the thousands rather than hundreds of wolves. As it stands now, FWS’ demographic recovery goal is not consistent with the best available data and should be revised upward to appropriately reflect current scientific knowledge. See 16 U.S.C. § 1533(b)(1)(A) (requiring listing determinations to be made “solely on the basis of the best scientific and commercial data available”).

2. The Northern Rockies Wolf Recovery Standard Inexplicably Differs From The Internationally Recognized IUCN Protocol For Assessing Extinction Threat

FWS’ current recovery standard for the northern Rockies’ wolves is similarly at odds with internationally recognized protocols for assessing the status of wildlife populations. The IUCN (or “World Conservation Union”) publishes a list of categories and criteria, known as the “Red List Criteria,” that it applies to determine species’ conservation status worldwide. See IUCN, Red List Categories and Criteria, Version 3.1 (2001) (“Red List Criteria”). The IUCN employs five separate criteria for listing a species as “Critically Endangered,” “Endangered,” or “Vulnerable.” A species is listed under one of these categories of threat if it meets any one of the listing criteria. IUCN’s published guidelines for applying Red List Criteria at a regional level state that for regional populations that are isolated, “the Red List Category defined by the criteria should be adopted unaltered.” IUCN, Guidelines for Application of IUCN Red List Criteria at Regional Levels, Version 3.0 (2003), at 13.

IUCN’s formalized thresholds for evaluating threat of extinction represent internationally accepted standards in population biology, and have been cited and relied upon by FWS in rendering ESA listing decisions. See, e.g., 12-Month Petition Finding and Proposed Rule to List the Polar Bear (Ursus maritimus) as Threatened Throughout Its Range, 72 Fed. Reg. 1,064 (Jan. 9, 2007). The criteria were developed by respected scientists from around the world and constitute the most reputable tool for assessing species status and conservation priorities on a global scale. In addition, at least 57 countries have adopted Red List Criteria, in combination with IUCN’s regional guidelines, for use on a national or regional scale.

The IUCN process explicitly requires listing a species as “vulnerable”—which corresponds to the ESA “threatened” listing category—if the population size drops below 1,000
“mature” individuals. Red List Criteria, at 23. An individual is defined as “mature” if it is capable of reproducing. Id at 10. This demographic standard addresses the need to maintain genetic diversity within isolated populations. When the number of breeding individuals drops below a certain threshold, the population may lose genetic diversity that is necessary for the population to adapt to changing conditions.

In the case of gray wolves, only a small percentage of the population contributes to the genetic heritage of the population. Pups and one-year old wolves, which are incapable of breeding, constitute a majority of the northern Rockies wolf population. Among adult wolves, typically only the alpha male and alpha female of a pack reproduce. 72 Fed. Reg. at 6,107. In addition, wolves in Yellowstone and Idaho are almost all descendants of fewer than 100 wolves that were reintroduced in 1995 and 1996. With an estimated 1,463 wolves in 97 breeding pairs, the northern Rockies wolf population is currently well below the IUCN’s floor for designating a species or isolated population as “Vulnerable” due to threats to genetic diversity. 3 See 73 Fed. Reg. at 63,928. Until FWS explains its departure from well-established international recovery standards that the agency has previously employed in rendering listing decisions, it cannot delist the northern Rockies wolf population.

B. The Northern Rockies Wolf Population Remains Endangered By A Lack Of The Connectivity That FWS Deemed Essential To Wolf Recovery

As emphasized by Montana’s federal district court, the genetic isolation of wolves within the northern Rocky Mountains remains a threat to the species’ survival. See Defenders of Wildlife, 565 F. Supp. 2d at 1168-72. FWS has stated repeatedly that gray wolves will not be recovered in the northern Rockies until wolves in the Greater Yellowstone (“GYA”), central Idaho, and northwestern Montana core recovery areas establish a northern Rockies metapopulation. See, e.g., 72 Fed. Reg. at 6,107 (recovery standard requires a northern Rockies “metapopulation … with genetic exchange between subpopulations”) (emphasis added); id. at 6,121 (“The recovery plan, the metapopulation structure recommended by the 1994 EIS, and subsequent investigations recognize the importance of habitat connectivity between [recovery areas].”) (citations omitted); see also Defenders of Wildlife, 565 F. Supp. 2d at 1169 (“The Fish & Wildlife Service’s assertion that the 1994 EIS requires only the potential for genetic exchange, not actual genetic exchange, is disingenuous. The 1994 EIS clearly requires ‘a metapopulation ... with genetic exchange between subpopulations.’”). Indeed, according to FWS, “[t]he importance of movement of individuals between sub-populations cannot be overemphasized.” FWS, Final Environmental Impact Statement: The Reintroduction of Gray Wolves to Yellowstone National Park and Central Idaho (Apr. 1994) (“1994 FEIS”), App. 9 at 42; see also id., Glossary at 4 (defining metapopulation as essential component of recovery).

3 The IUCN downgraded the gray wolf’s threat status globally (including wolf populations in Alaska, Canada, and Europe) from “Vulnerable” to “Least Concern” in 1996. IUCN generally does not assess distinct populations of species within a particular region, and therefore has no designation applicable to gray wolves in the northern Rockies. As the Red List Criteria document notes, “taxa classified as Least Concern globally might be Critically Endangered within a particular region … .” Red List Criteria, at 8.
1. A Fully Functioning Metapopulation Does Not Currently Exist In The Northern Rocky Mountains

In its resurrected proposed delisting rule, FWS relies on Oakleaf et al. (2006) to suggest that a functioning wolf metapopulation exists in the northern Rockies. 72 Fed. Reg. at 6,119. Oakleaf in fact determined that “currently there appears to be limited interchange of individuals between the 3 Northern Rockies recovery areas.” Oakleaf et al. (2006), at 555. Oakleaf noted that wolves in the Greater Yellowstone recovery area are almost entirely isolated from wolves in central Idaho and northwest Montana. Id. at 561. Oakleaf stated that just one wolf has been documented entering the Greater Yellowstone region from another recovery area (Idaho) and that individual has not reproduced. Id. Accordingly, Oakleaf made clear that a metapopulation is not yet established. In the words of Montana’s federal district court, “[t]he Fish & Wildlife Service’s speculation about genetic exchange is not convincing.” Defenders of Wildlife, 565 F. Supp. 2d at 1170.

The results of a FWS-commissioned genetics study confirmed, in fact, that Yellowstone’s wolves have remained genetically isolated since the 1995 reintroduction. See VonHoldt et al. (2007), at 13. The study concludes that “an effective metapopulation dynamic—where wolves travel between core protected areas, sharing genetic material and recolonizing depopulated areas—has yet to be achieved.” Declaration of Robert Wayne, Defenders of Wildlife v. Hall, Civ. No. 08-056 (D. Mont.) (“Wayne Dec.”), ¶ 3 (attached as Defenders Doc. 3-8). Accordingly, the final delisting rule recently vacated by Montana’s federal district court conceded that “little, if any, … DNA [from dispersing wolves] has become incorporated into the GYA portion of the NRM DPS.” 73 Fed. Reg. at 10,553.

In its renewed delisting effort, FWS argues, as it did in the Defenders case, that the VonHoldt genetics study relied on incorrect assumptions. See 73 Fed. Reg. at 63,929. FWS commissioned this study and relied on its key conclusions regarding the Yellowstone wolf population’s inbreeding avoidance and absence of genetic material from other recovery areas as the best available science. See, e.g., 73 Fed. Reg. at 10,531, 10,540, 10,553. FWS criticizes the study’s conclusion that Yellowstone wolves could be harmed by inbreeding depression within 60 years unless adequate genetic exchange is achieved. However, in establishing the genetic exchange requirement, FWS recognized that genetic exchange is necessary to prevent genetic problems such as inbreeding depression. See 1994 FEIS at 39 (“Genetic variability lost within each sub-population can be offset by new variants being reintroduced by interchange between sub-populations.”). The fact that VonHoldt arrived at the same conclusion based on empirical study of Yellowstone wolves simply underscores the necessity of genetic exchange. FWS’ “rationale for rejecting the VonHoldt Study’s predictions is not convincing nor well explained.” Defenders of Wildlife, 565 F. Supp. 2d at 1171.

As FWS admits 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. Currently, suitable dispersal corridors between the GYA and other recovery areas are lacking; under the reduced population objectives and reduced protections of state management they will
be further diminished. Oakleaf (2006), at 560. Future habitat development and increased human-caused mortality under state management would further isolate the GYA subpopulation. 73 Fed. Reg. at 10,540. The mere potential for wolves to travel to the GYA cannot substitute for genetic exchange. In order to effect genetic rescue, a sufficient number of dispersers must travel to the GYA, join packs, and successfully breed, see VonHoldt (2007) at 16, 19; the mere existence of a handful of dispersers traveling to the GYA does not remedy the genetic problems faced by GYA wolves.

2. The Northern Rockies Wolf Population Cannot Be Deemed Recovered In The Absence Of Connectivity

FWS has again responded to the critical finding that an effective metapopulation has not been established in the northern Rockies by asserting that wolves are recovered notwithstanding their lack of connectivity. See 73 Fed. Reg. at 63,929; see also 73 Fed. Reg. at 10,553. This rationale is insufficient to justify delisting for several reasons. First, this purported justification controverts FWS’ 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’ about-face finding that a metapopulation dynamic is not essential to wolf recovery directly contradicts the best available scientific evidence. See 73 Fed. Reg. at 10,553. The FWS-commissioned Yellowstone genetics study concluded that if the Yellowstone Park wolves remain relatively constant at 170 individuals (estimated to be Yellowstone’s carrying capacity), the population will demonstrate substantial inbreeding effects within 60 years. VonHoldt (2007), at 19; see also Wayne Dec. ¶ 4 (“over time, significant inbreeding depression will occur without connectivity and migratory exchange with other populations”); Virginia Morell, Wolves at the Door of a More Dangerous World, Science 319:890, 892 (Feb. 15, 2008) (“Morell (2008)”) (attached as Defenders Doc. 3-2 Ex. 10). “Given these results, we would expect to observe an increase in juvenile mortality from an average of 23 to 40%, an effect

4 While wolves are able to travel through relatively poor habitat in order to colonize new areas, “such dispersal corridors … expose dispersers to higher mortality risk and thus can result in poor connectivity between populations.” Oakleaf (2006), at 561.

5 Despite extensive monitoring, FWS has so far divulged only four dispersers into the GYA, and no breeders, in the 14 years since wolf reintroduction. See Federal Defendants’ Opposition to Motion for Preliminary Injunction, Defenders of Wildlife v. Hall, Civ. No. 08-056 (D. Mont.) (“FWS Inj. Br.”), at 6 (attached as Defenders Doc. 35).

6 The VonHoldt (2007) conclusion that the Yellowstone population will demonstrate substantial inbreeding effects is based on studies of one of the same “smaller extant wolf populations” that FWS cited in support of its statement that the “potential lack of genetic connectivity” is not harmful. Compare 73 Fed. Reg. at 10,553-54 (citing Liberg (2005)), with VonHoldt (2007), at 19 (same).
equivalent to losing an additional pup in each litter.” VonHoldt (2007), at 19; see also Wayne Dec. ¶ 4.7 This increased pup mortality for Yellowstone wolves will occur well within the 100-year horizon FWS used in the vacated delisting rule as the appropriate time frame for assessing genetic threats. See 73 Fed. Reg. at 10,531. Further, FWS itself has acknowledged that without ongoing genetic interchange, isolated core recovery populations of merely 100 individuals and 10 breeding pairs—as contemplated by FWS’ vacated delisting rule—will not exhibit genetic diversity sufficient to avoid the harmful effects of inbreeding. See 1994 FEIS, App. 9 at 42 (“It is fairly clear that ten breeding pairs in isolation will not comprise a ‘viable’ population (i.e., have a high probability of survival for a long period without human intervention).”); see also VonHoldt (2007), at 18 (“populations of this size [100 wolves in 10 breeding pairs] that remain isolated will lose genetic variation and become inbred over the long term”).

FWS’ renewed assertions that a lack of genetic connectivity is not a threat to the wolves of the northern Rocky Mountains is wrong. See 73 Fed. Reg. at 63,929. Case studies of isolated populations that “have persisted for many decades,” id., were well known to FWS both at the time it determined that genetic exchange was essential to wolf recovery, 1994 FEIS at 39, and at the numerous times when FWS reaffirmed the genetic exchange requirement. See, e.g., 71 Fed. Reg. 6,634, 6,635 (Feb. 8, 2006); 73 Fed. Reg. at 10,521; see also Defenders of Wildlife, 565 F. Supp. 2d at 1171 (“The Service provides no new evidence or research to support its change of course.”). Indeed, the 1995 article on which FWS now relies was derived from FWS’ 1994 EIS analysis of recovery criteria. Compare Fritts and Carbyn (1995) with 1994 FEIS. Moreover, the Fritts and Carbyn study actually emphasizes “metapopulation connectedness” as “a major reason that small, local populations can survive.” Fritts and Carbyn (1995), at 35. Finally, the small wolf populations referenced by FWS in many cases suffered ill effects from inbreeding, radical population declines, and even extirpation. See, e.g., Fritts and Carbyn (1995), at 31-33; Declaration of Sylvia Fallon, Defenders of Wildlife v. Hall, Civ. No. 08-056 (D. Mont.), ¶ 10 (attached as Defenders Doc. 85-2).8 FWS’ failure to take stock of this finding even as the agency relies on this study only underscores the arbitrariness of its rationale.

3. The Endangered Species Act Does Not Permit Artificial “Recovery”

In attempting to revive the same delisting proposal rejected by Montana’s federal district court, FWS asserts that “natural connectivity is not and has never been required to achieve [its]

7 Further, a metapopulation dynamic may be necessary to maintain viability when stochastic events—i.e., drought, disease, fire, or some combination of unforeseen events—affect one subpopulation. See 1994 EIS, App. 9 at 39. The ability of wolves to disperse from one recovery area to another is key to rekindling subpopulations that are eliminated or severely diminished by unforeseen events, such as the disease outbreak that was partially responsible for a Yellowstone National Park wolf population crash from 171 wolves in 16 known breeding pairs in 2004, to 118 wolves in 7 breeding pairs in 2005. See 72 Fed. Reg. at 6,110.

8 Small populations face increased extinction risks due to genetics problems, which is why the standard rule of thumb is that populations must have at least 50 breeding individuals to withstand short-term genetics problems and 500 breeding individuals to withstand longer-term genetics problems. See 73 Fed. Reg. 19,929, 19,936-37 (Mar. 11, 2008) (FWS wolverine listing decision employing the 50/500 rule).
recovery goal” and, thus, “recovery” can be attained through human-engineered, “managed genetic exchange.” 73 Fed. Reg. at 63,927, 63,930. In the more colorful words of FWS’ wolf recovery coordinator, “[c]onnectivity can happen through a ride in the back of a truck.” Morell (2008), at 892. This “back of a truck” theory of species recovery is wrong because the ESA requires recovery in a functioning ecosystem, not artificial maintenance of a captive or heavily manipulated population. See 16 U.S.C. § 1531(b) (purpose of ESA is to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved”). “[I]n evaluating any policy or listing determination under the ESA, its polestar must be the viability of naturally self-sustaining populations in their naturally-occurring habitat.” Trout Unlimited v. Lohn, 2007 WL 1795036, at *16 (No. CV06-0483-JCC, W.D. Wash. 2007) (emphasis added); see also 16 U.S.C. § 1539(a)(2)(B)(iv) (before issuing incidental take permit, FWS must find “the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild”) (emphasis added); Interagency Cooperative Policy for the Ecosystem Approach to the ESA, 59 Fed. Reg. 34,273, 34,274 (July 1, 1994) (agency policy is to “[d]evelop and implement recovery plans … in a manner that restores, reconstructs, or rehabilitates the structure, distribution, connectivity and function upon which … listed species depend”).

Moreover, even if it were true that artificial genetic exchange could provide an adequate substitute for a naturally functioning metapopulation, no relocation program has been established. The absence of such a program is underscored by FWS’ draft memorandum of understanding regarding “human-assisted” connectivity, which establishes no concrete management actions or thresholds; in no way affects the statutory responsibilities of state wildlife managers; and “does not obligate any … agencies to the expenditure of funds[.]” Draft MOU at 3. Thus, FWS’ assurance that genetic interchange could occur through post-delisting human intervention, if the states decide to embark on such a costly program, is legally insufficient. See, e.g., Or. Natural Res. Council v. Daley, 6 F. Supp. 2d 1139, 1154-55 (D. Or. 1998) (FWS may not rely on “unenforceable efforts” or efforts that are not “currently operational” in deciding not to list a species).

IV. FWS HAS AGAIN FAILED TO ADDRESS THE THREAT POSED TO THE NORTHERN ROCKY MOUNTAIN WOLF POPULATION BY INADEQUATE STATE REGULATORY MECHANISMS

FWS’ recent experiment with state management demonstrated the threat posed to the northern Rocky Mountains’ wolves by inadequate state regulatory mechanisms. Wyoming, Idaho, and Montana’s post-delisting management schemes permit a level of wolf killing that radically diminishes the prospects for a functional northern Rockies metapopulation; nearly 100 wolves were deliberately killed while state laws governed wolf management. The states’ regulatory schemes fail to adequately protect wolves.

A. Wyoming’s Wolf Management Scheme Remains Inadequate To Protect The Northern Rockies Wolf Population

As Montana’s federal district court emphasized in rejecting the agency’s prior delisting effort, FWS’ suggestion that Wyoming’s regulatory mechanisms offer sufficient protection for
the region’s wolves cannot be sustained. See Defenders of Wildlife, 565 F. Supp. 2d at 1173.
To the contrary, Wyoming’s management scheme places “the continued existence of the wolf in
Wyoming and outside of the National Park[s] … in serious jeopardy.” Id. at 1175.

1. Wyoming’s Regulatory Scheme Maintains The Deficiencies Identified By FWS In 2004

In January 2004, FWS rejected Wyoming’s first attempt at a wolf management plan—a
plan that deemed wolves “predators” subject to unlimited killing in most of the state and failed to
guarantee that 15 breeding pairs would be maintained statewide. See FWS Letter to Wyoming
Game and Fish Department (Jan. 13, 2004) (“2004 Wyoming Letter”) (attached as Defenders
Doc. 3-3 Ex. 11); see also 71 Fed. Reg. 43,410 (Aug. 1, 2006). FWS rejected the 2003
Wyoming plan for three reasons. 2004 Wyoming Letter, at 1. First, FWS determined that “[t]he
‘predatory animal’ status for wolves must be changed” as “[t]he unregulated harvest, inadequate
monitoring plan, and unit boundaries proposed by the state’s management plan [did] not provide
sufficient management controls to assure the Service that the wolf population [would] remain
above recovery levels.” Id. By contrast, FWS stressed, statewide trophy game designation
would allow Wyoming to “provide[] for self-sustaining populations above recovery goals,
regulated harvest and adequate monitoring of that harvest.” Id. Second, FWS declared,
“Wyoming state law must clearly commit to managing for at least 15 wolf packs in Wyoming.”
Id. at 2. Finally, FWS concluded, Wyoming had to include a breeding pair–based metric for
assessing compliance with recovery standards. Id.

In December 2007, FWS “congratulate[d]” Wyoming for having adopted a revised
management plan that FWS deemed adequate to protect the region’s wolves—a plan that deems
wolves “predators” subject to unlimited killing in nearly 90 percent of the state and fails to
guarantee that Wyoming will maintain 15 breeding pairs. FWS Letter to Wyoming Game and
Fish Department (Dec. 12, 2007) (“2007 Wyoming Letter”) (attached as Defenders Doc. 3-3 Ex.
12), at 2. This reversal was arbitrary; FWS was right in rejecting Wyoming’s management
scheme in the first instance. See Defenders of Wildlife, 565 F. Supp. 2d at 1174. In declaring
that Wyoming’s 2007 management plan would maintain Wyoming’s wolf population “above
recovery levels into the foreseeable future,” 72 Fed. Reg. 36,939, 36,941 (July 6, 2007), FWS
ignored both the contents of the plan and FWS’ prior determinations.9 Wyoming’s current law
designates nearly 90 percent of the state as a “predatory animal” area in which wolves “may be
taken by anyone, anywhere … at any time, without limit, and by any means”—including, in
FWS’ words, “shoot-on-sight; baiting; possible limited use of poisons; bounties and wolf-killing
contests; locating and killing pups in dens including use of explosives and gas cartridges;
trapping; snaring; aerial gunning; and use of other mechanized vehicles to locate or chase wolves

9 FWS previously determined—correctly—that unenforceable statements in a Wyoming Plan
and a Wyoming Attorney General opinion cannot override controlling requirements of Wyoming
law. See 71 Fed. Reg. at 43,415 (“question[ing] whether commitments made in the Plan could
actually be implemented under the law”); id. at 43,429 (“Notwithstanding the Attorney General’s
opinion, we are concerned that WGFD would have no authority to act contrary to the categorical
requirements of an operative provision of the state law.”).
game” boundary in northwestern Wyoming and authorizing use of that boundary only where
“necessary to achieve federal government delisting of the gray wolf”). FWS has rightly
acknowledged that wolves are unlikely to persist in areas where they are deemed “predators.” 71
Fed. Reg. at 43,428. Indeed, Wyoming’s brief wolf management effort in 2008 confirmed this
fact, as wolves in Wyoming’s predator area were stalked and killed at state-run elk feedgrounds,
shot from the air, and tracked for miles by snowmobile. See, e.g., Joy Ufford, Wolf Suit Naps as
Clock Ticks Down, Sublette Examiner (Feb. 21, 2008) (attached as Defenders Doc. 3-4 Ex. 18);
as Defenders Doc. 3-4 Ex. 19). At least 13 wolves were killed in Wyoming as “predators” in
less than 30 days.

2. Wyoming’s Malleable “Trophy Game” Protections Fail To Adequately
Protect Wolves

Wyoming’s “trophy game” region itself is malleable, “present[ing] a metaphorical
moving target” that leaves Wyoming’s wolves in “serious jeopardy.” See Defenders of Wildlife,
565 F. Supp. 2d at 1174-75. The Wyoming Game and Fish Commission has authority to
“diminish[]” the “trophy game” area if it “determines [that] … diminution [would] not impede
the delisting of gray wolves and will facilitate Wyoming’s management of wolves[.]” Wyo. Stat.
“annually … only as necessary to reasonably ensure at least seven (7) breeding pairs” in
Wyoming, outside of the national parks. Id. § 23-1-304(a) (emphasis added). Already,
Wyoming’s governor has expressed his “unhapp[iness]” with the “trophy game” boundary and
his hope that it “can be revisited” after delisting. See Letter of Wyoming Governor Dave
Freudenthal to FWS (May 24, 2007) (attached as Defenders Doc. 3-3 Ex. 13). Under Wyoming
law, moreover, the Game and Fish Commission may allow killing of game animals as
“predators,” even within the trophy game zone. See Wyo. Stat. § 23-1-302(a)(ii); 23-3-103(a).
Wyoming’s current “trophy game” laws, in short, fail to adequately protect wolves.

3. Wyoming Has Failed To Commit To Maintaining 15 Breeding Pairs And
150 Wolves, As Required By FWS

FWS’ assertion that Wyoming has “clearly committed to manage for at least 15 breeding
pairs and 150 wolves within the State,” with “7 of those breeding pairs … outside the National
Park Units in Wyoming[,]” see 2007 Wyoming Letter; see also 72 Fed. Reg. at 36,940, is
“disingenuous,” Defenders of Wildlife, 565 F. Supp. 2d at 1173. Wyoming’s current law
provides no guarantee of maintaining 15 breeding pairs in the state if—as has already occurred—
the wolf population in the state’s national parks drops below eight breeding pairs. Under section
23-1-304(a), the state’s wildlife commission is required to revisit the “trophy game” protections
“annually” and establish a boundary “only as necessary to reasonably ensure at least seven (7)
breeding pairs of gray wolves are located in [Wyoming and outside of the state’s national parks]
at the end of the … calendar year.” Wyo. Stat. § 23-1-304(a) (emphasis added). Other
provisions of Wyoming law also emphasize management for only 7 breeding pairs. See id. § 23-
1-304(j) (encouraging wolf killing to reduce wolf predation on game populations when more
than 7 breeding pairs exist in Wyoming outside the parks); id. § 23-1-304(n) (requiring issuance
of wolf-killing permits for livestock conflicts when more than 7 breeding pairs exist in Wyoming outside the parks); 2003 Wyo. Sess. Laws, ch. 115 (H.B. 213), § 4(c) (directing management of prey base to support “at least” 8 breeding pairs in the parks, but “seven breeding pairs” “in all other areas of the state”). When seven breeding pairs exist outside the parks, for instance, Wyoming law requires the issuance of “annual” lethal control permits to “landowners or livestock owners” and authorizes the Wyoming Game and Fish Department to take “any action necessary to protect big and trophy game populations” from predation by wolves. Id. §§ 23-1-304(e), (j), (n). Each of these provisions is premised upon the expectation that Yellowstone National Park will sustain at least eight breeding pairs—an expectation that FWS has already rejected as “unrealistic” and that recent experience has proven to be unfounded. 72 Fed. Reg. at 6,131. Thus, if the wolf population in Wyoming’s national parks drops below eight breeding pairs, as occurred in 2005 (and likely 2008), implementation of Wyoming law will likely result in fewer than 15 breeding pairs statewide. See 71 Fed. Reg. at 43,429. Wyoming law does not include a commitment to maintain a statewide population of 15 breeding pairs—a commitment FWS deemed essential.


In keeping with FWS’ precipitous, eleventh-hour delisting effort, the Wyoming Game and Fish Commission has promulgated an “emergency rule”—to remain in effect for only 120 days—amending state regulations that affect wolf management. The Commission’s explicit intent in adopting the rule was to allow FWS “to consider the provisions of this regulation as a part of its decision-making process” for FWS’ delisting proposal. Wyoming Game and Fish Commission, Statement of Reason, available at http://gf.state.wy.us/downloads/pdf/STMTofReasonCh21.pdf. However, FWS may not consider the emergency regulation in its delisting analysis because it is temporary. Regardless, even if the emergency rule were adopted as a permanent regulation, it would not constitute an adequate regulatory mechanism to ensure that Wyoming wolves are not endangered.

Section 4(a) of the emergency rule provides that the Game and Fish Commission shall manage for 15 breeding pairs within the trophy game area, with at least 7 breeding pairs primarily located outside of the National Parks. This is not an adequate regulatory mechanism. First, the provision conflicts with operative Wyoming law, which provides that the Commission must manage wolves “only as necessary to reasonably ensure at least seven (7) breeding pairs of gray wolves are located in [Wyoming] and primarily outside [its national parks],” irrespective of breeding pair totals in the parks. Wyo Stat. § 23-1-304(a). Moreover, when seven breeding pairs exist outside the parks, Wyoming law requires the issuance of “annual” lethal control permits to “landowners or livestock owners” and authorizes the Wyoming Game and Fish Department to take “any action necessary to protect big and trophy game populations” from predation by wolves. Id. § 23-1-304(e), (j), (n). To the extent the emergency rule purports to commit Wyoming to managing for more than 7 wolf breeding pairs, it conflicts with Wyoming statutory authority and accordingly has no effect.

Further, the emergency rule does nothing to correct the fatal defects in Wyoming’s wolf management scheme identified by the Montana federal court. The emergency rule retains a dual
classification scheme that designates wolves as predators throughout most of the state. Moreover, under Wyoming law, the Game and Fish Commission may allow killing of game animals as “predators,” even within the trophy game zone. See Wyo. Stat. § 23-1-302(a)(ii); 23-3-103(a).

The emergency rule also fails to fix a permanent trophy game boundary (nor could it, in light of its limited, 120-day duration). See Emergency Rule, Ch. 21, § 4(c). As the Court noted, “[t]his aspect of the Wyoming plan presents a metaphorical moving target.” Defenders of Wildlife, 565 F. Supp. 2d at 1174. Wyoming law authorizes the Commission to “diminish[]” the “trophy game” area if it “determines [that] … diminution [would] not impede the delisting of gray wolves and [would] facilitate Wyoming’s management of wolves.” Wyo. Stat. § 23-1-101(a)(xii)(B)(I). The emergency rule adds a condition that the diminishment may not prevent the Commission from achieving the management objectives in section 4(a)—i.e., maintaining 15 wolf breeding pairs statewide with at least 7 breeding pairs outside of the national parks. Emergency Rule, Ch. 21, § 4(c). This condition is not operative because it conflicts with the provision of the Wyoming statutes that requires the Commission to annually delineate a wolf trophy area no larger than necessary to maintain seven breeding pairs. Wyo. Stat. § 23-1-304(a). Even if the condition were given effect, it does not transform Wyoming’s defective wolf management scheme into an adequate regulatory mechanism.

Montana’s federal district court astutely explained the cumulative effect of these numerous problems with Wyoming’s wolf management:

States have flexibility to manage unlisted species within their borders so long as that management does not threaten the continued viability of the species. Here, however, Wyoming submitted a plan that classifies the wolf as a predatory animal in approximately 90 percent of the state. The Service acknowledged wolves in this area will not likely persist because wolves cannot survive unregulated human-caused mortality. 73 Fed. Reg. at 10,549-10,550. The remaining 10 percent of Wyoming, which provides some protection for the wolf, can be altered by the Wyoming Fish & Wildlife Commission at any time. These facts, when coupled with Wyoming’s failure to firmly commit to managing to preserve at least 15 breeding pairs in the state, show the continued existence of the wolf in Wyoming and outside of the National Park Units is in serious jeopardy.

Defenders of Wildlife, 565 F. Supp. 2d at 1175. Because Wyoming’s latest attempt to revise its wolf management strategy still fails to render Wyoming law an adequate regulatory mechanism, FWS cannot finalize its proposal to delist wolves in the northern Rockies.10

10 The 2008 Revisions to the Wyoming Plan—a non-binding document that describes Wyoming’s wolf management activities—also do not constitute adequate regulatory mechanisms. First, agency conservation plans or programs do not qualify as regulatory mechanisms under the ESA “[a]bsent some method of enforcing compliance.” Or. Natural Res. Council v. Daley, 6 F. Supp. 2d at 1155. Second, the 2008 revisions suffer from the same flaws described above for the emergency rule.
B. Idaho’s Wolf Management Scheme Remains Inadequate To Protect The Northern Rockies Wolf Population

1. Idaho’s Management Laws Are Aimed At The Elimination Of Wolves From The State

Lest there be any confusion concerning how Idaho will interpret its wolf laws and plans, one need only look to the Executive Summary of the state’s management plan, where Idaho’s legislature reaffirmed that:

The state of Idaho is on the record asking the federal government to remove wolves from the state by the adoption in 2001 of House Joint Memorial No. 5. The position reflected in House Joint Memorial No. 5 continues to be the official position of the State of Idaho.

Idaho Wolf Conservation and Management Plan (Mar. 2002), at 4. Joint Memorial No. 5 demanded “that wolf recovery efforts in Idaho be discontinued immediately and wolves be removed by whatever means necessary.” In its findings, the Idaho Legislature determined that wolf recovery “has no basis in common sense, legitimate science or free-enterprise economics,” that “wolves are not a game animal; they are predators and should be managed as such;” and that wolves should be immediately delisted and the federal government should be financially responsible for all damages created by wolves, not only to livestock, but for domestic animals, pets and especially for damages to Idaho’s wildlife.

Idaho House Joint Memorial No. 5. Accordingly, the Idaho Legislature resolved that “wolf recovery efforts in Idaho be discontinued immediately, and wolves be removed by whatever means necessary.” In its Statement of Purpose, the Idaho Legislature stated:

In 1994, wolves were reintroduced into Idaho by the U.S. Fish and Wildlife Service, an activity opposed by the Idaho Legislature. Historically, wolves were eliminated in Idaho in recognition that an agricultural economy could not co-exist with an exploding predator wolf population. In year 2000, it is apparent that successful re-introduction of wolves has re-established a negative economic impact for farmers, ranchers, and small rural communities that are agriculturally based. The ravaging of domestic livestock and Idaho wildlife will increase, no matter the faulty management tool designed to mitigate these losses, and has reached an intolerable level with no end in sight. This memorial calls for discontinuance of the wolf recovery program in Idaho and the immediate removal of wolves. This memorial further calls for immediate de-listing and monetary remuneration from the Federal Government for all damages created by wolves, not only to livestock, but for domestic animals, pets and especially for damage to Idaho’s wildlife.

Id.
2. The Provisions Of Idaho’s Wolf Management Plan Are Not Binding Upon The State’s Wildlife Managers, Leaving Wolves Subject To Aggressive Control Actions

Consistent with the hostile purposes of Idaho’s wolf management scheme, the legislature has not made compliance with the Idaho plan mandatory. Instead, it has provided that wolves must be managed “in accordance with existing laws or approved management plans.” Idaho Code § 26-201 (emphasis added). Management in accordance with existing laws is cold comfort to wolves because, absent federal protections, Idaho law will allow State entities to “control” wolves as predators. Idaho Department of Agriculture regulations define a “predatory animal” as “An animal which needs to be controlled in order to protect land, water, wildlife, livestock, domesticated animals, human life, or crops.” See IDAPA § 02.01.03 (rules regarding airborne control of unprotected or predatory animals). Although currently only coyotes and red fox are designated “predators” under this regulation, additional animals may be designated “after consultation with the Idaho Department of Fish and Game.” Id. The Idaho Fish and Game Commission is statutorily prohibited from itself designating predators, Idaho Code § 36-201, and regulations do not provide Fish and Game the power to veto predator designations by the Department of Agriculture. Therefore, regardless of what management regime would apply to wolves under Idaho’s wolf management plan, wolves may be declared “predatory animals” by the Department of Agriculture and subjected to virtually unregulated killing in at least three ways: (1) The commissioners of each county have “full power and authority to declare any predatory animal … that feeds upon, preys upon or destroys any poultry or livestock of any kind upon any public or private lands within their respective counties … to be agricultural pests, and to take all steps that they may deem necessary to control such pests,” id. § 25-2601; (2) the state Department of Agriculture is similarly authorized to “take all steps that are deemed necessary to prevent and control damage or conflicts on federal, state, or other public or private lands caused by predatory animals… that are injurious to animal husbandry, agriculture, horticulture, forestry, wildlife and human health and safety,” id. § 22-103(24); and (3) the state animal damage control board also has authority to prevent and control “damage caused by predatory animals,” id. § 25-2612A.

Separate from the authority of state agencies to declare and “control” wolves as predators, “livestock owners, their employees, [and] agents” may “dispose” of predators that molest livestock without a permit. Id. § 36-1107(b). Idaho law goes even further, however, in providing that “[l]ivestock owners may take steps they deem necessary to protect their livestock.” Id. (emphasis added). There is no limitation on what steps a livestock owner may take, or even on what circumstances render such steps “necessary.” The law leaves it entirely within a livestock owner’s discretion to target wolves using M44s, trapping, shooting, dynamite, or any other means, either in response to depredation or preemptively.

3. Idaho’s Management Scheme Fails To Protect 15 Breeding Pairs, As Required By FWS

Just like Wyoming law, Idaho’s management scheme fails to ensure protection of 15 breeding pairs. Instead, the Idaho wolf plan provides minor changes in depredation “Control” when fewer than 15 packs exist in Idaho and “becomes increasingly stringent until at ‹10 packs it
reverts to the control plan specified in the final rule (50 CFR Part 17, page 80270).” Idaho Wolf Conservation and Management Plan (Mar. 2002), at 5. Idaho Fish and Game defines a “pack” as “a verified group of wolves traveling together[,]” a definition that does not meet FWS’ breeding pair definition. Wolf Population Status 1995-2005, available at http://fishandgame.idaho.gov/cms/wildlife/wolves/pack_status.cfm. Two or three wolves traveling together at any time of the year would meet Idaho’s definition of pack. Under this definition, Idaho’s commitment to maintain 15 packs could equate to only 30 to 45 wolves that could be slaughtered before the end of the year. FWS should reject Idaho’s plan for its failure to meet even FWS’ insufficiently protective recovery standards.

4. Idaho’s Management Guidance Fails To Foster Wolf Dispersal Between The State And The Greater Yellowstone Area’s Isolated Wolf Population

Idaho contains key dispersal corridors between the central Idaho and GYA wolf subpopulations. Nonetheless, Idaho’s 2008 management guidance fails to foster wolf dispersal into the GYA. There is currently a large gap between documented wolf packs on the eastern fringe of the central Idaho subpopulation and the GYA. See Idaho Wolf Population Management Plan (2008-2012), at 10 (map depicting “2007 Wolf Activity”). Rather than reducing wolf mortality between the cores of these subpopulations, Idaho has proposed public hunting in these areas to “stabilize” or “decrease” already minimal wolf numbers. See id. at 28 (map depicting wolf management units); id. at 33 (population status and short-term harvest strategy for South Idaho, Southern Mountains, and Upper Snake units); see also Idaho Department of Fish and Game 2008 Draft Statewide Wolf Season Options (draft statewide mortality quotas for each unit, based on the 328-wolf mortality cap). Both in setting excessive wolf hunting levels, and in failing to provide needed protections for the areas through which wolves must travel to attain needed connectivity, Idaho’s management scheme fails to provide adequate regulatory mechanisms for wolves.

5. Idaho’s Revised Definition Of “Breeding Pair” Is Inconsistent With FWS’ Definition, Reducing The Number Of Wolves That Must Be Maintained Following Delisting

FWS previously rejected the 2003 Wyoming wolf plan because Wyoming proposed measuring wolf packs rather than wolf breeding pairs as a recovery standard. See 71 Fed. Reg. at 43,427-30. However, FWS has failed to recognize the same defect in Idaho’s wolf management scheme. There are many more wolf packs than breeding pairs. For example, as of September 2008, FWS estimated that there were 197 packs in the northern Rockies, but only 97 breeding pairs. 73 Fed. Reg. at 63,928. For both 2006 and 2007, Idaho abandoned the historic practice of documenting wolf population numbers and breeding pairs, and began implementing a revised definition of “breeding pairs” that no longer includes the requirements that a breeding pair be comprised of an alpha male and alpha female with at least two pups of the year that survive until December 31. Wolf Conservation and Management in Idaho, Progress Report 2007, Appendix A & Appendix B (describing methods for estimating wolf population numbers and breeding pairs); see also id. at 22, 31 (counting the Battle Ridge wolf pack as a breeding pair based solely on a spring count of 2 pups and 1 adult) (one of many such examples). This change of the definition of “breeding pairs” alters the manner in which breeding pairs are counted and
changes the count of breeding pairs to a mere estimate. This flatly contradicts FWS’ prior position, and raises fundamental questions about what metric will be used to measure how many wolves must be maintained post-delisting. This changed recovery standard dramatically reduces the number of wolves that the states must maintain following delisting and thus dramatically increases the extinction threat the wolves face. It also represents an unexplained departure from recovery standards that have been in place for more than a decade. In authorizing Idaho’s revised definition of “breeding pair,” FWS is obligated to explain its departure from its own recovery standards, demonstrate how such a change is consistent with the best available science, and examine how many wolves will be maintained under this revised standard and why a smaller population can be considered viable in the long term.

For all of these reasons, Idaho’s management scheme is insufficient to protect the region’s wolves from harassment and mortality. FWS’ renewed effort to deprive the northern Rockies’ wolves of federal protections must, therefore, be abandoned.

C. Montana’s Wolf Management Scheme Remains Inadequate To Protect The Northern Rockies Wolf Population

Montana law is similarly inadequate to protect wolf populations within the State. Montana law defines “predatory animal” to include coyotes, red fox, “and any other individual animal causing depredations upon livestock.” Mont. Code Ann. § 81-7-101. Montana’s livestock code contains six parts which pertain to control of predators in the state of Montana. Instead of providing a global exemption from the predator control provisions of Montana law, in passing SB 163 in 2001, the Montana legislature exempted the gray wolf only from two specific sections of Chapter 7, Title 1, which pertain to control actions taken by the Montana Department of Livestock (“DOL”). Mont. Code Ann. § 87-5-131(3) (requiring that DOL predator control actions pursuant to Mont. Code Ann. §§ 81-7-102 and 81-7-103 be consistent with Montana’s wolf management plan). Left unaffected by this limited exemption are four other statutory predator control provisions. Under Mont. Code Ann. § 81-7-104, Montana DOL is authorized to use “any means of effective predatory animal destruction and control, including systematic hunting and trapping and the payment of bounties” on private lands, state lands, or federal lands. Under Mont. Code Ann. § 81-7-302, county commissioners shall “conduct a predatory animal control program” for the protection of sheep that is recommended by “organized associations of sheep growers in the county.” Under Mont. Code Ann. § 81-7-505, any resident landowner may conduct aerial hunting of predatory animals without permit, provided the landowner annually provides notice to DOL. Under Mont. Code Ann. § 81-7-602, county commissioners may establish predatory animal control programs at the request of “an organized association of cattle producers in the county.” Given the extensive overlap of livestock with the current and expected range of the gray wolf in Montana, Montana law fails to provide adequate regulatory mechanisms for gray wolves.

In addition to Montana’s predatory animal control program, the statutory directives applying to Montana Fish, Wildlife, & Parks (“FWP”) fail to protect gray wolves. Under Mont. Code Ann. § 87-1-217, wolves are designated “large predators.” In managing large predators, the primary goals of FWP are not directed toward species recovery, but instead directed toward preserving citizens’ opportunities to hunt large-game species; protecting humans, livestock, and
pets; and preserving and enhancing the safety of the public during outdoor recreational and
livelihood activities. Id. Lest there be any doubt about the primacy of these directives, the
Montana legislature required that the specific provisions of Mont. Code Ann. § 87-1-217
“concerning the management of large predators will control the general supervisory authority” of
Montana FWP “regarding the management of all wildlife.” Id. Thus, by Montana law, wolves
must be managed to reduce impacts on ranching and hunting. Similarly, Mont. Code Ann. § 87-
3-130 exempts from criminal liability the taking of wildlife, including wolves, when they are
“attacking, killing, or threatening to kill a person or livestock.” Id. (emphasis added).

Once the gray wolf is removed from the ESA’s list of threatened and endangered species,
Montana FWP is authorized to remove the species from the state list of endangered species.
Mont. Code Ann. § 87-5-131(1). Upon removal from the state list, the gray wolf would initially
be managed “as a species in need of management.” Mont. Code Ann. § 87-5-131. As applied to
wolves, “species in need of management” is not defined by Montana law, although
“management” is broadly defined to include “the entire range of activities,” including “control,”
“periodic protection of species or populations,” and “regulated taking.” See Mont. Code Ann. §
87-5-102(5). This broad definition of “management” would allow virtually any management
regime—running the gamut from protection to an extermination campaign like that required by
law against predatory animals. The lack of protective management guidelines under Montana
law for “species in need of management” is another basis for rejecting the regulatory
mechanisms that would apply in Montana post-delisting.

Moreover, whatever protection might conceivably flow from designation as a “species in
need of management” is ephemeral. As soon as Montana FWP and the Montana FWP
Commission determine that the wolf no longer needs protection as a “species in need of
management,” they have the discretionary authority to remove the wolf from that designation
and instead list the gray wolf as a “game animal.” Mont. Code Ann. § 87-5-131(2). While
anyone convicted of unlawfully attempting to trap or hunt a game animal may be subject to fine,
Mont. Code Ann. § 87-1-102(c), the FWP Commission has virtually unlimited discretion in
determining under what conditions taking of game animals is authorized or prohibited, including
the establishment of open seasons and unregulated taking via any means. Thus, Montana law
fails to protect gray wolves.

D. Each Of The State’s Regulatory Schemes Are Inadequate Because They
Authorize Unlimited Wolf Killing For “Predator Control” Purposes

Montana, Idaho, and Wyoming laws allowing individuals to kill wolves in defense of
property without restriction further demonstrate the inadequacy of the states’ regulatory
mechanisms to ensure a viable wolf population. Unlike separate provisions of state law that
allow wildlife officials to restrict public hunting and agency control actions, these laws afford
state officials no power to limit or halt wolf killing. These provisions apply even in core wolf
recovery areas. Just as FWS rejected unregulated killing in previously disapproving the
Wyoming state plan, FWS should not allow unregulated killing under predator control laws in
effect throughout Idaho, Wyoming, and Montana. See 71 Fed. Reg. at 43,428 (“Wolves are very
susceptible to unregulated human-caused mortality[,]”).
State predator-control laws are particularly troubling because post-delisting state management is “more likely to remove individuals that might disperse into the outer edges of the GYA because mortality rates are already highest along the edges of the core recovery areas,” and “the cumulative result of increased human-caused mortality will likely be more genetic isolation of wolves in the GYA.” 73 Fed. Reg. at 10,540 (emphasis added); see also 73 Fed. Reg. at 63,930. FWS entered this finding without considering state predator laws; the combination of state predator, wildlife, and defense of property laws will render lands between core wolf recovery areas highly inhospitable to wolves and thus radically decrease the prospects for continuing, essential genetic exchange.

In Idaho, where the gray wolf’s classification is left to the discretion of the Idaho Fish and Game Commission, see Idaho Code § 36-201, unregulated wolf killing in defense of property is permitted, id. § 36-1107; see also id. §§ 36-201 (requiring that “all methods of take” be authorized for wolf management, whatever the classification assigned to wolves), 36-715(2) (authorizing state “nuisance wolver” activities). Under Idaho law, “[w]olves may be disposed of by livestock or domestic animal owners … when [they] are molesting or attacking livestock or domestic animals” without a permit. Id. § 36-1107(c). “Molesting” is sweepingly defined as “annoying, disturbing or persecuting, especially with hostile intent or injurious effect, or chasing, driving, flushing, worrying, following after or on the trail of, or stalking or lying in wait for, livestock or domestic animals.” Id. As demonstrated by a county prosecutor’s 2008 decision not to prosecute an Ashton, Idaho landowner who killed two wolves, one of which he pursued by snowmobile for more than a mile, Idaho’s law places no meaningful limits on wolf killing in alleged defense of property. See Idaho Fish and Game, News Release: No Charges Filed in Wolf Killing (Apr. 16, 2008) (attached as Defenders Doc. 3-4 Ex. 20); Fremont County Prosecuting Attorney Letter to Idaho Fish and Game (Apr. 16, 2008) (attached as Defenders Doc. 3-4 Ex. 21); see also Boise County Prosecuting Attorney Letter to Idaho Fish and Game (June 11, 2008) (attached), at 2 (“I would characterize the definition of ‘molesting’ as incredibly broad as stated in this statute. … [T]he Department’s own interpretation of this statute vests great discretion to the livestock owner in determining whether livestock are being molested.”).

In Montana, where the gray wolf’s classification is left to the discretion of the Department of Fish, Wildlife and Parks, see Mont. Code § 87-5-131(2), individuals are allowed to kill wolves without a permit when wolves are “attacking, killing, or threatening to kill … livestock” or “attacking … a domestic dog.” Id. § 87-3-130(1). While the Montana Department of Fish, Wildlife and Parks has the power to promulgate rules for species in need of management, wolf killing in defense of property is statutorily exempt from such rules. Id. § 87-3-130. In 1996, the Department of the Interior determined that a prior version of the same statute was “inadequate” to protect a recovered grizzly bear population as it allowed “unlimited take of grizzly bears by livestock owners” and thereby “could endanger maintenance of a recovered bear population.” See U.S. Department of the Interior Office of the Solicitor Letter to FWS (May 17, 1996) (“Montana Letter”) (attached as Defenders Doc. 3-4 Ex. 16). For the same reason, Montana’s law is again inadequate here.

In Wyoming, wolves “doing damage to private property” anywhere within the state “may be immediately taken and killed” by property owners. Wyo. Stat. § 23-3-115 (a), (c); see also Defenders of Wildlife, 565 F. Supp. 2d at 1176 (“Because Wyoming’s depredation control law is
significantly more expansive than the § 10(j) regulations, it is unclear whether a viable wolf population can be sustained under the law.”). The Wyoming Game and Fish Department lacks statutory authority to limit wolf mortality authorized pursuant to Wyoming Stat. § 23-3-115. The Department of the Interior, in 1997, determined that this provision was “insufficient to meet the delisting criteria” for grizzly bears “for the same reasons” as Montana’s private predator control provision. See U.S. Department of the Interior Office of the Solicitor Letter to FWS (Jan. 27, 1997) (attached as Defenders Doc. 3-4 Ex. 17). This, in combination with other state measures providing for the “aggressive management” of wolves within Wyoming’s “trophy game” area, see, e.g., Wyo. Stat. § 23-1-304(g), (h), underscores the hostile nature of the protections set forth in Wyoming law.

Previously, FWS asserted that state predator control laws are no different than federal regulations in effect under ESA section 10(j). See FWS Inj. Br. at 18. This is incorrect. First, the section 10(j) regulations applied only to experimental populations of wolves; control of the endangered northwestern Montana population was not governed by these rules. See 73 Fed. Reg. 4,720 (Jan. 28, 2008). Moreover, even in the areas where 10(j) was operative, the standards for lethal control would change substantially under delisting. The 10(j) regulation permits individuals to take only wolves “in the act of attacking” livestock. 50 C.F.R. § 17.84(n)(4)(iii)(A) (emphasis added). In contrast, Idaho law allows individuals to kill wolves that are merely “worrying” livestock, and has been interpreted to allow a horse owner to kill a wolf after chasing the animal over a mile on a snowmobile. Idaho Code § 36-1107(c) (emphasis added); Idaho Fish and Game, News Release: No Charges Filed in Wolf Killing (Apr. 16, 2008) (attached as Defenders Doc. 3-4 Ex. 20); Fremont County Prosecuting Attorney Letter to Idaho Fish and Game (Apr. 16, 2008) (attached as Defenders Doc. 3-4 Ex. 21). This killing would not have been permissible under the 10(j) regulation. See also Wyo. Stat. § 23-3-115 (a), (c) (allowing property owners to kill wolves “doing damage to private property” anywhere in the state) (emphasis added); Mont. Code § 87-3-130(1) (allowing individuals to kill wolves that are “attacking, killing, or threatening to kill” livestock) (emphasis added).

FWS cannot point to any state law to support its prior contention that “[l]ethal predator control activities … will be modified or halted if recovery might ever be at risk.” FWS Inj. Br. at 19. To the contrary, state laws allow individuals to kill wolves that are “attacking, killing, or threatening to kill” livestock, without any limit on wolf mortality. Mont. Code § 87-3-130(1); see also Wyo. Stat. § 23-3-115 (a), (c); Idaho Code § 36-1107(c). As the Solicitor for the Interior Department noted in a review of Montana’s defense of property law, “[i]t places no upper limit on human-caused mortality. … Nothing in [Montana law] gives the Commission authority to limit the unlimited take permitted by § 87-3-130. Such unlimited take could result in the mortality limits of a recovered population being exceeded.” Montana Letter, at 2 (emphasis added). The same deficiency holds true for similar Idaho and Wyoming laws.

Because Idaho, Montana, and Wyoming predator control laws allow unregulated wolf

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11 The 10(j) regulation defines “in the act of attacking” as “actual biting, wounding, grasping, or killing of livestock or dogs, or chasing, molesting, or harassing by wolves that would indicate to a reasonable person that such [activities] are likely to occur at any moment.” 50 C.F.R. § 17.84(n)(3).
killing, and remain in full force and effect even with a crashing wolf population, there are not adequate regulatory mechanisms in place to protect northern Rockies wolves. See 16 U.S.C. § 1533(a)(1)(D).

E. Aspirational, Non-Binding “Commitments” In State Management Plans Are Not Adequate Regulatory Mechanisms

FWS has repeatedly relied on purported “commit[ments]” in state management plans as a basis to justify delisting gray wolves in the northern Rockies. See, e.g., 73 Fed. Reg. at 10,552. This is wrong—a fact underscored by the four months of state management that occurred prior to the Court’s decision reinstating ESA protections for wolves in Defenders of Wildlife. Most notably, in May 2008, Idaho’s Fish and Game Commission demonstrated why aspirational statements in unenforceable conservation plans are not “regulatory mechanisms”: the Commission increased by 100 the state’s annual mortality cap—from 328 to 428—against the advice of Idaho Department of Fish and Game (“IDFG”) biologists. See, e.g., Jason Kauffman, State Approves Plan to Hunt Hundreds of Wolves, Idaho Mountain Express (May 23, 2008) (attached as Defenders Doc. 88-3). As Wyoming, Idaho, and Montana have failed to establish binding, statutory commitments to maintain any minimum number of wolves, their management schemes must be rejected as inadequate. Broad, aspirational language in wolf state management plans cannot cure this legal defect.

V. THE ESA DOES NOT PERMIT FW S TO SIMULTANEOUSLY DESIGNATE AND DELIST THE NORTHERN ROCKY MOUNTAIN WOLF DPS

In 1978, FWS concluded that “the entire species Canis lupus is Endangered or Threatened to the south of Canada.” 43 Fed. Reg. 9,607 (Mar. 9, 1978). FWS listed the wolf as endangered throughout the contiguous United States and Mexico, except for Minnesota, where FWS listed the wolf as threatened. Id. FWS now proposes to remove from the endangered list only the portion of the gray wolf population in the lower-48 United States that occupies the northern Rockies. Specifically, FWS proposes to simultaneously designate and delist a northern Rockies gray wolf DPS.

12 Nothing in Idaho’s law or wolf management plans empowers state wildlife officials to limit killing by livestock owners of wolves that “worry[]” livestock. See Idaho Code § 36-1107(b), (c) (“Other provisions of this title notwithstanding …”). Even if such wolf killing were subject to limitation under Idaho’s wolf management plans, Idaho’s Fish and Game Commission provided a stark reminder that the minimal protections provided in such plans are not enforceable and can be easily diminished. See Or. Natural Res. Council v. Daley, 6 F. Supp. 2d at 1154-55 (FWS may not rely on “unenforceable efforts” or efforts that are not “currently operational” in deciding not to list a species). Moreover, Idaho law establishes no minimum wolf population. Idaho’s management plans state only that IDFG will “review[]” management policy to determine if changes are needed” and adopt more restrictive standards for agency control if Idaho’s wolf population drops below 15 breeding pairs. Idaho Wolf Population Management Plan (2008-2012), at 19; Idaho Wolf Conservation and Management Plan (Mar. 2002), at 5. Thus, FWS’ previous finding that Idaho plans make a “commit[ment]” to maintaining at least 15 breeding pairs, 73 Fed. Reg. at 10,552, is unfounded.
FWS’ proposal violates the ESA, which requires that before a “species” can be delisted, FWS must first designate and list the “species” as threatened or endangered. See 16 U.S.C. §§ 1533(a)(1), (c)(2)(B); see also id., § 1532(16) (defining “species” to include DPS). As the United States District Court for the District of Columbia recently observed in vacating FWS’ final rule delisting gray wolves in the western Great Lakes region:

Section 1533(c)(2)(B) does not suggest that FWS may simultaneously designate and delist a previously unlisted sub-population of vertebrates within a broader listing. Rather, it quite strongly suggests—consistent with common usage—that the listing of any species (such as the western Great Lakes DPS) is a precondition to the delisting of that species. See 16 U.S.C. § 1533(c)(2)(B) (instructing FWS periodically to conduct a review of all species “included in a list, ... which is in effect at the time of such review,” and to determine whether any particular species should be “removed from such list”) (emphasis added); cf. Pls.’ Mot. at 31 (arguing that “the Act requires symmetry for the listing and delisting of DPSs.”).


Rather than an unlawful, piecemeal approach to wolf recovery and delisting, FWS must undertake wolf recovery throughout the wolf’s entire listed range, i.e. the lower-48 United States. Specifically, FWS should prepare a recovery plan that identifies “site-specific management actions that may be necessary to achieve the plan’s goal” for the recovery of the species nationwide. Id. § 1533(f)(B); see also NRDC & Defenders of Wildlife, A Petition to Prepare A Recovery Plan Under the Endangered Species Act for the Gray Wolf (Feb. 20, 2008).

VI. FWS’ CONTINGENCY PLAN TO DELIST ONLY A PORTION OF THE NORTHERN ROCKY MOUNTAINS DPS VIOLATES THE ESA

FWS’ renewed, contingency proposal to delist only a portion of the Northern Rocky Mountains DPS if Wyoming fails to adopt an adequate state law and wolf management plan would violate the Endangered Species Act.

A. ESA Section 4 Does Not Permit Piecemeal Delisting Of A DPS

In its resurrected delisting proposal, FWS states that “[i]n order to finalize this rule as proposed, Wyoming would have to adopt a State law and wolf management plan that would adequately conserve a recovered wolf population into the foreseeable future in the significant portion of range outside the National Parks in northwestern Wyoming.” 72 Fed. Reg. at 6,117. If Wyoming again fails to adopt such a state law and plan, as is likely to be the case, see Panel Keeps Dual Classification, Casper Star-Tribune (Nov. 20, 2008) (attached), FWS again proposes delisting the DPS in Idaho, Montana, Washington, Oregon and Utah, as well as the portion of Wyoming that is not deemed a significant portion of the northern Rocky Mountain wolf’s range. See id.; see also 73 Fed. Reg. at 63,927. However, “[t]he significant portion of the range that exists outside the National Parks within the State of Wyoming would continue to be listed as
‘nonessential experimental’ based on the biologically significant nature of that portion of the species’ range and the continuing unacceptable level of threats that occur under the State’s current statute and management plan.” 72 Fed. Reg. at 6,117; see also 73 Fed. Reg. at 63,927. FWS thus proposes to delist only a portion of the Northern Rocky Mountains DPS to address the inadequacy of Wyoming’s state law and wolf management plan.

The ESA does not permit this approach to delisting. The ESA provides that FWS may “determine whether any species is an endangered species or a threatened species.” 16 U.S.C. § 1533(a). The statute defines a species to include “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.” Id. § 1532(16). These ESA provisions authorize listing and delisting decisions at the species, subspecies or DPS levels. Accordingly, “[l]isting distinctions below that of subspecies or a DPS of a species are not allowed under the ESA.” Alsea Valley Alliance v. Evans, 161 F. Supp. 2d 1154, 1162 (D. Or. 2001) (emphasis added). Here, FWS proposes to delist only a portion of the Northern Rocky Mountains DPS and thus violate the ESA.

Indeed, by acknowledging that the portion of Wyoming that would be excluded from delisting constitutes a significant portion of the northern Rocky Mountain wolf’s range, FWS underscores the illegitimacy of the Wyoming contingency plan. Under the ESA, FWS must determine whether a species is endangered or threatened “throughout all or a significant portion of its range.” 16 U.S.C. §§ 1532(6), (20). In the revived draft rule, FWS acknowledges that “[c]urrent predatory animal status in Wyoming would jeopardize the GYA significant portion of range and the overall NRM wolf population.” 72 Fed. Reg. at 6,119 (emphases added). Accordingly, by FWS’ own admission, the entire northern Rocky Mountain wolf population is jeopardized by Wyoming’s state laws and wolf management plan. The ESA requires that the DPS remain listed in response to this threat unless and until Wyoming changes its laws so as to provide adequate regulatory mechanisms for wolves. See 16 U.S.C. § 1533(a)(1)(D). The ESA does not permit FWS to attempt to deal with this threat by arbitrarily drawing a listing distinction below the DPS level. See Alsea Valley Alliance, 161 F. Supp. 2d at 1162.

B. Piecemeal Delisting of the Proposed Northern Rocky Mountains DPS Is Inconsistent With ESA Section 10(j)

FWS seeks to justify its differential treatment of wolves in northwestern Wyoming, explaining that “the DPS would no longer exist” after wolves in Montana, Idaho, Washington, Oregon, and Utah were reclassified as “not listed,” and that the “significant portion of the range that exists outside the National Parks within the State of Wyoming would continue to be listed as “non-essential experimental.” 72 Fed. Reg. at 6,117. This explanation is incoherent. First, species are “listed” under the ESA, not significant portions of range. Second, the designation “non-essential experimental” applies to populations that are reintroduced for purposes of species conservation. Section 10(j) of the Act expressly states that “the term ‘experimental population’ means any population [including any offspring arising solely therefrom] authorized by the Secretary for release.” 16 U.S.C. § 1533(j)(1) (emphasis added). Consistent with this statutory definition, FWS cannot designate the Yellowstone experimental population, Final Rule, 59 Fed. Reg. 60,252 (Nov. 22, 1994), and then delist a portion of that population.
C. FWS Has Not Offered Any Justification For Its Changed Position Regarding The Legality Of Piecemeal Delisting

FWS has long recognized that it must delist gray wolves as a species, subspecies, or DPS in keeping with ESA section 4. When wolves were first reintroduced into the northern Rockies, the agency’s section 10(j) rules clearly stated that “[i]n accordance with the Act, delisting may occur when analysis of the best available scientific and commercial data shows that gray wolves are no longer threatened with extinction” due to any of the ESA section 4 factors governing listing and delisting of species. Final Rule, 59 Fed. Reg. 60,266, 60,272 (Nov. 22, 1994); 59 Fed. Reg. 60,252, 60,258 (Nov. 22, 1994).

In 2003, when FWS published its rule seeking to reclassify endangered wolves to threatened status, it more explicitly set forth the ESA’s statutory requirements related to delisting. See Final Rule, 68 Fed. Reg. 15,804, 15,806 (contrasting the use of the term “population” in the DPS context, in which it “is part of the statutory definition of ‘species’” and is “significant for listing, delisting, and reclassification purposes,” with its more “flexible” use in the 10(j) context), 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). Notably, in response to comments suggesting a state-by-state delisting approach, FWS stated: “We cannot use a boundary between states to subdivide a single biological population in an effort to artificially create a discrete population.” Id. at 15,821.

Again, in 2005, when FWS promulgated new section 10(j) rules for states and tribal governments with approved wolf management plans, public comments once again urged that “States with approved management plans should be able to be delisted separately.” Final Rule, 70 Fed. Reg. 1,286, 1,296 (Jan. 6, 2005). In response, FWS stated, “at this time the Act does not allow wolves to be delisted on a State-by-State basis.” Id. (emphasis added). The ESA has not been amended since FWS took the unequivocal position that piecemeal delisting based on state plan approvals is illegal. Nevertheless, FWS is now proposing to adopt precisely this approach. The agency has not, and cannot, justify this departure from its longstanding, and correct, interpretation of the ESA’s delisting requirements.
VII. CONCLUSION

For the reasons discussed above, FWS’ resurrected proposal to designate the northern Rockies gray wolf population a DPS and remove it from the list of threatened and endangered species violates the ESA, its implementing regulations, and FWS policies. In making this proposal, FWS ignores law, science, two federal district court opinions, and common sense in an exercise of political fiat that, if finalized, will stand as one of the last acts of a beleaguered administration. It should be abandoned.

Sincerely,

[Signature]

Douglas Honnold
Jenny Harbine
Sean Helle