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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

DEFENDERS OF WILDLIFE, et al.,

Plaintiffs,

vs.

KEN SALAZAR, et al.,

Defendants.

GREATER YELLOWSTONE COALITION,

Plaintiff,

vs.

KEN SALAZAR, et al.,

Defendants.

Case No. CV-09-77-M-DWM
Case No. CV-09-82-M-DWM
(Consolidated)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Since their reintroduction to the northern Rockies, wolves have made an astounding comeback. But challenges to their survival remain. Based on an outdated recovery standard that fails to incorporate the best available science, the U.S. Fish and Wildlife Service ("FWS") has declared premature victory and given Idaho and Montana free rein to kill hundreds of wolves—even in key dispersal areas. At the same time, FWS has conceded that the region's wolf population remains endangered across a significant portion of its range in Wyoming—a concession that should have stopped the agency's delisting effort in its tracks. If allowed to stand, FWS's premature and unlawful decision will drive the northern Rockies wolf population farther from legitimate recovery. In order to prevent such an outcome, plaintiffs Defenders of Wildlife, et al., brought this challenge to the Delisting Rule. See 74 Fed. Reg. 15,123 (Apr. 2, 2009) ("Delisting Rule").

FWS's renewed delisting effort rests on contortion, not conservation. First, at the same time it designated a distinct population segment ("DPS") of wolves in the northern Rockies, FWS split that DPS into two parts in order to delist one of them. The Endangered Species Act ("ESA"), however, requires FWS to protect species—meaning species, subspecies, or distinct population segments. It does not allow FWS to create a management patchwork by extending the ESA's protections to only certain members of an endangered population. As this Court has ruled, plaintiffs "have demonstrated a likelihood of success on the merits" of their

challenge to this piecemeal delisting. Order, Defenders of Wildlife v. Salazar, Civ. No. 09-77-M-DWM (D. Mont. Sept. 8, 2009) ("PI Order"), at 9.

Second, instead of using the best available science, FWS supports the Delisting Rule by relying on an antiquated wolf recovery standard that scientists have criticized for over 15 years. An outdated document, even one labeled "recovery plan," cannot trump the more recent, comprehensive science that FWS had before it when it delisted wolves.

Third, as with recent efforts to delist Yellowstone grizzly bears, FWS relies on inadequate state plans. The ESA, however, requires more than stated intentions; it requires enforceable mechanisms to keep wolves from sliding farther from recovery.

Fourth, FWS designated the northern Rockies DPS solely as a means of delisting it. But FWS was not acting on a blank slate; the ESA has protected gray wolves across the contiguous United States since 1974. Carving out a population of an already listed species is an entirely different undertaking than listing that population in the first place—it requires a re-examination of the original listing rule, as well as an assessment of the status of the remnant portion of the original listing. FWS did neither analysis, asserting that it was not actually listing and delisting, but instead merely "revis[ing]" the list of endangered and threatened species. 74 Fed. Reg. at 15,144. This argument is sophistry—the simultaneous

recognition and delisting of a DPS runs counter to the statutory commands of the ESA, to say nothing of the rigors of logic.

Finally, FWS asserts that most of the unoccupied habitat in the northern Rockies is of minor importance for wolves because there are great threats to wolves in those areas. Perversely, FWS has written off thousands of acres of wolf habitat because wolves are threatened by human activity and intolerance in those areas. This argument has the tail wagging the wolf—under the ESA, FWS must determine whether an area is biologically significant to the species and, if so, whether the species is threatened by human activity or intolerance in that portion of its range. FWS flipped this required analysis on its head.

Because FWS has once again failed to follow law and science in delisting the northern Rockies wolves, plaintiffs respectfully ask this Court to grant their summary judgment motion, vacate the Delisting Rule, and reinstate the prior rule protecting the northern Rockies wolves under the ESA.[1]

I. STANDARD OF REVIEW

Plaintiffs bring this case under the ESA's citizen suit provision, 16 U.S.C. § 1540(g), and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 et seq., which provides the standard of review. See Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835, 840-41 (9th Cir. 2003). Under the APA, the court shall set

[1] The facts underlying this litigation are set out in plaintiffs' Statement of Undisputed Facts.

aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). Although this standard requires that deference be given to "an agency's determination in an area involving a 'high level of technical expertise,'" Lands Council v. McNair, 537 F.3d 981, 993 (9th Cir. 2008) (en banc) (citation omitted), administrative action nonetheless must be vacated where the agency:

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983).

II. PARTIAL DELISTING VIOLATES THE ESA

FWS's Delisting Rule rests on a fundamental violation of the ESA. In assessing the status of the northern Rockies wolf population, FWS found that (1) the region's wolves are a "distinct population segment," 74 Fed. Reg. at 15,129; (2) "the Wyoming portion of the [DPS's] range represents a significant portion of range[,]" id. at 15,184; and (3) the DPS "remains in danger of extinction" in Wyoming, id. FWS determined, in other words, that the northern Rockies wolf population is a "species which is in danger of extinction throughout … a significant portion of its range"—that is, an "endangered species." See 16 U.S.C.

§ 1532(6). Undeterred by its own finding, FWS declared that it has "broad discretion" to limit ESA protections to only the "significant portion" of a species' range in which the species is deemed endangered. 74 Fed. Reg. at 15,152. Exercising this alleged discretion, FWS elected simply to "delist[] most of the [northern Rockies] DPS[,]" stripping the ESA's protections from all but Wyoming's wolves. Id. at 15,144. FWS's piecemeal approach to delisting violates the plain language of the statute and reverses the agency's long-standing position that partial delisting of the northern Rockies DPS is unlawful.

A. The ESA Does Not Permit Partial Delisting

The ESA does not permit FWS to subdivide the northern Rockies DPS in order to delist a portion it deems recovered. The ESA authorizes only the listing and delisting of "species," see 16 U.S.C. § 1533(a)(1)—defined by the statute to include (1) species; (2) "any subspecies of fish or wildlife or plants[;]" or (3) "any distinct population segment of any species of vertebrate fish or wildlife[,]" id. § 1532(16). Congress thus explicitly limited listing choices to these three categories. It also created a three-tiered approach to listing based on taxonomy: FWS could list any species, but only a subspecies of "fish or wildlife or plants" (thereby excluding mushrooms and fungi), or a "vertebrate" population of fish or wildlife (thereby excluding plants and invertebrates). Id. (emphases added).

Under the ESA, "species"—not their ranges or individual members—are afforded legal protections when "threatened" or "endangered" across "all or a significant portion of [their] range." See, e.g., id. § 1532(6) ("The term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range[.]"); id. § 1536(a)(2) ("Each Federal agency shall … insure that any action … is not likely to jeopardize … any endangered species … ."") (emphasis added); id. § 1538(a)(1) (take prohibition applicable "to any endangered species of fish or wildlife") (emphasis added); see also, e.g., Trout Unlimited v. Lohn, 559 F.3d 946, 949 (9th Cir. 2009) ("[I]f NMFS decides to list a species or a distinct population segment as 'endangered' or 'threatened,' it must accord the species or the distinct population segment various legal protections.") (emphasis added); 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."), appeal dismissed for lack of jurisdiction sub nom. Alsea Valley Alliance v. Dep't of Commerce, 358 F.3d 1181 (9th Cir. 2004). FWS's attempt to strip the ESA's protections from parts of the northern Rockies DPS when the DPS remains endangered in a "significant portion of its range" was thus arbitrary and unlawful. As this Court already noted,

> The Service determined that the wolves in the northern Rockies are a distinct population segment. … Having done so, the Service cannot delist part of the species

> below the level of the DPS without running afoul of the clear language of the ESA.

PI Order at 6-7 (citation omitted); see also Nat'l Wildlife Fed'n v. Norton, 386 F. Supp. 2d 553, 564 n.9 (D. Vt. 2005) ("[T]he FWS cannot exclude portions of a DPS from listing a species. Once a DPS is formed, it is treated uniformly throughout the DPS.").

B. FWS's Interpretation Of The Statute Impermissibly Renders The DPS Concept Superfluous

FWS's new interpretation of its ESA listing authority violates a fundamental canon of statutory construction—that statutes should be read in a manner "giv[ing] effect to all of [their] provisions." See Defenders of Wildlife v. Norton, 258 F.3d 1136, 1141-42 (9th Cir. 2001) (quotations omitted, emphasis in original). The DPS concept allows FWS to list population segments of species, rather than entire species or subspecies. See 61 Fed. Reg. 4,722, 4,725 (Feb. 7, 1996) (DPS Policy). In National Association of Home Builders, the Ninth Circuit identified the DPS provision, not the "significant portion of its range" language, as the source of listing flexibility under the ESA. 340 F.3d at 841 n.7, 842. FWS's new interpretation of the "significant portion of its range" language would eclipse the DPS provision as the authority for such finer-scale listings, rendering it superfluous. As this Court noted, "[t]he language of the statute and the purpose behind the DPS amendment are superfluous if the Secretary already has the

flexibility to limit the protections of the ESA through its authority to publish the range of the species." PI Order at 7.

More tellingly, FWS's new interpretation—unlike the DPS authority—would allow the agency to list plants and invertebrates below the species or subspecies level, a result that was explicitly rejected by Congress when it enacted the DPS provision for vertebrate fish and wildlife populations only. See 16 U.S.C. § 1532(16); see also 61 Fed. Reg. at 4,724 (DPS Policy) ("recogniz[ing] the inconsistency of allowing only vertebrate species to be addressed at the level of DPS's," but concluding that "the Act is perfectly clear and unambiguous in limiting this authority").

C. The Delisting Rule Conflicts With FWS's Longstanding Interpretation Of The ESA

FWS cannot overcome the plain language and purpose of the ESA, which prohibits the agency's effort to delist some of the northern Rockies' endangered wolf population. See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). However, even if the ESA were ambiguous, which it is not, "the Service's current interpretation regarding its ability to delist below the level of a DPS would receive little deference" in light of the agency's

prior, conflicting interpretations. PI Order at 8 (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 447 n.30 (1987)).

In the past, FWS has repeatedly acknowledged that the ESA does not permit partial delisting along state lines. In its 2003 wolf rule, FWS stated that "[d]elisting can occur only when a species (or subspecies or DPS) is recovered," and "[t]he DPS boundaries must contain the biological grouping and cannot subdivide it[.]" 68 Fed. Reg. 15,804, 15,825, 15,826 (Apr. 1, 2003) (emphases added). In response to comments suggesting a state-by-state delisting approach, FWS stated that "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. Later, in a 2005 wolf rule, FWS reiterated that "the Act does not allow wolves to be delisted on a State-by-State basis." 70 Fed. Reg. 1,286, 1,296 (Jan. 6, 2005) (emphasis added). FWS's decision now to adopt an approach it previously determined to be illegal is entitled to little deference. See Nat'l Wildlife Fed'n v. NFMS, 524 F.3d 917, 928 (9th Cir. 2008). The Delisting Rule should accordingly be rejected.

III. FWS FAILED TO USE THE BEST AVAILABLE SCIENCE IN THE DELISTING RULE

The biological foundation of FWS's Delisting Rule is similarly flawed. The critical issues facing FWS in delisting northern Rockies wolves were whether the population is presently large enough to withstand extinction threats and, if so,

whether the population will remain sufficiently large under state management. Rather than examining the best science currently available, FWS relied extensively on its 20-year-old, 300-wolf recovery standard. The best available science does not support FWS's determination regarding the number of wolves needed for long-term viability.

A. A Viable Wolf Population Requires More Than 300 Wolves

In order to validly delist the northern Rockies wolves, FWS must use the "best … available" science. 16 U.S.C. § 1533(b)(1)(A). It has not done so. Numerous peer-reviewed studies published after FWS established its 300-wolf recovery standard—studies presented to FWS before it rendered its delisting decision—indicate that well over 1,000 wolves are necessary to maintain a viable, non-endangered wolf population. For example, Reed, et al. (2003) estimated the viable population size for over 100 vertebrate organisms, including the gray wolf. The minimum population for adult gray wolves was estimated at 1,403. AR2009–025834. Similarly, Brook, et al. (2006) estimated the minimum viable population for 1,198 species, including the gray wolf, and found that the median overall estimate was 1,377 individuals. AR2009–035878. Traill, et al. (2007) conducted an analysis of minimum viable population for 212 species, including gray wolves, and concluded that the minimum for most species will exceed a few thousand individuals. AR2009–025798; see also Fallon (2008), AR2009–036625-26.

Basic scientific principles of conservation biology support these conclusions. When determining minimum viable population size, conservation biologists often employ the "50/500 rule," which states that 50 breeding individuals (also called the effective population, or "N_e") are needed for a population to be ecologically viable over the short term, while 500 breeding individuals are needed for a population to be evolutionarily viable over the long term—i.e., for 100 years or more. See Fallon (2008), AR2009–036625 (citing Soule and Wilcox (1980); Frankel and Soule (1981); Soule (1986); Franklin and Frankham (1998)). Indeed, studies before FWS concluded that the number of breeding individuals should be even higher. Id. (citing Lande (1988), and Lande (1995)). Since the effective population of most organisms is usually between 10 and 20 percent of the total population, id. (citing Frankham (1995); Palstra and Ruzzante (2008), AR2009–025739), the 500 rule translates into a total population size of 2,500 to 5,000 individuals for long-term viability.

This conclusion is consistent with the International Union for the Conservation of Nature's ("IUCN") listing standards, which require listing species as vulnerable (one step below endangered) when they fall under 1,000 mature individuals. AR2008–022479-80. FWS has previously recognized IUCN determinations in ESA listing decisions. See, e.g., Determination of Threatened

Status for the Polar Bear (Ursus maritimus) Throughout Its Range, 73 Fed. Reg. 28,212, 28,275 (May 15, 2008).

B. FWS Erred In Relying On The Antiquated 1987 Recovery Plan

In determining whether northern Rockies wolves have recovered, FWS unlawfully ignored these recent studies, instead relying on its 20-year-old recovery plan. See, e.g., 74 Fed. Reg. at 15,130-38.[2] In addition to being out of date, the 1987 Recovery Plan provides no scientific basis—or indeed any rationale whatsoever—for the derivation of its 10-breeding-pairs-in-3-recovery-areas-for-3-consecutive-years standard. AR2009–026377-503 (1987 Recovery Plan).

In 1994, in part to determine whether wolf reintroduction should go forward in light of an erroneously presumed lack of carrying capacity, FWS reevaluated its recovery standards. AR2009–030679-86. FWS conducted a review of scientific literature and acknowledged that current literature showed that long-term viability for wolf populations would require an effective population size (N_e) of 500 and up. Id. at 030680.[3] FWS rejected this recovery goal because it did not believe a

[2] In Defenders of Wildlife v. Hall, 565 F. Supp. 2d 1160, 1168-72 (D. Mont. 2008), this Court found that genetic exchange necessary to satisfy FWS's recovery standard was lacking. Here, FWS fails to demonstrate that genetic exchange will occur if wolves are managed down to its minimal numeric standard.

[3] As part of this review, FWS surveyed wolf biologists, many of whom firmly criticized the FWS's recovery goal of 30 breeding pairs of wolves and a total population of 300 wolves. See, e.g., AR 2008–022729 (John Theberge) ("I believe 10 breeding pairs is not a viable population … . 30 breeding pairs is still well below the 1% rule which I believe is overly low itself.") (emphasis in original);

population of this size was possible. Id. at 030680 ("Clearly, finding an area to support N_e = 500 of wolves in the lower 48 states is very unlikely, as this would equate to a total population in the low thousands."). This point bears repeating: FWS refused to set a scientifically valid recovery goal because the agency believed it could not reach that goal. This bias turns the concept of recovery on its head and cannot justify delisting.

FWS also reexamined its wolf recovery goals in 2001, when it conducted another survey of wolf scientists. AR2008–022376-590. Again, FWS was repeatedly told that its basic wolf recovery paradigm—30 breeding wolf pairs—was inadequate. See AR2008–022498-500 (FWS scientist Brian Kelly) (without scientific analysis, standard is "subjective"); AR2008–022589 (University of Montana genetics professor Fred Allendorf) ("300 wolves is too small to avoid genetic problems in the foreseeable future"); AR2008–022462-80 (Phil Miller) (recommending FWS review and adapt supplied IUCN standards).

Most importantly, by the 2009 delisting, it was clear that FWS's conclusion that the northern Rockies could not support a population of more than a thousand

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AR 2008-022662 (FWS scientist Mike Nelson) ("[G]enetic viability would not be achieved by 10 breeding pairs of wolves. … There also appears to be agreement that 'several hundreds' of breeders are needed to ensure long-term evolutionary potential. The common value in the literature is N_e = 500 and that translates into the low thousands for a population size in wolves. By this criterion, the individual wolf populations as well as their metapopulation would not be evolutionarily viable.").

wolves was simply wrong. The most recent northern Rockies wolf population estimate is nearly 1,650 wolves. 74 Fed. Reg. at 15,135. In relying on a recovery standard premised on the erroneous belief that such a population could never be established in the northern Rockies, FWS acted arbitrarily and unlawfully. See 16 U.S.C. § 1533(b)(1)(A).

C. There Is No Legitimate Scientific Basis For Differential Delisting Standards For The Same Listed Species

FWS's failure to use the best available science is illustrated by the differential treatment it accords Midwest wolves. In the Midwest, FWS requires two separate subpopulations, the first containing 1,250-1,400 gray wolves and an additional, separate population of 100-200 wolves for a minimum of 5 consecutive years before delisting is appropriate. 74 Fed. Reg. 15,070, 15,070-71 (Apr. 2, 2009) (Midwest wolf delisting rule).

Without any citations whatsoever, FWS contends that this disparity is justified as the western Great Lakes region "can support more and higher densities of wolves because of high white-tailed deer density, homogenous and more contiguous suitable habitat, different patterns of livestock density, distribution, and management, and different patterns of human access." 74 Fed. Reg. at 15,140. This rationale fails for two reasons. First, endangered species recovery cannot be determined by analyzing the carrying capacity of habitat degraded by human developments—recovery must be assessed in light of the biological needs of the

species. See, e.g., 16 U.S.C. § 1533(a)(1). Second, almost all of the factors identified by FWS weigh in favor of higher wolf populations in the northern Rockies. While white-tailed deer are more abundant in the Midwest, some of the largest ungulate populations in the lower-48 states are in the northern Rockies. See, e.g., 74 Fed. Reg. at 15,160 (noting "100,000 to 250,000 wild ungulates" estimated in each state); see also id. at 15,140 (conceding that "the NRM can support a wolf population that is several times higher than [FWS's] minimum" recovery goal). There are no vast tracts of public lands in the Midwest that rival the northern Rockies. Compare id. at 15,133 (noting "3 areas of large core refugia (National Parks, wilderness areas, large blocks of remote secure public land)" in the northern Rockies), and id. at 15,140 (identifying 65,725 mi^2 of suitable northern Rockies wolf habitat), with 74 Fed. Reg. at 15,072 (Midwest wolf delisting rule) (identifying a "stabilized [wolf] range" of 33,971 mi^2 in Minnesota).

FWS contends that the number of wolves needed for delisting the northern Rockies wolf population is only a fraction of that needed for Midwest wolves because "the history of recovery and planning efforts" differs and there is greater "potential for human conflict[s]" in the northern Rockies. 74 Fed. Reg. at 15,140. These non-scientific rationales cannot support a different delisting standard. The ESA requires that FWS address threats to the species and overcome circumstances that preclude delisting, not define them away. See, e.g., 16 U.S.C. § 1533(a)(1).

Given the extensive public land matrix in the northern Rockies, the presence of some of the lower-48's largest ungulate herds, the area's National Parks, and the steady growth in wolf numbers and distribution in the region, there is no legitimate basis for FWS's differential delisting standards for wolves.

IV. IDAHO AND MONTANA LACK ADEQUATE REGULATORY MECHANISMS

FWS's determination that Idaho and Montana laws are sufficient to protect the northern Rockies wolves was also arbitrary and unlawful. "It has been long recognized that the future conservation of a delisted wolf population in the [northern Rockies] depends almost solely on State regulation of human-caused mortality." 74 Fed. Reg. at 15,166. Nevertheless, FWS relied on state management programs that include little in the way of "regulation." Because Idaho and Montana laws fail even to ensure that FWS's inadequate recovery standard will be met under state management, the Delisting Rule cannot be squared with the ESA. See 16 U.S.C. § 1533(a)(1)(D) (requiring FWS to assess "the inadequacy of existing regulatory mechanisms"); Order, Greater Yellowstone Coalition v. Servheen, Civ. No. 07-134-M-DWM (D. Mont. Sep. 21, 2009) ("Grizzly Order"), at 20 (invalidating delisting rule where "the centerpiece of the regulatory mechanisms relied on by the Service … [could not] actually regulate anything"); Fed'n of Fly Fishers v. Daley, 131 F. Supp. 2d 1158, 1164-69 (N.D. Cal. 2000) (finding voluntary and future actions to be inadequate regulatory

mechanisms); Or. Natural Res. Council v. Daley, 6 F. Supp. 2d 1139, 1155 (D. Or. 1998) (state conservation plans do not qualify as "regulatory mechanisms" under the ESA "[a]bsent some method of enforcing compliance").

A. Idaho And Montana Laws Fail To Ensure Genetic Exchange

FWS's wolf recovery standard "clearly requires 'a metapopulation … with genetic exchange between [the northern Rockies' three] subpopulations.'" Defenders of Wildlife, 565 F. Supp. 2d at 1169 (quoting 1994 EIS (AR2009–042228)); see also 74 Fed. Reg. at 15,130-31 (same). FWS concedes that "[t]he delisted [northern Rockies] wolf population is likely to be reduced from its current levels … by State management" and, "[i]f the population is managed to the minimum recovery target of 150 wolves per State, [FWS] expect[s] dispersal [between subpopulations] to noticeably decrease." 74 Fed. Reg. at 15,177; see also, e.g., id. at 15,172 ("Managing to minimal recovery levels also increases the chances of genetic problems developing in the GYA population and would reduce the opportunities for demographic and genetic exchange in the [Wyoming] portion [of] the GYA."). FWS nonetheless declares that essential genetic exchange will occur in the wake of delisting due largely to (1) "State projections indicat[ing] [that] they will manage the population [at] at least two to three times this minimal recovery level[,]" and (2) a recent "memorandum of understanding" that "commits [the states] to establish and maintain a monitoring protocol to ensure that necessary

levels of gene flow occur[.]" Id. at 15,177. This determination was arbitrary and unlawful.

1. Idaho And Montana Laws Fail To Protect A Wolf Population Sufficiently Large To Ensure Dispersal

In its challenged regulation, FWS emphasizes its "belie[f]" that "the NRM wolf population will be managed for over 1,000 wolves," 74 Fed. Reg. at 15,133, thus rendering delisting's "impact on dispersal and connectivity … negligible[,]" id. at 15,177. FWS's sanguine "belie[f]" rests on nothing more than state projections and snippets from unenforceable guidance documents. FWS relies on a "population goal" in Idaho's recent, step-down management plan of "maintaining the population near or above the 2005 levels (approximately 520 wolves)" during the five-year post-delisting period,[4] id. at 15,169; see also AR2009–038317 (2008 Idaho Wolf Population Management Plan), and a "predict[ion]" in Montana's plan that state management will result in a wolf population of "between 328 and 657 wolves[,]" 74 Fed. Reg. at 15,167.[5] Such goals and predictions are not regulatory

[4] In assessing delisting, FWS is statutorily obligated to evaluate extinction risks for "the foreseeable future," see 16 U.S.C. § 1532(20), not merely five years.

[5] Montana's population "predict[ion]" was made in an environmental impact statement, which could not commit Montana to maintaining a minimum number of wolves. See 74 Fed. Reg. at 15,167 (citing Montana's environmental impact statement (AR2009–031408)). Montana's environmental review statute is purely "procedural," Mont. Code Ann. § 75-1-102(1), and "does not define or affect the statutory decision making authority of the agency[,]" Mont. Admin. R. 32.2.238(4).

mechanisms under the ESA, rendering the Delisting Rule arbitrary and unlawful. See, e.g., Grizzly Order at 17-18 ("Conservation Strategy" inadequate where it no more than established "a goal of maintaining above 500 bears and associated mortality limits for grizzly bears").

2. FWS Illegally Relied On Unenforceable State Intentions To Promote Genetic Exchange

FWS's reliance on unenforceable state intentions to promote essential genetic exchange was similarly arbitrary and unlawful. According to FWS, a recent memorandum of understanding ("MOU") will ensure needed genetic exchange. 74 Fed. Reg. at 15,177. Yet the MOU establishes no concrete management actions or thresholds, does not alter the statutory responsibilities of state wildlife managers, and "does not obligate any … agencies to the expenditure of funds[.]" AR2009–037224. The MOU is a voluntary agreement, not a regulatory mechanism that can justify removal of ESA protections. See Grizzly Order at 15 (citing Fed'n of Fly Fishers, 131 F. Supp. 2d at 1169, which "conclud[ed] that a Memorandum of Understanding with states to undertake future conservation efforts did not constitute an existing regulatory mechanism"); Or. Natural Res. Council, 6 F. Supp. 2d at 1158-59.

Equally unmerited is FWS's assertion that state management will promote genetic exchange by limiting hunter-caused mortality during periods of peak wolf dispersal. See 74 Fed. Reg. at 15,176. As Montana's wolf program coordinator

summarized,

> [i]f [the states] were truly promoting [wolf dispersal], seasons would close by November and they don't anywhere in the three states. … And there are more things that [states] could have done to 'promote' connectivity relative to public harvest and [states] did not. Lipstick on a pig—well—it's still a pig[.]

AR2009–005418 (Sept. 14, 2008 email) (emphasis in original); see also AR2009–037656-58 (Jimenez, et al. (2008d)) (wolves disperse in all months, with peak dispersal occurring late fall to early winter (October-January)); AR2009–036335 (Boyd, et al. (2007)) (same). Rather than promoting genetic exchange, the states' hunts will curtail it. Idaho, for one, has identified management zones in critical dispersal areas along the Montana-Idaho border as areas where wolf presence should be decreased. Compare AR2009–041112 (map depicting management units), AR2009–041190, 041197 (direction to "reduce[]" or "decrease[]" wolf numbers in Southern Mountains and Salmon management units) with AR2009–038170 (Oakleaf, et al. (2006), Fig. 3) (color version at Dkt. 58-3) (identifying dispersal corridors). Such actions illustrate FWS's arbitrary and unlawful failure to ensure that regulatory mechanisms for essential connectivity exist.

B. Neither Idaho Nor Montana Has Ensured The Survival Of 150 Wolves In 15 Breeding Pairs

In addition to genetic exchange, FWS required for delisting purposes that each state commit to managing for at least 150 wolves in 15 breeding pairs—

slightly above the agency's inadequate demographic recovery standard. See 74 Fed. Reg. at 15,132. In the Delisting Rule, FWS arbitrarily determined that regulatory mechanisms in Montana and Idaho are adequate because "Montana and Idaho have committed to manage for at least 15 breeding pairs and at least 150 wolves in mid-winter[.]" Id. at 15,174 (emphasis added); see also id. at 15,130 ("breeding pair" defined as "an adult male and an adult female wolf that have produced at least 2 pups that survived until December 31 of the year of their birth, during the previous breeding season").

Neither state meets both requirements. Montana has promised only to "ensure maintenance of at least 15 breeding pairs"—a "commitment" that could be satisfied with as few as 60 wolves. Mont. Admin. R. 12.9.1301(1) (emphasis added); id. R. 12.9.1302(4) (adopting FWS definition of "breeding pair"); see also, e.g., Mont. Code. Ann. § 87-1-217(4) (authorizing "lethal action to take problem wolves that attack livestock, so long as the state objective for breeding pairs has been met") (emphasis added); 74 Fed. Reg. at 15,168 ("when the population is above 15 breeding pairs, regulated fair chase hunting of wolves" is allowed in Montana) (emphasis added).

Under Idaho's legislatively approved 2002 "Wolf Conservation and Management Plan," the Idaho Department of Fish and Game "will begin instituting [unspecified] remedial measures" only if the state's wolf population "falls below

15 packs," not breeding pairs—a "commitment" that could apparently be satisfied with even fewer wolves. AR2009–037356 ("Idaho Plan"); see also 74 Fed. Reg. at 15,169 (acknowledging that Idaho's plan only "calls for … maintain[ing] a minimum of 15 packs") (emphasis added). Cf. 71 Fed. Reg. 43,410, 43,428-30 (Aug. 1, 2006) (12-month petition finding) (rejecting Wyoming's reliance on packs, not breeding pairs).[6]

Consistent with their failure to "commit[] to manage for at least 15 breeding pairs and at least 150 wolves in mid-winter," see 74 Fed. Reg. at 15,174, Montana and Idaho laws contain numerous provisions that allow wolf killing unchecked by the states' supposed "commitments" to maintain recovered wolf subpopulations.

First, while declaring an intent to protect at least fifteen breeding pairs or packs within their borders, both Idaho and Montana allow continued "lethal control" actions when their wolf populations fall below such levels. See Mont. Admin. R. 12.9.1301(1) ("If there are fewer than 15 breeding pair, the department will allow only conservative management of the wolf populations so that the number of breeding pair does not go below 10 but may still approve lethal

[6] In a recent non-regulatory plan, Idaho's Department of Fish and Game ("IDFG") acknowledges that Idaho's legislature failed to define the state's supposed "15 pack" commitment in a manner requiring 15 breeding pairs. See AR2009–038301. Circularly, IDFG asserts that Idaho's "minimum objectives" are nonetheless "based on breeding pairs, not packs[,]" in light of FWS's requirement "that all 3 states maintain ≥15 breeding pairs[.]" See id. Idaho's attempt to remedy a regulatory failure with a non-regulatory plan must fail. See, e.g., Grizzly Order at 22-24.

control.") (emphasis added); AR2009–037330 (Idaho Plan) (authorizing continued "lethal control" when the state's wolf population falls below "15 packs" and, if necessary to "end [a] depredation problem[,]" when the number of Idaho packs "falls below 10"); see also Idaho Code § 36-201 ("Notwithstanding the classification assigned to wolves [by Idaho's fish and game commission], all methods of take … shall be authorized for the management of wolves in accordance with existing laws or approved management plans.").

Second, Idaho and Montana laws continue to authorize county officials to declare wolves "predators" or "pests" subject to unlimited, unregulated taking. See, e.g., Mont. Code. Ann. § 81-7-602 ("[T]he board of county commissioners may … establish a predatory animal control program for the protection of cattle in the county[.]"); Idaho Code § 25-2601 (granting county boards "full power and authority to declare any predatory animal[s] … to be agricultural pests, and to take all steps that they may deem necessary to control such pests").

Finally, Idaho and Montana's authorization of unregulated, private wolf killing in defense of property also undermines their purported commitment to maintain fifteen pairs or packs. Under Idaho law, "livestock or domestic animal owners" or their agents are allowed to "dispose[]" of wolves, without a permit and without restriction, when they are found "molesting" livestock—that is, "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" domestic animals. Idaho Code § 36-1107(c) (emphasis added). Under Montana law, private individuals have similarly broad authority to kill wolves statewide, without a permit and without restriction, when wolves are found "attacking, killing, or threatening to kill … livestock" or "attacking or killing a domestic dog." Mont. Code Ann. § 87-3-130(1) (emphasis added). Because "the future conservation of a delisted wolf population in the [northern Rockies] depends almost solely on State regulation of human-caused mortality[,]" 74 Fed. Reg. at 15,166, such legal authorizations of unlimited wolf killing render Idaho and Montana laws inadequate to ensure the conservation of the region's wolves. See, e.g., AR2009–034931-33 (U.S. Dep't of the Interior Office of the Solicitor Letter to FWS (May 17, 1996)) (Interior Solicitor's determination that Montana's private livestock protection provision was "inadequate" to protect the state's grizzly bears as it allowed "unlimited take" in defense of livestock).

In sum, because Idaho and Montana's wolf management schemes "include no enforcement mechanism or standards to ensure that mortality does, in fact, stay below the prescribed levels[,]" FWS's Delisting Rule is arbitrary and unlawful. See Grizzly Order at 23.

V. FWS'S DESIGNATION OF THE NORTHERN ROCKIES DPS WAS ILLEGAL

A. FWS Illegally Departed From The Lower-48 Wolf Listing

In 1978, FWS listed gray wolves as endangered throughout the lower-48 states, except for Minnesota, where the wolf was listed as a threatened species. 43 Fed. Reg. 9,607 (Mar. 9, 1978). The listing of the gray wolf, *Canis lupus*, in the lower-48 states was not a listing of an entire species or subspecies: FWS did not list the wolf in Alaska and Canada. The lower-48 wolf listing accordingly fell under the proto–"distinct population segment" language of the ESA which, at the time of the 1978 rule, defined listable "species" as including species, subspecies, and "any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature." See Pub. L. No. 93-205, 87 Stat. 884, 886 (1973).

Ignoring entirely its prior endangerment findings in listing gray wolves in the conterminous states, FWS designated a newly created northern Rockies wolf distinct population segment. 74 Fed. Reg. at 15,123. FWS made no new ESA section 4(a)(1) findings concerning the status of gray wolves in the rest of the lower-48 states, and retained the listing of lower-48 gray wolves, with a geographic exception for the northern Rockies and Midwest populations. Id. at 15,187.

In designating the northern Rockies wolf DPS, FWS illegally departed from its prior ESA listing in three ways:

First, FWS failed to explain its determination that the existing listing across all of the lower-48 states was no longer appropriate by examining the ESA listing criteria with respect to the lower-48 gray wolf population to determine whether the 1978 listing was in error. FWS was obliged to explain its determination that its ESA listing analysis for wolves could properly focus on the more localized level of the northern Rockies population. See State Farm, 463 U.S. at 42 (agency must supply a "reasoned analysis" for regulatory changes). Perhaps the reason for this unexplained departure is that, in its 1978 listing, FWS determined that a population of more than 1,200 wolves in Minnesota was a threatened species—which directly conflicts with the northern Rockies Delisting Rule. See 65 Fed. Reg. 43,450, 43,455 (July 13, 2000) (Minnesota wolf population estimated at 1,000-1,200 wolves for 1976 and 1,235 wolves for 1978-79). The 2009 wolf delisting decision is at odds with the 1978 listing decision both biologically and legally; FWS offers no explanation whatsoever for these disparities.

Second, FWS failed to assess any of the ESA listing factors with respect to the remnant portion of the lower-48 wolf population that remains listed as an endangered species. See 16 U.S.C. § 1533(a)(1); 74 Fed. Reg. at 15,187 (describing remnant areas that retain ESA protection as an endangered species).

Here, when FWS created a northern Rockies DPS it was also obligated to conduct a listing analysis for the remnant population of wolves, which it was effectively relisting as a new, reconfigured, DPS. Similarly, FWS failed to designate critical habitat for the newly created remnant listing. See 16 U.S.C. § 1533(a)(3)(A) (duty to designate critical habitat at the time of listing).

Third, FWS violated the ESA by simultaneously designating and delisting a portion of a population. As a matter of logic, a population can only be listed if it is threatened or endangered; it cannot be simultaneously imperiled and recovered. In the Delisting Rule, FWS contends that it is not simultaneously listing and delisting, but instead merely "revis[ing]" the list of endangered and threatened species "to reflect the current status of [northern Rockies] wolves." 74 Fed. Reg. at 15,144. The problem with this argument is that FWS made no findings regarding the 1978 lower-48 wolf population and the need to modify that listed entity. Despite FWS's efforts to describe away its listing errors, its fundamental departure from the structure of the ESA and its ESA gray wolf listing history are arbitrary and unlawful.

Because FWS failed to designate the northern Rockies DPS in compliance with the ESA and failed to explain adequately or follow ESA procedures in departing from its 1978 lower-48 wolf listing, the Delisting Rule is arbitrary,

capricious and unlawful, and should be set aside. See 16 U.S.C. § 1533(a), (c); 5 U.S.C. § 706(2).

B. FWS Violated ESA Section 10(j) In Designating Wyoming's Wolves An Experimental Population

FWS's arbitrary departure from its prior listing further violated section 10(j) of the ESA. With the Delisting Rule, FWS designated Wyoming's wolves an "experimental population" subject to special management regulations. See 74 Fed. Reg. at 15,184, 15,187. Under the ESA, however, a population may be considered experimental "only when, and at such times as, [it] is wholly separate geographically from nonexperimental populations of the same species." 16 U.S.C. § 1539(j)(1). In light of FWS's determination that Wyoming's wolves are not "wholly separate" from those in Idaho and Montana, see, e.g., 74 Fed. Reg. at 15,176, the agency's designation of a Wyoming "experimental" wolf population was contrary to the ESA.

VI. FWS ILLEGALLY DISREGARDED "UNSUITABLE" AND "UNOCCUPIED" HABITAT

As FWS acknowledges, human activity and intolerance continue to imperil wolves in large sections of the northern Rockies, inhibiting both pack establishment and individual dispersal. See, e.g., 74 Fed. Reg. at 15,127, 15,157-58 (wolves remain imperiled across most of the northern Rockies by "high densities of livestock compared to wild ungulates, chronic conflict with livestock

and pets, local cultural intolerance of large predators, and wolf behavioral characteristics that make them vulnerable to human-caused mortality in open landscapes"). Rather than recognizing these threats as sufficient to warrant an endangerment finding, however, FWS declared such "unsuitable" and "unoccupied" habitat as unimportant to the conservation of the species. According to FWS, the wolf's "unoccupied" range outside of Wyoming makes "only a minor contribution [to] the resiliency, redundancy, and representation" of the northern Rockies wolf population and, as a result, is "not a significant portion of [the population's] range" that requires listing. Id. at 15,183-84.[7]

In contending that areas rendered "unsuitable" for wolves by human activity and intolerance cannot form a "significant portion" of the wolf's northern Rockies range, FWS turned the ESA on its head. Under the ESA, a DPS must be afforded legal protections whenever it is threatened or endangered in "a significant portion of its range" as a result of human activities—that is, "the present or threatened destruction, modification, or curtailment of its habitat or range[,]" the "inadequacy of existing regulatory mechanisms[,]" or "other … manmade factors affecting its continued existence." 16 U.S.C. §§ 1532(6), (20); 1533(a)(1)(A), (D), (E). FWS's

[7] In asserting that a portion of a species' range can be "significant" only if it is part of the species' "current range," 74 Fed. Reg. at 15,180, FWS contravened Ninth Circuit authority holding that the agency must assess the significance of "historical range" in which a species "is no longer viable but once was[,]" Defenders of Wildlife, 258 F.3d at 1145.

habitat assessment eviscerates these provisions, declaring large portions of the wolf's range irrelevant to the agency's endangerment analysis precisely because of the very sorts of human-caused threats to the species that the ESA was designed to address. See 74 Fed. Reg. at 15,127, 15,183-84. The Delisting Rule is accordingly arbitrary and unlawful.[8]

VII. THIS COURT SHOULD VACATE THE DELISTING RULE AND ENJOIN ITS IMPLEMENTATION

To remedy FWS's violations of the ESA, this Court should vacate and set aside the Delisting Rule, thereby reinstating ESA protections that have brought the northern Rockies wolves to the brink of recovery. The APA authorizes federal courts to set aside illegal agency action. 5 U.S.C. § 706(2) (court shall "hold unlawful and set aside [invalid] agency action"). "When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." Harmon v. Thornburgh, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989); see also Alsea Valley Alliance, 358 F.3d at 1185 ("vacatur of an unlawful agency rule normally accompanies a remand"). Under controlling Ninth Circuit precedent, vacatur would result in the reinstatement of ESA protections for the wolf. "The effect of

[8] Moreover, FWS's assertion that "unoccupied" regions outside of Wyoming are unimportant to wolf conservation is arbitrarily at odds with the agency's determination that all of Wyoming—not just its "suitable" and "occupied" areas—constitutes a significant portion of the DPS's range. See 74 Fed. Reg. at 15,183.

invalidating an agency rule is to reinstate the rule previously in force." Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005); Cal. ex rel. Lockyer v. U.S. Dep't of Agric., 575 F.3d 999, 1020 (9th Cir. 2009) (same).

Such a remedy is warranted to address irreparable injury. The bases for permanent injunctive relief in federal court "are irreparable injury and inadequacy of legal remedies." Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987). "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." Id. at 545.

Just as in Greater Yellowstone Coalition v. Servheen, where this Court enjoined implementation of the grizzly bear delisting rule, this Court should enjoin implementation of the wolf Delisting Rule. See Grizzly Order at 45-46. All three district courts that previously reviewed wolf downlisting or delisting rules vacated or enjoined those regulations. See Humane Soc'y of the U.S. v. Kempthorne, 579 F. Supp. 2d 7, 21 (D.D.C. 2008) ("[T]he ESA's preference for protecting endangered species counsels strongly in favor of vacating the Final Rule … ."); Nat'l Wildlife Fed'n, 386 F. Supp. 2d at 568 (vacating downlisting rule); Defenders of Wildlife v. Sec'y, U.S. Dep't of the Interior, 354 F. Supp. 2d 1156,

1174 (D. Or. 2005) (enjoining downlisting because "the Final Rule permit[ted] lethal and non-lethal harm" to the wolf). This Court should do the same.

Wolves remain threatened by "excessive human persecution[.]" See 74 Fed. Reg. at 15,151. FWS's Delisting Rule explicitly allows human persecution to escalate, authorizing unregulated control actions and sport hunting. Wolf hunting seasons began in Idaho on September 1, 2009 and in Montana on September 15, 2009. See Docs. 58-5 and 58-6. Already, in the early days of these hunting seasons, 100 wolves have been shot and killed. See Exhs. 1 and 2. While the ESA allows the incidental take of protected species under limited circumstances, see 16 U.S.C. § 1536(b)(4), sport hunting for a protected species is illegal, Sierra Club v. Clark, 755 F.2d 608, 612-15 (8th Cir. 1985) (sport trapping of wolves protected under the ESA illegal). Allowed to stand, the Delisting Rule will continue to allow increased wolf killing in control actions and hunts—killing that will cause irreparable injury to individual endangered wolves, the northern Rockies wolf population, and plaintiffs' members' interest in observing wolves in the wild.[9]

The current and future wolf hunts in Idaho and Montana are planned to coincide with wolf dispersal periods and threaten to disrupt the genetic exchange that FWS itself has repeatedly identified as essential to wolf recovery. See Sec. IV.A.2, supra; see also Fallon Decl. ¶¶ 14-16 (offered for remedial purposes only).

[9] Plaintiffs supplement their injunction declarations with additional standing declarations filed herewith.

Moreover, the level of wolf hunting, in combination with lethal control actions, will reduce current population levels. 74 Fed. Reg. at 15,142. Idaho has planned a substantial wolf population reduction, which is now underway; Idaho has a five-year goal of reducing the current population of around 850 wolves to as few as 518 wolves. See AR2009–038317 (Idaho population plan); see also Defenders of Wildlife, 565 F. Supp. 2d at 1177-78 (finding irreparable harm where "[t]he reduction in the wolf population that will occur as a result of public wolf hunts and state depredation control laws … is more than likely to eliminate any chance for genetic exchange to occur between subpopulations").

Under the ESA, the balance of harms and the public interest tip in favor of the protected species. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978); see also Wash. Toxics Coalition v. EPA, 413 F.3d 1024, 1035 (9th Cir. 2005) ("Congress has decided that under the ESA, the balance of hardships always tips sharply in favor of the endangered or threatened species."). An injunction should accordingly be entered here.

CONCLUSION

Plaintiffs respectfully request that this Court grant their motion for summary judgment and the relief requested herein.

Respectfully submitted this 26th day of October, 2009.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), I hereby certify that the foregoing brief contains 7,822 words, excluding the caption and this certificate, as determined by the word count function of Microsoft Word 2003 Professional Edition. Plaintiffs have moved for leave to file a memorandum in excess of the 6,500 word limit of Local Rule 7.1(d)(2)(A).

Dated: October 26, 2009

/s/ Douglas L. Honnold