



EARTHJUSTICE

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII
INTERNATIONAL JUNEAU, ALASKA OAKLAND, CALIFORNIA
SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.
ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

August 6, 2007

Ed Bangs, Western Gray Wolf Recovery Coordinator
U.S. Fish & Wildlife Service
585 Shepard Way
Helena, MT 59601

Re: RIN Number 1018-AU53

Supplemental Comments on the Proposal to Designate the Gray Wolf Northern Rocky Mountain Distinct Population Segment and to Remove this Distinct Population Segment from the Federal List of Endangered and Threatened Wildlife

Dear Ed:

On behalf of Natural Resources Defense Council, Sierra Club, Jackson Hole Conservation Alliance, The Humane Society of the United States, and Help Our Wolves Live (HOWL) we submit the following supplemental comments on the U.S. Fish and Wildlife Service ("FWS") proposal to designate the Gray Wolf Northern Rocky Mountain Distinct Population Segment ("DPS") and to Remove the Northern Rocky Mountain Gray Wolf DPS from the List of Endangered and Threatened Species. See 72 Fed. Reg. 6,105 (February 8, 2007); 72 Fed. Reg. 36,939 (July 6, 2007). This comment letter supplements the comments we previously submitted on May 8, 2007.

The 2007 Wyoming Wolf Plan Cannot Form the Basis for Delisting Because It Is Not An "Existing Regulatory Mechanism." Under the Endangered Species Act ("ESA"), a species may be threatened or endangered solely due to the "inadequacy of existing regulatory mechanisms." 16 U.S.C. § 1533(a)(1)(D). In its Northern Rockies gray wolf delisting proposal, FWS determined that gray wolves in Wyoming remained threatened because Wyoming had not adopted protective measures that would ensure that wolves would remain above the recovery levels established by FWS. 72 Fed. Reg. 36,942; see also 71 Fed. Reg. 43,410, 43,430 (Aug. 1 2006) (denying Wyoming's petition to delist because of the 2003 Wyoming Plan). As we previously explained, FWS's recovery levels for wolves in the Northern Rockies are a mere fraction of those required to maintain adequate genetic diversity in the long term, and fall far short of established international endangered species viability standards and even FWS's own demographic recovery levels for wolves in the Midwest. May 8, 2007 Earthjustice Comment Letter at 4-9. FWS now proposes to delist wolves within a significant portion of the range in Wyoming notwithstanding the fact that Wyoming still has not adopted measures to regulate human-caused mortality throughout the vast majority of the wolf's range within the state.

The 2007 draft Wyoming plan is not an existing regulatory mechanism because it has not been formally adopted. The Wyoming legislature approved House Bill 213 in February 2007 as

a contingency option that might provide for post-delisting wolf management in Wyoming. Wyoming has not revised its 2003 wolf management plan to conform to HB 213, but has instead adopted a statutory provision allowing the governor to direct the Wyoming Game and Fish Commission to adopt a boundary within which wolves would be treated as trophy game up to a maximum area described by statute. Wyo. Stat. §§ 11-6-302(b), 23-1-101(b). The 2007 revisions to the Wyoming wolf plan proposed by FWS establish the maximum boundary permitted under Wyoming law. Compare id. with 2007 Wyoming Plan at 4. Rather than direct the Game and Fish Commission to adopt this boundary, however, Wyoming Governor Freudenthal has determined that the revisions may not be adopted until certain conditions are met: 1) wolf delisting, 2) resolution of Wyoming's lawsuit to compel FWS to approve its 2003 wolf management plan, and 3) amendment of the gray wolf 10(j) regulations. See May 24, 2007 Letter from Gov. Freudenthal to Mitch King, FWS Regional Director (describing the "contingent" nature of the 2007 draft Wyoming wolf plan, the conditions that must first be satisfied, and the independent role of the Wyoming Game and Fish Commission). These same conditions appear in Wyoming law. Wyo. Stat. § 23-1-109(a), (b), (c).

FWS may not legally proceed with delisting in Wyoming until necessary Wyoming laws and regulations are finalized and in full force and effect. HB 213 fails to meet this standard because it will not be effective until after the gray wolf is delisted in the entire state of Wyoming and FWS has modified 50 C.F.R. § 17.84 or executed an agreement with Wyoming that fully responds to Wyoming's desire to kill wolves that impact ungulates. Wyo. Stat. § 23-1-109. The Governor of Wyoming must certify that these conditions are satisfied before the statute can become effective, and the Governor is vested with substantial discretion to elect not to make the necessary certification. Id. In addition to these considerable hurdles, another statutory criterion requires resolution – either by court order or settlement – of Wyoming's lawsuit to compel FWS to approve its 2003 wolf management plan. See Wyo. Stat. § 23-1-109(b) (referencing State of Wyoming v. Dep't of the Interior, No. 06CV-245J). If Wyoming were to prevail on its claims in that case, it would implement the 2003 plan rather than the 2007 plan. The grossly inadequate 2003 plan, which FWS has determined could not maintain Wyoming's wolf population above FWS recovery levels, designates wolves as predators throughout 90% of their current range in Wyoming outside of Yellowstone National Park. Moreover, Wyoming's lawsuit asks the Court to order FWS to kill all but 100 wolves in Wyoming and then delist the Northern Rocky Mountain wolf population. In other words, Wyoming will only honor the compromise embodied in the draft 2007 wolf plan if it cannot get its way through litigation. This reservation does not represent a commitment on the part of Wyoming to conserve a viable wolf population. Instead, it represents Wyoming's determination to allow the greatest possible amount of wolf-killing without the interference of federal management under the ESA.

Until Wyoming formally adopts and guarantees it will implement laws and regulations that ensure a viable wolf population for the foreseeable future, FWS cannot conclude that wolves in the Northern Rockies are not threatened due to the "inadequacy of existing regulatory mechanisms." 16 U.S.C. § 1533(a)(1)(D).

FWS Has Failed to Provide a Public Comment Period that Complies with the ESA and the Administrative Procedures Act. As we explained in our May 2007 comment letter, FWS' DPS and delisting proposal fails at the outset because FWS has failed to comply with basic

procedural requirements. Under the ESA, FWS is required to evaluate and solicit comments on all of the statutory listing factors, including whether a species is at risk of extinction due to, among other factors, the “inadequacy of existing regulatory mechanisms.” 16 U.S.C. § 1533(a)(1)(D). Here, it is impossible for FWS or the public to evaluate the adequacy of key regulatory mechanisms because the statute Wyoming passed in 2007 has no current force and effect, and because Wyoming has not even proposed, let alone finalized, a Wyoming wolf plan, or adopted binding regulations to protect wolves within the state. Until the conditions imposed by HB 213 have been satisfied and Wyoming has finalized its state wolf management plan, it is premature for the public to comment on the adequacy of regulatory mechanisms.

The Trophy Game Boundary Proposed in the 2007 Draft Wyoming Plan is Insufficient to Maintain a Viable Wolf Population for the Foreseeable Future. The area proposed for trophy game management in the 2007 draft Wyoming plan, while larger than the area proposed in the 2003 Wyoming plan, is still not adequate to ensure that unregulated wolf-killing in Wyoming will not: a) cause the population to drop below FWS’s inadequate recovery levels; or b) prevent the population from attaining legitimate demographic recovery standards. See May 2007 Earthjustice Comment Letter (2,000-3,000 wolves needed for recovered wolf population).

Under the 2007 draft Wyoming plan, wolves in most of Wyoming would be formally designated predators, subject to unregulated killing. As FWS previously determined, few, if any, wolves will survive in areas where wolves are designated predator. In addition, under Wyoming law, the Wyoming Game and Fish Commission is empowered to develop rules that treat wolves as “predators” within a larger trophy game area. Wyo. Stat. § 23-1-302(a)(ii); 23-3-103(a). Thus, under the 2007 draft Wyoming plan, most of Wyoming provides no protection for wolves—and instead offers outright persecution—and even within the trophy game area the Commission may allow unlimited wolf killing in certain areas. For these reasons, the 2007 draft Wyoming plan fails to provide adequate regulatory protection for wolves.

Even if the 2007 draft Wyoming plan provided complete protection for wolves within the area proposed for initial trophy game management, the area is simply too small. The recent home ranges of numerous Wyoming wolf packs are extremely near or extend over the proposed trophy game area. See 2007 Wyoming Plan at 5, Fig. 1. Many of these packs are just beginning to establish their home ranges. The data used to compile their home ranges is incomplete and limited to at most three years. In light of these factors, many of these packs may have already used, or will use in the future, lands outside of the trophy game area where they will be subject to unregulated killing. See, id. at 18 (home range data limited to three years, with numerous packs lacking data even within that three-year period).

As FWS has previously determined in rejecting Wyoming’s use of a two-management-area system for wolves, human-caused mortality for species like wolves is often great in areas adjacent to the boundary of a protected reserve. 71 Fed. Reg. 43,410, 43,420 (relying on Woodroffe & Ginsberg (1998)). These border areas often serve as a population sink, and may cause extinction of a population notwithstanding its protected status within a reserve. Id. Under Wyoming’s proposed wolf management plan, this “edge effect” will prevent the wolf population from attaining legitimate demographic recovery levels. The edge effect threat to population levels will be further amplified by the lack of complete protection even within the trophy game

area. FWS erred in concluding that the draft 2007 Wyoming plan trophy game area designation was adequate to support a recovered wolf population.

The 2007 Wyoming Wolf Law Suffers From Two of the Same Key Defects of the 2003 Wyoming Wolf Law Rejected by FWS. Wyoming's 2007 wolf statute suffers from two major defects that prompted FWS to reject Wyoming's 2003 wolf statute. First, it continues to assume that Yellowstone Park will "carry most of Wyoming's share of the wolf population." See 71 Fed. Reg. 43,429; 2007 Wyoming Plan at 1 (only 7 breeding pairs maintained outside National Parks). As FWS stated in rejecting Wyoming's 2003 statute as a regulatory mechanism:

The potential success of the current Wyoming law and wolf plan to maintain its share of wolves in the NRM is greatly dependent on YNP having at least eight breeding pairs. However, recent experience tells us this is an unrealistic expectation.

71 Fed. Reg. 43,429 (also noting that the number of Yellowstone park breeding pairs crashed to seven in 2005). FWS concluded that because Wyoming law "depends on at least eight National Parks/Wilderness wolf packs to constitute most of the wolves in Wyoming," the "Wyoming wolf population could quickly slide below recovery goals." *Id.* at 43,430. Even if HB 213 becomes law, Wyoming continues to depend on Yellowstone and Grand Teton Park wolf packs to "constitute most of the wolves in Wyoming," and thus FWS must reject the Wyoming regulatory mechanisms on this basis alone.

The second, independent, ground for rejecting Wyoming's legal framework is Wyoming's continued reliance on Wyo. Stat. § 23-1-304(b); 2007 Wyoming Plan at 1, 10. This subsection is a provision of Wyoming's 2003 statute that was unchanged by HB 213. In rejecting Wyoming's state law as an inadequate regulatory mechanism to warrant wolf delisting, FWS explained in great detail why this subsection would defeat wolf recovery efforts. See 71 Fed. Reg. 43,429. Under subsection (b), Wyoming would not be required to increase the area where wolves are managed as trophy game even if there are only 5 **packs** outside the Parks, and would not be required to increase protections for wolves even if the population crashed below 15 **packs** in the state. *Id.* (quoting from Wyoming Attorney General letter). The same holds true today.

While subsection (b) requires the Wyoming Game and Fish Commission to make a determination if there are fewer than 7 **packs** of gray wolves in Wyoming primarily outside the Parks **and** fewer than 15 **packs** statewide, § 23-1-304(b)(i), there is no effective statutory remedy for such a determination. Section 23-1-304(b)(i)(A) provides that, if such a determination is made, the Commission shall adopt rules and regulations to modify the trophy game area as necessary "to reasonably ensure [that] seven (7) **packs** of gray wolves" are located outside of the Parks in Wyoming. *Id.* (emphasis added). However, nothing in this provision, or elsewhere in the statute, authorizes the Commission to modify the trophy game area so as to ensure the existence of more than seven breeding pairs outside the Parks, even if there are fewer than eight wolf breeding pairs in the Parks such that the Service's established minimum of 15 wolf breeding pairs in the state would not be achieved. Indeed, HB 213 proposes to modify section 23-1-304(a) so that the Commission's authority to modify wolf hunting areas, seasons, and bag limits is restricted to taking action "only as necessary" to ensure the existence of 7 wolf breeding pairs

outside the Parks. Thus, if HB 213 becomes effective, not only will Wyoming law make no provision for areas of the state outside the Parks to make up for a deficit in the Park population by ensuring more than 7 breeding pairs, but in fact state law will actually prohibit the Commission from adjusting hunting areas, seasons and bag limits to achieve this result.

Moreover, § 23-1-304(b)(ii) requires the Commission to maintain the status quo with respect to predator and trophy game classifications of wolves in Wyoming if there are at least 7 wolf **packs** outside the Parks **or** at least 15 wolf **packs** within the state. This provision would also prevent the Commission from taking action to ensure a minimum of 15 breeding pairs in the state (by, for example, adjusting the classifications to provide for more than 7 wolf breeding pairs outside the Parks), so long as there are at least 7 packs outside the Parks -- even if the Parks population had crashed such that 15 total breeding pairs would not be achieved. Likewise, it would prevent the Commission from taking remedial action if there were fewer than 7 breeding pairs outside the Parks, so long as the Park population was sufficiently robust that there remained at least 15 **packs** in the state. This mirrors the problem the Service identified in previously rejecting the Wyoming statute and plan because of inappropriately heavy reliance on the Parks to carry Wyoming's share of a minimum required wolf population. Application of § 23-1-304(b) ensures that Wyoming will not be able to meet even the unjustifiably low FWS wolf recovery standards.

These deficiencies are exacerbated by revisions to Wyo. Stat. § 23-1-304(c), which previously contained Wyoming's definition of "pack," but as amended by HB 213 now provides instead a definition of "breeding pair." Given this change, if HB 213 becomes effective, there would be no statutory definition of "pack," allowing Wyoming to interpret "pack" in any fashion it saw fit. This could mean lowering the "pack" definition below Wyoming's prior statutory definition of 5 or more wolves traveling together at any time of year. Under Wyo. Stat. § 23-1-304(b), there is no obligation to manage for 15 breeding **pairs**; instead this remnant of the 2003 Wyoming law instructs Wyoming to manage for only 7 **packs** in Wyoming outside the Parks **or** 15 **packs** statewide. In August 2006, FWS entered a formal Federal Register finding that because of Wyo. Stat. § 23-1-304(b) Wyoming law was inadequate to protect wolves without the safety net of the ESA; the same result should obtain a mere eleven months later.

The 2007 Wyoming Wolf Law Increases the Prospects For Widespread Wolf Killing. The preamble to HB 213 sets the tone for Wyoming's entire statutory scheme for wolf management when it describes the Act as "providing for aggressive management of wolves." If FWS were to accept current Wyoming law as it pertains to wolf management and predator control, it would virtually guarantee the necessity of relisting wolves in the near future to avoid extinction in Wyoming.

If it becomes effective, HB 213 would change the starting point for the area where wolves would be designated trophy game at the time wolves are delisted. But, the Wyoming Game and Fish Commission retains the authority to eliminate the trophy game area immediately following delisting. *Id.* (proposed amendments to § 23-1-304(a) and 23-1-101(a)(xii)(B)(I)). HB 213 creates a process where Wyoming would set annual seasons and bag limits for wolves within the trophy game area. *Id.* The seasons and bag limits must be set at levels designed to reduce the number of wolves outside Yellowstone and Grand Teton Parks to 7 breeding pairs.

Id. In shooting for this target, the Wyoming Game and Fish Commission would be required to set take standards that would be predicted to reduce wolves to 7 breeding pairs “at the end of the calendar year.” Id. The annual seasons and bag limits would be set early in the year; the breeding pairs would be counted as of December 31. Wyoming would set take standards for the trophy game area that are predicted to bring the Wyoming wolf population to the brink of delisting, but not trigger delisting. Such an approach will ensure that wolves plummet below existing wolf recovery standards in Wyoming, and fall well below legitimate demographic standards for recovery, and thus fail to provide adequate regulatory mechanisms.

Further, Wyoming law permits the Game and Fish Commission to diminish the trophy game area by rule if it “determines the diminution does not impede the delisting of gray wolves and will facilitate Wyoming’s management of wolves.” Id. (proposed amendments to §§ 11-6-302(a)(x)(B)(I), 23-1-101(a)(xii)(B)(I). Since HB 213 can only possibly become effective after wolf delisting, the only constraint on the Commission’s modification of trophy game boundaries is that the diminution “facilitate[s]” wolf management. The provision includes no standards that would guide the Commission’s determination to reduce trophy game boundaries. Once the wolf is delisted, there is no protective measure—either in state or federal law—that could prevent the commission from eliminating the trophy game area entirely.

As to hunting restrictions on those lands where wolves are designated as a “trophy game” species, the new legislation directs the Wyoming Game and Fish Commission “to regulate [within the trophy game area] the number of gray wolves which may be taken under a [hunting] license issued under this act or as necessary to carry out the commission’s duties under this act.” See proposed amendments to Wyo. Stat. § 23-1-302 (a)(xxix). However, the Commission may limit its issuance of hunting permits for the killing of wolves labeled trophy game “*only* as necessary to reasonably ensure at least seven (7) breeding pairs” outside of National Parks. Id. § 23-1-304(a) (emphasis added); see also id. § 23-1-304(n) (Commission must grant hunting permits to landowners and livestock owners to kill wolves in trophy game areas as long as Wyoming maintains 7 breeding pairs outside of National Parks). The requirement that Game and Fish issue hunting licenses to manage down to 7 breeding pairs outside the National Parks virtually ensures that the Wyoming wolf population will fall below FWS’ already inadequate recovery standards.

Moreover, the requirement that the Game and Fish Commission reserve 7 breeding pairs in Wyoming does not apply to lethal wolf control activities to protect big game species. “Notwithstanding other provisions of [title 23] ... the [game and fish] department shall manage the gray wolf population as necessary to ensure the long-term health and viability of any big game animal herd that is being threatened in this state.” Id. § 23-1-304(e). State law could therefore require the complete elimination of wolves within Wyoming outside of the National Parks if the State deems the action “necessary” to protect big game. And it is clear that Wyoming officials perceive wolves as a substantial threat to the State’s game populations. Governor Dave Freudenthal has stated wolves’ impact to wildlife is “unacceptable,” and that reducing the wolf population is “essential for both wildlife and domestic livestock.”¹

¹ Knickerbocker, B., Gray wolves may lose US protected status, The Christian Science Monitor, Feb. 1, 2007 (available at <http://www.csmonitor.com/2007/0201/p03s03-ussc.html>); Royster, W., Wyo

The take of depredating wolves in Wyoming is similarly unrestricted by a requirement to maintain a minimum number of breeding pairs. The Game and Fish Commission is authorized “to use aggressive management techniques ... to protect private property, including, but not limited to, livestock and other domesticated animals from wolf depredation.” *Id.* § 23-1-304(g). Additionally, landowners are authorized to take wolves “doing damage to private property” without a permit, as long as they later notify the Wyoming Department of Agriculture of the killing, *id.* § 23-3-115(c), and game wardens may take trophy game animals, including wolves, that “are doing substantial damage” to property, Game and Fish Comm’n Regs., Ch. 56, § 2. Because Wyoming law does not limit the number of wolves that may be killed to prevent property damage and depredation, there is no way for the State to ensure that take does not cause the wolf population to drop below even the number of breeding pairs established by FWS as the minimum necessary for wolf recovery.

Other Provisions of Wyoming Law Aggressively Promote Wolf Killing. Wolf management in Wyoming is the responsibility of both the Department of Agriculture, governed by title 11 of the Wyoming statutes, and the Department of Game and Fish, governed by title 23. Statutory provisions guiding both of these departments are alarmingly hostile to wolves. Wolves are currently classified by Wyoming as “predatory animals” throughout the state. Wyo. Stat. §§ 11-6-302(a)(ix)(B), 23-1-101(a)(viii). The 2007 Wyoming wolf law, which would apply only after wolf delisting, would classify wolves as a “predatory animal” throughout most of the state, Wyo. Stat. §§ 11-6-302(a)(ix), 23-1-101(a)(viii)(B), except for a small northwest corner in which wolves will be classified as “trophy game,”² *id.* §§ 11-6-302(a)(x), 23-1-101(a)(viii)(B)(II). The “predatory” designation allows widespread use of virtually every means of extermination implemented by anyone, thus ensuring that wolves will not survive on lands where wolves are so designated. *See* 72 Fed. Reg. at 6,129 (listing potential methods of take under Wyoming’s predator law, including: 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 down); *id.* (“These types and levels of take would most likely prevent wolf packs from persisting in areas of Wyoming where they are classified as predatory, even in otherwise suitable habitat.”).

Moreover, the trophy game area is virtually meaningless. Even within the trophy game area, the Game and Fish Commission is authorized to establish zones “in which trophy game animals may be taken ... in the same manner as predatory animals without a license.” Wyo. Stat. § 23-1-302(a)(ii); 23-3-103(a) (emphasis added). Wolves with trophy game status may

targets wolf packs, Casper Star-Tribune, Dec. 31, 2006 (available at <http://www.casperstartribune.net/articles/2007/01/02/news/wyoming/015584daa8e79309872572540026943d.txt>).

² The final trophy game boundary has not been established; the legislature has provided a geographical range and directed the governor to negotiate with FWS to establish a mutually acceptable boundary within the constraints set by the legislature. Wyo. Stat. § 11-6-302(a)(x)(B)(II).

therefore have a *de facto* “predator” label in any part of the state at the Commission’s discretion.

Outside of the trophy game area, it will be open season on wolves. Wyoming law not only lacks restrictions on the taking of wolves deemed predators, it actively encourages it. The Game and Fish Commission has no delegated authority to regulate wolf killing in areas where they are labeled predatory animals. Individuals may hunt wolves by any means, at any time, and in any amount. Further, to the extent that wolves are deemed a threat to property, livestock, or wildlife, the State will subsidize their killing. Wyoming law designates each county a “predator management district.” *Id.* § 11-6-201(a). The board of directors for each predator management district consists entirely of livestock owners and, in some circumstances, sportsmen and hunters. *Id.* § 11-6-202(a). The districts are required to “[d]evis[e] and put in operation those methods that best manage or control damage caused by predatory animals,” and are authorized to pay bounties. *Id.* §§ 11-6-205(a)(ii), 11-6-206. Wyoming law also created the Wyoming animal damage management board (ADMB), which accepts applications for assistance to prevent and mitigate damage by predatory animals. *See id.* § 11-6-304; ADMB Reg., Ch.1, § 1. In 2006 alone, \$5.7 million was appropriated to the ADMB to assist funding predator management districts. ADMB, 2006 Annual Report, at <http://www.wyadmb.com/reports/06legisreport.pdf>.

For these reasons, Wyoming law is not an adequate regulatory mechanism to ensure Wyoming’s wolf population remains above recovery thresholds.

Wyoming and FWS Are Decreasing the Gray Wolf Demographic Recovery Standards.

In most respects, the proposed revisions to the 2003 Wyoming wolf plan track the language of HB 213, and suffer from the same defects described above. Embedded in the 2007 draft Wyoming plan is one proposition with alarming implications: Wyoming and FWS are proposing to change the means of measuring wolf population abundance in the Northern Rockies. *See* 2007 Wyoming Plan at 12. FWS rejected the 2003 Wyoming wolf plan because Wyoming proposed measuring wolf packs rather than wolf breeding pairs. *See* 71 Fed. Reg. 43,410, 43,427-30. There are many more wolf packs than breeding pairs. For example, as of December 2006, there were 23 confirmed wolf packs in Wyoming outside Yellowstone and Grand Teton National Parks, but only 15 breeding pairs. *See* 2007 Wyoming Plan at 4 (citing USFWS *et al.* 2007). The 2007 draft Wyoming plan states that FWS “**has proposed** to modify the monitoring criteria regarding what constitutes a successfully reproducing pack of wolves.” *Id.* at 12 (emphasis supplied). “The proposal being evaluated would change the definition of a breeding pair to maintenance of a certain number of individuals.” *Id.* FWS has not finalized this complete reversal of its prior position, but the outcome appears to be pre-ordained:

The Service has not implemented these new criteria and probably will not establish them by the time this plan is completed but **they will be useful** in the future.

Id. (emphasis added). The Service apparently proposes that some portion of packs comprised of four or more wolves of unknown composition be counted toward the requirement that Wyoming provide 10 breeding pairs. *Id.* (“each wolf pack containing 4 or more individuals but of unknown composition contributes some proportion towards the overall estimated number of

breeding pairs in each state.”). This proposed change of the definition of breeding pairs would both alter the manner in which breeding pairs are counted and would change the current confirmed count of breeding pairs to a mere estimate. *Id.* This flatly contradicts FWS’s prior position, and raises fundamental questions about what metric will be used to measure how many wolves must be maintained post-delisting. By its own terms, the 2007 draft Wyoming plan leaves unresolved the question of how many packs or breeding pairs Wyoming will maintain following delisting. Any deviance from FWS’s prior breeding pair standard along the lines proposed by Wyoming will dramatically reduce the number of wolves in Wyoming following delisting and thus dramatically increase the extinction threat the wolves face. Without clear, binding demographic recovery standards that insure a certain number of wolves remain on the ground in Wyoming following delisting for the foreseeable future, regulatory mechanisms are by definition inadequate.

The 2007 Draft Wyoming Plan Is Inadequate to Protect Wolves. As described above, the Wyoming Game and Fish Commission has yet to propose a revised Wyoming wolf plan, take public comment, and respond to public comment in finalizing a plan. FWS developed the current 2007 draft Wyoming plan by proposing insertions and modifications to the 2003 Wyoming wolf plan. Wyoming Governor Freudenthal determined that the Service’s proposed changes to the 2003 plan could provide a basis for inclusion of Wyoming within the Northern Rockies gray wolf delisting proposal, but noted that the Wyoming Game and Fish Commission must exercise its “independent judgment following public notice and opportunity for public comment.” May 24, 2007 Gov. Freudenthal Letter. As Governor Freudenthal has concluded, “this process cannot occur at this time” because HB 213 is not yet operative. *Id.* The contingencies detailed in HB 213 have not been met, there is no final revised Wyoming wolf plan, and there is no binding commitment by Wyoming that would justify either delisting, or even public comment on the adequacy of regulatory mechanisms in Wyoming. Virtually of the key regulatory pieces are still in motion.

The overwhelming majority of the 2007 draft Wyoming plan remains unchanged from the 2003 Wyoming wolf plan that FWS rejected. The 2007 draft Wyoming plan retains the following sentence from the 2003 Wyoming wolf plan rejected by FWS at 71 Fed. Reg. 43,410, 43,427-30:

According to Wyoming Statute (W.S.) 23-1-304 and interpretation of said statute by the Wyoming Attorney Generals Office, Wyoming, will commit to maintaining at least 15 breeding pairs of wolves Statewide....

2007 Wyoming Plan at 1, see also id. at 10 (nearly the same quote). Even though FWS had previously rejected the 2003 version of Wyoming Statute 23-1-304 and the Wyoming Attorney General’s opinion letter interpreting that law, FWS now appears to endorse the 2003 statute. While this sentence has been changed to indicate that Wyoming will make an initial commitment to maintain 15 breeding pairs (not packs), given the failure to change the remainder of the sentence, it is unclear if FWS is now endorsing the 2003 Wyoming statute and the Wyoming Attorney General’s opinion letter interpreting the 2003 law.

The 2003 statute relied almost exclusively on Yellowstone Park to provide habitat for wolf recovery. By continuing to rely on the earlier version of Wyoming Statute 23-1-304 and the Wyoming Attorney General's opinion letter, it is unclear whether Wyoming is continuing to assert that wolf recovery must be confined to Yellowstone Park and whether Wyoming's commitment to maintain 15 breeding pairs is limited to wolves in Yellowstone Park and contiguous wilderness areas. The supplemental language provided by FWS is even worse—it asserts that Wyoming will work with the Park Service and FWS to “assure that Wyoming's wolf population never drops below 10 breeding pairs **and** 100 wolves.” 2007 Wyoming Plan at 1. (emphasis added). First, this language abandons the 15-breeding pair standard, in favor of a 10-breeding pair standard. Second, as written, it could allow Wyoming to drop the number of breeding pairs below 10 as long as 100 wolves are maintained (the population would not drop below 10 breeding pairs **and** 100 wolves). Alternatively, Wyoming could reduce the number of wolves in Wyoming to 40 wolves, as long as 10 breeding pairs were maintained (requiring only an alpha male, an alpha female, and two pups of the year).

Elsewhere, the 2007 draft Wyoming plan retains Wyoming's overt hostility toward wolves and the desire to manage wolves to minimum population levels. The plan asserts that “[w]olves can cause negative economic impacts” and claims that “[i]f the number of breeding pairs can be maintained near **target** levels, the potential economic impacts for all occupied areas should be manageable.” *Id.* at 2 (emphasis added). This makes clear that Wyoming intends to reduce the areas occupied by wolves and aggressively reduce breeding pairs to the lowest possible “target” levels. *See also, id.* at 32 (“The Department is determined to keep economic losses from a recovered wolf population to a minimum.”).

Much of the 2007 draft Wyoming plan is a list of options, with no binding management standards. The plan notes that the Wyoming Game and Fish Commission has “authority to promulgate regulations to limit take of wolves within the described trophy game areas,” *id.* at 4, but whether the Commission will do so, and whether those regulations will protect wolves, is an open question. Similarly, the 2007 draft Wyoming plan lists a menu of options for responding to wolf-livestock conflicts, but is ambiguous enough to allow lethal control in all circumstances. *Id.* at 21. Because of this ambiguity, when evaluating the sufficiency of the Wyoming plan it must be assumed that Wyoming will always employ lethal control, because there are no “regulations” that would prohibit such management.

In like manner, the 2007 draft Wyoming plan states that even within areas where wolves are accorded trophy game status, the Game and Fish Department “**will**” take management actions when wolves “begin to significantly affect ungulate populations in localized areas such as feedgrounds and crucial winter range.” *Id.* at 27 (emphasis supplied). Those management options include translocating or killing wolves. *Id.* at 28. This particular provision of the 2007 draft Wyoming plan is particularly troubling, because it would allow virtually unlimited killing of wolves merely because they are having an undefined “affect” on their native prey species. Such an approach cannot be squared with wolf recovery. *See* August 6, 2007 Earthjustice Comment Letter on FWS Proposal to Amend Gray Wolf 10(j) Regulations.

In addition to all of these flaws, the 2007 draft Wyoming plan provides no details concerning what wolf management practices will actually be implemented in Wyoming, instead

offering either a menu of choices or broad, hortatory platitudes. The only way to understand what specific management actions Wyoming will implement—including when and how wolves will be killed—is to review specific, implementing regulations that would interpret and apply the plan. Those regulations do not currently exist. None of the current or proposed Wyoming laws or regulations provide adequate protection for wolves to ensure their survival absent the protections of the ESA.

The Wyoming Plan and State Law are Inadequate Regulatory Mechanisms Because They Lack Funding for Implementation. The 2007 draft Wyoming plan is also an inadequate regulatory mechanism because no funding exists for its implementation. The lack of assurances that the 2007 draft plan will be fully funded makes FWS' reliance on the plan's resource-intensive monitoring and regulatory regime inappropriate.

The 2007 draft plan predicts that wolf management in Wyoming will cost approximately \$615,900 annually. This figure underestimates actual management costs. The estimate “presume[s] that the Department will assume management authority in 2004.” 2007 Wyoming Plan at 31. However, Wyoming will assume wolf management responsibilities in 2008 at the earliest. Wyoming must plan for management costs that reflect inflation and other sources of cost increases since 2004. Indeed, Wyoming's 2004 request to Congress for federal wolf management funding included \$778,800 for wolf management in 2008, a year in which federal agencies would continue to provide many wolf monitoring and management services. A.R. at 10394. Governor Freudenthal has acknowledged that the projected management costs “no longer reflect the current estimated costs of gray wolf management in Wyoming.” May 24, 2007 Gov. Freudenthal Letter at 2.

Wyoming's cost estimate is also inaccurate because it assumes “that wolf abundance and distribution will be similar to existing conditions.” 2007 Wyoming Plan at 31. It is not reasonable to assume that wolf abundance and distribution will remain stable after delisting. In fact, Wyoming has committed to eliminating all but 100-150 of its wolves. Managing for a minimum number of wolves, while attempting to ensure that the wolf population does not drop below the FWS minimum recovery level, will require intensive and costly monitoring efforts. According to Wyoming law, “[p]opulation monitoring shall include the use of global positioning systems and radio collaring of gray wolves, including use of aerial tracking, necessary to accurately determine the population and movement of gray wolves in the state.” Wyo. Stat. § 23-1-304(d). These efforts will be most intensive immediately after delisting, when “it will be necessary for the Department [of Game and Fish] to monitor the number of breeding pairs residing in Wyoming, regardless of legal classification, and document their distribution, reproduction, and mortality.” 2007 Wyoming Plan at 12. It is inconceivable that these activities will cost only \$90,000 annually, as projected by Wyoming. *Id.* at 31.

Perhaps most troubling, Wyoming does not provide any assurance that state funding will be made available even for the underestimated budget projections included in the 2007 draft Wyoming plan. The plan states that Wyoming's “participation in wolf management is predicated upon securing a stable, long-term source of funding.” *Id.* at 29. Wyoming expects this funding to come from the federal government. *Id.* at 30 (“For the foreseeable future, the

funding effort will focus on annual congressional appropriations for the three States.”). However, the receipt of annual appropriations from Congress is entirely speculative.

Funding for implementation of the 2007 draft Wyoming plan is uncertain, and the Service cannot rely on uncertain future conservation efforts when determining a species’ listing status. See, e.g., Center for Biological Diversity v. Morgenweck, 351 F. Supp. 2d 1137, 1141 (D. Colo. 2004) (“The law is clear that FWS cannot consider future conservation efforts in its review of the Petition.”) (citations omitted). Funding is an integral part of future conservation efforts, and the lack of assured funding has been an additional reason for courts to reject listing determinations. See Fed. of Fly Fishers v. Daley, 131 F. Supp. 2d 1158, 1167-68 (N.D. Cal. 2000) (finding reliance on future conservation measures improper where “[o]ther than a budget change proposal, NMFS cited no funding that had been definitively earmarked toward realizing [the state agency’s] commitments”). Because Wyoming has no secure source of funding for activities that are essential to its proposed efforts to manage wolves after delisting, the 2007 draft Wyoming plan is not an adequate existing regulatory mechanism under 16 U.S.C. § 1533(a)(1)(D).

FWS Fails to Assess Whether Anti-Wolf County Ordinances that Are Currently Prohibited by the ESA Imperil the Gray Wolf. Numerous counties within the proposed DPS boundaries have passed resolutions or ordinances declaring wolves an unacceptable or unwanted species, embodying the counties’ hostility toward wolves. In Wyoming at least five counties—Sublette, Park, Fremont, Carbon, and Lincoln—have adopted resolutions hostile to wolves and wolf recovery.

Although the delisting proposal assumes that states, rather than local governments, will have control over wolf management post-delisting, counties will gain some control over the fate of wolves within their borders once federal protections are lifted. Wyoming law provides for countywide “predator management districts,” whose boards of directors primarily consist of sheep, goat, and cattle owners, that are charged with implementing a “predator management program” for the “control of predatory animals and predacious birds that prey upon and destroy livestock, other domestic animals and wildlife.” Wyo. Stat. § 11-6-205. Wyoming law defines “predators” to include wolves everywhere outside of the “trophy game” boundary. See Wyo. Stat. § 11-6-302(a)(ix). Wolves are classified as predators within at least part of every Wyoming county that has adopted an “anti-wolf” resolution. In addition, under Wyoming law, counties have general regulatory power. FWS has failed to even identify, let alone assess the impacts on wolf recovery, of duly adopted county ordinances that are openly hostile toward wolf recovery in Wyoming.

The Delisting Proposal Fails to Establish Protocols to Ensure Coordination Between States and Consistency Among State Wolf Monitoring and Management Efforts After Delisting. Coordination and consistency of wolf monitoring and management between states are especially important post-delisting because federal legal oversight will cease. The plans and laws for the three states are different in many regards, including the conditions upon which wolves can be killed. Further, they could differ even more markedly after delisting, depending on such factors as the current political leadership and availability of funds. And, if the measures for counting

wolves are changed in some states but not others, it could be increasingly difficult to ascertain what is happening to wolves on a DPS or an ecosystem-wide scale after delisting.

In its initial and supplemental delisting rule, FWS did nothing to ensure meaningful coordination of wolf recovery efforts among the involved states. This failure invites a number of problematic future scenarios. What happens, for example, if one state allows excessive mortality of wolves? Is another state required to compensate by killing fewer animals to attain recovery goals? What happens if one state, such as Wyoming, changes its measurement from breeding pairs to packs (groups of wolves traveling together), while another does not? How can there be a biologically defensible, DPS or ecosystem-wide count if the measures used by the states are different? The implications of these questions become more problematic if states are deliberately managing wolves at minimum levels, as Wyoming and Idaho intend.

In a similar situation involving Greater Yellowstone grizzly bears, FWS established a system for ensuring coordination among states via the development of a coordinated conservation strategy and delisting proposal. First, FWS required the development of a committee, comprised of state and federal land managers, to coordinate management after delisting. Second, FWS attempted to ensure consistency of state and federal monitoring of bear numbers, mortalities, conflicts, and habitat conditions, through the annual reporting efforts of the Interagency Grizzly Bear Study Team. These requirements resulted from 30 years of grizzly management, which involved historical problems created by differences in monitoring and data collection about mortality and other issues among the three states. While the monitoring system for grizzly bears has its own set of faults, at least FWS required a uniform, consistent set of monitoring protocols that would be employed following delisting. In the case of wolves, which are similarly wide-ranging, FWS has failed to require similar kinds of coordination and consistency in monitoring the wolf populations following delisting.

Absent such coordination and consistency, monitoring for a recovered wolf population will be inadequate. Without a reliable means of monitoring wolf populations, regulatory mechanisms are necessarily inadequate because there will be no legitimate basis to evaluate population status and trends after delisting.

CONCLUSION

For the reasons describe above and in our previous comment letter, FWS's DPS and delisting proposals are deeply flawed. The Service's current proposal to sweep Wyoming within the delisting proposal despite FWS's recent rejection of major components of Wyoming wolf law is based on political expediency, not biology. FWS also seems poised to dramatically weaken the breeding pair definition that has been used by the Service since the wolf reintroduction began. With legitimate wolf recovery in the Northern Rockies within sight, FWS is working on several fronts to reverse the hard-earned wolf recover gains of recent years. We urge FWS to show the vision and leadership to attain true gray wolf biological recovery in the Northern Rockies and withdraw the current proposals.

Sincerely,

A handwritten signature in black ink that reads "Doug Honnold". The signature is written in a cursive style with a large, looped initial "D".

Douglas Honnold
Jenny Harbine