April 22, 2024

Deb Haaland, Secretary
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Martha Williams, Director
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By Email and Certified USPS Mail

Re: Notice of Intent to Sue over the Not Warranted Finding for the Gray Wolf in the Northern Rocky Mountains and the Western United States

Dear Secretary Haaland and Director Williams:

On behalf of Animal Wellness Action (AWA), the Center for a Humane Economy (the Center), Project Coyote, the Kettle Range Conservation Group, Footloose Montana, and the Gallatin Wildlife Association, I write to provide notice pursuant to 16 U.S.C. § 1540(g)(2) of our intention to seek legal redress for the U.S. Fish and Wildlife Service's (FWS) February 2, 2024 finding that Western United States gray wolf does not warrant listing ("Finding").[1]

In 2021, AWA, the Center, Project Coyote, Kettle Range Conservation Group, Footloose Montana, the Gallatin Wildlife Association, and dozens of other organizations filed a petition with the FWS requesting federal ESA protections for gray wolves in the Western United States ("Western gray wolves") or, in the alternative, gray wolves Northern Rocky Mountains ("NRM gray wolves").

Though the FWS released an initial 90-day finding in September 2021 that the petitioned action "may be warranted,"[2] it now reverses course in its 2024 Finding.

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[1] U.S. Fish & Wildlife Serv., Finding for the Gray Wolf in the Northern Rocky Mountains and Western United States, Docket No. FWS-HQ-ES-2021-0106, 89 Fed. Reg. 8,391 (Feb. 7, 2024). (This publication also included a finding denying a second 2021 petition that sought emergency relisting of the NRM gray wolf.)

[2] 90-Day Finding for Two Petitions To List the Gray Wolf in the Western United States, 86 Fed. Reg. 51,857–59 (Sept. 17, 2021).

As detailed below, the failure to list the Western U.S. gray wolf violates the Endangered Species Act of 1973 (ESA) and the Administrative Procedure Act (APA).

I. Statutory and Regulatory Background

The "plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost."[3] The ESA is "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species."[4]

The ESA directs the Secretary of the Interior, through the FWS, to list species that he determines are endangered or threatened.[5] The ESA defines an "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range."[6] The ESA also protects species in less immediate peril, which FWS may list as "threatened species." A threatened specifies refers to "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[7] Under § 4(d) of the ESA, FWS must issue regulations "necessary and advisable to provide for the conservation of [endangered and threatened] species."[8]

Listing decisions must be made "solely on the basis of the best scientific and commercial data available * * * ."[9] The ESA requires the FWS to list a species if they are an endangered or threatened species due to one of the following five factors:

> (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.[10]

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[3] *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).
[4] 16 U.S.C. § 1531(b).
[5] *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1064 (D.C. Cir. 2003).
[6] 16 U.S.C. § 1532(6).
[7] 16 U.S.C. § 1532(20).
[8] 16 U.S.C. § 1533(d).
[9] 16 U.S.C. § 1533(b)(1)(A).
[10] 16 U.S.C. § 1533(a)(1).

FWS listing determinations are subject to review under § 706 of the APA.[11,12] Under that standard, a reviewing court must overturn an agency decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[13] A reviewing court "must not 'rubber-stamp * * * administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'"[14]

II. Factual Background

Between 1966 and 1976, the FWS and predecessor agencies declared as endangered regional subspecies of the taxonomic species "gray wolf" (*Canis lupis*).[15] In 1978, the FWS downlisted the gray wolf in Minnesota to threatened but kept the gray wolf in the endangered category for the remaining States (excluding Alaska).[16] In 1995 and 1996, the FWS reintroduced wolves to Idaho and Yellowstone National Park.[17] Just several years after reintroducing wolves, the FWS began efforts to remove ESA protections for wolves.[18]

In 2003, FWS issued a rule subdividing the gray wolf listing into three "distinct population segments" (DPS) – an Eastern segment, a Western segment, and a Southwestern segment – and downlisting the Eastern and Western segments as threatened instead of endangered.[19] Two district courts subsequently invalidated the 2003 Rule's attempted designation of those three segments.[20]

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[11] 5 U.S.C. § 706.
[12] *Humane Soc'y of United States v. Zinke*, 865 F.3d 585, 595 (D.C. Cir. 2017).
[13] 5 U.S.C. § 706(2)(A).
[14] *Bureau of Alcohol, Tobacco and Firearms v. Fair Lab. Rel. Auth.*, 464 U.S. 89, 97 (1983) (quoting *Nat'l Lab. Rel. Bd. v. Brown*, 380 U.S. 278, 291–292 (1965)).
[15] *Humane Soc'y*, 865 F.3d at 591.
[16] *See* Reclassification of the Gray Wolf in the United States and Mexico, with Determination of Critical Habitat in Michigan and Minnesota, 43 Fed. Reg. 9,607, 9,608, 9,612 (Mar. 9, 1978).
[17] *See* Proposal To Reclassify and Remove the Gray Wolf From the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States; Proposal To Establish Three Special Regulations for Threatened Gray Wolves, 65 Fed. Reg. 43,450, 43,457 (July 13, 2000).
[18] *Id.* at 43,450.
[19] Final Rule to Reclassify and Remove the Gray Wolf From the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States; Establishment of Two Special Regulations for Threatened Gray Wolves, 68 Fed. Reg. 15,804, 15,818 (Apr. 1, 2003).
[20] *Defs. of Wildlife v. U.S. Dep't of the Interior*, 354 F. Supp. 2d 1156, 1170-72 (D. Or. 2005); *Nat'l Fed'n v. Norton*, 386 F. Supp. 2d 553, 564-65 (D. Vt. 2005).

In 2009, the FWS simultaneously identified and delisted a new gray wolf DPS – the Northern Rocky Mountain (NRM) population.[21] Although the rule was struck down in court,[22] it was then reinstated by an act of Congress in 2011, circumventing the critical judicial review.[23] This legislation directed the FWS to delist the NRM population, excepting the portion of it located in Wyoming. Then, after multiple delisting attempts and court reversals, the Wyoming gray wolf was delisted in 2017 and has been since.[24]

Therefore, since 2011, Idaho and Montana have been responsible for management of gray wolves within their borders, and since 2017, Wyoming has had uninterrupted management of gray wolves within the state.[25]

The wolf populations in Idaho, Montana, and Wyoming are of particular importance for other Western states and for the success of the species' recolonization of significant portions of their former range. Washington relies on dispersing wolves from source populations located in Idaho and Montana, and Colorado relies on source populations in Wyoming. Oregon similarly relies on dispersing wolves from its northern neighbors Idaho and Washington. California, in turn, receives dispersals of wolves from Oregon.

III. Reasons the Finding Violates the ESA and APA

The FWS should withdraw its current Finding for the following reasons:

First, the FWS failed to properly analyze and consider the ESA's section 4(a) five factors, in particular with respect to the recreational overutilization (hunting) of the Western gray wolf, the inadequacy of existing regulatory mechanisms, and the effect of manmade factors such as politics and socio-political sentiment on the species' continued existence.

Second, the FWS failed to use the best available science. This failure fundamentally flaws its Finding, specifically with regards to regional population projections and continued genetic health of the species.

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[21] Final Rule to Identify the Northern Rocky Mountain Gray Wolf DPS and Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15,123 (Apr. 2, 2009).
[22] *Defs. of Wildlife v. Salazar*, 729 F. Supp. 2d 1207, 1228 (D. Mont. Aug. 5, 2010).
[23] Department of Defense and Full-Year Appropriations Act, 2011, Pub. L. No. 112-10, § 1713, 125 Stat. 150 (2011).
[24] Endangered and Threatened Wildlife and Plants; Reinstatement of Removal of Federal Protections for Gray Wolves in Wyoming, 82 Fed. Reg. 20,284 (May 1, 2017).
[25] The 2009 rule adopted by Congress in 2011 also delisted wolves in the eastern reaches of Oregon and Washington, and a small portion of Utah.

Finally, FWS failed to properly consider and analyze the danger of the Western gray wolf's extinction "in all or a significant portion of its range," as the ESA demands.[26]

The FWS also violated the APA by abusing its discretion and acting arbitrarily and capriciously and otherwise in violation of the law, by the above failures.

A. FWS Failed to Properly Analyze and Account for the Inadequacy of Existing Regulatory Mechanisms, Overutilization, and the Effect of Other Manmade Factors.

The FWS has failed to properly analyze and consider the impacts of current state wolf regulatory schemes, over-hunting of wolves, and the effects of sociopolitical winds and anti-wolf sentiment brewing in Western states. While the latter manmade factors are not easily quantified scientifically, the ESA nevertheless demands their careful consideration.[27] The FWS has underestimated the combined, or cumulative, effect of these factors on the gray wolf's future survival.

1. Existing Regulatory Mechanisms and Overutilization

The ESA requires consideration and evaluation of existing regulatory mechanisms absent the species' listing.[28] However, the FWS's consideration of other regulatory mechanisms in its Finding fails to account for the trending political wins that inform state regulatory decisions such as harvest rates and makes unsupported assumptions.

As one example, the FWS briefly discusses the harvest rates of Oregon and Washington, concluding that the likely future harvest rates are zero for Oregon and limited tribal harvest in Washington. The FWS neglected, however, to account for the Oregon Legislature's mandated delisting of the gray wolf as endangered under the Oregon ESA.[29] Then, Oregon's 2019 state management plan opened the proverbial door to legal hunting and trapping in the future.[30] This must be taken into account with the currently stagnant rates of wolf growth in Oregon and record-setting levels of poaching of wolves since 2021 (*see* discussion *infra* Section 2c). Despite Oregon offering nearly 68,500 square kilometers (26,400 square miles) of

[26] 16 U.S.C. § 1532(6), (20).
[27] 16 U.S.C. § 1533.
[28] 16 U.S.C. § 1533(a)(1)(D).
[29] *Cascadia Wildlands v. Dep't of Fish & Wildlife*, 300 Or. App. 648, 655, 455 P.3d 950, 951 (2019) (quoting ORS 496.172(1)).
[30] OREGON DEP'T NAT. RES., OREGON WOLF CONSERVATION AND MANAGEMENT PLAN 31-32 (June 2019).

potential wolf habitat that could support a population of approximately 1,450 wolves,[31] Oregon's wolf count remains below 180 total and growth has stalled.[32]

While previously the gray wolf has been classified as endangered under Washington state law, Washington is currently seeking public comment on a proposal to reclassify the gray wolf from endangered status to sensitive status.[33] And while the FWS states that there is "limited" tribal harvest, in 2019, the Confederated Tribes of the Colville Reservation removed season limits and bag limits on wolf hunting.[34]

Several of the relevant states have virtually no protections for the gray wolf; what's more, the trends in these states wolf management practices suggest that wolf hunting and trapping will continue to rise.

Utah requires state wildlife officials to prevent the establishment of a viable wolf pack by extermination of any wolves coming into the state.[35]

In Wyoming, wolves may be taken by any legal means year-round and without limit in the "Predatory Animal Area," which covers most of the state.[36] Since 2022, Wyoming only allows for 160 wolves total in the state; its hunting season's "biological objective" is "to stabilize the wolf population at approximately 160 wolves in the WTGMA [Wolf Trophy Game Management Area, which covers most of the state outside Yellowstone National Park and Wind River Reservation]."[37]

In 2023, Idaho finalized a new wolf management plan that stated an objective of reducing an estimated peak population of 1,337 wolves in 2022, to a population of

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[31] Tad Larsen & William J. Ripple, *Modeling Gray Wolf (*Canis lupus*) habitat in the Pacific Northwest*, U.S.A., 2 J. OF CONSERVATION PLANNING 17, 26 (2006).
[32] OREGON DEP'T FISH &. WILDLIFE, OREGON WOLF CONSERVATION AND MANAGEMENT 2023 ANNUAL REPORT 4 (2024).
[33] *WDFW opens public comment period for rule making on proposed status change for the gray wolf*, WASHINGTON DEP'T FISH & WILDLIFE (Feb. 7, 2024), https://wdfw.wa.gov/newsroom/wdfw-opens-public-comment-period-rule-making-proposed-status-change-gray-wolf.
[34] *Monthly Wolf Report March 2019*, WASHINGTON DEP'T FISH & WILDLIFE (Apr. 5, 2019), https://wdfw.wa.gov/species-habitats/at-risk/species-recovery/gray-wolf/updates/monthly-wolf-report-march-2019.
[35] Utah Code § 23-29-201(2).
[36] Wyoming Statute § 23-2-303(d), 23-3-103(a), 23-3-112, 23-3-304(b), 23-3-305, and 23-3-307.
[37] WYOMING GAME AND FISH DEP'T, WYOMING GRAY WOLF MONITORING AND MANAGEMENT: 2022 ANNUAL REPORT 16 (2023).

approximately 500 wolves in the future.[38] In Idaho, wolves may be taken year-round, with no daily or season bag limit.[39] For half the year, "expanded hunting methods" are allowed, during which use of dogs, night hunting, bait on private lands, and use of motor vehicles is allowed, and weapons restrictions no longer apply.[40]

Also in 2023, Montana published a draft wolf management plan in which the objective is reduce the state's population to around 450 wolves.[41] In Montana, wolves may be taken by methods including firearms, snaring, trapping, baiting, and, on private land, at night and with artificial lights and night scopes.[42] In 2021, Montana passed a law that, among other wolf killing liberalizing provisions, authorizes the Fish and Wildlife Commission to permit the harvest of an unlimited number of wolves by the holder of a single wolf hunting or wolf trapping .[43]

In their 2009 rule delisting the NRM wolf, the FWS stated that "if a State changed their regulatory framework to authorize the unlimited and unregulated taking of wolves … emergency listing would be immediately pursued."[44] Given the above state management regimes that allow for virtually unlimited and unregulated hunting and trapping of wolves, it is clear the FWS is failing to follow through on its commitment. Even in its February 2, 2024 press release describing the Finding, the FWS unequivocally acknowledged that "[t]he states of Montana and Idaho recently adopted laws and regulations designed to substantially reduce the gray wolf populations in their states using means and measures that are at odds with modern professional wildlife management."[45]

Further, the FWS' models assume that Idaho and Montana's current 2023 plan and draft plan, respectively, will continue unchanged. This is a deeply flawed assumption, given several factors. First, is the ever-increasing politicization of the

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[38] IDAHO DEP'T OF FISH AND GAME, IDAHO GRAY WOLF MANAGEMENT PLAN 2023–2028, 39 (2023).
[39] IDAHO DEP'T OF FISH AND GAME, IDAHO BIG GAME 2024 SEASONS & RULES 77-80 (2d ed. 2024).
[40] *Id.*
[41] MONTANA FISH, WILDLIFE, AND PARKS, MONTANA GRAY WOLF CONSERVATION AND MANAGEMENT PLAN 2023 5 (2023).
[42] MONTANA FISH, WILDLIFE, AND PARKS, TRAPPING AND HUNTING REGULATIONS – WOLF FURBEARER TRAPPING 2023 15 (2023).
[43] S.B. 314, 67th Leg. (Mont. 2021).
[44] Final Rule To Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and To Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15,123, 15,148 (Apr. 2, 2009).
[45] *U.S. Fish and Wildlife Service completes status review and finding for gray wolves in the Western United States; launches National Recovery Plan*, U.S. FISH & WILDLIFE SERVICE (Feb. 2, 2024), https://www.fws.gov/press-release/2024-02/service-announces-gray-wolf-finding-and-national-recovery-plan.

gray wolf combined with the general hyper-partisan and hyper-adversarial condition of modern American politics. Second, after the passage of bills in 2021, the management of wolves in both Idaho and Montana have moved substantially from the state agencies to the legislatures.[46] Even the Idaho Fish and Game Commission opposed that state's 2021 Senate Bill 1211[47] (as well as many other sportsman and hunting groups[48]), and Montana's Fish, Wildlife, and Parks Department (FWP) as well as Montana Governor Gianforte's own office opposed a set of 2023 bills that stripped discretion from the Montana FWP.[49] Third, while Idaho's new wolf management plan issued in 2023 states a wolf population goal of around 500, the publicly stated intent of lawmakers behind Idaho's Senate Bill 1211, which was passed in 2021, was to ultimately reduce the population to around 150 (about a 90% reduction).[50] It remains to be seen how the power play between the Idaho Legislature and the state agency will ultimately play out, but it is foolish to fail to recognize that politicians are now largely managing wolves in Idaho – rather than scientists.

In sum, FWS's unsupported conclusions regarding these states' future management plans, harvest rates, and minimum populations, violates the APA for being arbitrary, capricious, and an abuse of discretion and also violates the ESA.

2. Other Manmade Factors

a. Wolves As Political Symbol

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[46] S.B. 1211, 66th Leg. (Idaho 2021); H.B. 224, 67th Leg. (Mont. 2021); H.B. 225, 67th Leg. (Mont. 2021), S.B. 314, 67th Leg. (Mont. 2021); *see also* H.B. 627, 68th Leg. (Mont. 2023); H.B. 628, 68th Leg. (Mont. 2023).

[47] Keith Ridler, *Bill to kill up to 90% of Idaho wolves signed by governor*, ASSOCIATED PRESS (May 7, 2021), https://apnews.com/article/us-news-idaho-lifestyle-wolves-bills-f83cd2449975c977d167c0509bccab24.

[48] *See, e.g.*, *Idaho Senate Bill 1211*, BACKCOUNTRY HUNTERS & ANGLERS (June 23, 2021), https://www.backcountryhunters.org/idaho_senate_bill_1211.

[49] Amanda Eggert, *Committee votes on four wolf bills as legislative deadline nears*, MONTANA FREE PRESS (Mar. 1, 2023), https://montanafreepress.org/2023/03/01/wolf-bills-montana-legislature/.

[50] The Associated Press has published multiple arguments made by lawmakers sponsoring the bill, such as Idaho Sen. Mark Harris who said on the Senate Floor, "These wolves, there's too many in the state of Idaho now. We're supposed to have 15 packs, 150 wolves. We're up to 1,553, was the last count, 1,556, something like that. They're destroying ranchers. They're destroying wildlife. This is a needed bill," and Idaho Sen. Van Burtenshaw, who said in a committee hearing that the bill would allow for the killing of wolves down to 150 wolves or 15 packs, though he disputed that later. Associated Press, Keith Ridler, *Bill to kill up to 90% of Idaho wolves signed by governor*, THE LEWISTON TRIBUNE (Apr. 22, 2021), https://www.lmtribune.com/northwest/idaho-senate-oks-bill-to-kill-90-percent-of-wolves/article_0ecb71bc-c39a-52ad-b30b-ff10f7fca8b6.html.

Over the past decade, the gray wolf has increasingly become a political flashpoint. Gray wolf conservation – or, alternatively, gray wolf eradication – is no longer just a concern of biologists, environmentalists, and ranchers, but rather has grown to embody an outsize but fundamental political conflict roiling the country, especially since 2021. The FWS has utterly failed to properly account for these sociopolitical aspects, especially those happening in the past three years, in its Species Status Assessment (SSA). And politics has been shown to predict public attitudes towards gray wolves and their management.[51]

In the states in which the continuing viability of wolf populations are the most critical for the health and survivability of the Western gray wolf – namely, Montana, Idaho, and Wyoming – wolf management is no longer driven by evidence-based management principles. Now, as former FWS wolf recovery coordinator Ed Bangs bluntly explains, wolf management is now driven single-mindedly by the motivation to

> ". . . [M]aking 'snowflakes' cry . . . Wild-ass hysteria is driving public policy. . . the legislatures [have] politicized everything and made wolves a symbol of liberals and outsiders. It's 1850s stuff — let's show how much we hate wolves and the people who like them, and let's stick it to the feds."[52]

In the 1850s through the middle of the 20th century, the gray wolf was very nearly eradicated from American soil due to widespread persecution.

b. Loss of State Agency Discretion and Authority

The FWS has assumed that states' management programs as they are at the time of the Finding will continue to be in force and has also assumed that in-state wolf management will be driven primarily or solely by respective state agencies. But as described above, in Idaho and Montana, management decisions that should be made by the appropriate regulatory agency are now being co-opted by the state legislatures. The management plans as they exist today very possibly could see

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[51] Lily M. van Eeden et al., *Political affiliation predicts public attitudes toward gray wolf* (Canis lupus) *conservation and management*, CONSERVATION SCI. AND PRACTICE 1 (Feb. 2021).

[52] Ted Williams, *America's New War on Wolves and Why It Must Be Stopped*, YALEENVIRONMENT360 (Feb. 17, 2022), https://e360.yale.edu/features/americas-new-war-on-wolves-and-why-it-must-be-stopped; *see also* Daniel M. Ashe, *Cruelty toward wolves is erasing conservation efforts. It's time to reinstate their protections.*, WASHINGTON POST (Aug. 3, 2021), https://www.washingtonpost.com/opinions/2021/08/03/wolves-idaho-montana-cruelty-conservation/ (the former director of the FWS stating that "[t]oday, an epidemic of cruelty toward wolves is erasing progress made to conserve this species. The government must immediately reinstate protections for these animals.").

further radicalization, then, too. The FWS failed to adequately take into account the possible impact(s) of politicians, rather than scientists, directing important aspects of wolf management.

c. Politics-Driven Unlawful Take

The FWS also disregarded the fact that illegal poaching of wolves is trending upwards. Oregon just released its 2023 annual wolf report, in which it concluded that the year saw twelve illegal wolf killings (including seven by poison)[53] – a skyrocketing increase on top of the prior two years' own jumps. In 2022, seven Oregon wolves were killed illegally[54]; 2021, eight wolves were found unlawfully killed by poison – wiping out an entire pack, and then some.[55] But in the entire three years before 2021, there were a total of only six unlawful takes.[56] In an April 12, 2024 news release, Oregon's Department of Fish and Wildlife expressed that it "remains extremely concerned about the number of confirmed poaching events and other suspicious deaths of wolves in Oregon."[57]

In Washington in 2022, nine wolves were poached, including six by poison; yet Washington only had two unlawful takes in 2021 and zero to one in 2020 and 2019, for example.[58]

Then there are the examples of wanton and egregious cruelty not seen for decades, such as the February 29, 2024 incident involving a Wyoming man who ran down a gray wolf with a snowmobile, captured it, taped its muzzle shut, paraded it in a local bar while subjecting it to extended and drawn-out abuse – including going so far as to kiss the dying wolf while being filmed; the wolf too weak to do anything but bare its teeth – and finally killed it.[59]

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[53] *Supra* note 32, at 7.
[54] OREGON DEP'T FISH &. WILDLIFE, OREGON WOLF CONSERVATION AND MANAGEMENT 2022 ANNUAL REPORT 7 (2023).
[55] OREGON DEP'T FISH &. WILDLIFE, OREGON WOLF CONSERVATION AND MANAGEMENT 2021 ANNUAL REPORT 7 (2022).
[56] 2020 had 4, 2019 had 0, 2018 had 2. OREGON DEP'T FISH &. WILDLIFE, OREGON WOLF CONSERVATION AND MANAGEMENT 2020 ANNUAL REPORT 7 (2021); OREGON DEP'T FISH &. WILDLIFE, OREGON WOLF CONSERVATION AND MANAGEMENT 2019 ANNUAL REPORT 7 (2020); OREGON DEP'T FISH &. WILDLIFE, OREGON WOLF CONSERVATION AND MANAGEMENT 2018 ANNUAL REPORT 7 (2019).
[57] *2023 Annual Wolf Report Available*, OREGON DEP'T OF FISH AND WILDLIFE WOLF UPDATES (April 12, 2024), https://dfw.state.or.us/wolves/updates.html.
[58] WASHINGTON DEP'T OF FISH AND WILDLIFE, WASHINGTON GRAY WOLF CONSERVATION AND MANAGEMENT 2022 ANNUAL REPORT 21 (2023).
[59] *See, e.g.*, Mark Heinz, *Wyoming Game and Fish Commission Blasts Wolf Abuse*, COWBOY STATE DAILY (Apr. 16, 2024), https://cowboystatedaily.com/2024/04/16/wyoming-game-and-fish-commission-blasts-wolf-torment/; Mike Koshmrl, *Eyewitness describes wolf's final hours in a rural Wyoming bar*, THE COLORADO SUN (Apr. 16, 2024),

If these rates – roughly anywhere between 300% to 500% – of increase in criminal activity were to happen in any other scenario, and concomitantly such public displays of viciousness and brutality, it would be called an epidemic.

Not only are poaching rates trending exponentially upwards, but studies suggest that most unlawful take is never discovered. This undiscovered, unreported poaching is termed "cryptic poaching."[60] There is strong evidence to suggest that the effect of poaching on the mortality of wolves is far underestimated, as the SSA discusses but largely dismisses.[61] There is evidenced systematic underestimation of poaching within all Lower 48 wolf populations.[62] Corrected estimates of poaching suggest illegal killing is one of the, if not the, largest sources of human caused mortality for wolves, including within the NRM.[63] Unaccounted poaching may account for 46% to 59% of total mortality for the NRM wolf population, which alone raises concerns over wolf population viability. A recent study[64] found that tracking collars can have a positive effect on the survival of large carnivores through potentially dissuading poachers, which suggests there is an even higher risk of poaching for non-monitored individual wolves – and it is these same non-monitored wolves whose take would most likely go unnoticed.

Further, recent science suggests that, counter to what had been commonly thought, the more relaxed and permissive the management and hunting laws over a carnivore, the more illegal deaths that occur. Chapron and Treves[65] analyzed data from periods during which no hunting or trapping seasons were held, and during which the only killing allowed was by government agents. That study concluded that even with that type of selective killing by government agents, the notion that liberalized killing of large carnivores can be a useful tool to decrease illegal killing "has no support" and that "liberalizing killing appears to be a conservation strategy that may achieve the opposite outcome than that intended."[66] In other words, it is at best unlikely that legalizing killing decreases poaching, and at worst, liberalized legal killing leads to an increase in unlawful take too. Research in other U.S. wolf

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https://coloradosun.com/2024/04/16/dying-wolf-struck-by-snowmobile-shown-off-in-wyoming-bar/.

[60] *See* Olof Liberg et al., *Shoot, shovel and shut up: cryptic poaching slows restoration of a large carnivore in Europe*, 279 PROCE. ROYAL SOC'Y B 910 (2012).

[61] U.S. FISH AND WILDLIFE SERV., SPECIES STATUS ASSESSMENT FOR THE GRAY WOLF (CANIS LUPUS) IN THE WESTERN UNITED STATES 46 (Dec. 22, 2023) ("SSA").

[62] *See, e.g.*, Adrian Treves et al., *Mismeasured mortality: correcting estimates of wolf poaching in the United States*, J. MAMMALOGY 1 (2017).

[63] *Id.*

[64] Cyril Milleret et al., *GPS collars have an apparent positive effect on the survival of a large carnivore*, BIOLOGY LETTERS 1 (2021).

[65] Guillaume Chapron & Adrian Treves, *Blood does not buy goodwill: allowing culling increases poaching of a large carnivore*, 283 PROCE. ROYAL SOC'Y B 1 (2016).

[66] *Id.* at 5.

populations (Wisconsin and Mexican gray wolves) has also suggested that poaching increases with liberalized killing.[67]

Thus it is likely that a higher rate of unlawful take will continue for the foreseeable future – and also possible that the rate of unlawful take will continue to increase rather than plateau at the current, too-high rate.

B. FWS Failed to Use the Best Available Science.

Listing decisions must be made "solely on the basis of the best scientific and commercial data available * * * *."[68] The FWS's failure here to "rationally consider and apply the best available science, as demanded by the APA and the ESA" will result in the federal courts vacating and remanding the Finding.[69] The FWS has done this before with respect to the gray wolf – the D.C. Circuit found that the FWS's 2013 gray wolf delisting proposal failed to consider rationally the best available science. The Finding here will meet a similar fate.

1. The FWS Relies on Montana's and Idaho's Unreliable Population Count Methods.

Both Idaho and Montana have in recent years implemented new wolf population estimation methods. Both systems have been subject to heavy criticism from experts, most notably and recently by Creel (criticizing both Idaho and Montana's specific methods)[70] and Crabtree (criticizing spatial models more generally and Montana's specifically).[71]

i. STE

Idaho implemented its new method in 2019, installing about 500 trail cameras that take photographs at timed intervals and upon the detection of motion. It then applies a statistical model called a "space-to-event" (or STE) model to find

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[67] *See, e.g.*, Naomi X. Louchouarn et al., *Evaluating how lethal management affects poaching of Mexican wolves*, 8 ROYAL SOC'Y OPEN SCI. 1 (2021); Francisco J. Santiago-Ávila et al., *Liberalizing the killing of endangered wolves was associated with more disappearances of collared individuals in Wisconsin, USA*, 10 SCI. REPORTS (2020).
[68] 16 U.S.C. § 1533(b)(1)(A).
[69] *Crow Indian Tribe v. United States*, 343 F. Supp. 3d 999, 1016 (D. Mont. 2018), *remanded on other grounds*, 965 F.3d 662 (9th Cir. 2020).
[70] Scott Creel, *Methods to estimate population sizes of wolves in Idaho and Montana*, Dep't of Ecology at Montana State University (2022), *available at* https://westernwatersheds.org/wp-content/uploads/2024/02/Creel-Wolf-Report_FINAL.pdf.
[71] Robert L. Crabtree, *Misleading overestimation bias in methods to estimate wolf abundance that use spatial models.*, Yellowstone Ecological Research Center 1 (2023), *available at* https://www.cabidigitallibrary.org/doi/10.31220/agriRxiv.2023.00215.

the average amount of space between wolves, and finally uses that average to estimate the statewide population size.

Creel[72] argues, joining other expert voices he cites,[73] that in order for STE to yield accurate population size estimates, numerous "critical assumptions" must be met, and rarely does real world population data hold true to these assumptions. There are also inherent limitations to STE models. Examining Idaho's use of STE, Creel identified six different assumption violations, as well as two other fundamental flaws (errors in extrapolation and a large hole in data due to wolf elusiveness).

"Taken together," Creel summarizes, "these problems do not allow confidence in the population estimates for Idaho wolves, or the associated inference that greatly liberalized hunting has essentially no effect on population size."[74]

ii. iPOM

Montana switched from its Patch Occupancy Model to an "integrated" Patch Occupancy Model, or iPOM, in 2021. iPOM uses three submodels, which compounds error, and two of the three models are properly meant to estimate distribution rather than abundance (as discussed below).[75]

Creel critically assessed[76] the iPOM methodology for estimating wolf populations, pointing out fundamental deficiencies in its three key components: estimation of area occupied by wolves, estimation of territory size, and estimation of pack size. In his assessment, Creel provided evidence that the reliance on data from hunter sightings and reports for estimating area occupied is flawed, leading to a high likelihood of false positives and subsequent population overestimation. He deemed the method for estimating territory size unreliable, given its dependence on questionable, coarse, and mutually dependent variables, as well as insufficient data clusters which limit the predictive power. Creel also critiqued the model for estimating pack size for its imprecise regression slope and inability to detect changes over time, raising concerns about its suitability for accurate conservation and management guidance.

In a more recent study (which was conducted independently of Creel's),[77] Crabtree provides empirical evidence that the iPOM methodology is plagued by a

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[72] Creel, *supra* note 70, at 3-8.
[73] *Id.* at 3 ("it is widely recognized that such mismatches lead to inaccurate population estimates . . ." (omitting references)).
[74] *Id.* at 8.
[75] Crabtree, *supra* note 71.
[76] Creel, *supra* note 70.
[77] Crabtree, *supra* note 71.

significant flaw, leading to a 150% overestimation bias in its wolf population estimates. This bias stems from a critical assumption violation related to wolf pack occupancy stability during fall surveys, exacerbated by the use of large grid cells that include unoccupied areas. The inherent problem in using occupancy modeling to estimate the area occupied by wolves is that any wolf sighting within a large cell leads to the inclusion of the entire 600 km2 cell area in the total area occupied by wolf packs. These packs are assumed to be spatially and numerically stable during the survey period, and the iPOM method compounds this issue by relying on hunter surveys, which 'confirm' observations as those of territorial pack members (rather than lone wolves). The issue with relying on such assumptions and observations is that the survey occurs during the fall, a period marked by spatial and numerical instability in packs due to a natural decrease in territorial behavior, dispersal of young wolves, and hunter-induced mortality. Additionally, Crabtree identified structural deficiencies, such as the lack of hierarchical integration and sensitivity to estimation errors, that further compromise the accuracy of iPOM's abundance estimates.

In sum, experts have persuasively unveiled severe deficiencies in iPOM and should undermine the FWS's confidence that the wolf population estimate and trends that iPOM provides are accurate and scientifically valid data that can be used to assess wolf status.

In sum, there is persuasive evidence that both STE and iPOM lead to substantial overestimation biases and that they cannot accurately detect changes in population. There have been enough serious questions raised about the accuracy of each model that the FWS cannot and should not rely on these methods when it is under the legal obligation to use the best available science and data.

2. The FWS Has Failed to Adequately Analyze and Consider Genetic Health, Gene Flow, and Connectivity.

The FWS has repeatedly asserted in the SSA that the Western gray wolf is genetically healthy. It supports this assertion through un-peer-reviewed, unpublished data from 2021, from which the FWS estimated the average ratio of effective to census population size to be 0.17, with a 95% confidence interval between 0.12 and 0.26. However, the FWS's approach to the gray wolf's genetic health has been criticized many times.

A recently published study by vonHoldt et al. (2023)[78] on gray wolf genetics and effective population size presents new research findings that, taken together

[78] Bridgett M. vonHoldt et al., *Demographic History Shapes North American Gray Wolf Genomic Diversity and Informs Species' Conservation*, MOLECULAR ECOLOGY (2023), *available at* https://onlinelibrary.wiley.com/doi/full/10.1111/mec.17231.

with the flawed populations models employed by Montana and Idaho, further undermine the accuracy of long-term population viability claims made in the SSA.

VonHoldt et al. found that effective population size – as opposed to census size – is a more accurate and relevant metric when assessing long term population viability and genomic diversity of gray wolves. According to their study, effective population size for gray wolves in the U.S. falls somewhere between 5.2-9.3% of census size. Applying this calculation specifically to NRM wolves, the effective population size ranges between 201 and 335 individuals. This study joins other studies in arguing for an effective population size of >500 in order to ensure long-term viability and genetic diversity within a population.[79,80] Falling well below 500, this is a clear indication that NRM states are currently failing to meet bare minimum effective population size for long-term viability.

In addition to finding effective population levels well below what is required for long-term viability, vonHoldt et al. also found eroding genetic diversity and higher inbreeding in NRM wolves since 1990 (as compared to other populations). And worse, this suggests a prediction for further decay in heterozygosity for the NRM population into the future (i.e., a continued decline in genetic diversity).

On top of an inadequate analysis of genetic health, the FWS fails to adequately analyze the problems with gray wolf connectivity across all nine relevant states. High rates of human-caused wolf mortality affect wolf dispersal and connectivity,[81] and this is especially pertinent given that the high rates occur in Montana, Idaho, and Wyoming: states that contain the ultimate source populations for the other six relevant states. A decline in dispersals from these high-kill states can therefore result in cascading effects across the rest of the Western gray wolf range.

Finally, the FWS also relies on Memoranda of Understanding (MOUs) from 2008 and 2012 to satisfy its obligation to ensure sufficient future connectivity and

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[79] *See, e.g.*, Noelia Pérez-Pereira et al., *Prediction of the minimum effective size of a population viable in the long term*, 31 BIODIVERSITY AND CONSERVATION 2763 (222); Richard Frankham et al., *Genetics in conservation management: Revised recommendations for the 50/500 rules, Red List criteria and population viability analyses*, 170 BIOLOGICAL CONSERVATION 56 (2014); A. Caballero et al., *Inbreeding load and purging: implications for the short-term survival and the conservation management of small populations*, 118 HEREDITY 177 (2017).

[80] *See also* SSA at 20, in which the FWS makes reference to many expert arguments for a 100/1000 rule but concludes ultimately that "a species-specific analysis of population viability is preferrable to these generalized targets [of 50/500 and 100/1,000]," but then offers no species-specific analysis pertaining to the Western gray wolf to support the choice of 50/500 over 100/1,000.

[81] Ana Morales-González et al., *Patterns and determinants of dispersal in grey wolves* (Canis lupus), 97 BIOLOGICAL REVS. 466 (2022).

genetic health.[82] Yet despite these MOUs being well over a decade old, the FWS apparently only has access to data from a single "2021 unpublished report from Wildlife Genetics International," which has not yet been peer-reviewed.[83]

3. The FWS's Population Modelling Makes Unscientific Assumptions.

The FWS' population modelling scenarios in the SSA rely on a number unscientific and unsupported assumptions regarding these management plans, and also use said plans to set artificial limits to their scientific models.

For example, the FWS' modelled harvest scenarios appear to set an artificial floor of 150 wolves for Montana and Idaho each – based on nothing more than these states' current management plans that, for the time being, aim to keep the wolf populations not below 150 wolves. Indeed, the FWS' population model of Harvest Scenario 3 (in which the highest harvest rates were assumed) 'bottoms out' at a population size of approximately 750 wolves for the entirety of the of five states of Idaho, Montana, Wyoming, Oregon and Washington – which is, not coincidentally, 150 x 5 states.[84]

In other words, the FWS population models literally cannot go below 750 wolves total, because it is a built-in and completely unscientifically based assumption that each state will continue, *ad infinitum*, to have a minimum of 150 wolves, based on their *current* so-called 'commitments' – commitments which are, first, subject to political winds (and whims), and second, from states that lack scientifically reliable means of wolf population estimates, as discussed above.

Another clearly absurd assumption the FWS has made is its assignation of a quasi-extinction threshold of only 5 wolves across five states. Obviously, a population size of one wolf per one state is incredibly low, far below what a realistic quasi-extinction rate should be.

Finally, the FWS assumes that future harvest rates will be directly proportional to population size even in states with highly liberalized hunting regulations such as Idaho and Montana – i.e., that as the population declines due to harvest, so will the number of wolves harvested – and also assumed that it will be "difficult" to achieve and sustain higher rates,[85] despite the fact that the gray wolf was eradicated in the 19th century and first half of the 20th century with far less sophisticated technology and techniques, and despite the fact that states have begun to liberalize the methods of wolf take that are permissible.

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[82] SSA at 141.
[83] *Id.*
[84] *See id.*
[85] *See, e.g.*, SSA at 172, 177, 180.

C. FWS Failed to Proper Analyze and Consider the Gray Wolf's Danger of Extinction in All or a Significant Portion of Its Range.

The ESA requires that FWS consider the danger of the subject species' extinction "in all or a significant portion of its range."[86] "This range includes those areas used throughout all or part of the species' life cycle, even if they are not used regularly (e.g., seasonal habitats)."[87]

Although both the D.C. and Ninth Circuits have held that the FWS's interpretation of "range" here to mean "current range" is entitled to deference, "the SPR [significant portion of range] policy still requires that FWS consider the historical range of a species in evaluating other aspects of the agency's listing decision, including habitat degradation."[88] In other words, the FWS cannot simply "brush off a substantial loss of historical range as irrelevant to the species' endangered or threatened status."[89] But in this Finding, the FWS failed to adequately consider the gray wolf's historical range in its analysis; for example, it failed to explain why it neglected to conduct an SPR analysis in areas in which the gray wolf historically occurred and where suitable habitat exists but where wolf populations have not yet established themselves. Indeed, the FWS received peer critique on failing to conduct a "more rigorous evaluation of states without established wolf populations," yet apparently failed to rectify this.[90]

The FWS further failed to adequately explain why it divided the Western gray wolf DPS into the four particular SPRs it chose (Idaho, Montana, the West Coast states, and the NRM) while failing to conduct an SPR analysis for other areas within the gray wolf's current range, such as Wyoming and the rest of the Rockies.

The FWS has simultaneously established the Western gray wolf DPS – defined as the gray wolf across nine Western states – and declared that listing the Western gray wolf is unwarranted, despite the fact that one-third of the states do not have multiple established packs (Colorado, Utah, Nevada), one-third of states

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[86] 16 U.S.C. § 1532(6), (20).
[87] Final Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species," 79 Fed. Reg. 37,578 (July 1, 2014) ("SPR policy").
[88] *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1067 (9th Cir. 2018) (citing *Humane Soc'y*, 865 F.3d at 605–06).
[89] *Humane Soc'y*, 865 F.3d at 605.
[90] Ellen E. Brandell, PEER REVIEW OF SPECIES STATUS ASSESSMENT FOR THE GRAY WOLF (CANIS LUPUS) IN THE WESTERN UNITED STATES 2 (July 21, 2022), *available within* PEER REVIEW (WITHOUT ATTRIBUTION) OF THE SCIENTIFIC INFORMATION IN U.S. FISH AND WILDLIFE SERVICE'S SPECIES STATUS ASSESSMENT FOR THE WESTERN GRAY WOLF (CANIS LUPUS): FINAL REPORT (Sept. 2022), *available via* https://www.regulations.gov/document/FWS-HQ-ES-2021-0106-55882.

have relatively small populations (California, Oregon, Washington), and only a small portion of available, suitable habitat is occupied.

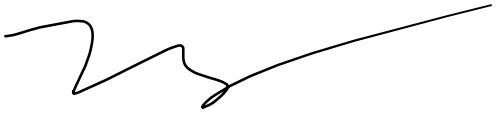
IV. Conclusion

The public is deeply concerned about wolves and has expressed its support for more protections to recover wolves, not fewer. In November 2014, the people of Michigan rejected two efforts by the state legislature to authorize trophy hunting and trapping of wolves through citizens' referendums. Similarly, Washington citizens have been deeply critical of lethal control actions aimed at wolves in 2019 and 2020, filing legal actions, staging protests, and otherwise objecting to policies that favor ranchers over protection of scarce wolves. In November 2020, the voters of Colorado in a citizen initiative approved a measure to restore wolves in the state. More comments from Idaho residents on Idaho's Fish and Game Department's 2023 proposed wolf management plan opposed the plan than supported it.[91] And about 75-90% of the comments on Montana's new 2021 rules were in opposition to the changes to the regulations.[92]

With its latest Finding, the FWS is repeating many of the same mistakes it has made in its many prior attempts to delist the gray wolf from ESA protection and the action is likely to face the same outcome as these earlier efforts. For the foregoing reasons, AWA, the Center, Project Coyote, Kettle Range Conservation Group, Footloose Montana, and the Gallatin Wildlife Association request that FWS remedy the ESA and APA violations by vacating the 2024 Finding.

If you believe that any of the foregoing reasons are in error, or have questions or clarifications, kindly contact me.

Sincerely yours,



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[91] Julie Luchetta, *Idaho Fish and Game approves plan to reduce wolf population from 1,300 to 500*, BOISE STATE PUBLIC RADIO NEWS (May 12, 2023), https://www.boisestatepublicradio.org/environment/2023-05-12/idaho-fish-game-wolf-population.

[92] *See, e.g.*, Nick Mott, *State Receives 26,000 Public Comments About The Future Of Wolf Hunting*, MONTANA PUBLIC RADIO (Aug. 16, 2021), https://www.mtpr.org/montana-news/2021-08-16/26-000-public-comments-debate-future-of-wolf-hunting; Darrell Ehrlick, *Public Comment Runs 10-1 Against Montana's New Wolf Hunting, Trapping Regs*, MISSOULA CURRENT (July 1, 2021), https://missoulacurrent.com/wolf-hunting/.

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