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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

DEFENDERS OF WILDLIFE, et al.,

Plaintiffs,

vs.

KEN SALAZAR, et al.,

Defendants.

GREATER YELLOWSTONE COALITION,

Plaintiff,

vs.

KEN SALAZAR, et al.,

Defendants.

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

DEFENDERS OF WILDLIFE, ET AL.'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

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Plaintiffs Defenders of Wildlife, et al. ("Defenders") hereby respond to the briefs of federal defendants and defendant-intervenors.

I. PARTIAL DELISTING VIOLATES THE ESA

A. The ESA Definition Of "Species" Controls

The Endangered Species Act ("ESA") authorizes the listing and delisting only of "species." 16 U.S.C. § 1533(a)(1). The term "species" is defined to include (1) species; (2) "any subspecies of fish or wildlife or plants;" and (3) "any distinct population segment of any species of vertebrate fish or wildlife." Id. § 1532(16). When the U.S. Fish and Wildlife Service ("FWS") designated the northern Rocky Mountain gray wolf Distinct Population Segment ("DPS"), it designated the "species" to be considered for ESA listing. 74 Fed. Reg. 15,123, 15,129 (Apr. 2, 2009). Once FWS defined the DPS boundaries, see id. at 15,127-29, it then considered whether the DPS—the "species" at issue—was threatened or endangered. FWS determined that the northern Rockies DPS is a "species" that is in danger of extinction throughout a significant portion of its range. See id. at 15,184. Yet, despite this conclusion, FWS chose to "delist[] most of the … DPS," stripping away the ESA's protections from all but Wyoming's wolves. Id. at 15,144. This Court has already ruled, "[t]he Service determined that the wolves in the northern Rockies are a distinct population segment. … Having done so, the Service cannot delist part of the species below the level of the DPS without

running afoul of the clear language of the ESA." Sept. 8, 2009 Order, [Doc. 93] at 6-7 (citation omitted) ("PI Order").

In a response that fails to even mention this Court's preliminary injunction order, FWS argues that it "'listed' the entire NRM DPS," while protecting only Wyoming's wolves—leaving wolves in Montana and Idaho listed but legally unprotected by the ESA.[1] FWS Br. at 3, n.2 (emphasis in original). Remarkably, FWS argues that there can be members of ESA "listed species" that are not recognized as "threatened species" or "endangered species." Id.

This argument is wrong. Congress established only two categories of listed species—threatened and endangered. See 16 U.S.C. § 1533(a)(1); see also id. § 1533(c)(1) (describing "list" of threatened and endangered species). Section 4(a)(1) specifies the criteria that FWS must consider to determine whether a species must be listed because it is threatened or endangered. Id. § 1533(a)(1). The ESA does not provide for the meaningless listing of species that are not threatened or endangered; if a species (a species, subspecies, or DPS) is not threatened or endangered, then its listing is not warranted. See id. § 1533(b)(3)(A), (B)(i) (FWS requirements with respect to warranted findings); id. § 1533(c)(1) (requirement to publish list of endangered and threatened species).

[1] The states do not share FWS's characterization of the Delisting Rule. Idaho contends that the wolf listing is "limited to Wyoming," Idaho Br. at 29, while Montana believes "that the gray wolf is a listed species in Wyoming and a delisted species in Montana and Idaho," Montana Br. at 23.

In its zeal to defend its partial wolf delisting, FWS attempts to rewrite the ESA so that FWS can pick and choose those members of listed species that receive protections and those that do not. This Court should not countenance this effort. It is endangered "species"—not chosen members of an endangered species—that receive ESA protections. See Defenders Br. at 5-7.

B. FWS's Interpretation Would Allow What Congress Would Not

FWS argues that the ESA's "significant portion of its range" language allows it list the northern Rockies wolf DPS, but limit ESA protections to wolves in Wyoming. FWS Br. at 3-6. Not only is this interpretation at odds with the ESA's fundamental architecture, it would allow FWS to protect regional populations of plants, invertebrates, and fungi—an outcome Congress expressly rejected.

The original 1973 ESA definition of "species" suitable for listing included species, subspecies, and "any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature." Pub. L. No. 93-205, 87 Stat. 884, 886 (1973). In 1978, Congress replaced "taxa in common spatial arrangement" with "distinct population segment of any species of vertebrate fish or wildlife." Pub. L. No. 95-632, § 2, 92 Stat. 3751, 3752 (1978); see 16 U.S.C. § 1532(16) (same). With both formulations, Congress provided for the listing of species and subspecies worldwide, and "group[s]" or "population

segment[s]" of fish or wildlife on a regional basis. What it did not permit was listing of "groups" or "population segments" of plants, invertebrates, and fungi—the very outcome that FWS's new statutory argument would permit.

Fourteen years ago, in developing its "distinct population segment" policy, FWS recognized "the inconsistency of allowing only vertebrate species to be addressed at the level of DPS's," but concluded that "the Act is perfectly clear and unambiguous in limiting this authority." 61 Fed. Reg. 4,722, 4,724 (Feb. 7, 1996). The "significant portion of its range" phrase should be read in harmony with the ESA's "clear" language and FWS's own DPS policy, not in a manner allowing listing of invertebrate populations. Both the ESA's treatment of population listings and FWS's prior interpretation of that language contradict FWS's new statutory argument.[2]

C. ESA Listing Flexibility Resides In The DPS Provision

As FWS correctly notes, FWS Br. at 10-11, when Congress drafted the ESA, it sought to avoid excessively "'broad listing[s]'" that would unnecessarily inhibit

[2] In 1979, Congress rejected an ESA amendment that would have prevented "FWS from listing geographically limited populations of vertebrates as threatened or endangered." S. Rep. No. 96-151 (1979) (Montana's Exh. A [Doc. 126-2]). FWS opposed the amendment because restricting the ability to list DPSs "would severely limit [its] ability to require the appropriate level of protection for a species based on its actual biological status." Id. Under FWS's newly minted ESA reading, no opposition to the proposed amendment would have been necessary; it could accomplish the same result through use of the "significant portion of its range" language.

local wildlife management. See Defenders of Wildlife v. Norton, 258 F.3d 1136, 1145 (9th Cir. 2001) (quoting Senator Tunney). However, Congress did not provide this "flexibility" by way of the statute's "significant portion of its range" provision, which was designed to allow the protection of species before they faced "worldwide extinction." See H.R. Rep. No. 93-412, at 149 (1973) [Doc. 88-2] (the ESA's "endangered species" definition "is a significant shift in the definition in existing law, which considers a species to be endangered only when it is threatened with worldwide extinction"). Instead, it did so by defining the term "species" in a manner that permits the protection of individual wildlife populations. See Endangered Species Act of 1973, Pub. L. No. 93-205, § 3(11), 87 Stat. 884, 886 (1973); 16 U.S.C. § 1532(16); see also 61 Fed. Reg. at 4,725 (DPS Policy); Trout Unlimited v. Lohn, 559 F.3d 946, 949 (9th Cir. 2009).[3]

D. Section 4(c)(1) Does Not Support FWS's ESA Interpretation

FWS relies heavily on ESA section 4(c)(1) to buttress its effort to rewrite the ESA. FWS Br. at 5. However, section 4(c)(1) does not support FWS's statutory argument. First, by its own terms, section 4(c)(1) is a mere publication

[3] Citing an imprecise statement by a single senator, the Ninth Circuit suggested in dicta that FWS's geographic management "flexibility" is rooted in the ESA's "significant portion" provision. See Defenders, 258 F.3d at 1144-45 (quoting Senator Tunney). The Ninth Circuit has since affirmed, however, that it is the statute's DPS provision—not discussed in Defenders—that allows FWS "'to provide different levels of protection to different populations of the same species.'" Trout Unlimited, 559 F.3d at 949 (quoting Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835, 842 (9th Cir. 2003)).

requirement. See 16 U.S.C. § 1533(c)(1). Rather than governing FWS's endangerment analysis, section 4(c)(1) simply requires publication of endangerment findings made pursuant to section 4(a)(1). Section 4(c)(1) requires that FWS "publish" a list of "species" that it has determined to be "threatened" or "endangered" under section 4(a)(1). Id. This publication function cannot be read to subvert ESA requirements regarding the listing of "species"—that is, species, subspecies, and DPSs—under section 4(a)(1). Further, it would stand the ESA on its head if section 4(c)(1)'s publication requirements could trump the specific statutory provisions that address the implications of listing a species as threatened or endangered. See Defenders Br. at 6 (describing ESA's listed-species implementation scheme).

Second, FWS's interpretation of section 4(c)(1) would, just like its interpretation of "significant portion of its range," allow FWS to accomplish what Congress expressly rejected—protection of individual populations of plants, invertebrates, and fungi.[4]

E. FWS's "Significant Portion Of Its Range" Determination Does Not Reconfigure The Entire ESA

The ESA requires that FWS list any species, subspecies, or vertebrate DPS it

[4] The publication requirement in the 1969 Endangered Species Conservation Act, was limited to identifying the species "by scientific, common, and commercial name or names," because species were only protected when "threatened with worldwide extinction." Pub. L. No. 91-135, 83 Stat. 275 (1969) (repealed 1973).

finds to be threatened or endangered "throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). FWS argues that this statutory language is "inherently ambiguous," relying on Defenders of Wildlife, 258 F.3d at 1141. FWS Br. at 5. However, the Defenders analysis was limited to determining what constitutes a "'significant portion of [a species'] range'"—a phrase that "is not defined in the statute." Defenders of Wildlife, 258 F.3d at 1145. Here, that question has been answered: FWS determined that Wyoming is a "significant portion" of the northern Rockies wolf DPS. 74 Fed. Reg. at 15,184. Moreover, FWS concluded that the northern Rockies DPS—the "species"—remains "in danger of extinction" across that "significant portion of its range." Id. These FWS findings should have marked the end of the inquiry. See 16 U.S.C. § 1532(6) (defining "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range").[5]

FWS wrongly asserts that Defenders' cited cases do not "undermine FWS's interpretation." FWS Br. at 9. In Trout Unlimited v. Lohn, the Ninth Circuit held that identification of a "species" and assessment of the species' conservation status

[5] FWS contends that plaintiffs read "the word 'or' out of" the statutory phrase "in danger of extinction throughout all or a significant portion of its range." FWS Br. at 6. Following the dictates of Congress and basic grammar, a species must be listed if it is endangered in all "or" a significant portion of its range. Congress rejected the prior statutory requirement that a species be endangered worldwide before listing, and adopted a precautionary approach requiring listing if it was endangered only in a "significant portion of its range."

are "two analytically distinct phases of agency action," and that the identification phase may not be influenced by the "threats" analysis. 559 F.3d at 955-56. The appellate court did not conclude that the ESA permits extending its protections to anything less than a "species." Instead, the Ninth Circuit held that the "plain language of the statute" requires "a status review of [an] entire 'species'—no more, and no less." Id. at 957; see also id. at 961 ("The ESA requires … that status reviews evaluate an entire species."). In the words of the appellate court, "if [FWS] decides to list a species or a distinct population segment as 'endangered' or 'threatened,' it must accord the species or the distinct population segment [the] various legal protections" of the ESA. Id. at 949-50 (emphasis added).

Defendants also mischaracterize Alsea Valley Alliance v. Evans, 161 F. Supp. 2d 1154 (D. Or. 2001), appeal dismissed for lack of jurisdiction sub nom., Alsea Valley Alliance v. Dep't of Commerce, 358 F.3d 1181 (9th Cir. 2004). FWS Br. at 9; Idaho Br. at 28 n.9; Montana Br. at 20. In Alsea, plaintiffs challenged a salmon DPS listing.[6] The district court held that the ESA prohibits listing only a portion of a DPS. Alsea Valley Alliance, 161 F. Supp. 2d at 1162. Because NMFS defined the salmon population to include hatchery fish along with wild fish, but listed only the wild fish, the court found that the agency had impermissibly subdivided the species. Id. ("listing distinctions below that of subspecies or a DPS

[6] Technically, the listing was an "Evolutionary Significant Unit," a term used by the National Marine Fisheries Service ("NMFS") for Pacific salmon DPSs.

of a species are not allowed under the ESA"); see also Nat'l Wildlife Fed'n v. Norton, 386 F. Supp. 2d 553, 564 n.9 (D. Vt. 2005) ("FWS cannot exclude portions of a DPS from listing a species. Once a DPS is formed, it is treated uniformly throughout the DPS.").[7] Intervenors attempt to distinguish Alsea on the ground that northern Rockies wolves "do not share the same geographical range," Safari Club Br. at 14, and yet that is precisely what they do—wolves comingle within the greater Yellowstone area, with resident packs straddling the borders of Wyoming, Idaho, and Montana. See 74 Fed. Reg. at 15,126 (map depicting northern Rockies wolf pack territories).

F. Common Sense Requires Species-Wide Protections

Defendants argue that "common sense" should not require wolves to be protected in Idaho and Montana when FWS considers only Wyoming's law inadequate. See, e.g., Idaho Br. at 3; Montana Br. at 22. To the contrary, the plain language of the ESA makes clear that once FWS identifies a biologically distinct population that is threatened or endangered, the ESA's protections cover that entire population; anything less could expose the population as a whole to the risk of

[7] Idaho misinterprets California State Grange v. National Marine Fisheries Service, 620 F. Supp. 2d 1111 (E.D. Cal. 2008), appeal pending, No. 09-15214 (9th Cir. argued Dec. 4, 2009). Idaho Br. at 27, 28. In that case, NMFS identified a trout DPS that included hatchery and naturally spawned fish, and then listed the entire DPS as a threatened species. The case does not involve the issue of partial listing. Indeed, the district court assumed that once a DPS is properly designated, it would be considered for listing (or not) in its entirety. See California State Grange, 620 F. Supp. 2d at 1153.

extinction. See supra. Congress rightly determined that "species" should receive ESA protections when they are on the brink of extinction because they are imperiled throughout their range, but also when they are on the path to extinction because they are imperiled in a significant portion of their range. See 16 U.S.C. § 1532(6), (20). Defendants' "common-sense" interpretation would remove all side boards from listing actions, allowing FWS to parse ever-finer listing distinctions within a single population, unraveling the whole concept of population-level listings.

Further, FWS has already rejected defendants' contention that state-by-state delisting is necessary to reward successful conservation efforts in some states. See Montana Br. at 22; Idaho Br. at 3, 29-30. "Particularly when applied to the delisting or reclassification of a relatively widespread species for which a recovery program is being successfully carried out in some States, recognition of State boundaries would offer attractive possibilities. Nevertheless, the Act provides no basis for applying different standards for delisting than those adopted for listing." 61 Fed. Reg. at 4,724 (DPS policy). As FWS previously recognized, defendants' policy arguments have no basis in the statutory text. The ESA imposes a precautionary approach to preventing extinction, not the "roll-the-dice" approach

that defendants now advance.[8]

II. FWS FAILED TO USE THE BEST AVAILABLE SCIENCE

In their opening brief, Defenders demonstrated that the "best scientific … data available" did not support FWS's determination regarding the number of wolves needed in the northern Rockies to ensure long-term viability. 16 U.S.C. § 1533(b)(1)(A); see Defenders Br. at 9-16. For example, FWS arbitrarily contends that the best available science requires at least 1,500 gray wolves in the Midwest, but a mere 300 wolves in the northern Rockies. Defendants argue that a reviewing court must defer to any agency decision so long as the agency invokes some science to support its conclusion. FWS Br. at 18. However, "[t]he presumption of agency expertise can be rebutted when its decisions, while relying on scientific expertise, are not reasoned." Brower v. Evans, 257 F.3d 1058, 1067 (9th Cir. 2001); see also Tucson Herpetological Soc'y v. Salazar, 566 F.3d 870, 878 (9th Cir. 2009) ("While our deference to the agency is significant, we may not defer to an agency decision that is without substantial basis in fact.") (quotation omitted). Moreover, the ESA commands that in rendering listing decisions, FWS employ the

[8] FWS is not entitled to deference for its new partial delisting interpretation, both because it contravenes clear statutory language, Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984), and because it contradicts FWS's long-standing position, see 68 Fed. Reg. 15,804, 15,825 (Apr. 1, 2003) ("[t]he DPS boundaries must contain the biological grouping and cannot subdivide it"); 70 Fed. Reg. 1,286, 1,296 (Jan. 6, 2005) ("the Act does not allow wolves to be delisted on a State-by-State basis"). See PI Order at 9.

"best scientific … data available." 16 U.S.C. § 1533(b)(1)(A) (emphasis added). Here, the published, peer-reviewed science dictates that FWS adopt recovery goals in line with those developed for Midwest wolves—and arbitrarily rejected here.

A. There Is No Legitimate Scientific Basis For Differential Delisting Standards For The Same Biological Species

Defenders previously demonstrated that FWS's recovery criteria for northern Rockies wolves are inconsistent with the agency's recovery criteria for Midwest wolves. See Defenders Br. at 14-16. Rather than defend the Delisting Rule's departure from the Midwest wolf recovery criteria, FWS denies the departure. FWS submits the recovery plan for Midwest wolves—which is not in the record of this case—and argues that the Midwest recovery plan sets no population standards for Minnesota wolves. See FWS Br. at 20-22. This new argument cannot be squared with the Delisting Rule, numerous FWS Federal Register findings, or the Midwest recovery plan.

First, the law prohibits post hoc rationalizations of challenged agency action; "the validity of an agency's determination must be judged on the basis of the agency's stated reasons for making that determination." Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 631 n.31 (1980). Since FWS did not previously contend that there are no recovery standards for Minnesota wolves—and this argument was not a basis for the Delisting Rule—it must be rejected.

Second, FWS now argues that its 1,251–1,400 Minnesota wolf recovery

standard was merely a "target management goal" and "did not constitute FWS's recovery goal." FWS Br. at 21 (emphasis in the original). Yet in delisting Midwest wolves in April 2009, FWS relied time and again on these very same "numerical recovery criteria." 74 Fed. Reg. 15,070, 15,083, 15,120 (Apr. 2, 2009). FWS determined that both the Minnesota population and a second Midwest wolf population had met its numeric recovery criteria, specifically finding that the Minnesota population was above "the 1992 Federal Recovery Plan's criteria of 1,251 to 1,400 wolves (USFWS 1992, p. 28)." Id. at 15,106; see also id. at 15,070 (Midwest wolf population "greatly exceeds the numerical recovery criteria established in its recovery plan"); id. at 15,083 (discussing the "numerical recovery criteria" and concluding that the Minnesota recovery goal had been achieved); id. at 15,103 (finding the Minnesota plan adequate because it would maintain a wolf population "well above" the numeric recovery criteria); id. at 15,105 (same); id. at 15,119 (same); id. at 15,120 (specifying that the "numerical recovery criteria" apply to Minnesota). The Midwest Recovery Plan is in accord with these findings. See Eitel Decl., Exh. H, [Doc. 117-8] at 28. Consequently, FWS's litigation argument that "FWS never required the maintenance of 1,240 to 1,400 wolves in the Western Great Lakes region," FWS Br. at 20, is false.[9]

[9] The FWS Post-delisting Monitoring Plan for Midwest wolves restates the 1,251–1,400 Minnesota wolf population criterion, and lists a trigger for consideration of relisting if the Minnesota winter wolf population reaches "1500 or fewer wolves."

Because FWS has failed to defend its Delisting Rule findings regarding the differential recovery standard for Midwest wolves, because post-hoc arguments cannot sustain a challenged rule, and because FWS's new argument is factually incorrect, there is no basis to sustain the Delisting Rule conclusion that northern Rockies wolves are recovered at population levels that are a mere fraction of those FWS required for Midwest wolves.

B. FWS Erred In Relying On Its 1987 Recovery Plan And Not Finding That The Best Available Science Required A Far Larger Wolf Population

In delisting northern Rockies wolves, FWS disregarded recent scientific studies and criticism of the agency's approach, and chose instead to rely primarily on its 20-year-old recovery plan to determine the number of wolves needed for recovery in the northern Rockies. See Defenders Br. at 12-14. The 1987 Recovery Plan provided no scientific basis for the derivation of its 10-breeding-pairs-in-3-recovery-areas standard. Id. While FWS contends that this "recovery goal was developed over a 20-year period, not 20 years ago," FWS Br. at 16 (emphasis in original), the core feature of its recovery plan—30 breeding pairs—has remained fixed since 1987. See AR2009–026397 (requiring "10 breeding pairs in each of three recovery areas"). FWS's continued reliance on that standard is arbitrary,

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Second Honnold Decl., Exh. 3 at 10-11. Separate FWS criteria require: 1) 200 wolves in Wisconsin-Michigan; and 2) at least 100 wolves in Wisconsin and 100 wolves in Michigan. Id.; see also 74 Fed. Reg. at 15,070-71.

capricious, and contrary to the best available science.

FWS argues that its recovery criteria are science-based because they include consideration of metapopulation dynamics, genetic diversity, and breeding pairs. FWS Br. at 16-17. This response misses the point. While features of FWS's recovery criteria (e.g., breeding pairs and genetic exchange) are grounded in science, this says nothing about the scientific basis for FWS's numeric requirement, which deviates from the agency's Midwest standard and the best science. Both the Delisting Rule and FWS's brief repeatedly reaffirm and defend the 30-breeding-pairs recovery goal. See, e.g., id. at 16; 74 Fed. Reg. at 15,132, 15,139.[10]

Despite this reaffirmation, FWS argues that it "did not rest on its minimum [30 breeding pairs] recovery goal," but instead required each state to maintain 15 breeding pairs and 150 wolves. FWS Br. at 17. This is not a modification of the 30-breeding-pairs standard, but merely a buffer to ensure that the states do not manage on the knife-edge of 30 breeding pairs, risking relisting when wolf numbers fluctuate. 74 Fed. Reg. at 15,139 ("managing for a safety margin"); id. at 15,140 (same).[11] Thus, the 15-breeding-pairs, 150-wolf measure does not modify

[10] In the northern Rockies, FWS treats a breeding pair as roughly equivalent to 10 wolves. See FWS Br. at 33 (arguing that 15 breeding pairs equates to 150 wolves).

[11] In 2002, the Montana wolf population totaled 17 breeding pairs; in 2003, it plummeted to 10 breeding pairs. AR2009–040626 (breeding pair totals per year).

the 30-breeding-pair recovery standard; it confirms it.

FWS also suggests that the Delisting Rule revised the recovery standard by "requir[ing] the States to adhere to their stated management objectives" providing for over 1,000 wolves. See FWS Br. at 17. This is sheer make-believe. FWS's "belie[f]," 74 Fed. Reg. at 15,133, that Idaho and Montana will maintain 1,000 wolves is based on short-term state predictions, not regulatory commitments. Defenders Br. at 18-19. Nowhere in the record is there support for FWS's claim that it "required" 1,000 wolves.

FWS criticizes Defenders' citation to scientists' peer review comments noting that FWS's recovery standard was insufficient. FWS Br. at 19. The purpose of peer review is "to ensure that reviews by recognized experts are incorporated into the review process," 59 Fed. Reg. 34,270 (July 1, 1994) (peer review policy), not to elicit a "majority rules" referendum. For example, in rejecting Wyoming's wolf plan, FWS based its decision in part on the views expressed by a small minority of peer reviewers. See Second Honnold Decl., Exh. 4 (July 11, 2007 FWS Brief) ("the mere fact that a majority of the peer reviewers approved the three plans is not controlling"). Neither in the Delisting Rule nor its brief does FWS meaningfully explain its disagreement with the reasonable criticism of certain peer reviewers. See, e.g., 74 Fed. Reg. at 15,131-32. Without an explanation why FWS chose to ignore valid critiques and relevant science

raised in the peer-review process, there is no basis for concluding that FWS rationally employed the "best scientific … data available" in setting this recovery standard or continuing to rely on it in the Delisting Rule. 16 U.S.C. § 1533(b)(1)(A); see Brower, 257 F.3d at 1067 ("The presumption of agency expertise can be rebutted when its decisions, while relying on scientific expertise, are not reasoned.").[12]

C. FWS's Recovery Goals Ignore Peer-Reviewed Science

In its opening brief, Defenders cited peer-reviewed scientific publications calculating gray wolf viable population levels and international listing standards in accord with these viability analyses. Defenders Br. at 10-12. In its brief, FWS continues to reject the best available science. FWS Br. at 17-19. Instead, FWS asserts that these studies are merely "theoretical" and should not "trump a species-specific analysis" of wolf population needs. Id. at 18. In fact, the cited studies specifically analyze the gray wolf. See, e.g., AR2009–025834 (calculating the minimum viable population size for numerous vertebrate species and concluding the minimum population for adult gray wolves (Canis lupus) was at least 1,403); Defenders Br. at 10-11.

FWS does not cite a single counter peer-reviewed calculation of wolf

[12] To the extent the administrative record sheds any light on why the northern Rockies recovery goals are so low, it shows that FWS erroneously believed the region could not support a population of more than a thousand wolves—an assumption proven wrong by wolf numbers on the ground. Defenders Br. at 12-14.

population viability, contending that these viability analyses provide merely "broad guidelines" but not a "'magic number' that will ensure persistence." FWS Br. at 18 (quotations omitted). This highlights that FWS has departed from published wolf viability analyses and presumptive scientific standards without a legitimate scientific explanation. These standards leave "little doubt that the actual population size (as opposed to the genetic effective population size) necessary to maintain evolutionary potential for the long term should be thousands of individuals and not hundreds." AR2009–003634 (Dr. Scott Mills textbook relied upon by both FWS and Montana) (emphasis in original).[13]

This conclusion is consistent with the International Union for the Conservation of Nature's ("IUCN") listing standards, which require listing species as vulnerable (one step below endangered) when they fall under 1,000 mature individuals. AR2008–022479-80. FWS argues that the IUCN standards do not apply to "local or regional" populations and the gray wolf has been designated merely as a species of "least concern." FWS Br. at 18-19. However, IUCN listing

[13] FWS cites a single page from the Mills textbook in an attempt to discredit the relevance of the IUCN's international listing criteria. FWS Br. at 19 n. 9. The Mills book chapter discussing "small and declining populations" expresses support for application of IUCN standards and the 50/500 rule, while recognizing that viability calculations using species-specific data are better than presumptive standards. See AR2009–003632-59. Here, FWS offers no species-specific viability analyses and contradicts both the science-based presumptive listing criteria and the peer-reviewed publications that contain calculations of wolf viable populations. Instead, FWS arbitrarily clings to a standard established without any expressed scientific rationale.

standards contemplate their application at regional levels, AR2008-022470, and specifically recognize that regional populations might face extinction while the species is relatively abundant worldwide, AR2008–022472-73. Second, gray wolves are currently listed as a species of "least concern" worldwide. AR2009–005690 (FWS citation).

Similarly, FWS seeks to rely on Canadian wolves to justify its 300-wolf standard. FWS Br. at 18 (unsupported assertion of connectivity with 12,000 Canadian wolves); compare AR2009–030573-74 (Kaminski Decl.) (few Canadian wolves near the Montana border). However, the Minnesota wolf population is also adjacent to a Canadian wolf population, but nevertheless FWS required more than 1,500 Midwest wolves for recovery. See 74 Fed. Reg. at 15,078 (4,000 wolves in Manitoba adjacent to northwest Minnesota, which are in turn connected to an estimated 50,000 Canadian wolves). Here, FWS found that a similar situation dictated a different result, and therefore acted arbitrarily.

In sum, the Delisting Rule is not based on, or even responsive to, the best available science. This is most glaringly revealed in FWS's failure even to defend the Delisting Rule's conclusions that the Midwest states must maintain more than 1,500 wolves, while here the states may reduce the wolf population below 300 wolves before FWS will even consider restoring their status as an endangered species. Because FWS failed to use the "best … available" science, 16 U.S.C. §

1533(b)(1)(A), and arbitrarily concluded that wolf numbers in the northern Rockies need be only a fraction of those in the Midwest, the Delisting Rule is legally invalid.

III. FWS ARBITRARILY DETERMINED THAT STATE REGULATORY MECHANISMS ARE ADEQUATE

FWS identified "State regulation of human-caused mortality" as the most critical component of wolf conservation. 74 Fed. Reg. at 15,166. Recognizing the ongoing public hostility toward wolves, FWS stated that it would "require[] adequate regulatory mechanisms to be in place that will balance negative attitudes towards wolves in the places necessary for recovery." Id. at 15,175. Having failed to do so, FWS now argues that "perfect" regulatory mechanisms need not be in place for delisting to occur. FWS Br. at 32. Existing regulatory mechanisms are not even adequate, as the ESA requires. See 16 U.S.C. § 1533(a)(1)(D).

A. Idaho and Montana Lack Adequate Regulatory Mechanisms To Promote Genetic Exchange

1. Idaho and Montana Do Not Commit To Maintaining 1,000 Wolves

In the Delisting Rule, FWS relies on its "belie[f]" that "the NRM wolf population will be managed for over 1,000 wolves" to support its determination that genetic connectivity will not be impaired by delisting. 74 Fed. Reg. at 15,133; see also id. at 15,177. Defendants' briefs do not defend this unsupported claim. Because the states have not committed to maintaining over 1,000 wolves, FWS's

reliance on a wolf population of this size to facilitate genetic exchange was arbitrary and capricious. See Defenders Br. at 18-19.

2. FWS Points To No Regulatory Mechanisms Promoting Genetic Exchange

Rather than citing adequate regulatory mechanisms for genetic exchange, FWS continues to rely on the states' vague and non-regulatory representations and FWS's false assumptions about the states' wolf hunts. First, FWS repeats the Delisting Rule's claim that "the States' management frameworks minimize mortality during key dispersal times." FWS Br. at 33 (citing 74 Fed. Reg. at 15,175-76). However, state hunts coincide with peak dispersal. See Defenders Br. at 19-20. Further, while Idaho claims that hunting limits are "very restrictive" in key dispersal corridors, Idaho Br. at 16, the record demonstrates the opposite, see AR2009–041190, 041197 (direction to "reduce[]" or "decrease[]" wolf numbers in Southern Mountains and Salmon management units, which contain key dispersal corridors).

FWS also relies on a genetics Memorandum of Understanding ("MOU") between the states and FWS. FWS Br. at 36-37. The MOU is not an adequate regulatory mechanism because "[t]he Service has not shown that the state and federal agencies which are signatories to the agreement can be compelled to comply with [it]." Greater Yellowstone Coal. v. Servheen, -- F. Supp. 2d --, 2009 WL 3775085, *7 (D. Mont., Sept. 21, 2009); see also Fed'n of Fly Fishers v.

Daley, 131 F. Supp. 2d 1158, 1164-69 (N.D. Cal. 2000) (finding voluntary and future actions to be inadequate regulatory mechanisms); Or. Natural Res. Council v. Daley, 6 F. Supp. 2d 1139, 1155 (D. Or. 1998) (state conservation plans do not qualify as "regulatory mechanisms" under the ESA "[a]bsent some method of enforcing compliance").

Ignoring this Court's reasoning in the grizzly bear delisting case, FWS contends that "there is no basis in the ESA for restricting FWS's [regulatory mechanisms] inquiry to only binding and enforceable laws or regulations." FWS Br. at 30. To the contrary, under ESA section 4(a)(1)(D), FWS is obliged to consider whether needed measures are "regulatory" and whether they are "inadequa[te]." 16 U.S.C. § 1533(a)(1)(D). Voluntary and unenforceable representations are neither.

Defining "regulatory mechanisms" as only those commitments that are binding is inherent in the definition of "regulatory." To "regulate" means "to govern or direct according to rule[;] to bring under the control of law or constituted authority." Merriam-Webster.com (last visited Dec. 31, 2009); see also Black's Law Dictionary 1286 (6th ed. 1990) (defining "regulate" as "[t]o fix, establish, or control; to adjust by rule, method or mode; to direct by rule or restriction; to subject to governing principles or laws"). The modifier "regulatory" directs that the mechanisms to be considered under ESA section 4(a)(1)(D) must be binding,

not hortatory.

Seeking support for its reliance on non-binding state representations in its section 4(a)(1)(D) "regulatory mechanisms" analysis, FWS undertakes a free-ranging survey of other ESA provisions. See FWS Br. at 29-31. For example, FWS claims that an ESA provision directing FWS to consider state "efforts," including "conservation practices," in listing decisions suggests an interpretation of "regulatory mechanisms" that does not require binding measures. Id. at 30 (citing 16 U.S.C. § 1533(b)(1)(A)). While state conservation practices are relevant under other listing criteria, Congress was clear in specifying in the ESA's listing protocol that FWS must consider as a separate listing factor whether a species is threatened or endangered due to "the inadequacy of existing regulatory mechanisms" alone. 16 U.S.C. § 1533(a)(1)(D). Here, voluntary state efforts are neither "regulatory," nor adequate in light of the critical need to control human-caused mortality. See 74 Fed. Reg. at 15,166.

FWS also argues that section 6 of the ESA, which allows FWS to enter into cooperative agreements with states "for the purpose of conserving any endangered or threatened species," informs FWS's assessment of "regulatory mechanisms." 16 U.S.C. § 1535(c); see FWS Br. at 30-31. However, cooperative agreements apply only to listed species. See 16 U.S.C. § 1535(a)(1) (cooperation designed to "conserve[] any endangered species or threatened species"). State conservation

programs are designed to supplement the ESA's protections for threatened and endangered species. The fact that Congress broadly defined ESA section 6 state conservation programs is irrelevant to the question whether ESA section 4 "regulatory mechanisms" must actually regulate.

Defendants cite several cases in support of their position that "regulatory mechanisms" may be voluntary. See FWS Br. at 31-32; Idaho Br. at 19. None requires this Court to ignore its own precedent requiring binding and enforceable conservation measures before delisting may occur. See Greater Yellowstone Coal., 2009 WL 3775085, at *8 (invalidating delisting rule where "the centerpiece of the regulatory mechanisms relied on by the Service … [could not] actually regulate anything").

For example, in Tucson Herpetological Society, 566 F.3d at 870, the Ninth Circuit upheld FWS's consideration of a conservation agreement in its "assessment of threats to the species' current range," id. at 881—i.e., FWS's analysis of "the present or threatened destruction … of its habitat or range" under section 4(a)(1)(A), 16 U.S.C. § 1533(a)(1)(A). The court did not state that a voluntary conservation agreement is an adequate regulatory mechanism under section 4(a)(1)(D). Defendants' remaining cases are likewise inapposite. See Ctr. for Biological Diversity v. FWS, 402 F. Supp. 2d 1198, 1210 (D. Or. 2005) (reviewing FWS's conclusion that binding habitat conservation plans and state laws were

adequate to protect habitat, notwithstanding "problems with some of the state management practices") overruled on other grounds, 274 Fed. Appx. 542 (9th Cir. 2008); Ctr. for Biological Diversity v. Badgley, 2001 WL 844399, *21 (D. Or. June 28, 2001) (reaffirming principle that "an agency may not rely upon future actions to justify a decision not to list a species as threatened or endangered," but finding that FWS did not do so). Furthermore, none of these cases demonstrates that voluntary measures and aspirational statements are adequate regulatory mechanisms in the context of wolf conservation. See 16 U.S.C. § 1533(a)(1)(D).

B. Idaho and Montana Have Not Committed To Maintaining 150 Wolves And 15 Breeding Pairs

FWS determined that wolf recovery requires Idaho and Montana to manage for at least 150 wolves and 15 breeding pairs to ensure that FWS's recovery goal of 100 wolves and 10 breeding pairs per state is met. See 74 Fed. Reg. at 15,132 ("To ensure that the NRM wolf population always exceeds the recovery goal of 30 breeding pairs and 300 wolves, wolves in each State shall be managed for at least 15 breeding pairs and at least 150 wolves in mid-winter.") (emphases added). Now, FWS concedes in its brief that neither state has laws that expressly meet both the population and the breeding pair requirements. See FWS Br. at 33-34. While effectively conceding that Montana has not expressly committed to maintaining 150 wolves, FWS argues that "actual data prove that well over 150 wolves will be present in Montana when over 15 breeding pairs are maintained." Id. at 33. The

opposite is true. During the only year in which Montana actually had 15 breeding pairs of wolves—2004—the number of wolves in all wolf packs containing a breeding pair totaled only 96 wolves. See AR2009–040044-45 (2004 annual report, tables 1a & 1b). In 2002, Montana's 17 breeding pairs contained only 114 wolves. See http://www.fws.gov/mountain-prairie/species/mammals/wolf/annualrpt02/all_tables.pdf (last visited Dec. 31, 2009) (2002 annual report, tables 1a & 1b). In fact, the number of wolves in all breeding-pair wolf packs did not total 150 wolves until 2006, when Montana had 21 breeding pairs. See http://www.fws.gov/mountain-prairie/species/mammals/wolf/annualrpt06/index.htm (last visited Dec. 31, 2009) (2006 annual report, tables 1a, 1b, & 1c). While these figures do not count lone wolves and non-breeding pair packs, Montana law contains no commitment to maintain any wolves in these non-breeding pair categories. According to the "actual data," FWS Br. at 33, it was arbitrary and capricious for FWS to treat a commitment to 15 breeding pairs as equivalent to a commitment to 150 wolves.

With respect to Idaho, FWS's brief maintains that the legislature's failure to commit to 15 breeding pairs is irrelevant because it allegedly "used 'packs' and 'breeding pairs' interchangeably." FWS Br. at 34. For support, FWS cites Idaho's statement that "[p]acks are formed when 2 wolves of [the] opposite sex develop a pair bond, breed, and produce pups." Id. (citing AR2009–37333). However, this

definition only makes clear that a "pack" is not equivalent to a "breeding pair," which is defined as a male and female that produce at least two pups that survive to December 31. 74 Fed. Reg. at 15,132; see also id. ("The breeding pair metric includes most of the important biological concepts in wolf conservation."). Idaho's "pack" definition encompasses two breeding wolves even if their pups do not survive. Indeed, those two wolves may be defined as a "pack" forever, even if they never breed again. Moreover, FWS's post hoc argument is dramatically at odds with its prior determination that an identical provision in Wyoming's wolf plan was a fatal flaw that precluded the plan's adequacy as a regulatory mechanism. See 71 Fed. Reg. 43,410, 43,428-30 (Aug. 1, 2006). FWS's decision that a pack metric is good enough for Idaho, when it was not for Wyoming, is arbitrary and capricious.

C. State Laws Allow Wolf Killing When the Population Is Below FWS Recovery Levels

In response to Defenders' argument that state regulations allow wolf killing even when the wolf population drops below FWS's recovery level, FWS argues that relisting is the cure for this malady. See FWS Br. at 34 (citing 74 Fed. Reg. at 15,184-85). However, relisting is a backstop against extinction in the event that regulatory mechanisms fail; it is not a regulatory mechanism. Further, relisting provisions "do not serve as regulatory mechanisms because they offer only a plan or promises of future actions." Greater Yellowstone Coal., 2009 WL 3775085, *7

(citing Or. Natural Res. Council, 6 F. Supp. 2d at 1155, and concluding that "[t]he Service and other agencies are not required to take any concrete response to protect grizzlies if monitoring shows population or habitat declines, but only to 'identify' the problems and make recommendations for changes").

FWS also cites statements in the Montana and Idaho plans that wolf management will be "increasingly more conservative" as the states' wolf populations decline. See FWS Br. at 34. FWS does not—and indeed, could not—contend that the states have committed to halt wolf mortality should wolf numbers drop below FWS's recovery goals. While FWS argues that these deficiencies are acceptable for Idaho and Montana, FWS determined that this same flaw in Wyoming law rendered Wyoming's regulatory mechanisms inadequate. See 71 Fed. Reg. at 43,428 ("[D]espite assurances that WGFD would regulate human-caused mortality if wolf populations fell below minimum levels, WGFD likely would still control problem wolves and their efforts at regulating human-caused mortality under those circumstances, particularly with the likely public confusion over the status of the wolf, do not seem likely to be highly effective.").

FWS also fails to confront Defenders' contention that Montana and Idaho game management agencies lack the authority to stop wolf killing by counties and individuals, even when the wolf population drops below FWS recovery levels. See Defenders Br. at 23-24. While FWS correctly notes that Montana and Idaho game

regulations do not presently classify wolves as predators, FWS Br. at 35, it simultaneously ignores state livestock laws that allow counties to treat wolves as predators subject to unregulated killing. For example, Montana's Livestock Code authorizes county commissioners to establish predatory animal control programs and defines "predatory animal" to "include[] coyote, red fox, and any other individual animal causing depredations upon livestock." Mont. Code Ann. § 81-7-101 (emphasis added); see also Idaho Code § 25-2601 (broadly defining "predatory animal" and authorizing counties "to take all steps that they may deem necessary to control such pests").

Likewise, Montana and Idaho game agencies have no control over private killing in defense of property. See Defenders Br. at 23-24. FWS argues that the state laws mirror federal rules in place prior to delisting. See FWS Br. at 35. However, there is one critical difference: while wolves remained listed, FWS had the authority to stop wolf killing in defense of property. Montana and Idaho's game agencies have no such authority to alter state statutes or prevent private property owners from exercising their right to kill wolves, meaning that the states' wolf populations could drop below FWS's recovery levels while the game agencies are powerless to act. See Idaho Code § 36-1107(c); Mont. Code Ann. § 87-3-130(1).

For all of these reasons, FWS's determination that state regulatory

mechanisms are adequate was arbitrary and capricious.

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

A. FWS Illegally Departed from the Lower-48 Wolf Listing

In the Delisting Rule, FWS failed to explain its departure from its 1978 listing of the lower-48 gray wolf. FWS defends that departure because "[t]he NRM DPS 'approximates the U.S. historic range of the purported NRM gray wolf subspecies' listed in 1974"—before FWS adopted its consolidated listing of the lower-48 gray wolf in 1978. FWS Br. at 14 (quoting 74 Fed. Reg. at 15,143). However, the 1978 reclassification rule determined that the 1974 listing was inappropriate because "the taxonomy of wolves is out of date [and] wolves may wander outside of recognized subspecific boundaries." 43 Fed. Reg. 9,607 (Mar. 9, 1978). FWS has not explained, either in the Delisting Rule or in its brief, why these findings are no longer relevant. Moreover, the gray wolf's historic range does not support FWS's delisting decision; it counters it. FWS concluded in the 1978 rule that "[t]he gray wolf formerly occurred in most of the conterminous United States and Mexico." Id. By 1978, wolves' western range was restricted primarily to Montana, Idaho, and Wyoming. See id. The same is true today. See 74 Fed. Reg. at 15,126. By focusing wolf recovery narrowly on these three states, and then delisting wolves in Idaho and Montana, FWS unlawfully cemented the range restriction present at the time of the 1978 listing.

FWS seeks deference to a statutory interpretation allowing simultaneous listing and delisting of northern Rockies wolves without regard to the lower-48 listing, even though the agency has made no such authoritative interpretation. FWS notes that in Humane Society v. Kempthorne, 579 F. Supp. 2d 7 (D.D.C. 2008), the court found the ESA "ambiguous" with respect to the issue of whether simultaneous listing and delisting was permissible. FWS Br. at 15. The court remanded the issue to the agency to adopt an interpretation consistent with the statute. Humane Soc'y, 579 F. Supp. 2d at 20. FWS claims that a 2008 Solicitor's memorandum provides such an interpretation. However, that memorandum does not address FWS's authority to simultaneously list and delist species. Instead, it rejects the court's characterization of the agency action at issue in that case and analyzes an entirely different question. See AR2009–028984 ("While the Department acknowledges that the ESA is arguably ambiguous on the 'precise question' posed by the court, it notes that the court's question does not accurately describe what FWS did in the Final Rule.") (emphasis added). "An agency's interpretation or regulation is given deference if … it is an opinion expressed when the agency is regulating the precise question at issue." Royal Foods Co. v. RJR Holdings, Inc., 252 F.3d 1102, 1109 (9th Cir. 2001) (emphasis added) (citing Christensen v. Harris County, 529 U.S. 576, 586-88 (2000)). FWS's suggestion that this Court must defer to the 2008 Solicitor's memorandum, even though that

memorandum does not address the issue in this case, is unfounded. See id. ("a strong statement made in the course of discussing a wholly different issue … does not constitute an agency interpretation that is entitled to deference in this setting") (emphasis in original).

Absent an authoritative FWS interpretation of its ESA authority to simultaneously list and delist species, this Court should apply the reasoning of the Humane Society court to preclude FWS's action here: the language of the ESA "quite strongly suggests … that the listing of any species … is a precondition to the delisting of that species." Humane Soc'y, 579 F. Supp. 2d at 17 (emphases in original).

To avoid the ESA construction proffered by the Humane Society court, FWS in the Delisting Rule described its action not as a simultaneous listing and delisting, but rather as a "revis[ion]" of the lower-48 listing under ESA section 4(c). 74 Fed. Reg. at 15,144. This semantic trick should not detain the Court.[14] Moreover, if FWS revised the lower-48 listing, then the Delisting Rule is unlawful for an additional reason. The ESA requires that revisions to the list of endangered and threatened species be made in accordance with ESA section 4(a), which sets

[14] While FWS claims that it did not newly list the northern Rockies DPS, the Delisting Rule added a separate entry to the list of threatened and endangered species for the DPS, in addition to the entry for the lower-48 states. See 74 Fed. Reg. at 15,187. FWS concedes this nature of its action elsewhere in its brief. See FWS Br. at 3 n.2 ("FWS 'listed' the entire NRM DPS") (emphasis in original).

forth listing factors and the requirement to designate critical habitat. See 16 U.S.C. § 1533(a)(1), (3)(A). Because FWS has not evaluated the gray wolf's status in the lower-48 states in relation to the ESA listing factors or designated critical habitat, FWS's purported revision to the lower-48 gray wolf's listing status was arbitrary.[15]

B. Wyoming Wolves Do Not Qualify as an Experimental Population

The contortions on which the Delisting Rule rests are further evident in FWS's strained effort to defend its action under ESA section 10(j). See FWS Br. at 15-16. Section 10(j) authorizes FWS to establish and protect "experimental populations" of threatened and endangered species "only when, and at such times as, the population[s] [are] wholly separate geographically from nonexperimental populations of the same species." 16 U.S.C. § 1539(j)(1) (emphasis added). In its opening brief, Defenders demonstrated that FWS violated the plain language of section 10(j) in isolating Wyoming wolves as an "experimental population," because they are not "wholly separate" from wolves in Idaho and Montana. Defenders Br. at 28. In response, FWS declares that it has not identified Wyoming's wolves as an "experimental population," as they "continue to be part of the Greater Yellowstone Area experimental population." FWS Br. at 15-16 (emphasis added). According to FWS, the Delisting Rule "did not alter the

[15] Contrary to the assertion of FWS, FWS Br. at 14-15, National Wildlife Federation, 386 F. Supp. 2d at 565, did not address the question of whether FWS must conduct a section 4(a) listing analysis for a "non-DPS remnant."

experimental population designation for [the Yellowstone] population" and—because the wolves of Wyoming, southern Montana, and eastern Idaho together allegedly "continue[] to satisfy the definition of an experimental population under the ESA"—the Delisting Rule does not run afoul of section 10(j). Id.

Contrary to FWS's post hoc assertions, however, the Delisting Rule altered the Yellowstone "experimental" population designation. In 1994, FWS published a rule defining the Yellowstone region's nonessential experimental gray wolf population to include southern Montana, eastern Idaho, and all of Wyoming. 59 Fed. Reg. 60,252, 60,266 (Nov. 22, 1994) (50 C.F.R. § 17.84(i)(7)(ii)) (including "all of Wyoming" and "portion[s]" of Idaho and Montana within "[t]he boundaries of the nonessential experimental population area"). With the Delisting Rule, FWS amended its Yellowstone section 10(j) regulation area, narrowing its boundaries to include only Wyoming. 74 Fed. Reg. at 15,187 (50 C.F.R. § 17.84(i)(7)(i)) ("The nonessential experimental population area includes all of Wyoming."); id. at 15,188 (50 C.F.R. § 17.84(n)(9)(i)) (same). Accordingly, in its brief, FWS mischaracterizes the decision challenged in this case in an apparent effort to avoid defending FWS's creation of a Wyoming 10(j) wolf population.

The reasons for the government's prestidigitation are readily apparent. Numerous wolf packs straddle Wyoming's borders with Idaho and Montana. AR2009–041271 (2008 map showing Yellowstone area packs). Moreover, in

support of its Delisting Rule, FWS itself contends that Wyoming's wolves are integral parts of the northern Rockies wolf population—not "wholly separate" from the wolves of Idaho and Montana. See, e.g., 74 Fed. Reg. at 15,134-35, 15,175. As a result, it cannot be argued that Wyoming's wolves are "wholly separate" from the wolves of Idaho and Montana; the agency's decision to identify Wyoming alone as an "experimental" wolf population accordingly violated the plain language of the ESA. See 16 U.S.C. § 1539(j)(1) ("'experimental population'" must be "wholly separate geographically from nonexperimental populations of the same species"); United States v. McKittrick, 142 F.3d 1170, 1174-75 (9th Cir. 1998) (cited in FWS Br. at 16) ("When experimental and nonexperimental populations overlap—even if the overlap occurs seasonally—section 10(j) populations lose their experimental status."). Had Montana and Idaho remained part of a "nonessential experimental" population, wolves in those areas would be governed by ESA section 10(j) regulations, not subject to state management and hunting. This was neither the intent nor the effect of the Delisting Rule.

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

FWS side-steps Defenders' claim that the agency violated the ESA by treating recognized threats to wolves over large areas of the wolf's historic NRM range as disqualifying factors in FWS's "significant portion of the range" analysis.

See Defenders Br. at 28-30. Instead, FWS restates the challenged reasoning. See FWS Br. at 27-28. It is unsurprising that in areas where threats to wolves are the greatest, "wolf breeding pairs persist only in low numbers." Id. at 27. Yet FWS treats this truism as sufficient reason for declaring such areas insignificant to wolf conservation. To the contrary, the fact that wolves do not occupy these areas is evidence that they remain threatened or endangered by "the present or threatened destruction, modification, or curtailment of [their] habitat or range[,]" the "inadequacy of existing regulatory mechanisms[,]"or "other … manmade factors affecting [their] continued existence." 16 U.S.C. § 1533(a)(1)(A), (D), (E).

FWS further restates the Delisting Rule's finding that unoccupied areas "are not important or necessary for maintaining a viable, self sustaining, and evolving representative wolf population in the NRM into the foreseeable future." FWS Br. at 27-28. This finding is undermined by (1) FWS's acknowledgement that "the habitat is important to facilitating dispersal of wolves," id. at 27, and (2) FWS's recovery standard, which emphasizes the importance of genetic exchange, see, e.g., 74 Fed. Reg. at 15,130-32. For these reasons, FWS's significance analysis was arbitrary and unlawful.

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

The bases for permanent injunctive relief in federal court "are irreparable injury and inadequacy of legal remedies." Amoco Prod. Co. v. Vill. of Gambell,

480 U.S. 531, 542 (1987). With nearly 500 wolves killed in Idaho and Montana by hunters and government agents in 2009 on the basis of a deeply flawed Delisting Rule, these requirements have been met and an injunction is warranted. See Second Honnold Decl., Exhs. 5, 6 (492 wolves killed in Idaho and Montana through December 28, 2009).

Defendants urge this Court to leave wolves delisted and allow wolf hunts to continue even should the Court find that the Delisting Rule violates the ESA. See FWS Br. at 38; Mont. Farm Bureau Br. at 19. There is no legal basis for Defendants' request. A determination that the Delisting Rule is invalid should result in vacatur. See Alsea Valley Alliance, 358 F.3d at 1185 (vacatur of an unlawful agency rule normally accompanies a remand); accord Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005); Natural Res. Def. Council v. EPA, 966 F.2d 1292, 1305 (9th Cir. 1992). Vacatur, in turn, has the effect of "reinstat[ing] the rule previously in force." Cal. ex rel. Lockyer v. U.S. Dep't of Agric., 575 F.3d 999, 1020 (9th Cir. 2009) (quoting Paulsen, 413 F.3d at 1008). This Court properly restored ESA protections for Yellowstone grizzly bears when it held recently that their delisting was unlawful. See Greater Yellowstone Coal., 2009 WL 3775085, *18 Likewise, in conjunction with its 2008 determination that FWS unlawfully delisted Midwest wolves, the District Court for the District of Columbia held that "the ESA's preference for protecting endangered species

counsels strongly in favor of vacating the Final Rule while FWS revisits its statutory interpretation" on remand. Humane Soc'y, 579 F. Supp. 2d at 21. Defendants provide no reason for a different result here.

More than 200 wolves have already been killed by hunters in Idaho and Montana. See Second Honnold Decl., Exhs. 5, 6. Ensuring that hunting mortality climbs even higher, Idaho recently extended its wolf hunting season to March 31, 2010 in every part of the state where the wolf quota has not yet been met. See id., Exh. 7.

Aggressive control actions and hunting have left 492 Idaho and Montana wolves dead in 2009, out of an estimated two-state population (as of December 2008) of 1,343 wolves. See id., Exhs. 5, 6; AR2009–041091. In Idaho alone, 2009 wolf mortality significantly exceeded pup production. See id., Exh. 6 (Idaho report of 268 dead wolves through December 28, 2009); id. Exh. 8 (estimate that only 179 wolf pups were produced in Idaho in 2009).[16] While Montana's pup production estimate is not yet available, as a whole, the northern Rockies wolf population has likely decreased for the first time since wolves were listed as endangered. These facts demonstrate irreparable injury to individual endangered wolves, the northern Rockies wolf population, and to plaintiffs' members' interests

[16] This is consistent with Idaho's pledge to reduce its wolf population. See AR2009–035107-08.

in observing wolves in the wild. This Court should restore the northern Rockies wolf's listed status to prevent further irreparable injury.[17]

CONCLUSION

For the foregoing reasons, Defenders respectfully requests that this Court grant its motion for summary judgment, deny defendants' summary judgment motions, vacate and remand the Delisting Rule, and restore ESA protections for northern Rockies wolves.

Respectfully submitted this 31st day of December, 2009.

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[17] There is no need for further briefing regarding remedy. See FWS Br. at 38. Defendants have had a full opportunity to brief this issue and the record supports vacatur, reinstatement of the prior wolf listing rule, and remand.

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), I hereby certify that the foregoing brief contains 9,355 words, excluding the caption, tables, and this certificate, as determined by the word count function of Microsoft Word 2003 Professional Edition. Plaintiffs have moved for leave to file a consolidated memorandum in response to the opening/opposition briefs of all defendants.

Dated: December 31, 2009

/s/ Douglas L. Honnold