

**HEADQUARTERS**

120 Shelton McMurphey Blvd.
Suite 340
Eugene, OR 97401
(541) 485-2471
info@westernlaw.org

Defending the West

OFFICES

Oregon
Washington
New Mexico
Montana
Colorado

westernlaw.org

WESTERN ENVIRONMENTAL LAW CENTER

February 7, 2024

Sent via U.S. Mail (Delivery Confirmation) and E-mail.

Deb Haaland, Secretary
U.S. Dep't of the Interior
1849 C Street N.W.
Washington, D.C. 20240
exsec@ios.doi.gov

Martha Williams, Director
U.S. Fish & Wildlife Service
1849 C Street N.W., Room 3358
Washington, D.C. 20240
Martha.Williams@fws.gov

RE: Sixty-day Notice of Intent to Sue – Not Warranted Finding for the Gray Wolf in the Northern Rocky Mountains and the Western United States – Docket No. FWS-HQ-ES-2021-0106, 89 Fed. Reg. 8,391 (Feb. 7, 2024)

Dear Secretary Haaland and Director Williams –

Pursuant to Section 11(g)(2) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), the Western Environmental Law Center (“WELC”) provides this sixty-day notice intent to sue the U.S. Department of the Interior and the U.S. Fish and Wildlife Service (hereinafter referred to jointly as the “Service”) for the 12-month finding that the Western United States (“Western U.S.”) gray wolf (*Canis lupus*) distinct population segment (“DPS”) does not warrant listing as an endangered or threatened species under the Endangered Species Act (“ESA”) (“not warranted finding” or “finding”).¹ This finding was issued in response to a 2021 petition submitted by Western Watersheds Project and 70 other nonprofit conservation organizations requesting federal

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).

protections for gray wolves in the Western U.S. or Northern Rocky Mountains (“NRM”) be reinstated (“2021 petition”).²

This notice is submitted by WELC on behalf of Western Watersheds Project, the International Wildlife Coexistence Network, WildEarth Guardians, Nimiipuu Protecting the Environment, Alliance for the Wild Rockies, Friends of the Clearwater, Wilderness Watch, Predator Defense, Trap Free Montana, and Protect the Wolves.

Collectively these organizations represent over 500,000 members and supporters who adamantly support the science-based recovery and conservation of gray wolves in the NRM and Western U.S. Each of these organizations is actively engaged in gray wolf conservation efforts in the NRM and Western U.S. Their many members, supporters, staff, and board members have sincere aesthetic, educational, recreational, scientific, and spiritual interests in seeing gray wolves recovered and conserved in the wild. The organizations have a strong interest in ensuring that the Service utilizes the best available science and complies with the ESA when making listing decisions. This notice of intent – and the subsequent legal action to follow, if necessary – is being submitted in furtherance of these organizations and their members’ interests.

INTRODUCTION / BACKGROUND

Although gray wolves historically occurred throughout most of the contiguous 48 states, they were largely extirpated through widespread human persecution.³ What was then known as the “northern Rocky Mountain wolf (*C. l. irremotus*)” was listed as endangered with the passage of the ESA in 1973.⁴ In 1995 and 1996 the Service reintroduced wolves to Idaho and Yellowstone National Park.⁵

Beginning only four years later, in 2000, the Service began efforts to prematurely remove wolves from ESA protection.⁶ After these efforts failed to pass judicial muster, Congress directed the Service to reissue a 2009 rule delisting wolves in the NRM and immunized that action from judicial review.⁷ Since then, wolves have been managed by state authority in Idaho, Montana, and

² The determination also includes the decision for a separate petition filed by the Center for Biological Diversity and Humane Society of the United States seeking the emergency relisting of the NRM population of gray wolves. 89 Fed. Reg. 8,391, 8,392.

³ See 2003 Wolf Downlisting Rule, 68 Fed. Reg. 15805 (Apr. 1, 2003).

⁴ Amendments to Lists of Endangered Fish and Wildlife, 38 Fed. Reg. 14678 (June 4, 1973).

⁵ See 2000 Proposed Wolf Delisting Rule, 65 Fed. Reg. 43457 (July 13, 2000).

⁶ See *id.*

⁷ 2011 Delisting Rule, 76 Fed. Reg. 25,590–92 (May 5, 2011); *All. for the Wild Rockies v. Salazar*, 672 F.3d 1170, 1175 (9th Cir. 2012).

Wyoming,⁸ and have had no federal ESA protections in those states. Gray wolves are presently listed under the ESA in the rest of the United States.⁹

Wolves in Idaho, Montana, and Wyoming are currently under attack by these states' management regimes. In Wyoming, wolves are classified as a "predatory animal" throughout 85 percent of the state and may be shot on-sight without bag limits, hunting license requirements, or limits on methods of take. Without federal oversight, Idaho and Montana have adopted increasingly lax new laws allowing greater and greater numbers of wolves to be killed and removing restrictions on wolf killing methods. In Idaho, this has led to grisly outcomes with days'-old wolf pups weighing as little as three-pounds being killed. In its 2009 rule delisting wolves in the NRM, the Service promised that "if a State changed their regulatory framework to authorize the unlimited and unregulated taking of wolves ... emergency listing would be immediately pursued,"¹⁰ but it has not followed through on that commitment.

Because of these alarming new pressures on wolves, in July 2021, Western Watersheds Project and its allies petitioned the Service to list a "Western DPS" of gray wolves as federally protected under the ESA, or alternatively, relist the "NRM DPS." In September 2021, the Service issued a positive 90-day finding on the petition.¹¹ The Service also issued a positive 90-day finding on a separate petition submitted by the Center for Biological Diversity and Humane Society of the United States seeking to federally protect the NRM DPS as a listed species under the ESA on an emergency basis.¹² The Service found that both petitions presented substantial information that listing of the gray wolves in the Western U.S. or NRM "may be warranted."¹³ The Service then initiated a status review of the species.¹⁴

Although the ESA required the Service to issue a finding that the petitioned listings were "warranted," "not warranted," or "warranted but precluded," within 12-months of receiving the first listing petition, 16 U.S.C. § 1533(b)(3)(B), it did not. Consequently, the Center for Biological Diversity and others sued the Service, and the parties settled for a deadline for the required finding by February 2, 2024.¹⁵

While the federal status review was pending, in 2023, Idaho finalized a new wolf management plan that announced an objective of promoting wolf killing until the wolf population is reduced from an estimated peak population of 1,337 wolves in 2022, to a population fluctuating

⁸ The 2009 rule also delisted wolves in the eastern one-third of the states of Oregon and Washington, and a small portion of north-central Utah as well.

⁹ See *Defenders of Wildlife v. U.S. Fish & Wildlife Service*, 584 F. Supp. 3d 812 (N.D. Cal. 2022) (overturning 2020 Nationwide Wolf Delisting Rule, 85 Fed. Reg. 60780 (Nov. 3, 2020)).

¹⁰ 2009 Delisting Rule, 74 Fed. Reg. 15,123, 15,148 (Apr. 2, 2009).

¹¹ 86 Fed. Reg. 51,857–59 (Sept. 17, 2021).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See

around 500 wolves.¹⁶ Also in 2023, Montana issued a draft wolf management plan announcing a plan to reduce the state’s population to around 450 wolves.¹⁷ Wyoming continues to manage for just 160 wolves, some of which move between Wyoming, Idaho, and Montana. Consequently, the NRM states of Idaho, Montana, and Wyoming (together) have expressed intentions to manage for roughly 1,110 wolves *total* in the NRM.

Although the Service initially found that the 2021 petition submitted by Western Watersheds Project, et al. presented substantial information showing that listing the species “may be warranted,” it apparently succumbed to political pressure and declined to list the species following its status review. The Service’s finding determines that the NRM is not a valid DPS, and thus, is not a valid listable entity under the ESA. The Service’s finding also determines that while the Western U.S. qualifies as a valid DPS, it does not meet the statutory definitions of an “endangered species” or a “threatened species,” and thus, does not warrant listing under the ESA.

The Service’s not warranted finding for the Western U.S. gray wolf is unlawful.

LEGAL VIOLATIONS

I. The Service failed to adequately consider and analyze the ESA’s five threat factors

The Service violated the ESA by failing to adequately consider and analyze all five threat factors from section 4(a) of the ESA, 16 U.S.C. § 1533(a), before issuing its 2024 not warranted finding. Pursuant to section 4(a)(1) of the ESA and the Service’s implementing regulations, the Service is required to determine whether a species is threatened or endangered because of any of the following factors: (A) the present or threatened destruction, modification, or curtailment of the species’ range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other man-made factors affecting the species’ continued existence. *Tucson Herpetological Soc’y v. Salazar*, 566 F.3d 870, 873 (9th Cir. 2009) (citing 16 U.S.C. § 1533(a)(1); 50 C.F.R. § 424.11(c)). These factors are listed in the disjunctive so any one or combination of them can be sufficient for a finding that a species qualifies as threatened or endangered.

In deciding not to list the Western U.S. gray wolf as endangered or threatened, the Service failed to carefully consider and adequately apply Section 4(a)(1)’s listing factors as required by the ESA and the Service’s implementing regulations.

¹⁶ Idaho Wolf Management Plan (2023) at 39, available at <https://idfg.idaho.gov/sites/default/files/idaho-gray-wolf-management-plan-2023-2028.pdf> [hereinafter “Idaho Plan (2023)”].

¹⁷ Montana Draft Wolf Management Plan (2023) at 5, available at https://fwp.mt.gov/binaries/content/assets/fwp/aboutfwp/public-comments/draft-wolf-plan/wmp2023_.pdf [hereinafter “Montana Draft Plan (2023)”]. However, note that both Idaho and Montana use unreliable methods to measure their states’ wolf populations, rendering these objectives an aspirational fiction. See e.g., Creel (2022), Crabtree (2023).

For example, the Service failed to adequately analyze and evaluate the threats from factor (B) (overutilization) and factor C (predation) and erroneously discounted and did not adequately consider the inadequacy of existing regulatory mechanisms (factor D). This includes failing to accurately consider the direct, indirect, and cumulative effects of drastically increased levels of human-caused mortality on wolves in the Western U.S., and in particular, in the core of the NRM population in Idaho and Montana (which serves as a source population for other regions in the Western U.S.). The Service also failed to consider and evaluate how Idaho's, Montana's, and Wyoming's management and population objectives for gray wolves in those states – if met – would directly, indirectly, or cumulatively affect the Western U.S. DPS.

Further, although Idaho and Montana pledge to maintain minimum wolf populations (which, by themselves are insufficient to maintain viable populations over the long-term), those promises are not reliable because neither state has a reliable method of estimating wolf populations that is sensitive to changes in the population. *See* Creel (2022) (“[I]mportant changes in the wolf populations of Idaho and Montana are likely to go undetected by the monitoring methods now in use.”); Crabtree (2023). Meanwhile, other factors point to lower wolf survival, such as smaller pack sizes (Idaho Plan (2023) at 11; Montana Draft Plan (2023) at 9), declining harvest (Idaho Plan (2023) at 13; Montana Draft Plan (2023) at 48, Fig. 10) despite higher hunter and trapper effort in Idaho (*see* Idaho Plan (2023) at 27) and incentives for removal in both states.¹⁸ Both Idaho and Montana admit that their state's wolf populations have declined in 2023 – a further decline from already decreased abundance in 2022. *See* Idaho Plan (2023), Appx. 56, Ex. 09; Montana Draft Plan (2023) at vi.

The Service acknowledges that human-caused mortality remains the leading threat to wolves, but instead of considering the impacts of increased mortality on the species' viability over the long-term in the Western U.S., especially in Idaho and Montana, it simply assumes that the effects won't cause extinction throughout the Western U.S., so the species, overall, will be fine. Whereas efforts to recover wolves presumed that human understanding would evolve to appreciate the gray wolf as “an important and necessary part of natural ecosystems,” in agriculture-based rural areas, hostility towards wolves often leads to aggressive efforts to eliminate them. 59 Fed. Reg. 60,253 (citing Musiani and Paquet (2004), Mech (2017)). That hostility drives state management in Idaho, Montana, and Wyoming, and in the absence of federal protections, these three states have focused increasingly on reducing the wolf populations within their boundaries to the 15 breeding pair/150 wolf minimum required by the Service to avoid returning the species to federal management.

For example, since 2018–2019, human hunting and trapping has killed between 30 and 50 percent of Idaho's wolf population annually (depending on whether the population is measured at years' end – around 1,000 wolves – or at its peak in the spring – around 1,500 wolves). However, the best available science reveals that wolves cannot withstand mortality above 20–25 percent of

¹⁸ See e.g., Found. For Wildlife Mgmt, <https://f4wm.org/> (last visited Jan. 31, 2024) (“F4WM funded 75% of the total wolves removed from Idaho in the 2022–2023 Season, as well as 54% of those harvested in Montana.”).

the population without sustaining population-level effects. Creel, et al. (2015) at 1474.¹⁹ Some of these population-level effects are already occurring (i.e., high pup mortality, younger-aged population, etc.). Nevertheless, Idaho and Montana have portrayed wolf populations as “stable” and have marshalled their resources towards eliminating even more wolves.

Yet, neither Montana’s iPOM model, nor Idaho’s space-to-event (“STE”) model can detect even large changes in the wolf population. See Creel (2021) at 8, 11, 14;²⁰ Crabtree (2023).²¹ Thus, wolf populations in these states could easily drop below the anticipated 15 breeding pair/150 wolf minimum without detection. As an example, Idaho’s population estimates represent the median of a range varying by about 800 wolves. Yet, Idaho’s wolf management plan anticipates wolf populations could dip to as few as 350 wolves, as estimated using Idaho’s STE model. A population “fluctuating around 500” total could represent as few as 100 wolves. While the Service’s finding recognizes that Montana and Idaho’s new population estimates are not comparable to past estimates, it also fails to accurately consider the effects of this aggressive human-caused mortality on the species’ conservation and recovery in the Western U.S.

The best available science reveals that eliminating, or seriously reducing, the wolf populations in Idaho, Montana, and Wyoming would have severe effects on wolf recovery throughout the West. For example, Washington’s wolf plan relies on a source population in Idaho and Montana to support its conclusion that the wolf population there can withstand planned state-sponsored removals. And, Colorado’s efforts to recover wolves in its boundaries have already been harmed by Wyoming’s management, since the first pack of wolves documented to have naturally reestablished in Colorado was lured across the Wyoming border and shot.

Managing for such minimal wolf numbers is already harming the genetic fitness of wolves in the Northern Rockies. vonHoldt, et al. (2023)²² studied NRM wolf genetics and found that wolves in the NRM already have declining genetic diversity at present population numbers. vonHoldt, et al. (2023) at 10, 11. The authors observed: “Current management actions that seek to reduce overall populations and permit hunting during the breeding season have the greatest potential to have negative consequences on effective population sizes.” *Id.* at 11. Yet, at the 2021 census number of 3,354 wolves for the NRM, the authors found the effective population size translated to only 201–335 wolves. *Id.* at 12. They concluded: “Given the strong skew in the effective-to-census size ratio in grey wolves, larger wolf populations are necessary to ensure long-term adaptation and survival.” *Id.* Despite these recent findings – which the Service did not

¹⁹ Creel, et al., Questionable Policy for Large Carnivore Hunting, *Science* (Vol. 350, Issue 6267) (2015).

²⁰ Creel, Methods to Estimate Population Sizes of Wolves in Idaho and Montana (2022) (submitted with comments from Western Watersheds Project during the status review).

²¹ Crabtree, et al., Misleading Overestimation Bias in Methods to Estimate Wolf Abundance That Use Spatial Models, *agRxiv* (2023), available at <https://www.cabidigitallibrary.org/doi/abs/10.31220/agriRxiv.2023.00215>.

²² 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>.

consider – the Service determined: “We also expect the population size to remain large enough, with sufficient connectivity and genetic diversity, to avoid consequential levels of inbreeding or inbreeding depression in the future.”

The Western U.S. gray wolf is thus threatened by inadequate states regulatory mechanisms, specifically state management regimes that manage to only minimum amounts, lack of adequate population sizes to ensure genetic viability into the foreseeable future, and the use of misleading population counting methodologies that do not adequately account for changes in the population. The Service failed to adequately consider these threats and their resulting effects on the conservation of the species in the Western U.S. in violation of the ESA. The Service also failed to account for changes in wolf habitat and movements in relation to climate change, loss of habitat from increasing hunter/trapper effort in Idaho and Montana, increased habitat fragmentation and loss of connectivity, and other human-caused factors. The Service also fails to consider how potentially low genetic diversity and small population sizes in portions of the Western U.S. threatened the species viability in the Western U.S. DPS. Nor did the Service consider how these threats cumulatively may affect gray wolves in the Western U.S. now or into the foreseeable future.

II. The Service failed to utilize and apply the best available science

The Service’s not warranted finding conflicts with the best available science. Pursuant to Section 4(b)(1)(A), 16 U. S.C. § 1533(b)(1)(A), the Service’s implementing regulations, and the Service’s 2011 policy on scientific integrity, the Service must make all listing determinations “solely on the basis of the best scientific and commercial data available.” This standard – often referred to as the “best available science” standard – does not require scientific certainty (assuming it even exists) or prohibit the Service from making listing decisions in the face of uncertainty or even scientific disagreement.

The ESA’s best available science standard ensures that the agency “take preventative measures before a species is ‘conclusively’ headed for extinction.” *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 679–80 (D.D.C. 1997) (emphasis in original); *see also American Wildlands v. Norton*, 193 F. Supp. 2d 244, 251 (D.D.C. 2002) (same). As such, definitive conclusions are not required.

Here, the Service’s not warranted finding largely ignores and/or misinterprets and misconstrues the best available science on the Western U.S. gray wolf population in at least two primary ways.

First, the Service fails to consider the best available science relating to the species’ genetic health (i.e., vonHoldt, et al. (2023)). Throughout its finding and the underlying SSA, the Service asserts the genetic diversity of gray wolves in the Western U.S. is fine and fails to constitute a sufficient threat to the species’ continued viability now, nor in the foreseeable future. However, there is no accurate scientific support or data in support of this finding. In fact, the Service ignores recent, published, peer-reviewed science demonstrating that this conclusion is false. In November 2023, vonHoldt et al. found that NRM wolves are presently experiencing genetic drift and “face

long-term risk of extinction on their own given their present-day effective population sizes.” vonHoldt, et al. (2023) at 11.

The Service acknowledges that the best available science reveals an effective population size of 500 is required to maintain the longterm genetic viability of a species, and some studies have even shown that an effective population size of 1,000 is required. *See* SSA at 20. But, while the Service estimates that the average ratio of effective population size to census size is 17 percent (0.12 to 0.26, 95 percent confidence interval) for the NRM, vonHoldt et al. (2023) determined that based on genetic data it is actually only 5.2 to 9.3 percent. *Compare* SSA at 20 with vonHoldt, et al. (2023) at 1. Thus, while the Service concludes that a census population size of only 1,923 to 4,167 wolves is needed to maintain an effective population of 500, vonHoldt, et al. (2023) specifically found that these numbers were insufficient. vonHoldt, et al. (2023) at 12. Indeed, vonHoldt, et al. (2023) found that at the 2021 census size of 3,354, wolves in the NRM were facing a loss of genetic diversity placing them at risk of longterm extinction. Because of this, a significantly larger census size is required to maintain the species longterm genetic diversity. The Service admits that its “[m]odel projections will underestimate risk of extinction if deleterious genetic effects are experienced by wolf populations at sizes >417 wolves,” which vonHoldt, et al. (2023) shows to be the case. SSA at 181. State management regimes in Idaho, Montana, and Wyoming will maintain census population sizes of less than one-third of 2021 levels. The Service’s failure to consider this important, recent scientific information and assumptions about total and effective population sizes (and the ratio between them) in making its finding conflicts with the best available science in violation of the ESA.

Second, the Service relies on wolf population estimates that also conflict with the best available science. The population estimates were devised by Idaho and Montana using the STE and iPOM methods, despite evidence that these estimates are unreliable and biased (i.e., Crabtree, et al. (2023); Creel (2022)). Although the Service recognizes that the estimates have been criticized, it states that “currently there are no published estimates of potential bias, if any, for the population estimates reported in Idaho and Montana, just as there are no definitive estimates of bias for minimum counts of wolves in these states.” SSA at 192. This is untrue, and in-fact, Crabtree, et al. (2023) stated: “Sells, et al. (2022a) reported that the [Montana] state-wide wolf abundance from iPOM was 1,141 individuals (arranged in 191 packs) when the true wolf population, according to the inherent bias we quantified, would actually be 456 individuals.” Crabtree, et al. (2023) at 9. Thus, Crabtree, et al. (2023) offers at least one published estimate of potential bias. Yet, the Service does not consider Crabtree, et al. (2023) anywhere in its analysis.

Instead, the Services arbitrarily relied upon the iPOM and STE-generated population estimates because “the best available scientific information does not allow us to determine if correcting the estimates from Idaho or Montana above or below their current values is appropriate, nor does it provide a clear correction factor.” SSA at 192. In fact, both Crabtree, et al. (2023) and Creel (2022) conclude that the flaws in both models are so severe that they do not permit any reliable inference about population size at all. *See* Creel (2022) at 14; Crabtree, et al. (2023) (entire). Crabtree (2023) provides a specific correction factor, stating: “At the grid cell size used in iPOM for Montana (600 km²) there was a severe overestimation bias of 150% that proliferated

through the iPOM submodel structure and resulted in estimated wolf abundance 2.5 times larger than true abundance.” The Service ignores these findings and uses population sizes derived from the models to support its finding that the species does not warrant ESA protection.

Under the ESA, the Service cannot ignore the findings of recent science in this way. *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1072–72 (9th Cir. 2018) (“Although FWS has broad discretion to choose which expert opinions to rely on when making a listing decision, it cannot ignore available biological data.”). Although the Service is free to choose among experts, it must acknowledge that it is doing so. *Id.* at 1068; *see also Survivors v. U.S. Dep’t of Interior*, 2022 WL 1539530, at *8 (N.D. Cal. May 16, 2022) (“By simply dismissing the relevant data, rather than ‘disagree[ing] with or discredit[ing]’ it, the Service ‘ignored’ the best available data.” (quoting *San Luis & Delta-Mendota*, 747 F.3d at 602)). The Service unlawfully failed to consider the best available science on the Western DPS’s genetic fitness, effective population size, and estimated populations in the core of its range in Idaho and Montana.

Additionally, the Service makes a number of scientifically unsupported conclusions and assumptions throughout its decision not to list the Western U.S. gray wolf, including, but not limited to: (1) assuming that Montana and Idaho will stop killing wolves in the next five to ten years once it has exhausted its current aggressive population reduction efforts to the minimal level; (2) assuming that states will continue to pursue conservation efforts for gray wolf conservation and recovery absent federal mandates under the ESA requiring them to do so; (3) assuming that wolf genetic diversity would not decrease to such an extent that it would negatively affect population demographics; (4) assuming that wolf populations will be managed to stay above 150 in Idaho and Montana; (5) assuming that Wilderness areas will serve as “refugia” for wolves, without considering efforts to increase hunter and trapper access into Wilderness areas; (6) assuming that inbreeding is not presently occurring; and (7) assuming that the Western U.S. DPS is a functioning metapopulation.

In short, the SSA’s conclusions underlying the Service’s not warranted finding are deeply flawed, conflict with the best available science, and fail to provide a “rational basis” to conclude that wolves in the Western U.S. are not warranted for listing.

III. The Service misapplied the ESA’s terms

The Service’s not warranted finding is premised on a misapplication of the terms “threatened” and “endangered” as used and applied in the ESA. Pursuant to the ESA, a species is “threatened” if it is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20). A species is “endangered” if it is “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). Construction of this language must be based on the best available science. *See Trout Unlimited v. Lohn*, 645 F.Supp. 2d 929, 947, 948 (D. Or. 2007); *Western Watersheds Project v. Foss*, 2005 WL 2002473, *15–17 (D. Id. 2005).

“Likely to become endangered” means “likely” to be “in danger of extinction.” *Lohn*, 645 F. Supp. 2d at 948. “[L]ikely’ clearly means something less than 100% certain, but how much less is not as clear.” *Id.* at 945. A reasonable construction of “likely” is at least a 50 percent chance (more likely than not). *Id.* at 949. In any case, the level of certainty relied upon by the Service must be based on consideration of the relevant statutory factors using the best available science. *Id.* at 947.

Likewise, “in danger of extinction” is not a fixed term, but its construction must be grounded in the best available science. *Id.* at 948. Certainly, “in danger of extinction” does not mean a “high risk of extinction.” *Western Watersheds Project*, 2005 WL 2002473, *17 (D. Id. 2005). “Instead, the required danger level for extinction necessarily depends on the applicable scientific viability assessments for the particular species.” *Lohn*, 645 F. Supp. at 948. For example, a one to five percent risk of extinction in 100 years can create a discernible risk of extinction. *Foss*, 2005 WL 2002473, *15 (citing *Center for Biological Diversity v. Lohn*, 296 F. Supp. 2d 1223, 1232 (W.D.Wash. 2003)).

The term “foreseeable future” must also be defined by reference to the best available science. *Foss*, 2005 WL 2002473, *15-17. As the Service recognized in a 2009 Solicitor Memorandum, “[t]he Secretary’s analysis of what constitutes the foreseeable future for a particular listing determination must be rooted in the best available data that allow predictions into the future, and the foreseeable future extends only so far as those predictions are reliable. ‘Reliable’ does not mean ‘certain’; it means sufficient to provide a reasonable degree of confidence in the prediction, in light of the conservation purposes of the Act.” M-Opinion 37021 at 13. What must be avoided is “speculation.” *Id.* at 8. The corollary is that the Service may not dismiss a risk of extinction that may be reasonably forecasted by science. *Foss*, 2005 WL 2002473, *15-17. It “defies common sense” to define “foreseeable future” to exclude the timeframe in which [the best available science] predict[s] extinction. *Id.* at 15. Prediction of the future is necessarily grounded in the “data and logic” of today. M-Opinion 37021 at 8. As one court reasoned, if a species will be endangered in the future if current circumstances continue, “it is clearly threatened today.” *Biodiversity Legal Found. v. Babbitt*, 943 F. Supp. 23, 25 n.5 (D.D.C. 1996).²³

With respect to the Western U.S. gray wolf, the Service failed to properly apply the ESA’s standards for “threatened” and “endangered” and the terms included therein when deciding the species is not warranted for listing. This includes failing to properly define and analyze whether the Western U.S. gray wolf is likely to become endangered in the “foreseeable future” (and relying on a new regulatory definition of “foreseeable future,” 50 C.F.R. § 424.11(d), which raises the bar too high and conflicts with the statute).

While the Service uses a 100-year “foreseeable future” timeframe to assess the species’ extinction risk in its finding and SSA, it also assumes that the current levels of aggressive and

²³ In 2019, the Service issued a new regulatory definition of “foreseeable future,” however, that definition is problematic and potentially unlawful as it raises the bar for assessing extinction risk too high by requiring documentation of both likely threats and the species’ likely responses to those threats. See 50 CFR 424.11(d) (2019).

excessive human-caused mortality being implemented in the core of the species range (i.e., Montana and Idaho) will stop within the next five to ten years if those states' efforts to reduce their populations to minimal levels succeed. This is speculative, at best, considering these states' past management practices and stated intentions to decrease wolf populations to absolute minimal levels. The Service's projections failure to consider the effects of such dramatic population declines in the core of the Western U.S.'s gray wolf population on the conservation and recovery prospects for the species throughout the entirety of the DPS. While the Service relies on continued progress and increasing populations in the West Coast States and Colorado to make up for the drastic reductions in wolf numbers in the core of the population's base in the NRM, it fails to make a rational connection between the facts found and decision made – i.e., Montana and Idaho have stated their intention (indeed, their state-level legal mandate) to exterminate wolves in their states to (potentially) as low as the minimum 150 wolves each (and 15 breeding pairs), but yet this dramatically decreased source population is supposed to remain viable enough to continue to serve as a crucial source population and further the conservation and recovery of wolves elsewhere in the Western U.S. This is the epitomy of arbitray and capricious decisionmaking that the law prohibits.

Additionally, the Service's use of a "quasi-extinction" threshold of only five wolves set the bar for assessing extinction risk far too high and fails to comport with the best available science. The Service's SSA, PVA analysis and future conditions modeling use a threshold of only five wolves as an indication that extinction of the species would be inevitable, citing Legendre, et al. (2008) and a prior PVA for gray wolves (ODFW (2015b) for support that five wolves is the definition of "biological extinction" for the species. SSA at 169. The use of five wolves as a quasi-extinction threshold fails to consider the reproductive ability of such a minimal population, their location and dispersal ability, among other factors, and fails to align with the best available science. The use of this quasi-extinction threshold in lieu of accurately determining a minimum viable population (MVP) also conflicts with the best available science.

IV. Failed to properly evaluate whether listing is warranted in a "significant portion" of the species' range

The Service's interpretation of "significant portion" and determination that the Western U.S. gray wolf is "not in danger of extinction in a significant portion of its range" is arbitrary and conflicts with the ESA. Under the ESA and the Service's implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so throughout all or "a significant portion of its range." The evaluation of whether a portion of the species range is "significant" typically involves a number of variables and factors, including (but not limited to) the size of the area, the percentage of the species' range, its biological and/or ecological importance, unique factors and habitat conditions, its importance for maintaining connectivity amongst subpopulations and facilitating genetic exchange, and whether its loss would result in the loss of a unique or critical function of the species. The focus of the analysis must be on the portion itself.

In 2014, the Service published a final rule interpreting the phrase "significant portion of its range." 79 Fed. Reg. 37,578 (July 1, 2014). The policy demands a high threshold for identifying a "significant portion." A portion of a species' range will only be deemed "significant" if its

“contribution to the viability of the species is so important that, without the members in that portion, the species would be in danger of extinction, or likely to become so in the foreseeable future, throughout all of its range.” *Id.* at 37,609. In other words, to qualify as a “significant portion” of a species’ range, the loss of members in that portion must ultimately threaten the entire listable entity. Two district courts have held this interpretation of “significant portion of its range” to be unlawful. *See Desert Survivors v. U.S. Dept. of the Interior*, 321 F. Supp. 3d 1011 (N.D. Cal. 2018); *Center for Biological Diversity v. Jewell*, 248 F. Supp. 3d 946 (D. Ariz. 2017).

Here, the Service found four areas as potentially “significant portions” of the Western U.S. gray wolf’s range warranting analysis: (1) Idaho, (2) Montana, (3) West Coast, and (4) NRM. However, the Service’s finding is erroneous with respect to its analysis of the ESA threat factors (individually and in the aggregate) to gray wolves across these four potentially “significant portions” of the species range as required by section 4(a)(1). When evaluating the five threat factors in these “significant portions,” the Service fails to support its finding with sufficient and reliable evidence, including, as mentioned above, recent science on the species’ genetic health (vonHoldt, et al. (2023)) and relies on population estimates without accurately considering the flaws of the methodologies being employed by some states (e.g., Montana and Idaho (Creel (2022), Crabtree, et al.(2023)). The Service ignored concerns of prominent wolf biologists and relied on unproven and unreliable methods and assumptions to support its findings contrary to the mandates of the ESA. Additionally, the Service failed to adequately explain why other portions of the species’ range in the Western U.S. were not significant, including areas where the species historically occurred and where suitable habitat exists but that are not currently occupied.

V. The Service relied on speculative conservation measures and commitments by states

The Service’s not warranted finding relies too heavily on largely voluntary and highly speculative actions that may or may not be taken by the states currently managing wolf populations and those that may have management authority over wolves if the species is delisted in areas in which it currently remains protected by the ESA in the Western U.S.

Pursuant to section 4(b)(1)(A) of the ESA, 16 U. S.C. § 1533 (b)(1)(A), and the Service’s implementing regulations, the Service must make listing determinations after “conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State” to protect such species. The Service can rely on conservation efforts, including state-initiated efforts, so long as they are binding and current, not voluntary or future, and have a proven track record of success. *See Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739, 748 (W.D. Tex. 1997); *Oregon Natural Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1153 (D. Or. 1998); *Fed’n of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, 1165 (N.D. Cal. 2000); *Ctr. For Biological Diversity v. Morgenweck*, 351 F. Supp. 2d 1137, 1141 (D. Colo. 2004). A sufficient track record of success is two years. *Save Our Springs*, 27 F.Supp. 2d at 748. Any conservation effort relied upon by the Service must also have been submitted for public notice and comment. *Id.*; *see also Morgenweck*, 351 F. Supp. 2d at 1141.

Here, the Service’s “not warranted” finding for the Western U.S. gray wolf inappropriately relies on commitments to purportedly “conserve” the species by states that have consistently (and

vociferously) done just the opposite. The Service relies on state management plans in Idaho and Montana that have been in effect for less than a year, and base population management goals on inaccurate population estimates. And, it makes a key assumption that states hostile to wolves – such as Montana and Idaho, in particular – will stop killing wolves once they have successfully decimated current populations to the most minimal number, even though those states’ population estimates are not sensitive to population changes (Creel (2022)). More importantly, in relying on the plans as conservation measures, the Service ignores that management in both Idaho and Montana has been dictated by the Legislatures in those states, which are not bound by the management plans and which have exhibited – and continue to exhibit – hostility towards wolves. Other states could duplicate this framework.

VI. The Service fails to use reliable data and make a rational connection between the facts found and the decision made

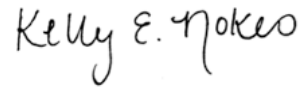
The Service’s Service’s not warranted and related findings are unsupported by reliable and meaningful data. Pursuant to the ESA and APA, the Service’s findings – including listing decisions – must be supported by reliable and meaningful data and evidence, and there must be a rational connection between the facts found in the record and the ultimate choice made. *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670 (D.D.C. 1997).

Here, the Service’s decision fails to utilize the best available science (as outlined above) and fails to provide adequate biological data and support for its conclusion that the Western U.S. gray wolf is “not warranted” for listing. Data and evidence on the effects of dramatically increased levels of human-caused mortality on the core source population of wolves in the Western U.S., in primarily Idaho and Montana, for instance, is missing from the decision or supporting SSA even though it was raised in comments by the public, by experts, and in the scientific literature. While the Service can “draw conclusions based on less than conclusive scientific evidence, it cannot base its conclusions on no evidence.” *National Assoc. of Home Builders v. Norton*, 340 F.3d 835, 847 (9th Cir. 2003). There is also no rational connection between the facts found regarding the likely effects of dramatic population reductions in Idaho and Montana and the conclusion that the species is not likely to become endangered in the foreseeable future throughout all or a significant portion of its range.

CONCLUSION

Wherefore, this sixty-day notice letter serves to put the Service on notice of its liability for violating the ESA and inform the agency of our intent to file a citizen suit under the ESA seeking appropriate relief. This notice is provided pursuant to, and in accordance with, section 11(g)(2) of the ESA, 16 U.S.C. § 1540(g)(2). If you have any questions regarding this notice or would like to meet with representatives from the undersigned organizations regarding this notice and their concerns, please contact me at the email address or number below.

Sincerely,



Kelly E. Nokes
Western Environmental Law Center
nokes@westernlaw.org
(575) 613-8051

Matthew K. Bishop
Western Environmental Law Center
bishop@westernlaw.org
(406) 324-8011

On behalf of:

Erik Molvar, Executive Director
Western Watersheds Project
P.O. Box 1770
Hailey, ID 83333
erik@westernwatersheds.org
(307) 399-7910

Suzanne Stone, Director
International Wildlife Coexistence Network
9169 W. State St. No. 1014
Garden City, ID 83714
suzanne@wildlifecoexistence.org
(208) 861-5177

Lindsay Larris, Wildlife Program Director
WildEarth Guardians
P.O. Box 7516
Missoula, MT 59807
llarris@wildearthguardians.org
(720) 468-0842

Julian Matthews, Coordinator
Nimiipuu Protecting the Environment
P.O. Box 452
Lapwai, ID 83540
protectingnimiipuu@gmail.com
(509) 330-0023

George Nickas, Executive Director
Wilderness Watch
P.O. Box 9175
Missoula, MT 59807
gnickas@wildernesswatch.org
(406) 542-2048 ext. 7

Brooks Fahy, Executive Director
Predator Defense
P.O. Box 5446
Eugene, OR 97405
brooks@predatordefense.org
(541) 937-4261

KC York
Trap Free Montana
P.O. Box 335
Hamilton, MT 59840
info@trapfreemt.org
(406) 218-1170

Roger Dobson
Protect the Wolves
7520 Fairland Road
Lucerne Valley, CA 92356
roger@protectthewolves.com
(714) 750-6878

Michael Garrity, Executive Director
Alliance for the Wild Rockies
P.O. Box 505
Helena, MT 59624
wildrockies@gmail.com
(406) 459-5936

Paul Busch
Friends of the Clearwater
P.O. Box 9241
Moscow, ID 83843
paul@friendsoftheclearwater.org
(208) 882-9755