

Office of the Governor

November 25, 2008

Public Comments Processing
ATTN: RIN 1018-AW37
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive
Suite 222
Arlington, VA 22203

RE: Comments on the proposed rule to designate the northern Rocky Mountain population of the gray wolf as a distinct population segment and to remove the distinct population segment from the Federal list of endangered and threatened species

Dear Madam or Sir:

On October 28, 2008, the United States Fish and Wildlife Service (“Service”) announced the reopening of the comment period for the proposed rule to establish a distinct population segment of the gray wolf in the northern Rocky Mountains of the United States (“NRM DPS”) and to remove the gray wolf in the NRM DPS from the list of endangered and threatened species. *See* 73 Fed. Reg. 63926-63932 (Oct. 28, 2008). The proposed delisting rule was published in the Federal Register in February 2007. *See* 72 Fed. Reg. 6106 – 6139 (Feb. 8, 2007). The State of Wyoming (“State”) hereby comments on the proposed rule and the seven specific issues listed in the announcement regarding the reopening of the comment period.

Introduction

In 1982, Congress amended the listing/delisting provisions in the Endangered Species Act (“ESA”) to require that listing and delisting decisions be based solely upon the best scientific and commercial data available. In enacting this amendment, Congress explained that the amendment was intended “to remove from the process of listing or delisting of species any factor not related to the biological status of the species.”

Despite this unambiguous congressional mandate, the Service repeatedly has allowed politics and public relations concerns to influence its decisions related to the delisting of the northern Rocky Mountain gray wolf population. In 2004, the then-Director of the Service rejected the State’s original wolf management scheme based upon political and public relations concerns about the predator classification for wolves in Wyoming and concern over how federal courts might react to the term “predator” in litigation over the final delisting rule. In 2006, the

Service denied the State's petition to delist for these same reasons. The Service had no legitimate biological or science-based reasons for rejecting the State's initial wolf management in 2004 and in denying the State's petition to delist in 2006.

In December 2007, the Service finally adhered to the ESA "best science" mandate and approved the State's wolf management scheme. However, based upon non-binding, cursory legal analysis of the State's wolf management scheme in a preliminary injunction order issued by a federal district court in Montana, the Service now has reverted back to a politically driven decision-making process in an attempt to promulgate a new delisting rule before the close of the current administration. To assure that this mad dash to adopt a new delisting rule will be completed before January 20, 2009, the Service already has decided to delist the gray wolf in Idaho and Montana, but not in Wyoming, even though the public comment period on the proposed rule has not been completed.

The Service provided irrefutable proof of this prejudged outcome when it recently informed State officials that the Service will not approve the State's wolf management scheme until the State amends its wolf management statutes to address the concerns expressed in the aforementioned preliminary injunction order. The ESA does not require that the regulatory mechanisms governing the management of a species be statutory. Thus, not only is the demand for statutory changes legally indefensible, but given that the Service has announced publicly that it intends to publish a new delisting rule in early January 2009, and given that the Wyoming Legislature does not convene its next legislative session until mid-January 2009, the demand for statutory changes also makes it logistically impossible for the State to comply with the demand. The Service is using the demand for statutory changes as an excuse to justify removing the State from the final delisting rule so that the Service can complete the rulemaking process by its self-imposed January 2009 deadline.

In the strongest possible terms, the State urges the Service to end its practice of allowing politics and public relations concerns to drive the decision-making process for the new delisting rule. While any rule to delist the northern Rocky Mountain gray wolf population will undoubtedly be challenged in court, relying solely upon biological evidence to evaluate the adequacy of the three states' respective regulatory mechanisms is the only possible way the new delisting rule can survive judicial review. The Service must trust that the biological evidence supporting a rule to delist wolves in the entire NRM DPS ultimately will carry the day in court, even if the Service has to pursue an appeal to prevail on the merits.

The State's current wolf management scheme allows the State to maintain its share of a recovered wolf population. The Service thus has no legitimate biological reason to deem the State's wolf management scheme inadequate or to delist wolves in Idaho and Montana but not Wyoming.

The gray wolf populations in the proposed NRM DPS should have been delisted in 2004 but, due solely to the Service's willingness to let politics trump biology, the gray wolf remains listed and likely will remain so for years to come if the Service continues to let politics influence its delisting decision. The time has come for the Service to set politics aside and to fulfill its

legal responsibilities under the ESA. The Service can accomplish this by promulgating a final rule to delist the gray wolf population throughout the entire NRM DPS.

I. Comments on preliminary matters.

The Service cannot use the February 2007 proposed rule as the basis for soliciting public comments on the new final delisting rule because the February 2007 proposed rule does not include the Service's analysis of the State's current wolf management scheme.

In 2007, after the proposed rule was published, the Wyoming Legislature amended the State's wolf management statutes. The current wolf management statutes are therefore different than the statutes analyzed in the proposed rule.

In October 2008, the Wyoming Game and Fish Commission ("Commission") adopted an amended version of the wolf management rule ("Chapter 21") in the Rules and Regulations of the Commission ("Commission Rules"). Chapter 21 has been amended, *inter alia*: (1) to clarify the State's commitment to manage for at least 15 wolf packs in Wyoming; (2) to clarify the State's commitment to manage wolves so that, to the extent practicable, genetic connectivity and diversity issues do not threaten the gray wolf population; (3) to define the phrase "doing damage to private property" so that it is consistent with the definition of the phrase "in the act of attacking" in the 2005 10(j) rules; and (4) to define the phrase "chronic wolf depredation area" to clarify the applicable geographic and temporal limitations. In November 2008, the Commission amended the Wyoming Plan to incorporate the amendments made to Chapter 21 of the Commission Rules. Both the amended rules in Chapter 21 and the corresponding changes to the Wyoming Plan are consistent with the State's current wolf management statutes.

The Service must consider the State's current wolf management statutes, the amended rules in Chapter 21, and the amended Wyoming Plan is assessing the adequacy of the State's wolf management scheme. In doing so, the Service must issue a proposed rule in which the Service provides a detailed analysis of whether the State's wolf management scheme satisfies the adequate regulatory mechanisms requirement in the ESA and give the public a chance to comment on the Service's analysis of this issue. By using the existing proposed rule and then soliciting comments on seven specific issues, the Service effectively (and improperly) has inverted the public comment process.

In the Federal Register notice announcing the reopening of the comment period on the February 2007 proposed rule, the Service solicited comment on seven specific issues. *See* 73 Fed. Reg. at 63927. The request for comment on the seven specific issues falls outside of the purview of the public comment provisions in the federal Administrative Procedure Act ("APA"). Accordingly, the failure to provide specific comments on any (or all) of the seven specific issues does not preclude the State from seeking judicial review of the Service's final decision on any (or all) of the seven specific issues in the Federal Register notice for the final delisting rule.

The seven specific comment issues appear to arise from the preliminary injunction order issued by the United States District Court for the District of Montana ("Montana district court")

in *Defenders of Wildlife v. Hall*, U.S.D.C. (Mont.) Case Number 08-56-M-DWM (July 18, 2008). In this preliminary injunction order, the Montana district court questioned the adequacy of the Wyoming wolf management scheme in determining whether the plaintiffs were likely to succeed on the merits of the claims asserted in the lawsuit. As a matter of law, this un-appealed preliminary injunction order has no binding legal effect outside of the context of the preliminary injunction proceeding. Thus, the Service is not bound by the Montana district court's findings in the preliminary injunction order. The Service also cannot rely on the findings in the preliminary injunction order as a reason for rejecting the State's wolf management scheme.

On a related note, in a letter dated November 10, 2008, the Acting Deputy Regional Director of the Service's Region 6 office notified the State that the Wyoming wolf management statutes must be amended before the Service will approve the State's wolf management scheme. The Acting Deputy Regional Director indicated that the statutory amendments are necessary as a result of the preliminary injunction order issued by the Montana district court. The preliminary injunction order does not (and, as a matter of law, cannot) require the State to amend its wolf management statutes. In addition, given that the preliminary injunction order is not legally binding on the Service outside of the context of the preliminary injunction proceedings, the Service cannot rely on the order as an excuse for demanding that the State amend its wolf management statutes. By demanding that the State make statutory changes, the Service has illegally prejudged the outcome of the delisting decision-making process.

The Service's demand regarding amendments to the State's wolf management statutes also represents an indefensible interpretation of the adequate regulatory mechanism requirement in the ESA. Nothing in the text of the ESA, the legislative history of the ESA, or the text of the regulations that implement the ESA require that the regulatory mechanisms governing the management of a species be statutory. The State's wolf management statutes, the corresponding wolf management rule, and the Wyoming Wolf Management Plan ("Wyoming Plan") all must be considered in any assessment of the adequacy of the State's regulatory mechanisms.

II. Comments on the proposed rule published in the Federal Register on February 8, 2007

On April 5, 2007, the Wyoming Game and Fish Department ("Department") submitted the attached 88 page comment letter on the proposed delisting rule published in the Federal Register on February 8, 2007. The State adopts the Department's April 5, 2007, comments and incorporates those comments by reference here.

In addition, in the proposed rule, the Service identifies two possible alternatives for the new final delisting rule. Under the first alternative, the Service will create an NRM DPS for the gray wolf and will delist the entire NRM DPS. Under the second alternative, the Service will create an NRM DPS and will delist all of the NRM DPS except for the area in northwestern Wyoming where the wolf currently is classified as a trophy game animal. The NRM DPS proposed in both alternatives encompasses all of Idaho, Montana, and Wyoming, and portions of northern Utah, eastern Oregon, and eastern Washington.

The Service should adopt the first alternative in the new final delisting rule. In the Federal Register notice for the proposed rule, the Service analyzes a Wyoming wolf management scheme that no longer exists. Although the State disagrees with the Service's determination that the State's prior wolf management scheme did not satisfy the adequate regulatory mechanism requirement for delisting in the ESA, the State's current wolf management scheme (consisting of the statutory amendments enacted in House Bill 213 during the 2007 legislative session, the current Chapter 21 of the Rules and Regulations of the Wyoming Game and Fish Commission ("Commission Rules"), and the Wyoming Gray Wolf Management Plan approved by the Commission in November 2008) indisputably provides an adequate regulatory mechanism to allow the State to maintain its share of the recovered wolf population in to the foreseeable future. Therefore, the Service should find that delisting the entire NRM DPS is warranted.

As a matter of law, the Service cannot implement the second alternative in the new final delisting rule. The ESA authorizes the Service to delist a DPS, not a part of a DPS. Thus, the Service has no legal authority to create the NRM DPS and then delist wolves in Idaho and Montana while leaving wolves in Wyoming listed. If the Service adopts the second alternative, the Service has no legal authority to deviate from the exact structure of the rule as described in the Federal Register notice for the proposed rule, particularly with respect to the issues of: (1) the dual status of wolves in Wyoming as described in the second alternative (non-essential experimental and "not listed"); and (2) the boundaries for the NRM DPS as described in the second alternative.

III. Comments on the Federal Register notice published on October 28, 2008.

The State adopts the attached comments from the Wyoming Game and Fish Department ("Department") on the Federal Register notice published on October 28, 2008, and incorporates those comments by reference here. With respect to the seven specific issues on which the service now has solicited public comment, the State offers the following additional comments:

A. Whether it is appropriate or necessary to revise the Service's recovery goal to clarify that the genetic exchange called for can be satisfied through either natural migration or managed genetic exchange.

The State adopts the attached November 24, 2008, comments from the Department on this issue and incorporates those comments by reference here.

B. What additional management, protections, and regulatory mechanisms may be needed to facilitate genetic exchange (including both natural migration and managed genetic exchange) including the actions outlined in the draft memorandum of understanding regarding the protection of genetic diversity of NRM gray wolves.

The State adopts the attached November 24, 2008, comments from the Department on this issue and incorporates those comments by reference here.

C. What portions of Wyoming need to be managed as a trophy game area, how Wyoming should manage wolves in the trophy game area, and the significance of all portions in the range in the State of Wyoming in maintaining the viability of the NRM DPS.

The State adopts the attached November 24, 2008, comments from the Department on this issue and incorporates those comments by reference here.

D. The adequacy of existing regulatory mechanisms in Montana, Idaho, and Wyoming, including whether Wyoming's regulatory mechanisms do or should manage for 15 breeding pairs and 150 wolves in mid-winter and if Wyoming's malleable trophy game area affects its ability to manage for such numbers of wolves.

The State adopts the attached November 24, 2008, comments from the Department on this issue and incorporates those comments by reference here.

This comment issue apparently arises from the analysis in the preliminary injunction order issued by the Montana district court. The Montana district court identified the following four alleged deficiencies with the State's wolf management scheme: (1) Wyo. Stat. Ann. § 23-1-304 shows that the State is not committed to maintaining 15 breeding pairs of wolves in Wyoming; (2) the Service did not explain why it had changed positions on the issue of whether wolves should be classified as trophy game animals statewide in Wyoming; (3) the Service did not explain why Wyoming's wolf management scheme is adequate given the "malleable nature" of the trophy game area in Wyoming; and (4) the Service did not analyze whether the depredation control authority in Wyo. Stat. Ann. § 23-3-115 may prevent the State from maintaining its share of the recovered wolf population. Taking these specific issues in turn:

1. Wyo. Stat. Ann. § 23-1-304

The Montana district court determined that Wyo. Stat. Ann. § 23-1-304 shows that the State is not committed to maintaining 15 breeding pairs of wolves in Wyoming. The Montana district court based its determination on three different subsections in Wyo. Stat. Ann. § 23-1-304: subsections (a), (j), and (n). Reading these subsections together, the Montana district court concluded that the State intends to satisfy the 15 breeding pair requirement by relying on Yellowstone National Park, Grand Teton National Park, and the John D. Rockefeller, Jr. Parkway (collectively "the National Parks") to maintain eight breeding pairs of wolves in Wyoming and, thus, the State has not clearly committed to managing for 15 breeding pairs of wolves in Wyoming.

Chapter 21 of the Commission Rules confirms the State's commitment to manage for at least 15 breeding pairs of wolves in Wyoming. In Section 4(a) of Chapter 21, the Commission unambiguously commits to manage for at least 15 breeding pairs of wolves in Wyoming, with at least seven of those breeding pairs located in Wyoming and primarily outside of the National Parks. In addition, Chapter 21, Section 4(b) states as follows:

If the Commission determines that there are less than eight (8) breeding pairs located inside of the National Parks for two (2) consecutive years, then the Department shall manage for a sufficient number of breeding pairs and wolves in the area of the WTGMA located outside of the National Parks to achieve the management objective described in Section 4(a).

Read together, Sections 4(a) and 4(b) in Chapter 21 clarify that the State is committed to managing for at least 15 breeding pairs of wolves (comprising at least 150 wolves) in Wyoming. Given that Chapter 21 of the Commission Rules has the force and effect of law, this clear management commitment should satisfy the adequate regulatory mechanisms requirement for delisting.

The three subsections in Wyo. Stat. Ann. § 23-1-304 that the Montana district court cited as raising questions about the State's commitment to manage for 15 breeding pairs are consistent with the unambiguous language of Sections 4(a) and 4(b) in Chapter 21 in the Commission Rules. In accordance with Wyo. Stat. Ann. § 23-1-304(a), the Commission annually shall set bag limits and seasons for areas where wolves are classified as trophy game animals "only as reasonably necessary to ensure at least seven (7) breeding pairs of gray wolves are located in [Wyoming] and primarily outside of [the National Parks] at the end of the current calendar year." (Emphasis added). The open-ended phrase "at least" gives the Commission and the Department absolute discretion to manage for more than seven breeding pairs of wolves in the area of Wyoming outside of the National Parks if doing so is necessary for the State to maintain its share of the recovered wolf population. The unambiguous language in Wyo. Stat. Ann. § 23-1-304(a) thus is consistent with Sections 4(a) and 4(b) in Chapter 21 of the Commission Rules.

The unambiguous language in Wyo. Stat. Ann. § 23-1-304(j) also is consistent with Sections 4(a) and 4(b) in Chapter 21 of the Commission Rules. In accordance with Wyo. Stat. Ann. § 23-1-304(j), the Department "is authorized to take any action necessary to protect big and trophy game populations in this state from predation by gray wolves" as long as there are at least seven breeding pairs of wolves in Wyoming and primarily outside of the National Parks. (Emphasis added). The passive verb phrase "is authorized" gives the Department discretion to take action to address wolf predation on wild ungulate herds in Wyoming, but does not require the Department to do so. Moreover, Wyo. Stat. Ann. § 23-1-304(j) must be interpreted in light of the legislative intent in enacting Wyo. Stat. Ann. § 23-1-304. The Wyoming Legislature enacted WYO. STAT. ANN. § 23-1-304 "to provide appropriate state management and control of gray wolves in order ... to prevent future listing of the gray wolf as an experimental nonessential population, endangered species, or threatened species." 2003 Wyo. Sess. Laws, ch. 115, §4(a). Thus, in exercising its discretion under Wyo. Stat. Ann. § 23-1-304(j), the Department cannot take any action that may result in the relisting of the gray wolf. Given the discretionary nature of Wyo. Stat. Ann. § 23-1-304(j) and the legislative intent underlying Wyo. Stat. Ann. § 23-1-304, Wyo. Stat. Ann. § 23-1-304(j) is consistent with the commitment in the Commission Rules to manage for at least 15 breeding pairs of wolves in Wyoming.

Finally, the unambiguous language in Wyo. Stat. Ann. § 23-1-304(n) is consistent with Sections 4(a) and 4(b) in Chapter 21 of the Commission Rules. In accordance with Wyo. Stat. Ann. § 23-1-304(n), the Department shall promulgate rules for the issuance of lethal take permits to address chronic wolf predation and that such permits shall be issued “as long as there are seven (7) breeding pairs within [Wyoming] and outside of [the National Parks].” However, Wyo. Stat. Ann. § 23-1-304(n) further provides that “the rules shall provide for suspending or cancelling permits if further lethal control could cause relisting of wolves under the [ESA].” Therefore, if circumstances dictate that the Department must manage for more than seven breeding pairs of wolves in Wyoming outside of the National Parks to maintain the State’s share of the recovered wolf population, then lethal take permits may be cancelled or suspended as needed to achieve this management objective. The unambiguous language in Wyo. Stat. Ann. § 23-1-304(n) thus is consistent with the commitment in the Commission Rules to manage for at least 15 breeding pairs of wolves in Wyoming.

In addition to expressing concerns about Wyo. Stat. Ann. §§ 23-1-304(a), (j), and (n), the Montana district court also relied on previous statements from the Service in finding that it is “unrealistic” for the State to rely on the National Parks to maintain eight of the State’s 15 breeding pairs of wolves. This “unrealistic” finding arises from the Service’s labored attempts to explain why it rejected the original Wyoming Plan on the ground that the plan did not commit the State to manage for at least 15 packs (or breeding pair).

In January 2004, the then-Director of the Service rejected the State’s original wolf management scheme in part because he determined that the wolf management scheme did not clearly commit the State to manage for at least 15 packs (or breeding pair) of wolves. The then-Director had no biological or scientific evidence to support this statement, but instead made the statement as a veiled demand for the State to eliminate the predator classification.

The Service further confused the “clear commitment” issue in August 2006 when, in the Federal Register notice announcing the denial of the State’s petition to delist, it attempted to explain the “clear commitment” statement. In this Federal Register notice, the Service cited a one year drop (in 2005) in the number of breeding pairs in Yellowstone as evidence that it is “unrealistic” for the State to rely on the National Parks to maintain at least eight breeding pairs of wolves in Wyoming.

The “unrealistic” statement is disingenuous as the Service’s analysis in the Federal Register notice implies that only seven pairs of adult wolves in Yellowstone bred and had pups in 2005. Such is not the case. Many of the wolf pups born in Yellowstone in 2005 died from canine parvovirus and/or distemper. By definition, to be a “breeding pair,” an adult male wolf and an adult female wolf must have at least two pups survive until December 31 of the years the pups were born. Thus, by definition, there were only seven “breeding pairs” of wolves because only seven pairs had at least two pups survive until December 31. However, significantly more than seven adult wolves bred and had pups in 2005. These pairs of adult wolves bred again in 2006 and, as a result of a much higher pup survival rate, the number of “breeding pairs” in Yellowstone in 2006 rebounded to 10 breeding pairs.

The “unrealistic” statement also is disingenuous because it falsely implies that Yellowstone has had less than eight breeding pairs of wolves in other years. Since the numeric recovery goals were first met in 2000, 2005 is the only year in which Yellowstone has had less than eight breeding pairs. Given the wolf population numbers from the past nine years, the Service was wrong to state that it is “unrealistic” to expect Yellowstone to have at least eight breeding pairs of wolves annually.

In addition, the “unrealistic” statement in the Federal Register notice shows a complete lack of understanding of basic wildlife management biology. Viewed in isolation, a one year population decline for wolves in Wyoming is not relevant in determining whether the State is maintaining its share of the recovered wolf population. At a minimum, the Service must look at the wolf population trend over a consecutive three year period to determine whether the wolf population in Wyoming truly is declining. For example, history has shown that the so-called “substantial decline” in breeding pairs in Yellowstone in 2005 was nothing more than a one year aberration that in no way jeopardized the long term viability of the recovered wolf population in Wyoming, as Yellowstone had 10 breeding pairs in both 2006 and 2007.

2. Statewide trophy game status

The Montana district court next determined that the Service did not explain why it had changed positions on the issue of whether wolves should be classified as trophy game animals statewide in Wyoming. It is important to note that the Montana district court did not find that the dual classification of wolves as trophy game animals and predators in Wyoming violates the ESA or otherwise would prevent the State from maintaining its share of the recovered wolf population. Instead, the Montana district court held that the Service had changed its position on the dual classification issue — first rejecting the State’s petition to delist in part because wolves were not classified as a trophy game animal statewide and then approving the State’s wolf management scheme which include a dual classification for wolves — without explaining why the Service had changed positions on the issue.

According to the Montana district court, “the Service rejected Wyoming’s 2003 plan in favor of statewide trophy game designation. The Service has failed to provide any rationale for accepting something less now. Left unexplained, the capitulation is arbitrary and capricious.”

The Service alone is responsible for the Montana district court’s ruling on the dual classification issue. In January 2004, the then-Director of the Service told the State that the Service would not approve the State’s wolf management scheme unless wolves were classified as trophy game animals statewide. The then-Director imposed this requirement even though there was no biological or scientific evidence to support it. The Service further confused the issue in February 2006 when it attempted to justify the statewide trophy game requirement in the Federal Register notice announcing the denial of the State’s petition to delist. In a confused and rambling analysis in this Federal Register notice, the Service did not cite any biological or scientific evidence to justify the statewide trophy game requirement.

The Service has no biological or scientific basis for requiring the State to change the dual classification for wolves in Wyoming. The dual classification management concept has been peer reviewed by 11 of “the top recognized wolf researchers, wolf management and livestock depredation experts in North America,” each of whom was selected by the Service, and has been vetted by the Service’s Western Gray Wolf Recovery Coordinator. None of these wolf experts have opined that the dual classification of wolves in Wyoming will prevent the State from maintaining its share of the recovered wolf population.

Of the 11 peer review experts who review the dual classification concept, only three expressed concerns about the predator classification, but none of these peer reviewers concluded that the State must classify wolves as trophy game animals statewide in order to maintain the State’s share of the recovered wolf population. Moreover, the Service’s Western Gray Wolf Recovery Coordinator has expressly approved the dual classification management concept for wolves in Wyoming, stating that “[w]hile we do not believe dual status in and of itself will preclude Wyoming from maintaining its share of a recovered wolf population, the area where wolves are managed as ‘trophy game’ has to be large enough to completely encompass a recovered wolf population.” As the Service has stated repeatedly, the current trophy game area in Wyoming is large enough to allow the State to maintain its share of the recovered wolf population.

In the Federal Register notice for the new delisting rule, the Service must admit that in January 2004 and in February 2006, Service officials relied on factors other than biological evidence in concluding that wolves must be classified as trophy game animals statewide in Wyoming and admit that, in doing so, these officials violated the unambiguous requirements for delisting in the ESA. If the Service does not admit to this mistake, then no delisting proposal will survive judicial review. The Service also must provide a rational, biology-based analysis to explain why the dual classification for wolves as established in the State’s current wolf management scheme will allow the State to maintain its share of the recovered wolf population.

3. The malleable trophy game line

The Montana district court also concluded that the Service did not explain why Wyoming’s wolf management scheme is adequate given the “malleable nature” of the trophy game area in Wyoming. As a matter of law, the Service cannot rely on the possibility that the size of the trophy game area might change at some time in the future as a reason for finding that Wyoming’s wolf management scheme is inadequate. The ESA requires the Service to evaluate to the adequacy of “existing” regulatory mechanisms in determining whether a species should be delisted. The unambiguous language in the ESA thus prohibits the Service from relying on future or speculative regulatory mechanisms in making a delisting decision. Any concerns about the alleged “malleability” of the trophy game area necessarily must be based on improper speculation about some future action the Wyoming Game and Fish Commission may or may not take and therefore cannot be considered in assessing whether the State’s wolf management scheme is adequate to maintain the State’s share of the recovered wolf population.

The outermost boundary of the trophy game area in Wyoming is established in Chapter 21, Section 3(j) of the Commission Rules. Pursuant to Chapter 21, Section 4(c) of the Commission Rules, the Commission cannot diminish the trophy game area described in Section 3(j) unless, based upon the best scientific data available, the Commission determines that diminishing the trophy game area will not prevent the Commission from achieving the management objectives of at least 15 breeding pairs (comprising at least 150 wolves) in Wyoming. Sections 3(j) and 4(c) thus establish a stable, constant area where wolves are classified as trophy game animals and not the “metaphorical moving target” suggested by the Montana district court. Moreover, as the Service repeatedly has recognized, the area encompassed by this trophy game area is sufficient to support at least 15 breeding pairs of wolves (comprising at least 150 wolves). Accordingly, the existing trophy game area in Wyoming is sufficient to allow Wyoming to maintain its share of the recovered wolf population and, thus, satisfies the requirements for delisting.

4. Wyo. Stat. Ann. § 23-3-115

Finally, the Montana district court questioned whether the State’s depredation control law, Wyo. Stat. Ann. § 23-3-115, would prevent the State from maintaining its share of the recovered wolf population. The Montana district court also chastised the Service for not explaining whether Wyo. Stat. Ann. § 23-3-115 is similar to the defense of property provisions in the 10(j) rule.

Read together, Wyo. Stat. Ann. §§ 23-3-115 (a) and (c) authorize the owner, an employee of the owner, or a lessee of private property to immediately take and kill a gray wolf “doing damage” to the property. In Chapter 21, Section 3(b) of the Commission Rules, the Commission has defined the phrase “doing damage to private property” to mirror the definition of the phrase “in the act of attacking” from the 2005 10(j) rules. Given this definition in Chapter 21, Section 3(b), the defense of property provisions in Wyo. Stat. Ann. §§ 23-3-115 (a) and (c) afford gray wolves the same protection as the 2005 10(j) rules. If this level of protection was sufficient while the wolf population was still listed, then the protection afforded by Wyo. Stat. Ann. §§ 23-3-115 (a) and (c) also should be more than sufficient to allow Wyoming to maintain its share of the recovered wolf population.

In addition to the concerns expressed by the Montana district court, the Service also has told the State that the phrase “chronic wolf depredation area” must be defined to impose geographic and temporal limitations on the terms of lethal take permits issues to private citizens. The Commission has amended Chapter 21 to define the phrase “chronic wolf depredation area” in the manner requested by the Service.

E. If the Service determines that Wyoming’s State law and wolf management plan do not constitute adequate regulatory mechanisms, the area in northwestern Wyoming that is a significant portion of the range in the NRM DPS that should retain its nonessential experimental population status under Section 10(j) of the ESA, even if the Service determines that the rest of the DPS should be delisted.

The State adopts the attached November 24, 2008, comments from the Department on this issue and incorporates those comments by reference here.

As a matter of law, the Service cannot delist only a portion of the NRM DPS. The ESA authorizes the Service to delist a DPS, not a part of a DPS. Thus, the Service has no legal authority to create the NRM DPS and then delist wolves in Idaho and Montana while leaving wolves in Wyoming listed.

Both the wording of this request for comment and public statements made by Service representatives suggest that the Service may change the listed status of wolves in Wyoming to some other listed status in the new final delisting rule. The Service has no legal authority to make such a change in the listed status of wolves in Wyoming. When wolves were introduced into Yellowstone in the mid-1990s, it was understood that wolves in Wyoming would remain listed as non-essential experimental until such time as the wolves were delisted.

The legal requirements of the APA also prohibit the Service from changing non-essential experimental status of wolves in Wyoming to some other listed status in the new final delisting rule. The proposed rule sets forth two delisting alternatives — the Service will either delist wolves throughout the entire NRM DPS or will delist wolves in all parts of the NRM DPS except the significant portion of the range of the wolves in Wyoming. The proposed rule states that, under the second delisting scenario, wolves in the significant portion of the range in Wyoming will retain the nonessential experimental listing status. If the Service adopts the second delisting scenario in the new final delisting rule but changes the listed status of wolves in the significant portion of the range in Wyoming to some other listed status, then the Service will have violated the public comment requirement in the APA. Such a change in listed status is not a “logical outgrowth” of the proposed rule. The Service’s solicitation of comments on the seven specific issues in addition to the substance of the proposed rule does not cure this legal defect.

Finally, the Service cannot change the listed status of the wolves in Wyoming to some other listed status without first completing an environmental impact statement in accordance with the National Environmental Policy Act. Since Congress required the Service to complete an EIS before introducing wolves to Wyoming, the Service must complete a new EIS or a supplemental EIS before it can change the listed status.

F. How Idaho, Montana, and Wyoming’s management of take associated with their defense of property laws and hunting regulations affects each State’s commitment and ability to manage for 15 breeding pairs and 150 wolves in mid-winter.

The State adopts the attached November 24, 2008, comments from the Department on this issue and incorporates those comments by reference here.

G. Whether and under what authority the Service may identify and designate a DPS within a broader pre-existing listing and determine that this DPS should be removed from the endangered species list.

The State adopts the attached November 24, 2008, comments from the Department on this issue and incorporates those comments by reference here.

This request for comment arises from the decision of the United States District Court for the District of Columbia (“D.C. District Court”) in *Humane Society v. Kempthorne*, U.S.D.C. (D.C.) Civil Action Number 07-0677 (Sept. 29, 2008). In *Humane Society*, the D.C. District Court remanded the case to the Service “to bring its expertise and experience to bear on the question of whether the ESA permits [the Service] to use the DPS tool” to create and simultaneously delist a DPS. The D.C. District Court then instructed the Service to address the following five specific issues to support the Service’s interpretation: (1) how the Service’s interpretation conforms to the text, structure, and legislative history of the ESA; (2) how the Service’s interpretation is consistent with the judicial interpretations of the ESA (if any); (3) how the Service’s interpretation serves the policy objectives of the ESA; (4) how the Service’s interpretation could undermine the policy objectives; and (5) whether the Service’s interpretation represents a change in position.

The Service should continue to interpret the ESA as allowing the Service to create a DPS within a broader pre-existing listing and to simultaneously delist the DPS. In the Federal Register notice for the new final delisting rule, the Service’s explanation of the basis for the delisting should include a reasoned analysis of the five specific issues identified as relevant by the D.C. District Court. The State reserves its right to review and comment on the adequacy of the analysis.

H. Additional comments the Federal Register notice published on October 28, 2008.

The State adopts the attached November 24, 2008, comments from the Department on the remainder of the October 28, 2008, Federal Register notice and incorporates those comments by reference here.

Conclusion

The ESA dictates the Service must evaluate the adequacy of existing regulatory mechanisms requirement for delisting based solely upon the best scientific and biological evidence available. The Service has no legitimate biological reason to find that the State’s current wolf management scheme is not adequate to allow the State to maintain its share of the recovered wolf population in the proposed NRM DPS for the foreseeable future.

The Service also has no basis for relying on the findings in the Montana district court’s preliminary injunction order as a reason for rejecting the State’s wolf management scheme. To the extent that the Montana district court identified possible ambiguities in the State’s wolf management scheme, the State has amended Chapter 21 in the Commission Rules and the Wyoming Plan to clarify the State’s commitment to manage for at least 15 breeding pairs in Wyoming, to affirm that the State will consider genetic connectivity and diversity issues in managing wolves in Wyoming, and to clarify the geographic and temporal limitations on the

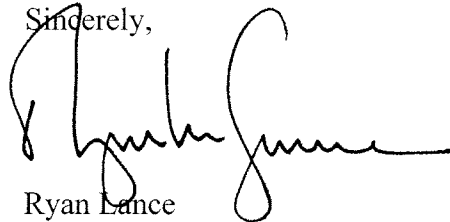
phrase “chronic wolf depredation area.” Each of these clarifications in Chapter 21 and the Wyoming Plan are consistent with the State’s existing wolf management statutes.

To the extent that the Montana district court voice concerns about the allegedly “malleable” trophy game area line, Chapter 21 of the Commission Rules (which has the same legal effect as a statute) defines a fixed boundary for the trophy game area in Wyoming. The Service has stated repeatedly that the area encompassed by the fixed trophy game area boundary is sufficient to allow the State to maintain its share of the recovered wolf population.

To the extent that the Montana district court took issue with the Service’s failure to explain why it had changed positions on the statewide trophy game classification for wolves in Wyoming, the best scientific and biological information available irrefutably shows that the dual classification for wolves as set forth in the State’s current wolf management scheme will allow the State to maintain its share of the recovered wolf population. The Service thus needs to explain in the new final delisting rule that it was wrong when it initially required the State to adopt the statewide trophy game classification.

In the final analysis, the best scientific and biological information available shows that the State’s current wolf management scheme satisfies the adequate regulatory mechanisms requirement for delisting in the ESA. Accordingly, in the new final delisting rule, the Service should create the NRM DPS as described in the proposed rule and should delist the entire NRM DPS.

Sincerely,

A handwritten signature in black ink, appearing to read "Ryan Lance". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Ryan Lance
Deputy Chief of Staff