



State of Utah

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Washington D.C.

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Public Comments Processing
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Subject: Proposed Rule Removing the Gray Wolf from the List of Endangered and Threatened Wildlife and Maintaining Protections for the Mexican Wolf by Listing it as Endangered (78 FR 35664)

Proposed Revision to the Nonessential Experimental Population of the Mexican Wolf (78 FR 35719)

Dear Director Ashe:

The State of Utah has reviewed the U.S. Fish and Wildlife Service's (Service) proposed rules removing the gray wolf from the endangered species list, listing the Mexican wolf, and revising management of the nonessential experimental population of the Mexican wolf. The state has long advocated for removing the gray wolf from the endangered species list because the population is not at risk of extinction. Once the gray wolf is delisted¹, Utah's wolf management plan will fully take effect, and the species will be managed by the state on a sustainable basis.²

¹ Under 78 FR 35664

² Under state authority, the gray wolf will be managed as directed in Utah Code § 23-14-3 and the duly-adopted management plan.

However, the proposed revision for the Mexican wolf population³ is insufficient to support the recovery and eventual delisting of the Mexican wolf. The reasons for this insufficiency include: 1) a failure to confine suitable habitat to the Mexican wolf's historic habitat, which will lead to intergradation with the gray wolf, 2) a lack of consideration for listing the species as a distinct population segment, which provides the best possibility for recovery and eventual delisting, and 3) a lack of planning to consider the consequences of Mexican wolf populations which disperse unchecked. In addition, the Service failed to consider the social and economic impacts on local resource users, or the effects on state sovereignty. Listing the Mexican wolf as a subspecies will deprive the state of the ability to effectively manage the consequences of Mexican wolf movement outside the established habitat. The state respectfully requests the proposed rule revision be withdrawn until the Service resolves these concerns.

Gray Wolf Delisting Status

The gray wolf and its constituent subspecies, excluding the Mexican wolf, are not in danger of extinction throughout all or a significant portion of their respective ranges, and are not likely to become so in the foreseeable future.⁴ Additionally, the Endangered Species Act (ESA) does not require listed species to be restored to all habitat currently suitable before recovery is considered complete and delisting initiated. The plain language of the ESA states that a species/subspecies can be listed only when it is in danger of *extinction* throughout all or a significant portion of its range. The same should be true for delisting—a listed species is recovered when no longer at risk of extinction throughout all or a significant portion of its range. Nothing in the ESA suggests that the legal or biological threshold for delisting would differ in any respect from the threshold established for listing. It is an incorrect interpretation of the ESA to expect that delisting of the gray wolf is contingent upon full recovery in all habitat which may be suitable currently.

Under the Service's new Significant Portion of Its Range definition,⁵ a portion of the range is "significant" if its contribution to the viability of the species is so important that, without it, the species as a whole will be in danger of extinction. However, the notion that recovery is incomplete until all suitable habitats are occupied by a species misapplies the purpose of the ESA, which is to prevent extinction. Furthermore, this assumption abuses ESA and the Service's Distinct Population Segment Policy by suggesting that suitable habitat, in and of itself, establishes a significant portion of the range. The gray wolf species, *Canis lupus*, and its subspecies, *C.l. nubilis* and *C.l. occidentalis*, are each viable and self-sustaining across their North American range. The presence of unoccupied gray wolf habitat in the contiguous United States does not preclude delisting because the habitat is not a significant portion of the range. This is evidenced by the fact that its absence does not place the species/subspecies, as a whole,

³ Under 78 FR 35719

⁴ The purpose of the Endangered Species Act (ESA) is to "provide a program for the conservation of endangered species and threatened species." 16 U.S.C. §1531(b) Conservation is defined as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary." 16 U.S.C. §1532(3) The measures referred to in this definition are recovery protocols extended to species and subspecies found in danger of extinction throughout all of a significant portion of their range.

⁵ See 76 FR 237 at p. 76987

in danger of extinction. The Service should finalize the delisting of the gray wolf.

Suitable Habitat for the Mexican Wolf Should be Restricted to Historic Range

Among the various conditions identified in the proposed rule relevant to identifying suitable habitat, the Service fails to confine the designation to areas within the Mexican wolf's historic range. The proposed rule defines suitable habitat for the Mexican wolf as forested, montane terrain containing adequate wild ungulates to support a wolf population. It further excludes from consideration as suitable habitat areas with high densities of roads and human development.

Historic range is critical in defining suitable habitat for a number of reasons. First, the ESA does not authorize the recovery of a listed entity outside its historic range, particularly when opposed by the state hosting the nonnative recovery efforts. Second, recovering the Mexican wolf in Utah and Colorado (areas outside its historic range) exposes the subspecies to hybridization (intergradation) with the Northern gray wolf (*C.l. occidentalis*). Dispersal of these hybridized wolves within core Mexican wolf populations in Arizona and New Mexico will swamp the unique genetic features of the subspecies and jeopardize its recovery. Of relevance, the Service currently lists numerous species/subspecies due to the deleterious effects of nonnative species. The Service should not knowingly allow the intermixing of species and subspecies where it will lead to genetic intergradation, and, in this case, compromise the recovery of the Mexican wolf subspecies. The state requests the Service strongly affirm, in the proposed rule, that suitable habitat is confined to the core historic range of the Mexican wolf in Arizona, New Mexico, West Texas, and Mexico.

A Distinct Population Segment Listing is More Likely to Achieve Recovery

Listing the Mexican wolf as a Distinct Population Segment (DPS) will most effectively advance recovery of the subspecies. The Service entirely fails to consider or analyze⁶ the merits of listing the subspecies as a DPS. Despite the Center for Biological Diversity's August 11, 2009 Petition to list the Mexican wolf as a DPS, and the Service's commitment in its 90-day finding to evaluate such an option in its 12-month status review, the evaluation has never been detailed in a published document, and thereby made available to the public for review and comment. The proposal to list the Mexican wolf subspecies as endangered wherever an individual may be found is procedurally flawed and arbitrary and capricious, because the Service has failed to articulate the reasons for and involve the public in its decision to abandon the DPS option. Since the Mexican wolf is legally eligible for a DPS listing under the Service's policy, the choice to list it as a subspecies as opposed to a DPS is a discretionary act subject to review under the Administrative Procedure Act.

A DPS listing provides Utah with more management opportunities than a *subspecies* listing. A *subspecies* listing protects the Mexican wolf anywhere it is found in the United States, which would deprive the State of Utah and all other states outside its historic range from managing or controlling dispersing wolves. More problematic is the probable need to relist the gray wolf in Utah under the similarity-of-appearance provisions of Section 4(e) of the ESA.

⁶ See 78 FR 35664

This section authorizes the Service to treat any species as threatened or endangered, even though it is not listed, where it so closely resembles a listed species so that enforcement personnel will have substantial difficulty differentiating between the listed and unlisted species. The gray wolf and the Mexican wolf are very similar in appearance. The combined effect of the two listings would preclude the State from managing dispersing gray wolves from the North or Mexican wolves from the South, and allow establishment of resident wolf populations without state authority to balance them with prey base and livestock operations. Inasmuch as the Mexican wolf's historic range in the United States is limited to western Texas and south-central Arizona and New Mexico, listing the subspecies nationwide places an unnecessary and unwarranted burden on the sovereign rights of states to manage wildlife within their respective borders.

The state is also concerned that listing the Mexican wolf as a subspecies will effectively prevent it from ever being delisted in the United States. Under the ESA, a listed species/subspecies may be delisted only when it is no longer in danger of extinction *throughout all or a significant portion of its range*. As approximately 10% of the Mexican wolf's historic range occurs in the United States with the remainder in Mexico, a completely successful recovery of the wolf in the United States will never constitute a significant portion of the subspecies' range. Delisting would require substantial wolf recovery in Mexico. Listing the wolf as a subspecies will effectively ensure federal management of wolves in Utah under the provisions of the ESA indefinitely. Because the ESA focuses on expanding the population of a listed species, and has no effective mechanism for controlling population growth, Utah will be obliged to host unchecked wolf populations to the detriment of its livestock and big game wildlife until the Mexican wolf is recovered in Mexico, which actions are beyond U.S. jurisdiction.

Listing the Mexican wolf as a DPS would better facilitate recovery and eventual delisting of the subspecies in the United States. A DPS will afford complete protection under the provisions of the Endangered Species Act within the DPS boundaries, yet allow state management to address the movement of individual wolves outside those boundaries. The boundaries of the DPS should reflect the historical range of the wolf, which is documented by the best scientific evidence as comprising portions of Arizona, New Mexico, Western Texas, and Mexico. Every published scientific study over the past century on the historic range of the Mexican wolf places its northern extent well south of Utah and Colorado. Application of a DPS to the proposed listing of the Mexican wolf is consistent with and satisfies all the criteria in the Service's DPS policy.

Another compelling advantage to the DPS designation is that the wolf can be delisted once the recovery goals for the DPS are satisfied. Recovery throughout all or a significant portion of the wolf's range in Mexico will be unnecessary to delist a DPS, and a DPS will not require the Service to relist the gray wolf in Utah under the ESA's similarity of appearance provisions.

If the Service lists the Mexican wolf as a Distinct Population Segment, the state requests the boundary be confined to the core historic range in Arizona, New Mexico, and Western Texas. To the extent territory north of the core range is needed as an intergradation zone for genetic exchange, federal protection and management of wolves under the ESA is unnecessary.

Once the gray wolf is delisted, Utah's Wolf Management Plan will manage the species on a sustainable basis.⁷ State management of wolves will allow the occasional genetic exchange needed by the Mexican wolf from gray wolf populations to the north. However, because too much interchange will swamp the unique genetic features of the Mexican wolf and jeopardize its recovery, particularly in the absence of significant genetic exchange between U.S. and Mexican populations of the Mexican wolf, use of the full protections of the ESA would be counterproductive.

Should the Mexican wolf be listed as a subspecies over the state's objection, the state expects the Service to develop a plan that will recover the wolf, achieve its delisting, and restore state management authority over the subspecies. As part of this effort, the State fully expects, and will require, that all recovery plans, initiatives, efforts, and activities be 1) confined exclusively to the historic range of *C.l. baileyi* in Mexico and in that portion of the United States south of Interstate 40 in Arizona and New Mexico, 2) undertaken through a Section 10(j) nonessential experimental population that is confined in the United States to Arizona and New Mexico south of Interstate 40, 3) designed and managed to minimize negative impacts to wild ungulates and livestock in Arizona and New Mexico; and 4) focused in Mexico where 90% of the subspecies' core range occurs.

Failure to Manage Future Dispersal of Mexican Wolf Populations

The proposed rule fails to clearly articulate and publicly explain the conditions imposed by the new TE-091551-8 permit (April 4, 2013) on the capture and removal of Mexican wolves that disperse outside the experimental population area. The Service states it intends to capture and return Mexican wolves originating from the nonessential experimental population that disperse outside of the area, however the new permit restricts the capture and return of Mexican wolves to only those wolves that originate from the experimental population area. In addition, any wolf outside the experimental population area is *presumed* to be of wild origin and fully protected under the ESA unless evidence, such as a radio collar, identification mark, or physical or behavioral traits, establishes otherwise. As a direct result of these presumptions and conditions, experimental population progeny and other unmarked Mexican wolves originating from the experimental population will spread northward without restraint and establish populations outside the designated experimental population area. The State of Utah will not agree to these conditions, and will strenuously oppose any rule, plan, strategy, or outcome that allows a Mexican wolf to permanently occupy lands north of Interstate 40, east of New Mexico, or west of Arizona. The Service must be required by rule to capture *any* Mexican wolf found north of Interstate 40, east of New Mexico, or west of Arizona and return it to the experimental area or a captive population. If the Service declines or fails to undertake a good faith effort to remove any such wolf, it will be presumed to be a delisted northern gray wolf, and the state will exercise its jurisdictional authority to remove the animal.

The Proposed Revision to the Nonessential Experimental Population is Unnecessary

The proposed amendments to the non-essential population rules are unnecessary to achieve the population objective for the Mexican wolf. The no-action alternative is appropriate

⁷ Utah Code § 23-14-3

under these circumstances. The purpose and need for the original 1998 Mexican wolf Section 10(j) rule was to establish a population of at least 100 Mexican wolves in the Blue Range Wolf Recovery Area. Currently, 75 wolves occupy this area, and the 100 individual population objective will be met in the near future. Based on population growth over the past several years, the proposed amendments are not necessary for the population objective to be achieved—which the Service asserts is the purpose and need for the amendments. The only amendment required to achieve the stated purpose is to replace the *Canis lupus* listing classification with the *Canis lupus baileyi* classification.

If the Service elects, against the state's wishes, to move forward with the amendments as proposed, the purpose and need to establish a population of at least 100 Mexican wolves in the Blue Range Wolf Recovery Area must be stated in the body of the rule. Although this objective is recognized and discussed in the explanation portion of the proposed amendment, it is not identified or articulated in the proposed amendment itself. Since the purpose and need for the proposed amendment is to establish a population of at least 100 Mexican wolves in the experimental population area, the amendment is legally flawed without actually articulating the objective. The objective must be detailed in the language of the proposed rule.

Alternatively, the state supports expanding the proposed Section 10(j) area south of Interstate 10 in Arizona and New Mexico to the Mexico border, provided: 1) Arizona and New Mexico are granted full authority to capture and remove any Mexican wolf, regardless of origin, found in the southern extension area; 2) the Service first undertakes extensive effort to inform the public on the potential consequences of the extension; and 3) no releases of any category of wolf be conducted and no wolf be allowed to persist in the southern extension area without full support of Arizona and New Mexico. With these conditions satisfied, extending the Section 10(j) area to the Mexican border will provide a more cohesive approach in managing the experimental population of Mexican wolves.

Additionally, the state proposes that the Service consider expanding the Section 10(j) area further south to include all Mexican wolf habitat in Mexico. Because there is no documented population of Mexican wolves in Mexico, and Section 10(j) does not prohibit the establishment of a nonessential experimental population in an area that straddles an international border shared with the United States, expanding the Mexican wolf Section 10(j) area south to include Mexico offers a number of advantages. An enlarged Section 10(j) area south into Mexico will also resolve the complexities associated with capturing and returning *all* Mexican wolves found north of Interstate 40. The proposed rule commentary states the Service will capture and return Mexican wolves “originating” from the experimental population that disperse outside the 10(j) area. Wolves originating from Mexico, however, are arguably exempt from the capture and return provisions in the proposed rule.⁸ By including Mexico in the experimental population area, all Mexican wolves found outside the enlarged Section 10(j) area will presumptively originate from an experimental population. This presumption will eliminate the inherent uncertainty and unresolvable debate related to classifying the origin of a Mexican wolf for purposes of capture and return.

⁸ As authorized under Section 10(a)(1)(A) of the ESA.

Insufficient Consideration of Social and Economic Impacts

The Service fails to consider or analyze social tolerance for the Mexican wolf in Arizona and New Mexico in light of the expanded recovery efforts embodied in the proposed amendment to the Section 10(j) rule. This includes analyzing tolerable impacts on wild ungulates and livestock created by expanding wolf populations. The Service must first spend sufficient time to identify a maximum population objective for the Section 10(j) area before it can address the associated impacts so vital to foster social tolerance for the Mexican wolf. Public support for the Mexican wolf is essential to a successful recovery. The Service has repeatedly recognized that the biggest obstacle to Mexican wolf recovery is public intolerance. It stands to reason that, without public and local governmental support, simply expanding recovery areas within the experimental population area is not likely to increase wolf populations.

The Service further fails to analyze the economic impacts to Arizona, New Mexico, Native American tribes, sportsmen, and livestock operators caused by expanding Mexican wolf distribution throughout the experimental population area. These are critical issues that must be recognized, understood, and addressed before the Service can expect the support of these groups. However, again, the Service must identify maximum population objectives for the experimental population area before economic impact analysis can meaningfully be performed. Thus far, the only information disclosed by the Service in its publications related to the Mexican wolf experimental population concerns the minimum population objective of 100 individuals. To the extent the proposed rule contemplates an unpublicized program or proposal which includes transplants, relocations, or introductions, the state opposes any effort by the Service or others to release any wolf, including a Mexican wolf, within the sovereign territory of Utah, Arizona, New Mexico, Colorado, or any other state without the express consent of the affected state.

The staggered sequence in which the Service has elected to publish and solicit comment on the proposed rule, draft environmental impact statement, and management plan effectively precludes integrated analysis and comment by the public and state government. This problem is severely compounded by short comment periods, which hamper an analysis of the full scope and extent of the program. The Service does not provide cooperators and stakeholders with sufficient time to comprehensively analyze the Service's varied proposals on Mexican wolf listing and management. The Service has spent years formulating these proposals, and then, because of self-induced artificial deadlines, (deadlines not based in any factual manner upon the biological status of the species), now expects stakeholders and cooperators, in a matter of months, to review and digest hundreds of pages of material, sort out the interconnected points concerning all the facets of the entirety, review the alternatives, formulate comments, and otherwise meaningfully participate in the review process.

Publishing the proposed rule prior to publishing the draft environmental impact statement, considering alternatives through the public comment process, releasing a recovery plan in this disjointed manner prevents stakeholders and cooperators from understanding the Service's overall plan for Mexican wolf recovery and formulating cogent comments in that context. The jumbled manner in which Mexican wolf listing and recovery proposals are being rolled out by the Service effectively robs the public of meaningful participation in the process,

fosters distrust, legally complicates integrating changes to the proposed rule recommended during the NEPA scoping process, reduces public participation to a procedural formality, and strongly suggests a predetermined outcome is forthcoming. The state requests the Service to make public all the Mexican wolf listing and recovery materials before closing the comment period, and finalizing a rule. This includes disclosing, among other things, its Mexican wolf recovery plan, management plan, Section 10(j) population objectives (if something other than 100 individuals), capture and return protocols, long term recovery plans outside the Section 10(j) area, and the analysis for rejecting the possibility of a DPS listing.

The state also requests the Service change the proposed rule to model it after a similarly proposed Section 10(j) rule for the wood bison in Alaska. Following this model would grant Arizona and New Mexico authority to: 1) establish Mexican wolf population objectives on a unit basis that will minimize wild ungulate and livestock losses; 2) manage the take of Mexican wolves within the Section 10(j) area to maintain population objectives; 3) utilize professional and recreational hunting, trapping, and other forms of take to manage population growth; and 4) remove all Mexican wolves from the Section 10(j) area in the event the nonessential experimental status is ever terminated. This will foster greater tolerance for Mexican wolf recovery in the affected states by assuring the public that wolf populations will be managed in balance with other state interests by its own wildlife management agency.

Summary Impact Statement Required Under Executive Order 13132

Finally, the state takes exception with the Service's conclusion that a Federalism Assessment under Executive Order 13132 is unnecessary. Contrary to the Service's assertion, the Proposed Rule will have a substantial effect on State sovereignty, federal/state relationships, and the distribution of power and responsibilities among the various levels of government. The proposed rule establishes a nonessential experimental population of Mexican wolves in the states of Arizona and New Mexico for the purpose of recovering the subspecies from an endangered status. The rule amendment is purportedly necessary, among other reasons, to "improve [the Service's] ability to establish a viable, self-sustaining population of at least 100 Mexican wolves in the wild." With current populations estimated at 75 individuals, it is reasonable to infer the Service's actual intent is to expand the Mexican wolf Section 10(j) population to an unspecified number beyond 100. Further, the Service retains ultimate authority to determine when and under what circumstances Mexican wolves may be taken—thus maintaining exclusive control over population size and the consequent impacts to state and private interests, such as big game herds and livestock. Under this management paradigm, affected states are obliged to shoulder the costs associated with Mexican wolf law enforcement, livestock depredation, big game herd impacts, population monitoring, biology, and the like. State authority to manage big game populations in the best interests of its citizens is preempted and impaired by exclusive federal control over Mexican wolf populations that prey on big game and livestock.

To say the proposed rule does not have a substantial effect on state sovereignty, federal/state relationships, or on the distribution of powers among various levels of government is simply incorrect. Section 6(c) of Executive Order 13132 forbids the Service from promulgating any regulation that has federalism implications and that preempts state authority without first consulting with state and local officials "early in the process." While states were

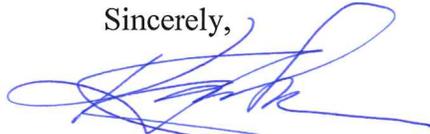
invited to meetings at which wolves were discussed, many of the problematic details of the proposed rule and the draft environmental impact statement, as outlined in Utah's and other states' comments, were not disclosed until the rule was published. A true and meaningful consultation with the states did not occur. With this in mind, the state requests the Service to prepare and submit to the Office of Management and Budget a federalism summary impact statement consistent with Section 6(c)(1) of Executive Order 13132.

Conclusion

The State fully supports delisting of the gray wolf and will successfully manage those populations as it has other large predators, such as cougar and bear. The proposed amendments to the protections for the Mexican wolf fall short of providing the best approach and support to enable the eventual recovery of the species. The State of Utah respectfully request that the Service withdraw the proposed revision for the Mexican wolf and resolve the aforementioned issues.

The State of Utah appreciates the opportunity to review and comment on these proposed rules. Please direct any other written questions regarding this correspondence to the Public Lands Policy Coordination Office at the address below, or call John Harja at (801) 537-9802.

Sincerely,



Kathleen Clarke