



Western Watersheds Project

PO Box 1770

Hailey, ID 83333

tel: (208) 788-2290

fax: (208) 475-4702

email: wwp@westernwatersheds.org

web site: www.westernwatersheds.org

Working to protect and restore Western Watersheds and Wildlife

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U.S. Fish and Wildlife Service

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Dear U.S. Fish and Wildlife Service Officials:

The creation of an “experimental, nonessential” population in Colorado under Section 10(j) of the ESA cedes too much authority to state governments, leaving introduced populations vulnerable to state policy changes based on politics. An “experimental, Nonessential” status essentially downgrades protections from “endangered” to proposed listing” levels. In addition, keeping Colorado wolves in ‘endangered’ status alleviates § 10(j)(1) problems¹ when wolves dispersing into Colorado mingle with the introduced population. There have been many problems with maintaining viable wolf populations under 10(j) “experimental nonessential” designations, whereas there are no examples of reintroductions under “endangered” status. Thus, projected policy downsides to “endangered” reintroductions are purely speculative, with no basis in science.

The strength of the Endangered Species Act is that it requires decisions to be made based on the best available science, thereby sidestepping political considerations that far too often are to the detriment of rare species protection and recovery. At present, Colorado has a governor who appears firmly committed to wolf reintroduction and recovery. However, elements within Colorado Parks and Wildlife have been caught colluding with anti-wolf local government entities, and today’s political situation cannot be counted upon to last throughout the period in which a 10(j) rule would be in effect. Accordingly, we recommend retaining full ESA ‘endangered species’ protection levels for the introduced Colorado population, and pursuing the reintroduction under the auspices of Section 10(a)(1)(A) of the Endangered Species Act, which authorizes translocations for the purpose of advancing the conservation of the species.

We are concerned that a 10(j) rule would deliberately isolate the reintroduced gray wolf population in Colorado, preventing ingress and egress from the state. This is important in the context of potential immigration of *Canis lupus occidentalis* from the Yellowstone ecosystem, *Canis lupus baileyi* immigration from New Mexico or Arizona, or *Canis lupus nubilus* immigration from the upper Midwest states to Colorado, all of which are possible, even likely, outcomes. All three subspecies would have intergraded and

¹ See *Wyoming Farm Bureau v. Babbitt*, 987 F.Supp. 1349 (D.Wyo. 1997).

interbred along the margins of their ranges (Leonard et al. 2004), increasing genetic diversity and providing improved fitness for the recipient population.

Rules promulgated under § 10(j) must, by law, advance the conservation of the species in question. There is considerable evidence based on past experience with wolf reintroductions, and also current events surrounding the Colorado wolf reintroduction effort, that the lessening of ESA protections under a 10(j) rule would be actively detract from, frustrate, and perhaps sabotage the success of wolf recovery in Colorado.

Efforts to appease “stakeholders” through relaxed protections do not advance the conservation of the species

The concept that “social tolerance” will be increased through the lethal “control” of wolves or other predators is a completely fictional proposition, based on the best available science. Santiago-Ávila et al (2020) determined that when Endangered Species Act protections for wolves were lifted in the Upper Midwest, and hunting seasons were instituted, the illegal take of wolves actually increased. This demonstrates that wolf-killing legally begets more wolf killing, illegally. There are no scientific studies to the contrary, to show that lethal wolf removals increase social acceptance of wolves. Indeed, those states that have articulated such arguments (e.g., the State of Wyoming in the context of their losing bid to defend Yellowstone grizzly bear de-listing) have articulated this argument quite cynically, in light of a demonstrated extinction/minimization agenda for large carnivores.

For the red wolf, the “experimental, nonessential” designation “was given to the newly introduced population of red wolves to provide greater flexibility in management and protection under the Endangered Species Act, and to gain acceptance from the public and encourage cooperation from local landowners” (Waddell and Rabon 2012: 23). The agency’s 10(j) rule “has had negative long-term consequences for the recovery of the red wolf” by “perpetuating the threats that caused the red wolf to decline to near-extinction.”² As of 2020, the red wolf population in the wild had declined to 7 individuals, with illegal poaching as the single largest cause of mortality (Agan et al. 2021). This illustrates the abject failure of “experimental, essential” status to either contribute to the preservation of the species, or to “gain acceptance from the public and encourage cooperation from local landowners. Instead, this loosening of restrictions likely increased wolf mortality by lessening accountability and penalties for illegal wolf killing.

Wolves in the Yellowstone ecosystem were reintroduced under an “experimental, nonessential” designation. “Some of the flexible options for controlling this experimental population in Yellowstone included the ability for livestock owners to kill a depredating wolf if the killings were verified to be domestic livestock on designated private land, to delist or reclassify wolves outside of the designated recovery zones as “listed under similarity of appearance”, to conduct control management practices early in the recovery process to limit significant impacts on prey populations, and to initiate wolf control on packs that hunt herds of prey outside of the Yellowstone National Park area” DaMato 2017:15, citing 1987 wolf recovery plan). It is manifestly obvious that this designation

² Animal Welfare Institute et al. 2016, Emergency petition to revise the red wolf’s 10(j) rule.

did not engender any social tolerance for the wolves in the states surrounding Yellowstone. In Wyoming, aggressive wolf hunting regulations classify the wolf as a “predatory animal” across 85% of the state, with no license, bag limits, or seasonal restrictions on killing. In addition, in Wyoming the practice of ‘coyote whacking’ is applied to wolves – running down and running over animals to the point where they are sufficiently broken that they can be easily dispatched with a pistol or by whacking against the side of a snowmobile. In Idaho, the state legislature is funding \$1 million a year to pay bounties on wolf killing. In Montana, wolves are regularly shot along the boundary of Yellowstone National Park, sometimes baited and lured beyond the Park boundary so they can legally be killed. These barbaric practices are not the actions of state populaces that have achieved any degree of “social tolerance” for wolves.

The agency’s historic sloganeering to the effect that the management flexibility created under a 10(j) rule improves recovery probabilities, for wolves in particular (as a controversial species), is of no account due to the abject absence of evidence to back up this proposition. The burden of proof is on the Service to show that the advertised benefits of “experimental, essential” status have been achieved, as proof of concept, through past wolf reintroductions.

The ballot initiative process stimulated the creation of multiple anti-wolf coalitions among elements of the livestock industry and the hunting lobby. Several formed the “Colorado Stop the Wolf Coalition” in 2019 in order to block the return of wolves to the Colorado Mountains. Coalition members included the Colorado Independent Cattlegrowers Association, Farm Bureau, Rocky Mountain Farmers Union, Safari Club International, Big Game Forever, and National Rifle Association. In addition, the Colorado Cattlemen’s Association, the Colorado Wool Growers Association, and the Colorado Farm Bureau formed “Coloradans Protecting Wildlife” to oppose the ballot measure. The Rocky Mountain Elk Foundation issued press releases announcing strong opposition to wolf reintroduction during the 2020 ballot initiative campaign, and elsewhere has funded bounties for wolf killing through a shadowy organization named “Foundation 4 Wildlife Management.”³ The presence of these anti-wolf elements in western Colorado increases the likelihood of poaching, and thus the maintenance of ‘threatened species’ status with the appurtenant severe legal penalties for take serve a useful purpose and represent a necessary deterrent. One Colorado northern rancher recently lost livestock to wolves. According to a news story, “After his son, Lee Gittleton, posted about the incident [on Facebook](#), many wolf opponents called on his family to ‘shoot, shovel, and shut up,’ a practice often abbreviated to ‘SSS’ on social media.”⁴ The local North Park Stockgrowers then brought in rabidly anti-wolf rancher-activist Cat Urbigkit to inveigh against non-lethal coexistence strategies to reduce livestock losses without killing wolves.⁵

³ See <https://www.rmef.org/elk-network/rmefnewssupportforfoundationforwildlifemanagement/>

⁴ <https://www.cpr.org/2021/12/23/colorado-wolves-livestock-rancher/>

⁵ <https://www.steamboatradio.com/2022/06/15/wolves-in-north-park-are-subject-at-meeting-monday-june-20/>

These instances clearly show the open hostility that elements of the western Colorado livestock industry and hunting organizations have toward wolf recovery, demonstrating that the adult supervision of full legal protections is warranted here.

Fraudulent reporting of livestock losses to wolves can lead to direct harm to reintroduction efforts

The Mexican wolf, also subjected to an “experimental, nonessential” reintroduction program, has struggled to attain minimum viable populations. One of the most salient reasons for this is the large numbers of Mexican wolves removed in response to livestock losses, many of which removals have turned on fraudulent claims by ranchers. The system under which the Livestock Indemnity Program issues compensation to ranchers for purported losses to Mexican wolves appears to actively incentivize the inflation of livestock losses to wolves, as these inflated numbers (and lax agency accountability in investigating them) lead to inflated payments to unscrupulous ranchers.⁶ Such inflated, exaggerated, or unfounded livestock loss claims have been used as justification for federal agencies to wipe out entire packs of imperiled Mexican wolves, such as the case of the Prieto Pack. Clearly and obviously, the lax protections of “experimental, nonessential” designation have created an atmosphere of corruption and permissiveness which has been a major detriment to Mexican wolf recovery efforts, which would not be the case to the same degree had the species been reintroduced under the full protections (and appurtenant legal consequences) of full “endangered” status.

‘Endangered Species’ protections offer superior protections and more conservation benefits than “experimental, nonessential” status

As the gray wolf is listed as an endangered species in Colorado, with appurtenant protections that appear necessary to prevent (or at least minimize) poaching, wolves in the state currently enjoy the strongest level of legal protection. Even this level of protection may not be enough, as the Irish Canyon pack, which immigrated to Colorado in early 2020, was wiped out by hunters under suspicious circumstances that have yet to be fully explained.⁷ From the standpoint of Section 7 consultation, “experimental, nonessential” status downgrades introduced endangered species to the level of Candidate Species (Congressional Research Service 2021). Even “experimental, essential” status, in which the species is downgraded to threatened species equivalency, acts that harm the species are prohibited only to the extent specified in a 4(d) rule (Congressional Research Service 2021).

Section 10 designations often preclude the designation of Critical Habitat for the enhancement of recovery efforts. The designation of Critical Habitat entails the prevention of “adverse modification” of such habitats, conferring numerous conservation

⁶ A full expose, based in significant measure on Freedom of Information Act documents obtained by WWP, and buttressed by admissions of wrongdoing by former New Mexico Wildlife Services staff, is available online at <https://theintercept.com/2022/05/24/mexican-gray-wolf-endangered-wildlife-services-fraud/>.

⁷ This incident, to the best of our information and belief, remains under criminal investigation, with rampant suspicion by conservationists that the wolves may have been actively driven across the Wyoming state border so they could be “legally” shot.

benefits (Congressional Research Service 2021: 23) unavailable to “experimental, nonessential” populations. Should the gray wolf in Colorado be reintroduced under an “experimental, nonessential” 10(j) rule, they would be deprived of such habitat protections, to the detriment of species recovery. This deprivation is particularly detrimental to the extent that new roads were to be constructed, or existing closed and gated roads were to be opened to motorized transit, offering opportunities for poachers to access heretofore secure habitats used during denning and at other sensitive times of year. By contrast “endangered” status (and the requisite designation of Critical Habitat) would present a legal bar to such adverse modification of wolf habitats.

Section 10 designations often allow for reintroduced species that breach designated boundaries to be either relocated back to the boundary area or be put in a captive breeding program. Wolves are listed as a threatened species in all states bounding Colorado except Wyoming and parts of Utah. The recovery of wolves nationwide is frustrated by these efforts to prevent natural dispersal beyond these boundaries, which typically are established based on political jurisdictions rather than suitable habitats. Wolves that emigrate from Colorado should be allowed to proceed unmolested in the interest of establishing viable populations in neighboring states.

Safe Harbor agreements and Incidental Take Permits achieve all the achievable benefits of flexibility and local acceptance without the drawbacks of removing consequences for deliberate take

Safe Harbor agreements are voluntary agreements between the Service and nonfederal landowners that provide assurances that penalties will not accrue in the event of unintentional/incidental take of a listed species in the context of day-to-day business operations (Congressional Research Service 2021). These achieve all of the purported benefits of a 10(j) “experimental, nonessential” rule without the conservation penalty of removing consequences for intentional take. Alternately, Incidental Take Permits can be issued to allow a certain level of take associate with a business operation, with the added benefit of potentially imposing addition conservation responsibilities under a Habitat Conservation Plan that have the potential to compensate for, at least in part, the incidental take suffered by the listed population. This conditions incidental take on the premise that it will not appreciably reduce the survival and recovery of the species in the wild (Congressional Research Service 2021), a conservation safety net that “experimental, nonessential status does not provide. The landowner is further indemnified from new regulations by the ‘no surprises’ regulation that accompanies ITPs.

Conclusions

Colorado’s Proposition 114, and the state law that follows from it, impose terms and conditions of their own to guide the state in its reintroduction effort. The federal government has responsibilities of its own, given that the gray wolf is listed in Colorado as an endangered species, and every American has a stake in its recovery, particularly so on Colorado’s federal public lands which are world-famous recreation destinations. The U.S. Fish and Wildlife Service could continue to make the same mistake (reintroduction under an “experimental, nonessential rule) and expect a different result (local acceptance and reduced resistance by anti-wolf elements of local populations). But this would be

irrational, and fly in the face of the best available scientific and commercial information, which definitively shows otherwise. Instead, we urge the Service to reintroduce gray wolves to Colorado under a §10(a)(1)(A) permit, fully endangered status, and use Incidental Take Permits and Safe Harbor agreements as the mechanism to provide landowners with regulatory flexibility and engender what little change in attitude toward wolf reintroduction is available under any of the possible regulatory scenarios for wolf reintroduction. If any “experimental” designation is pursued, the agency will need to apply the protections of the ESA as fully and as rigorously as possible, particularly regarding legal and criminal accountability for intentional take.

Respectfully yours,



Erik Molvar
Executive Director

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