



Via Certified Mail/Return Receipt Requested

September 19, 2018

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RE: Notice of Intent to Sue for Violations of the Endangered Species Act: Failure to Develop a Nationwide Recovery Plan and Complete a Timely Five-Year Status Review for the Gray Wolf

Time and time again, FWS has sought to prematurely reduce and remove gray wolf protections. Most recently, FWS has announced its intention to remove federal protections from gray wolves nationwide. But wolf recovery in the Lower 48 is not complete, and as explained below, FWS could best promote wolf recovery by developing a nationwide recovery plan. The agency should also prepare a five-year status review of the gray wolf, considering the recent science on wolf genetics, threats and population viability. Because FWS remains dead-set on removing wolf protections, rather than promoting wolf recovery as the law requires, the Center for Biological Diversity, through this letter, provides notice of its intention to sue the U.S. Fish and Wildlife Service and Ryan Zinke, Secretary of the Interior (collectively “FWS”), for violations of the Endangered Species Act, 16 U.S.C. § 1531, *et seq.* (“ESA”).

First, FWS has failed to develop a nationwide recovery plan for the gray wolf (*Canis lupus*). FWS listed the gray wolf under the ESA in the “48 conterminous States” and Mexico as endangered, except in Minnesota, where it was designated as threatened. 43 Fed. Reg. 9607 (March 9, 1978).¹ But FWS has never developed a nationwide plan to recover this broadly-listed entity, as required by Section 4(f) of the ESA. 16 U.S.C. § 1533(f)(1).

Second, the ESA requires FWS to develop a status review every five years for species listed under the Act. 16 U.S.C. § 1533(c)(2). Yet the last status review for the gray wolf was completed in February 2012, more than six years ago.

The Center for Biological Diversity (“Center”) is a national, non-profit conservation organization based in Tucson, Arizona and supported by over 1.6 million members and online activists. The

¹ This Notice does not concern Mexican gray wolves, which FWS listed as a separate endangered subspecies. 80 Fed. Reg. 2488-01 (Jan. 16, 2015). Nor does this Notice concern the gray wolf population in the northern Rocky Mountains, which lost its ESA protections in 2011. 76 Fed. Reg. 25,590 (May 5, 2011).

Center and its members wish to see viable gray wolf populations in suitable habitat in all significant portions of the wolf's historic range in the Lower 48. To realize that vision, the Center has participated in countless rulemakings for wolf management and has halted multiple unlawful downlisting and delisting attempts by FWS through litigation. The Center submitted a petition for rulemaking to FWS on July 20, 2010 that formally requested development of a national wolf recovery plan under the ESA and Administrative Procedure Act, 5 U.S.C. § 553.

I. The ESA Requires Recovery Plans and Five-year Status Reviews

The ESA was enacted, in part, to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b). Once listed as “endangered” or “threatened,” a species is entitled to the ESA’s substantive protections, and federal agencies assume duties to conserve, recover and protect it.

Section 4(f) of the ESA directs FWS to develop and implement recovery plans for the “conservation and survival” of listed species unless the agency makes a finding that “such a plan will not promote the conservation of the species.” 16 U.S.C. § 1533(f)(1). The ESA defines “conservation” to mean “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 this Act are no longer necessary.” 16 U.S.C. § 1532(3).

A recovery plan is a listed species’ “basic road map to recovery, *i.e.*, the process that stops or reverses the decline of a species and neutralizes threats to its existence.”² It contains: (1) a description of site specific management actions that may be necessary to recover the species; (2) objective and measurable criteria which, when met, would result in a determination that the species be removed from the list; and (3) estimates of the time and cost required to carry out those measures needed to recover the species and to achieve intermediate steps towards that goal. 16 U.S.C. § 1533(f)(1)(B)(i)-(iii).

The ESA also requires FWS to regularly assess the status of listed species. Specifically, section 4(c) requires that FWS “conduct, at least once every five years, a review of all [listed] species . . .” 16 U.S.C. § 1533(c)(2). Based on that review, the agency can determine whether the species should maintain its protections, be uplisted or be delisted. *Id.*; *see also* 50 C.F.R. § 424.21.

II. The Gray Wolf’s History of Persecution and Protection

The gray wolf once occupied the majority of North America, excluding perhaps only the driest deserts and the southeastern U.S. where the red wolf occurred. *See* 78 Fed. Reg. 35664 (June 13, 2013). Scientists estimate that pre-European settlement as many as 2 million wolves may have lived in North America.³

² *See, e.g., Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 131 (D.D.C. 2001).

³ J.A. Leonard, C. Vila and R. K. Wayne, *Legacy Lost: Genetic Variability and Population Size of Extirpated Grey Wolves (Canis lupus)*, 14 Molecular Ecology 9-17 (2005).

Wolves are incredibly important to the ecosystems they inhabit. Within the United States, studies of gray wolves in Yellowstone National Park and elsewhere demonstrate that wolves significantly shape their ecosystems, promoting biodiversity and overall ecosystem health.⁴

Failing to recognize the value of wolves, government agents used deadly poisons and traps to kill wolves during the late 19th century and first half of the 20th century.⁵ By 1967, when wolves were first federally protected under a precursor to the ESA, they had been reduced to fewer than 1,000 wolves in northeastern Minnesota, with a very small isolated population on Isle Royale. *See* 74 Fed. Reg. 15069 (April 2, 2009).

The Service originally protected wolves as four subspecies but, given uncertain validity of these subspecific designations, FWS in 1978 protected the gray wolf in the conterminous United States as an endangered species and designated the Minnesota population as threatened.⁶

Rather than develop a nationwide gray wolf recovery plan, the Service developed separate plans for wolves in three recovery areas: 1) the Northern Rocky Mountains (drafted in 1978, revised in 1987, now delisted); 2) the Great Lakes (drafted in 1978, revised in 1992); and 3) the Southwest (now separately listed as the Mexican gray wolf).⁷ All of these plans were developed prior to major scientific gains in wolf genetics and population viability analysis. Recovery plans have never been developed for many areas where wolves could and should recover, including the Northeast, Pacific Northwest and California, Southern Rocky Mountains and Great Plains.

Recovery efforts, including wolf reintroduction to the Northern Rocky Mountains, have been largely restricted to the regions with recovery plans.⁸ The recovery plan for the “eastern timber wolf” set a goal of 1,250-1,400 wolves for the Minnesota population in at least 40 percent of the state, with a geographically-disjunct population of at least 200 wolves. These goals were apparently met by 1998. 74 Fed. Reg. 15,070, 15,071 (Apr. 2, 2009).

Today, wolves occupy about ten percent of their historic range in the U.S. with most progress in those three recovery areas. The total population likely numbers less than 5,000 individuals (excluding unprotected wolves in the North Rocky Mountains). While this represents a considerable improvement in the status of the gray wolf since its listing, threats remain inadequately addressed in both occupied and unoccupied portions of the range.

⁴ *See, e.g.*, D. Chadwick, D, *Wolf wars: once protected, now hunted*, 217(3) National Geographic 34-55 (March 2010).

⁵ M. Robinson, *Predatory Bureaucracy*, Denver: University of Colorado Press (2005).

⁶ 43 Fed. Reg. 9607 (Mar. 9, 1978). Because the authority to list species as “distinct population segments” did not exist at the time of this action, the basis for the original split-species classification has remained unclear.

⁷ FWS released a final revised recovery plan for the now separately listed Mexican gray wolf in 2017. 82 Fed. Reg. 57,288, 57,289 (Dec. 4, 2017).

⁸ In 1994, FWS designated the Yellowstone Experimental Population Area, 59 Fed. Reg. 60252 (Nov. 22, 1994), and the Central Idaho Experimental Population Area, 59 Fed. Reg. 60266 (Nov. 22, 1994), to facilitate reintroduction of “nonessential experimental populations” of gray wolves under Section 10(j) of the ESA. *See* 16 U.S.C. 1539(j). FWS introduced more than 60 wolves to these areas between 1995 and 1996.

Because recovery efforts have focused on just three regions and not on the nationwide listed entity – *i.e.*, wolves throughout the Lower 48 – full recovery has not occurred. The Center submitted a petition for rulemaking to FWS on July 20, 2010 that formally requested development of a national wolf recovery plan under the ESA and Administrative Procedure Act, 5 U.S.C. § 553. FWS denied that petition.

FWS has made numerous premature efforts to reduce federal protections for wolves under the ESA. The only successful effort was in the Northern Rocky Mountains, where Congress (through a rider to an appropriations bill) directed FWS to remove wolf protections. 76 Fed. Reg. 25,590 (May 5, 2011).

Since then, in 2013, FWS proposed removal of wolf protections across the Lower 48. In conjunction with that proposal, on February 29, 2012, FWS released a five-year status review recommending that the listing be revised to reflect the current distribution and status of wolf populations in the Lower 48. The Service did not move forward with that nationwide delisting proposal, however, likely given the dissent of scientists regarding the agency’s taxonomic conclusions⁹ and the court’s reinstatement of wolf protections for the western Great Lakes region.¹⁰ But earlier this year, FWS announced that another nationwide delisting proposal would be published by the end of the year.

In summary, after multiple rounds of litigation over almost two decades in which the courts repeatedly found the Service violated the law and failed to apply the best science, wolves across the Lower 48 remain protected as endangered except for wolves in Minnesota that remain listed as threatened and the Congressionally-delisted wolves in the Northern Rocky Mountains.

III. Violations of the Endangered Species Act

Instead of developing a nationwide recovery plan for gray wolves in the Lower 48, FWS developed regional plans separately covering wolves in the Great Lakes, Northern Rocky Mountains and the Southwest. Given the removal of wolf protections in the Northern Rocky Mountains and the separate listing of Mexican gray wolves in the Southwest, the 1992 plan for the “eastern timber wolf” is only remaining recovery plan for the nationwide wolf listing. Reliance on such an outdated and geographically-restricted plan prevents FWS from facilitating nationwide wolf recovery, including in places such as the Pacific Northwest and the Northeast. The failure to develop a nationwide wolf recovery plan violates FWS’s duty under Section 4(f)

⁹ Considerable uncertainty remains as to wolf taxonomy. *See, e.g.*, B.M. vonHoldt et al., *A genome-wide perspective on the evolutionary history of enigmatic wolf-like canids*, 21(8) *Genome-Research* 1294-1305 (2011); J.T. Bruskotter et al. *Removing Protections for Wolves and the future of the US ESA*, 7(4) *Conservation Letters* 401 (2014). Such uncertainty in wolf taxonomy prompted Congress (through the Consolidated Appropriations Act of 2018) to compel FWS to initiate a study through a qualified independent entity to determine whether red wolves are a taxonomically valid species and whether Mexican gray wolves are a taxonomically valid subspecies.

¹⁰ *Humane Society v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017).

of the ESA. 16 U.S.C. § 1533. In addition, FWS's denial of the Center's petition for a nationwide recovery plan was unreasonable, in violation of the ESA and the APA.

Furthermore, more than six years have passed since FWS prepared a status review for the gray wolf in the Lower 48, even though the ESA requires these reviews "at least once every five years." 16 U.S.C. § 1533(c)(2)(a); *see also* 50 C.F.R. § 424.21. Completion of a timely status review is particularly important given the agency's continued efforts to remove wolf protections. For this additional reason, FWS is violating the ESA.

IV. Conclusion

As stated above, FWS has failed to develop a nationwide recovery plan and timely five-year status review for the gray wolf in the Lower 48, in violation of Section 4 of the ESA. If FWS does not act to correct the violations described in this letter, the Center will pursue litigation in U.S. District Court in 60 days. The Center will seek injunctive and declaratory relief, and legal fees and costs regarding these violations. To avoid litigation, FWS must immediately begin to develop a nationwide recovery plan and five-year status review under the ESA.

If you have wish to discuss this matter or believe this notice is in error, please contact me at 651-955-3821.

Sincerely,



Collette L. Adkins
Center for Biological Diversity