



Via Email and Certified Mail/Return Receipt Requested

February 22, 2023

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Re: Hunting of Endangered Colorado Wolves at the Wyoming Border: Notice of Intent to Sue for Violation of Section 7(a)(1) of the Endangered Species Act

Dear Sirs:

On behalf of the Center for Biological Diversity ("Center"), we hereby provide notice that the U.S. Forest Service ("Forest Service") is failing to conserve endangered gray wolves on the Medicine Bow-Routt National Forest in violation of section 7(a)(1) of the Endangered Species Act ("ESA"). 16 U.S.C. § 1536(a)(1).

LEGAL AND FACTUAL BACKGROUND

I. The ESA Requires That the Forest Service Take Affirmative Steps to Conserve Endangered Gray Wolves

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 like the Forest Service assume duties to conserve it.

Indeed, section 7(a)(1) provides an "affirmative duty" for federal agencies to conserve listed species. It provides that all federal agencies "shall, in consultation with and with the assistance of

the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed . . .” 16 U.S.C. § 1536(a)(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).

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

Beginning in 1915, the U.S. Bureau of Biological Survey trapped and poisoned gray wolves on behalf of the livestock industry. Its successor agency the U.S. Fish and Wildlife Service killed the last likely U.S.-born wolf in the western U.S. in 1945, in Conejos County, Colorado.¹

In 1978, the Fish and Wildlife Service protected the gray wolf in the conterminous United States as an endangered species and designated the Minnesota population as threatened.²

Beginning in 2000, the Fish and Wildlife Service began efforts to prematurely reduce federal protections for gray wolves under the ESA, despite progress toward recovery in only two core areas: the Great Lakes and the northern Rocky Mountains. A series of federal court decisions rejected nearly all these attempts. *See, e.g., Humane Soc’y v. Zinke*, 865 F.3d 585, 605 (D.C. Cir. 2017) (summarizing cases).

One of the court decisions, the 2010 decision reinstating protections for wolves in the Northern Rocky Mountains, was reversed by Congress. Accordingly, the Service reissued the rule removing ESA protections for the gray wolf population in the Northern Rockies (excluding Wyoming). 76 Fed. Reg. 25,590 (May 5, 2011). Thereafter, wolves in Wyoming also lost their federal protections. *Def’s. of Wildlife v. Zinke*, 849 F.3d 1077, 1081 (D.C. Cir. 2017).

More recently, in 2020, the Fish and Wildlife Service issued a final rule delisting gray wolves throughout the contiguous United States. 85 Fed. Reg. 69,778 (Nov. 3, 2020). On February 10, 2022, the District Court for the Northern District of California vacated the Service’s delisting rule.³

As a result, ESA protections have been restored to gray wolves in Minnesota and “all or portions of the 44 lower United States,” including in Colorado. However, wolves in Wyoming and the rest of the Northern Rocky Mountains remain unprotected by the ESA.

Gray wolves in Wyoming are designated as predatory animals everywhere in the state except Yellowstone National Park, select areas around Yellowstone and Grant Teton national parks where wolves are considered trophy animals and hunting is limited to select seasons, and the

¹ Robinson, M.J. 2005. *Predatory Bureaucracy: The Extermination of Wolves and the Transformation of the West*. University Press of Colorado; pp. 79-168, 285-286.

² 43 Fed. Reg. 9607 (Mar. 9, 1978).

³ U.S. Fish & Wildlife Service, *Endangered and Threatened Wildlife and Plants; Removing the Gray Wolf (Canis lupus) From the List of Endangered and Threatened Wildlife*, 85 Fed. Reg. 69,778 (Nov. 3, 2020); *Def’s. of Wildlife v. U.S. Fish & Wildlife Serv.*, No. 21-cv-00344-JSW, 2022 U.S. Dist. LEXIS 30123 (N.D. Cal. Feb. 10, 2022).

Wind River Indian Reservation.⁴ Predatory animals may be taken without a license in nearly any manner and at any time.⁵

III. The Return of Gray Wolves to Colorado

Individual wolves from Wyoming have occasionally crossed the Wyoming-Colorado border into the northern portions of Colorado.⁶ Over the past decade, Colorado Parks and Wildlife has had confirmed or probable wolf dispersals that occurred in 2004, 2006, 2009, 2015, and then annually since 2019.⁷

In January 2021, two wolves that entered Colorado from Wyoming were documented travelling together, and then, in June 2021, agency staff observed six black pups with this pair in Jackson County, Colorado.⁸ These pups are the first known wild wolves born in Colorado since the 1920s. This family is now referred to as the North Park pack.

Additionally, in 2020, Colorado voters passed Proposition 114 to reintroduce wolves into Colorado.⁹ Under Proposition 114, now Colorado Revised Statutes 33-2-105.8, Colorado Parks and Wildlife must develop a plan to reintroduce and manage gray wolves in Colorado no later than December 31, 2023, on designated lands west of the Continental Divide.¹⁰ The agency plans to release about 30 to 50 wolves in total over a 3-to-5-year time frame.¹¹ The U.S. Fish and Wildlife Service is developing an experimental population rule to govern management of the reintroduced wolves under the ESA.¹²

IV. Colorado's Endangered Wolves Risk Death in Wyoming, Including on the National Forest

Wolves that travel across the border into Colorado or are reintroduced into Colorado are federally protected. However, wolves that travel back into Wyoming are not protected and can be killed under Wyoming state law.¹³

⁴ Wyo. Admin. Code 040.0001.21 § 3.

⁵ Wyo. Stat. Ann. § 23-3-103.

⁶ *Wolf Management*, Colorado Parks and Wildlife (2023), <https://cpw.state.co.us/learn/Pages/CON-Wolf-Management.aspx>.

⁷ *Id.*; *Wolves in Colorado FAQ*, Colorado Parks and Wildlife (2023), <https://cpw.state.co.us/learn/Pages/Wolves-in-Colorado-FAQ.aspx> (providing list of known wolf observations in Colorado).

⁸ *Wolf Management*, Colorado Parks and Wildlife (2023), <https://cpw.state.co.us/learn/Pages/CON-Wolf-Management.aspx>.

⁹ *Id.*; Colo. Rev. Stat. § 33-2-105.8 (2020).

¹⁰ *Wolf Management*, Colorado Parks and Wildlife (2023), <https://cpw.state.co.us/learn/Pages/CON-Wolf-Management.aspx>.

¹¹ *Wolves in Colorado FAQ*, Colorado Parks and Wildlife (2023), <https://cpw.state.co.us/learn/Pages/Wolves-in-Colorado-FAQ.aspx>

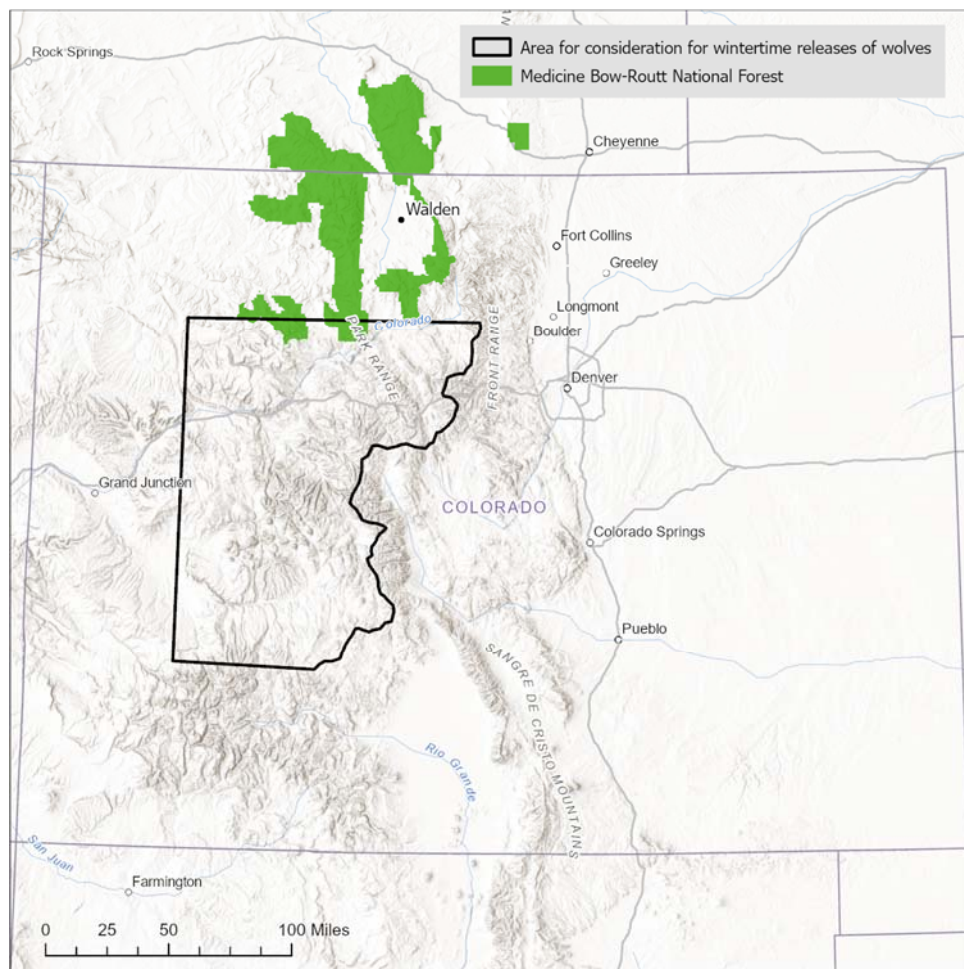
¹² 16 U.S.C. § 1539(j).

¹³ Wyo. Admin. Code 040.0001.21 § 3; Wyo. Stat. Ann. § 23-3-103.

According to Colorado Parks and Wildlife, it is not uncommon for wolves from the North Park pack to cross the border and enter Wyoming.¹⁴ On October 14th, 2022, the state agency received reports that Wyoming hunters killed three black sub-adult female wolves within ten miles of the Colorado border, in central Wyoming near the Medicine Bow-Routt National Forest. Agency scientists believe that these wolves were young of the North Park pack.¹⁵

Since then, in February 2022, Colorado Parks and Wildlife collared two male wolves of the North Park pack.¹⁶

The Medicine Bow-Routt National Forest straddles the Wyoming-Colorado border, in and near Jackson County, Colorado, where the North Park pack has been observed:



¹⁴ Miles Blumhardt, *Some of Colorado's first wolf pups in 80 years are believed to have been killed in Wyoming*, The Coloradoan (Nov. 1, 2022), <https://www.coloradoan.com/story/news/2022/11/01/colorados-first-wolf-pups-in-80-years-believed-killed-in-wyoming/69610306007/>.

¹⁵ *Id.*; Wolf Restoration Plan – CPW Commission Meeting (Dec. 6, 2022), https://www.highcountryshopper.com/spotlight/community/wolf-restoration-plan-cpw-commission-meeting/article_e590dd3c-7501-11ed-b06a-07391c37eadd.html.

¹⁶ Colorado Parks and Wildlife, *MEDIA ALERT: Colorado Parks and Wildlife recollars wolf 2101 near North Park* (Feb. 21, 2023), <https://cpw.state.co.us/aboutus/Pages/News-Release-Details.aspx?NewsID=3756>.

The U.S. Forest Service has not issued any orders to close wolf hunting or trapping or otherwise protect wolves on the Medicine Bow-Routt National Forest.¹⁷ Nor does the Land and Resource Management Plan for the Medicine Bow-Routt National Forest have any standards or guidelines aimed at conserving wolves. In fact, the Forest Plan, developed in 2003, includes no mention of wolves at all.¹⁸

Moreover, in response to a request under the Freedom of Information Act, the U.S. Forest Service did not produce any records documenting affirmative efforts to conserve gray wolves in the Medicine Bow-Routt National Forest. Instead, a document entitled “Rocky Mountain Region Guidance Paper: Gray Wolf” disclaims any duty to “manage habitat in a way that would benefit wolves” absent “a resident population,” even though it acknowledges the dispersal of wolves into Colorado.¹⁹ While it explains that active dens or rendezvous sites are susceptible to human disturbance, the document does not direct any action and instead just remarks: “Although rarely needed, temporary restrictions on human access may be imposed to protect known, active den or rendezvous sites between April 1 and June 30.”²⁰

V. The Forest Service Has the Authority to Prohibit Wolf Hunting on the National Forest to Conserve Endangered Wolves

The ESA confers a duty upon the Forest Service to conserve threatened and endangered species, as discussed above. Moreover, the National Forest Management Act of 1976 (“NFMA”) charges the Forest Service with providing for a “diversity of plant and animal communities.”²¹ And the Multiple Use Sustained Yield Act of 1960 (“MUSY”) directs the Forest Service to manage the national forests “so that they are utilized in the combination that will best meet the needs of the American people.”²² As the Forest Service has acknowledged in its Manual, these statutes grant the Forest Service the “authority and responsibility to manage wildlife” on National Forest System lands.²³

For the purposes of protecting wildlife, Forest Service regulations provide each Regional Forester with authority to prohibit, by regulation, acts “within all or any part of the area over

¹⁷ *Medicine Bow-Routt NFs and Thunder Basin NG Forest Orders*, U.S. Forest Service (2023), <https://www.fs.usda.gov/detailfull/mbr/alerts-notices/?cid=stelprdb5139680&width=full>.

¹⁸ Final Environmental Impact Statement and Revised Land and Resource Management Plan, U.S. Forest Service (Dec. 2003), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5163262.pdf; see *Defs. of Wildlife v. U.S. Fish & Wildlife Serv.*, 584 F. Supp. 3d 812, 832 (N.D. Cal. 2022) (observing that “the U.S. Forest Service land management plans in the West Coast states ‘do not contain standards and guidelines specific to wolf management’”); Email from Jessie McCartney, Resource Team Leader for Wild life, Fisheries, and Botany dated June 9, 2022 (on file with author) (“There are no references to gray wolves within the LMRP or ROD, however.”).

¹⁹ U.S. Forest Service, *Rocky Mountain Region Guidance Paper: Gray Wolf* (Feb. 2022) (“Until or unless a resident population is established, there is no requirement to manage habitat in a way that would benefit wolves.”).

²⁰ *Id.* at 5.

²¹ 16 U.S.C. § 1604(g)(3)(b).

²² 16 U.S.C. § 531(a).

²³ FOREST SERV. MANUAL 2601.1. Considering such authority and responsibility, the court has found that “administration” of public lands “includes wildlife management.” *Alaska v. Andrus*, 429 F.Supp. 958, 962 (D. Alaska 1977). Thus, when a wolf-hunting program threatened a caribou herd on BLM land, the court held that FLPMA granted this agency “the power to halt the wolf hunt.” *Id.*

which he [or she] has jurisdiction.”²⁴ They also authorize each Regional Forester and Forest Supervisor to “issue orders which close or restrict the use” of areas over which they have jurisdiction.²⁵ The Regional Forester or Forest Supervisor can do so “by applying any or all of the prohibitions authorized.”²⁶ Hunting prohibitions are explicitly authorized by regulation.²⁷

While FLPMA and MUSY acknowledge the authority of the States with respect to wildlife on the national forests, the Forest Service can preempt state game laws and regulations.²⁸ As the explained by the Forest Service Manual, hunting on National Forest System lands is subject to State laws and regulations *unless*: (a) they conflict with federal laws, or (b) they would permit activities that “conflict with land and resource management responsibilities of the Forest Service or that are inconsistent with direction in forest plans.”²⁹

As just one example of the Forest Service’s use of this authority to prohibit hunting, the Forest Supervisor has ordered a seasonal closure of prairie dog hunting on Thunder Basin National Grassland.³⁰

The Forest Service’s authority to restrict hunting on national forests has been repeatedly confirmed in the courts.³¹ As a federal appellate court stated: “The Service is charged with balancing competing uses of the Forests . . . if that balance requires closure of certain areas to certain activities, Congress has granted the Service that authority. There is no lawful policy that ties the Service’s hands in this regard.”³²

LEGAL VIOLATIONS

Section 7(a)(1) of the ESA imposes both substantive and procedural requirements upon the Forest Service with respect to conservation of endangered species, including Colorado’s

²⁴ 36 C.F.R. § 261.70(a).

²⁵ *Id.* § 261.50(a); *see also* 16 U.S.C. § 551 (providing the Secretary of the Agriculture the authority to make regulations to protect the national forests).

²⁶ 36 C.F.R. § 261.50(a).

²⁷ *Id.* § 261.58(v).

²⁸ *See* U.S. CONST., art. VI (establishing that federal law generally takes precedence over state laws); *Utah Native Plant Soc’y v. U.S. Forest Serv.*, 923 F.3d 860, 868 (10th Cir. 2019) (stating that “[l]ike Congress, a federal agency by way of congressional delegation of authority also may preempt state laws and regulations”); *see also* Robert B. Keiter, *Grizzlies, Wolves, and Law in the Greater Yellowstone Ecosystem: Wildlife Management Amidst Jurisdictional Complexity and Tension*, 22 WYO. L. REV. 303, 313 (2022); Martin Nie et. al., *Fish and Wildlife Management on Federal Lands: Debunking State Supremacy*, 47 ENVTL. L. 797, 898 (2017); E. Glitzenstein and J. Fritsch, *The Forest Service’s Bait and Switch: A Case Study on Bear Baiting and the Service’s Struggle to Adopt a Reasoned Policy on a Controversial Hunting Practice within the National Forests*, 1 Animal Law 47, 64-72 (1995) <https://www.animallaw.info/sites/default/files/Forest%20Service%27s%20Bait%20and%20Switch.pdf>.

²⁹ FOREST SERV. MANUAL 2643.1

³⁰ *Seasonal Prairie Dog Hunting Restrictions*, U.S. Forest Service (Jan. 31, 2022), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd992055.pdf.

³¹ For example, in *Meister v. U.S. Dep’t of Agriculture*, the Sixth Circuit found that gun hunting (authorized by the state game agency) was inconsistent with the direction in forest plans for the Huron-Manistee National Forests. *Meister v. U.S. Dep’t Agric.*, 623 F.3d 363, 379 (6th Cir. 2010). Therefore, the Forest Service had the authority to close certain portions of this forest to hunting. *Id.*

³² *Id.*

wolves.³³ It provides that the Forest Service must “in consultation” with the U.S. Fish and Wildlife Service “utilize [its] authorities by ... carrying out programs for the conservation” of listed species.³⁴

It is our understanding that the Forest Service has not complied with these requirements for endangered wolves found on or near the Medicine Bow-Routt National Forest. The Forest Plan includes no mention of wolves, and the Forest Service produced no records documenting a conservation program for endangered wolves. This likely constitutes the “total inaction” that courts hold plainly violates an agency’s duty to conserve.³⁵

To comply, the Forest Service must consult with the U.S. Fish and Wildlife Service about how to promote the survival and recovery of endangered wolves on the Forest.³⁶ Because hunting and trapping threaten the survival of endangered wolves in Colorado that travel to Wyoming, the Forest Service should prohibit wolf hunting and trapping across the Medicine Bow-Routt National Forest. Until the Forest Service issues such an order, or embarks on another program for the conservation of wolves on the National Forest, it remains in violation of Section 7(a)(1).

CONCLUSION

If the Forest Service does not act to correct the violation described in this letter, the Center may pursue litigation in U.S. District Court in sixty days. The Center would seek injunctive and declaratory relief, and legal fees and costs regarding these violations. If you have wish to discuss this matter or believe this notice is in error, please contact me at 651-955-3821.

Sincerely,



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³³ 16 U.S.C. § 1536(a)(1).

³⁴ *Id.*

³⁵ *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1146 (11th Cir. 2008) (“Total inaction is not allowed.”); *Defs. of Wildlife v. United States Fish & Wildlife*, 797 F. Supp. 2d 949, 959 (D. Ariz. 2011) (“In other words, the Ninth Circuit has set a floor for substantively evaluating section 7(a)(1), which is: ‘total inaction is not allowed.’”); *Nat’l Wildlife Fed’n v. Norton*, 332 F. Supp. 2d 170, 187 (D.D.C. 2004) (“This discretion is not so broad as to excuse total inaction.”).

³⁶ *Sierra Club v. Glickman*, 156 F.3d 606, 618 (5th Cir. 1998) (“The USDA simply cannot read out of existence § 7(a)(1)’s requirement that the USDA’s substantive conservation programs for the Edwards-dependent species be carried out ‘in consultation with and with the assistance of [FWS].’”).

cc (by email):

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