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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION**

CENTER FOR BIOLOGICAL DIVERSITY, et al., Plaintiffs, and WESTERN WATERSHEDS PROJECT, et al., Consolidated Plaintiffs, ANIMAL WELLNESS ACTION, et al., Consolidated Plaintiffs,	Lead Case No. 9:24-cv-86-DWM Member Case Nos. 9:24-cv-87-DWM 9:24-cv-97-DWM MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
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vs.

U.S. FISH AND WILDLIFE
SERVICE, et al.,

Federal-Defendants,

and

SPORTSMEN’S ALLIANCE
FOUNDATION; SAFARI CLUB
INTERNATIONAL; ROCKY
MOUNTAIN ELK FOUNDATION;
STATE OF MONTANA;
MONTANA DEPARTMENT OF
FISH, WILDLIFE AND PARKS;
STATE OF UTAH,

Defendant-Intervenors.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
INTRODUCTION	1
BACKGROUND	2
I. ESA Listing	2
II. The Service’s Refusal to List the Wolf	4
STANDARD OF REVIEW	7
ARGUMENT	7
I. The Service illegally disregarded highly suitable, but presently unoccupied, areas of the southern Rockies.....	7
A. The Service must examine for potential significance any “major geographical areas” where the wolf is “no longer viable but once was.”.....	8
B. The Service’s interpretation of “range” may have been “permissible” under <i>Chevron</i> , but it is not the “best” interpretation <i>Loper Bright</i> requires.....	10
II. The Service arbitrarily and capriciously determined that Colorado, where wolves currently range, is not a “significant portion of [the wolf’s] range.”.....	16
A. The Service failed to provide a satisfactory explanation for its dismissal of Colorado as “insignificant.”	16
B. The Service failed to consider important factors showing Colorado’s significance and the wolf’s status there.....	19
III. The Service also erred in its “significant portion” analysis of the West Coast.	25
CONCLUSION.....	25
CERTIFICATE OF COMPLIANCE.....	27

TABLE OF AUTHORITIES

Cases

<i>Chevron, U.S.A., Inc. v. NRDC, Inc.</i> (“Chevron”), 467 U.S. 837 (1984).....	11
<i>Ctr. for Biological Diversity v. USFWS</i> , 274 F. App’x 542 (9th Cir. 2008)	17
<i>Ctr. for Biological Diversity v. Zinke</i> (“Zinke”), 900 F.3d 1053 (9th Cir. 2018)	11, 12, 13, 15, 16
<i>Defs. of Wildlife v. Norton</i> (“Defenders”), 258 F.3d 1136 (9th Cir. 2001)	1, 3, 8, 9, 11, 14, 16, 19
<i>Defs. of Wildlife v. Salazar</i> , 729 F. Supp. 2d 1207 (D. Mont. 2010).....	3
<i>Defs. of Wildlife v. Sec’y, U.S. DOI</i> , 354 F. Supp. 2d 1156 (D. Or. 2005)	4
<i>Defs. of Wildlife v. USFWS</i> , 584 F. Supp. 3d 812 (N.D. Cal. 2022)	4
<i>Desert Survivors v. U.S. DOI</i> , 321 F. Supp. 3d 1011 (N.D. Cal. 2018).....	3, 19
<i>Friends of Animals v. Haaland</i> , 997 F.3d 1010 (9th Cir. 2021)	16
<i>Loper Bright Enters. v. Raimondo</i> (“Loper Bright”), 603 U.S. 369 (2024).....	7, 11, 14, 15
<i>Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.</i> (“State Farm”), 463 U.S. 29 (1983).....	19
<i>Nat. Res. Def. Council v. EPA</i> , 38 F.4th 34 (9th Cir. 2022)	18, 25
<i>Nat’l Ass’n of Home Builders v. Norton</i> , 340 F.3d 835 (9th Cir. 2003).....	18
<i>Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.</i> (“Brand X”), 545 U.S. 967 (2005).....	11, 15
<i>Nat’l Parks Conservation Ass’n v. EPA</i> , 788 F.3d 1134 (9th Cir. 2015)	24

<i>Nat'l Wildlife Fed'n v. NMFS</i> , 184 F. Supp. 3d 861 (D. Or. 2016)	18
<i>Port of Seattle v. FERC</i> , 499 F.3d 1016 (9th Cir. 2007)	21
<i>Tucson Herpetological Soc'y v. Salazar</i> , 566 F.3d 870 (9th Cir. 2009).....	9

Statutes

5 U.S.C. § 706(2)(A).....	7
16 U.S.C. § 1531(b)	13
16 U.S.C. § 1532(16)	3
16 U.S.C. § 1532(20)	3
16 U.S.C. § 1532(5)(ii)	13
16 U.S.C. § 1532(6)	3, 12
16 U.S.C. § 1533(a)	2
16 U.S.C. § 1533(a)(1).....	3
16 U.S.C. § 1533(a)(1)(A)	14
16 U.S.C. § 1533(a)(1)(D)	13
16 U.S.C. § 1533(b)(1)(A).....	3
16 U.S.C. § 1533(f).....	2
16 U.S.C. § 1538(a)(1)(B)	2
16 U.S.C. § 1539(j)(2)(A).....	12

Federal Register

65 Fed. Reg. 43450 (July 13, 2000).....	14
79 Fed. Reg. 37578 (July 1, 2014).....	3, 4, 11, 12, 22, 23
84 Fed. Reg. 52598 (Oct. 2, 2019).....	22
85 Fed. Reg. 69778 (Nov. 3, 2020).....	4
88 Fed. Reg. 41835 (June 28, 2023)	21
88 Fed. Reg. 77014 (Nov. 8, 2023).....	20, 21, 23

Other Authorities

Aldo Leopold, <i>A Sand County Almanac with Other Essays on Conservation from Round River</i> (1966).....	8
H.R. Rep. No. 95-1625 (1978).....	13
U.S. Fish & Wildlife Service, Species Assessment and Listing Priority Assignment Form (Jan. 4, 2024) (“Form”)	4, 5, 6, 8, 9, 12, 17, 18, 19, 22, 23, 24, 25
U.S. Fish and Wildlife Service, Species Status Assessment for the Gray Wolf (<i>Canis lupus</i>) in the Western United States – Version 1.2 (Dec. 22, 2023) (“Assessment”).....	3, 6, 7, 9, 18, 20, 21, 22, 23, 24

INTRODUCTION

After being wiped out by people decades ago, wolves are finally returning to the southern Rocky Mountains through natural recolonization and Colorado’s historic reintroductions. Spectacular expanses of public land teeming with elk could support more than a thousand wolves across the region. With their return comes the hope of true wolf recovery across the western United States.

Yet the Fish and Wildlife Service (“Service”) disregarded the southern Rockies, including Colorado, where the wolf is making a nascent return, as “insignificant.” Because too few wolves now live in the region—largely due to wolf killings that hinder wolf dispersal from the Northern Rocky Mountains—the agency’s position is that the region cannot be a “significant portion of [wolf] range,” and thus the species’ fragile status there cannot qualify the western U.S. wolf population for Endangered Species Act (“ESA”) protections. The agency is wrong.

The Ninth Circuit holds, consistent with the ESA’s text and conservation purpose, that the Service must examine any “major geographical areas” where the wolf is “no longer viable but once was,” such as the southern Rockies, for potential significance. *Def. of Wildlife v. Norton*, 258 F.3d 1136, 1145-46 (9th Cir. 2001) (“*Defenders*”). With *Chevron*’s demise, the Service’s contrary interpretation—solely focused on “current” range—cannot stand.

Moreover, even if the Service could abandon vast unoccupied areas, it cannot write off wolf recolonization in Colorado by deeming the state insignificant. Any reasonable application of the agency’s standard for assessing significance—whether the area “may contribute to the viability of the species”—demonstrates that this portion qualifies. Indeed, the Service repeatedly relied on Colorado to support its conclusion that the western U.S. wolf population is viable, but still perplexingly deemed the portion insignificant.

The Court should therefore vacate the Service’s denial of Plaintiffs’ listing petitions and ensure that, on remand, the agency grapples with the potential significance of the southern Rockies for wolf recovery across the West.

BACKGROUND

I. ESA Listing

The ESA’s effectiveness hinges on the Service’s implementation of the requirement to list imperiled species. 16 U.S.C. § 1533(a). Listed species enjoy protections, including prohibition on “take,” *id.* § 1538(a)(1)(B), and development of recovery plans, *id.* § 1533(f). Absent ESA protections, individual states manage wildlife.

When determining whether a species qualifies for listing, the Service assesses its status using “the best scientific and commercial data available,” considering five factors, including human-caused mortality from “overutilization.”

Id. § 1533(a)(1), (b)(1)(A). The Service uses the conservation principles of resiliency, redundancy, and representation (colloquially, “the 3Rs”) when assessing species’ viability. FWS000418-Assessment; Pls.’ J. Stmt. Undisputed Facts (“SOF”) ¶¶ 223-226.

The ESA term “species” includes “any distinct population segment of any [vertebrate wildlife] species.” 16 U.S.C. § 1532(16). A species, including a “distinct population segment,” must be listed as “endangered” or “threatened” if it meets the definition for either status “throughout all *or* a significant portion of its range.” *Id.* § 1532(6), (20) (emphasis added); *Def. of Wildlife v. Salazar*, 729 F. Supp. 2d 1207, 1228 (D. Mont. 2010) (holding entire segment must be listed if “significant portion” is endangered or threatened).

In 2014, the Service promulgated a policy interpreting the ESA’s phrase, “significant portion of its range.” 79 Fed. Reg. 37578, 37609 (July 1, 2014) (“2014 Policy”); SOF ¶¶ 406-10 (describing policy). That policy interprets “range” as the geographic area where a species is “currently found.” *Id.* at 37583. Notably, multiple courts rejected the 2014 Policy’s definition of “significant” for violating Ninth Circuit precedent. *See, e.g., Desert Survivors v. U.S. DOI*, 321 F. Supp. 3d 1011, 1074 (N.D. Cal. 2018); *see also Defenders*, 258 F.3d at 1142 (invalidating prior Service interpretation of phrase). Although the 2014 Policy’s definition of “range” relies on its now-vacated interpretation of “significant,” *see* 79 Fed. Reg.

at 37584, the Service still points to the Policy’s definition of “range” when making listing decisions.

II. The Service’s Refusal to List the Wolf

The Service has repeatedly attempted to strip protections from wolves, relying on versions of a single, flawed theory: limited recovery in core areas can justify abandoning others. Courts have consistently rejected this approach. *See, e.g., Defs. of Wildlife v. Sec’y, U.S. DOI*, 354 F. Supp. 2d 1156 (D. Or. 2005); SOF ¶¶ 33-53. Most recently, despite the lack of recovery in major regions like the southern Rockies and Northeast, SOF ¶¶ 17-19, 22-23, the Service removed protections from wolves across the Lower-48 states, except for the Northern Rocky Mountains (which lost protections through a Congressional rider), 85 Fed. Reg. 69778 (Nov. 3, 2020). A district court reinstated protections (outside the Northern Rocky Mountains), *Defs. of Wildlife v. USFWS*, 584 F. Supp. 3d 812 (N.D. Cal. 2022), but the Service appealed and is currently defending the delisting rule.

This lawsuit challenges the Service’s denial of two petitions to designate a “distinct population segment” and protect gray wolves in the Northern Rocky Mountains or across the West (“Denial”). FWS000003-04-Form. The Service concluded the Northern Rocky Mountains no longer represent a valid distinct population segment, instead determining a broader segment (“Western Segment”) is a “valid listable entity under the [ESA].” FWS000013-14-Form.

The Service conducted a status assessment to determine whether the Western Segment qualifies for listing. That assessment included the Northern Rocky Mountains (Montana, Idaho, Wyoming, eastern Oregon, eastern Washington, part of Utah), the West Coast (western Washington, western Oregon, California), and the southern Rockies (Colorado, rest of Utah, northern Arizona, northern New Mexico). FWS000005-Form (map below).

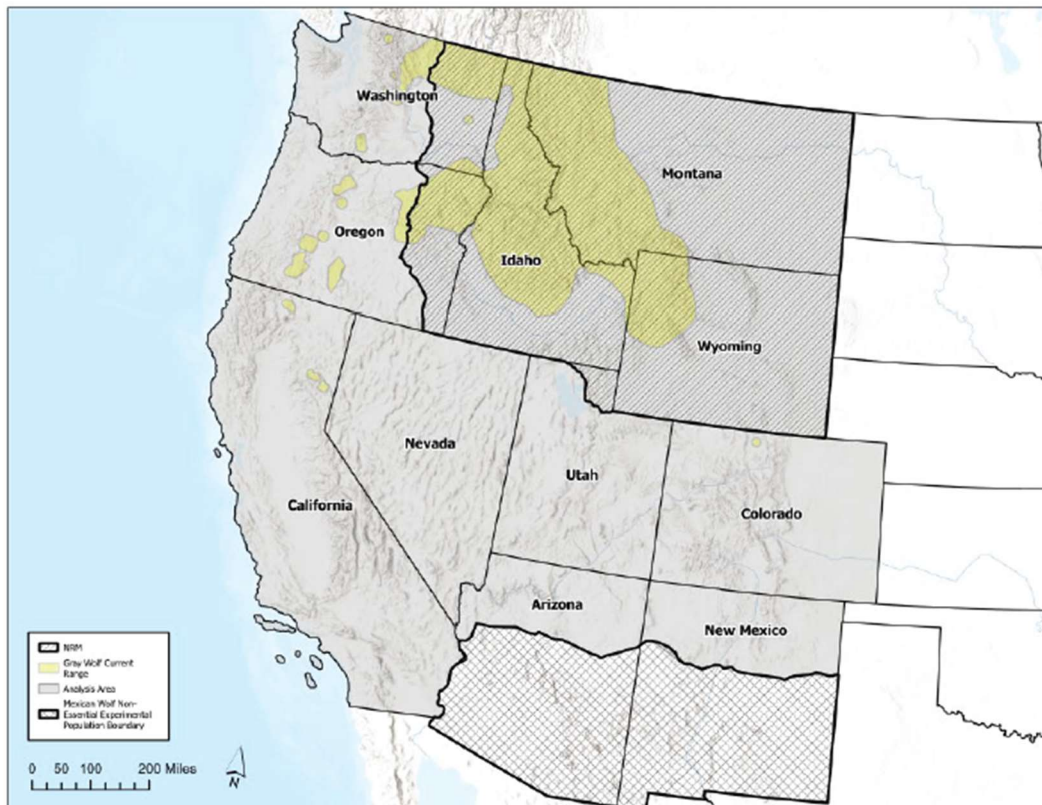


Figure 1. Analysis area of the SSA Report for the gray wolf in the Western United States. Analysis area includes the States of California, Colorado, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming; and portions of the States of Arizona and New Mexico. The gray shading of the analysis area on this map does not indicate historical, current, or potential range, nor does it represent the delineation of a Distinct Population Segment (DPS); rather, this map illustrates the area we considered in our SSA. The black hatched area on the map depicts the delisted NRM area. The yellow shaded area indicates current range of the gray wolf within the analysis area (as of December 31, 2022, except California, which is current as of May 2023) (see Chapter 1 of SSA Report (Service 2023) for references and details). The cross-hatched area delineates the Mexican Wolf Nonessential Experimental Population Area, which is not part of our analysis.

The agency first determined the wolf does not qualify for listing throughout “all” of the Western Segment. FWS000069-Form. The Service next identified potential significant portions of wolf range that “may warrant further review” by evaluating their (1) potential significance and (2) potentially different status compared to wolves elsewhere in the Segment. FWS000070-Form. The Service selected Idaho, Montana, the Northern Rocky Mountains, and the West Coast for further review. FWS000070-Form. Because the Service determined the wolf is not “endangered” or “threatened” in these areas, listing of the Western Segment was not warranted due to threats in “significant portion[s].” FWS000071-75-Form.

The Service recognized that wolves now live in Colorado through natural recolonization, FWS000545-Assessment, and wolf releases required by Colorado law, FWS000041-Form; SOF ¶¶ 334-42. Yet the Service determined Colorado “could not be considered significant in light of the small proportion of occupied current range that exists” there. FWS000070-Form. The Service nevertheless repeatedly relied on Colorado to support its conclusion that the Western Segment is viable. SOF ¶¶ 241-42.

The Service did not select any “unoccupied historical range or unoccupied suitable habitat as potentially significant portions.” FWS000069-Form. Thus, it did not assess the wolf’s status in Utah or other areas of the southern Rockies with

extensive suitable wolf habitat that the Service identified as unoccupied. SOF ¶¶ 18, 230-31, 307-16.

STANDARD OF REVIEW

Under the Administrative Procedure Act (“APA”), “courts, not agencies, will decide ‘*all* relevant questions of law’ arising on review of agency action—even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 392 (2024). For agency policymaking and factfinding, courts must “hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary [and] capricious....” 5 U.S.C. § 706(2)(A).

ARGUMENT¹

I. The Service illegally disregarded highly suitable, but presently unoccupied, areas of the southern Rockies.

Having recognized a Western Segment, the Service must assess threats to the wolf in any “significant portion of its range” across that segment. But the Service unlawfully disregarded unoccupied areas of the southern Rockies by relying on its incorrect interpretation of the ESA.² The Service’s position is that

¹ Plaintiffs have standing because the Denial harms their members’ interests in wolves across the western U.S. *See, e.g.*, Henderson Decl.; Keefover Decl.

² The Service’s error applies to other portions, such as the West Coast, where there are expanses of suitable habitat that are currently unoccupied. FWS000428-Assessment.

“range” means only “currently occupied range.” FWS000069-Form. That interpretation, however, conflicts with the text, legislative history, and purpose of the ESA, as well as binding precedent from the Ninth Circuit, which has already ascertained the best meaning of “significant portion of its range.”

A. The Service must examine for potential significance any “major geographical areas” where the wolf is “no longer viable but once was.”

The Ninth Circuit previously interpreted the ESA’s phrase—“significant portion of its range”—in *Defenders*, a seminal case involving the Service’s refusal to list the flat-tailed horned lizard. There, the court applied statutory construction tools to determine whether the Service lawfully disregarded loss of the lizard from private lands because it persisted on public lands. 258 F.3d at 1141. The court rejected the Service’s approach, holding the agency must examine “major geographical areas in which [a species] is no longer viable but once was” to determine if they are “significant portions.” *Id.* at 1145-46.

The Ninth Circuit explained that Congress made a choice not to forsake species in areas where they are imperiled simply because they are abundant elsewhere. *See id.* at 1144-45 (examining legislative history); *id.* at 1145 n.10 (“Relegating grizzlies to Alaska is about like relegating happiness to heaven; one may never get there.”) (quoting Aldo Leopold, *A Sand County Almanac* 277 (1966)). The court therefore remanded the unlawful decision to the Service to “at

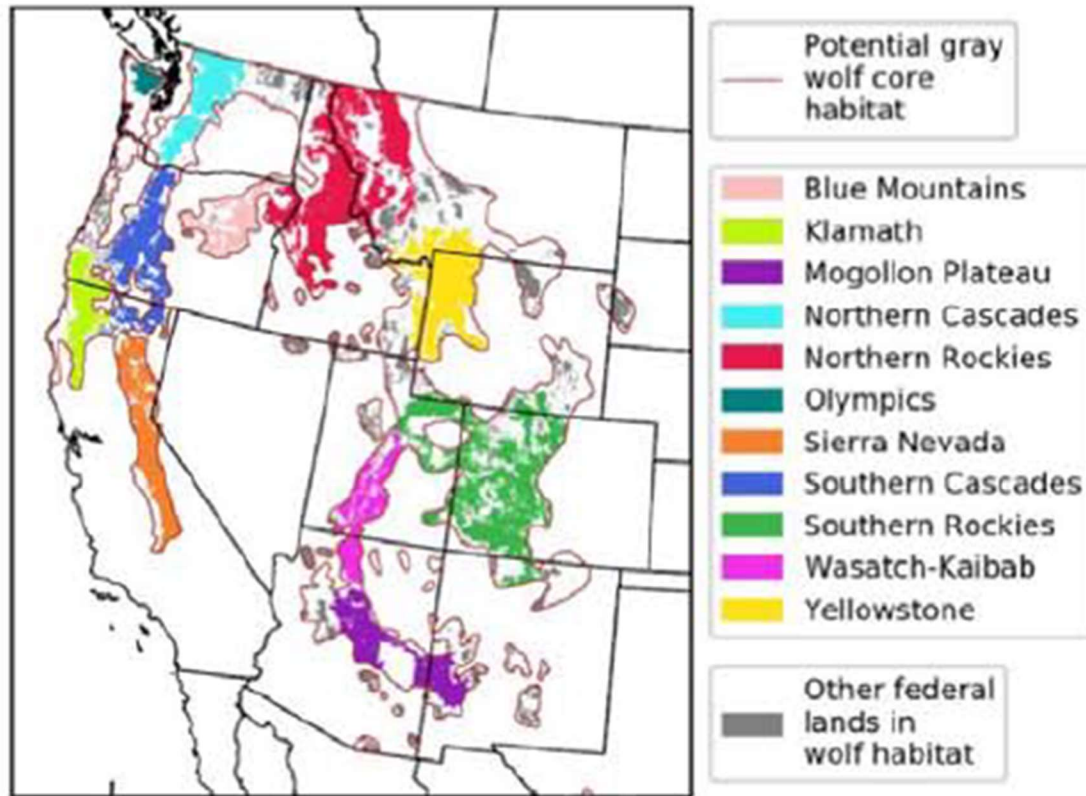
least explain [its] conclusion” that the area in which the lizard “no longer live[s] is not a ‘significant portion of its range.’” *Id.* at 1145.³

Here, though, the Service did not explain whether unoccupied areas of the southern Rockies or elsewhere could qualify as a “significant portion of [the wolf’s] range.” Instead, the Service merely stated that it does “not consider unoccupied historical range or unoccupied suitable habitat as potentially significant portions,” pointing to its now-dismantled 2014 Policy. FWS000069-Form.

The agency disregarded the fact that the southern Rockies contain tens of thousands of square miles of prime wolf habitat with abundant prey that could support up to 2,000 wolves, according to scientific findings. *See, e.g.*, FWS000533-34-Assessment; SOF ¶¶ 307-17, 322-26. Most of the region’s “[p]otential gray wolf core habitat” exists on federal lands, as shown in green and fuchsia below. FWS111597 (Ripple et al. 2022).

³ In a subsequent appeal, the court reaffirmed that the Service must consider “historic range,” while acknowledging the agency had, on remand, analyzed whether unoccupied areas were significant. *Tucson Herpetological Soc’y v. Salazar*, 566 F.3d 870, 876 (9th Cir. 2009). The Service determined those portions were insignificant partially because they did not provide “any unique or critical function for the well-being of the species.” *Id.* at 876-78.

(b) Potential reserves
on federal lands



Despite the lack of wolf recovery in highly suitable habitat across the vast southern Rockies, the Service refused to consider whether the region qualifies as a “significant portion of [wolf] range” simply because most of it is presently unoccupied.

B. The Service’s interpretation of “range” may have been “permissible” under *Chevron*, but it is not the “best” interpretation *Loper Bright* requires.

After losing in *Defenders*, the Service doubled down on its myopic interpretation of “range” in the 2014 Policy, stating “we respectfully disagree with

th[e] holding of the Ninth Circuit” that “the agency must consider whether lost historical range is a significant portion.” 79 Fed. Reg. at 37584-85. Thereafter, the Ninth Circuit assessed the Service’s interpretation in a case involving the Arctic grayling. *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053 (9th Cir. 2018) (“*Zinke*”). Concluding the term “range” is “ambiguous,” the Court applied *Chevron* deference to uphold the agency’s interpretation as “a permissible construction.” *Id.* at 1066-67 (quoting *Chevron*, 467 U.S. 837, 843 (1984)); *see also Brand X*, 545 U.S. 967, 982-83 (2005) (requiring *Chevron* deference even when agency’s interpretation of ambiguous statute conflicts with precedent).

Since the demise of *Chevron*, reviewing courts “under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.” *Loper Bright*, 603 U.S. at 413. Rather, courts must “use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity.” *Id.*

Using its “interpretive toolkit,” *id.* at 409, the *Defenders* court *already* determined the best reading of the ESA’s “significant portion of its range” language. There, the Ninth Circuit held that the Service must assess whether “major geographical areas in which [a species] is no longer viable but once was” are significant portions. *Defenders*, 258 F.3d at 1145. The Ninth Circuit’s

interpretation represents the “best reading” of the statute and, following *Loper Bright*, binds this Court.

The relevant statutory language occurs in the definition of “endangered species,” which “means any species which is in danger of extinction throughout all or a significant portion of its range....” 16 U.S.C. § 1532(6). The 2014 Policy latches onto the definition’s “present tense condition,” claiming a species cannot be “‘in danger’ in an area where it no longer exists” (i.e., historical range) because, if it has already been extirpated, there is no “current or future undesired event” that could harm the species. 79 Fed. Reg. at 37583. The Service is wrong.

A species can be “in danger” where it no longer exists if ongoing conditions hinder the species from recolonizing that area. *Zinke*, 900 F.3d at 1065. For example, killings in the Northern Rocky Mountains keep the wolf “in danger” in the southern Rockies because few wolves survive to disperse into its unoccupied but suitable habitat. Indeed, the Service explained that “with low levels of immigration from neighboring populations, wolves recolonizing Utah would likely exist in small numbers and increase slowly....” FWS000056-57-Form; *see also* SOF ¶¶ 347-98 (documenting threats to wolves recolonizing southern Rockies).

Moreover, the ESA contains tools for recovering species within their unoccupied range, like the previous wolf reintroductions in Yellowstone. 16 U.S.C. § 1539(j)(2)(A) (authorizing release of experimental populations “outside the

current range of [the] species”). The ESA also provides for designation of unoccupied “critical habitat” outside a species’ current range. *Id.* § 1532(5)(ii) (“critical habitat” includes “areas outside the geographical area occupied by the species” when it is listed).

Legislative history also demonstrates that Congress (in another ESA provision) used “[t]he term ‘range’ ... in the general sense to refer[] to the *historical* range of the species.” H.R. Rep. No. 95-1625, at 18 (1978) (emphasis added); *see also Zinke*, 900 F.3d at 1066 (finding, under presumption of consistent usage, “this legislative history provides support for interpreting ‘range’ as meaning historical range” throughout the ESA).

More fundamentally, the Service’s sole focus on a species’ current range has the effect of abandoning recovery in potentially significant areas where a species once lived—and could live again with the ESA’s vital safeguards. This directly conflicts with the ESA’s purpose of conserving imperiled species and the ecosystems on which they depend. 16 U.S.C. § 1531(b).

For wolves, the Service’s linguistic gerrymandering of “range” disregards unoccupied areas of the vast southern Rockies. It does so even though wolves no longer occupy most of this region precisely because of the very threats that Congress designed the ESA to address, like killings of dispersing wolves due to “inadequacy of existing regulatory mechanisms,” *id.* § 1533(a)(1)(D), or impaired

connectivity due to “present or threatened destruction, modification, or curtailment of its habitat or range,” *id.* § 1533(a)(1)(A). *See* SOF ¶¶ 347-98.

The agency’s narrow interpretation is also consequential for other imperiled species, such as grizzly bears and wolverines, who, like wolves, remain absent from most of their historical range. If only “current” range matters, these species could lose their ESA protections based on limited recovery progress in the few areas where they remain. This unacceptable result would be inconsistent with the agency’s “historical application of the Act.” *Defenders*, 258 F.3d at 1145. Its past practice was to protect wide-ranging species, like the bald eagle, until they returned to nearly all their original range. SOF ¶¶ 403-05. The Denial even contradicts the Service’s previous approach to wolf recovery. 65 Fed. Reg. 43450, 43452 (July 13, 2000) (recognizing need to “promote the recovery of the gray wolf throughout representative areas of their historical range” in Lower-48 states); SOF ¶¶ 399-402.

Finally, *Zinke*—where the Ninth Circuit exercised now-defunct *Chevron* deference to hold that the Service’s 2014 Policy *permissibly* determined that “range” is limited to current range—does not compel the Court to accept the Service’s interpretation here. To be sure, if *Zinke* were the *only* Circuit ruling on the issue, it could arguably “still [be] subject to statutory *stare decisis*.” *Loper Bright*, 603 U.S. at 412. But here, preexisting Circuit precedent in *Defenders*

provides the “single, best meaning” of the “significant portion of its range” phrase. *Id.* at 400. Indeed, in *Loper Bright*, the Supreme Court made clear that deferring to an agency’s interpretation, “even when a pre-existing judicial precedent holds that an ambiguous statute means something else,” is “the antithesis of the time honored approach the APA prescribes.” *Id.* at 399 (citing *Brand X*, 545 U.S. at 982). Moreover, since *Zinke*, multiple court have invalidated aspects of the 2014 Policy’s interrelated interpretation of “significant portion of its range.” SOF ¶¶ 407-10. As a result, the Service has provided revised interpretations of the phrase in individual listing decisions, like the Denial.

Post-*Loper Bright*, then, it is *Defenders’* interpretation of the “significant portion of its range” phrase that binds this Court. That case remains good law; indeed, *Zinke* quoted its key holding. 900 F.3d at 1065. It was only because of the now-discarded *Chevron* framework that the *Zinke* court deferred to the 2014 Policy.

To summarize, the Denial cannot stand because it relies on the defunct 2014 Policy, which does not reflect the “single, best meaning” of the “significant portion of its range” phrase, as *Loper Bright* requires. 603 U.S. at 400. The Court cannot allow the Service to categorically disqualify unoccupied areas. The agency must at least explain why “major geographical areas,” like the southern Rockies, where the wolf was “once viable but no longer is,” could not be “significant portions” before

disregarding them. *Defenders*, 258 F.3d at 1145-46; *Zinke*, 900 F.3d at 1065. This is particularly so because wolves could once again flourish in the region's expansive suitable habitat and thus contribute significantly to true wolf recovery in the Western Segment.

II. The Service arbitrarily and capriciously determined that Colorado, where wolves currently range, is not a “significant portion of [the wolf’s] range.”

Even if the Service could lawfully restrict its analysis of potentially significant portions of wolf range to occupied areas, the Denial must still be vacated. The Service's one-sentence dismissal of Colorado, where wolves currently live, as insignificant is unreasonable. It is contradicted by the agency's own findings about the state's contributions to the Western Segment's viability. Because of its irrational dismissal of Colorado, the agency failed to consider important indicators of the state's significance and avoided grappling with threats to the wolf's return there.

A. The Service failed to provide a satisfactory explanation for its dismissal of Colorado as “insignificant.”

Under the APA, the Service must “articulate a satisfactory explanation for its action.” *Friends of Animals v. Haaland*, 997 F.3d 1010, 1015 (9th Cir. 2021). It did not do so when it deemed Colorado “insignificant.” The Denial provides this standard for assessing “potential significance”:

areas that may contribute to the viability of the species because they serve a particular role in the life history of the species (such as the breeding grounds or food source for the species), include high-quality or unique-value habitat relative to the rest of the habitat in the range, represent a large percentage of the range, or other factors.

FWS000070-Form. The Service wrote off Colorado—after considering only one of the above factors—because it said the state “could not be considered significant in light of the small proportion of occupied current range that exists” there.

FWS000070-Form; SOF ¶¶ 231-234. This one-sentence excuse cannot withstand scrutiny.

The Service’s determination that Colorado is insignificant is contradicted by its multiple findings about Colorado’s contributions to the redundancy and resiliency—and thus *viability*—of the Western Segment. *See* FWS000047-Form (pointing to packs distributed across multiple states, including Colorado, as “contributing to redundancy of the species”); FWS000057-Form (“[T]his likely future increase in wolf abundance in ... Colorado ... would contribute to increased resiliency and redundancy of wolves in the Western metapopulation.”); SOF ¶¶ 241-42 (additional examples). Under the Service’s own analysis, then, Colorado meets the standard for potential significance because it “may contribute to the viability of the species.” FWS000070-Form; *see also Ctr. for Biological Diversity v. USFWS*, 274 F. App’x 542, 545 (9th Cir. 2008) (explaining the Service must consider areas in “significant portion” analysis if the “agency’s own reasoning”

recognizes their importance). Nonetheless, the Service summarily rejected Colorado as insignificant.

This sort of “[i]nconsistent reasoning” is “the hallmark of arbitrary action.” *Nat. Res. Def. Council v. EPA*, 38 F.4th 34, 51-52 (9th Cir. 2022). The Service cannot have it both ways. It cannot rely on Colorado’s contributions to viability when they support one conclusion (about the Western Segment’s status) but ignore that *same evidence* when they undercut another (about Colorado’s significance). *See Nat’l Wildlife Fed’n v. NMFS*, 184 F. Supp. 3d 861, 901 (D. Or. 2016) (rejecting such conduct). The Service’s error is compounded because its modeling predicts the core population in the Northern Rocky Mountains will decrease, with a median decline of 68% under the most impactful situation modeled. FWS000605-Assessment. A declining Northern Rocky Mountains population only increases the importance of Colorado’s, which the Service determined will “further reduce future extinction risk” for the Western Segment during the timeframe analyzed. FWS000067-Form.

The agency’s contradictory conclusions are not the only reason its determination regarding Colorado’s significance is unlawful. The Service “must ‘articulate a satisfactory explanation’ for [its] action to permit effective judicial review.” *Nat’l Ass’n of Home Builders v. Norton*, 340 F.3d 835, 846 (9th Cir. 2003). Here, though, the agency’s one-sentence dismissal of Colorado provided so

little explanation of its reasoning that this Court cannot assess whether the Service is impermissibly collapsing the key distinction between a species imperiled through “all” of its range with one imperiled in a “significant portion” of it—a legal violation the Service has repeated over the years. *See, e.g., Defenders*, 258 F.3d at 1141-42; *Desert Survivors*, 321 F. Supp. 3d at 1074. With virtually no explanation from the Service as to why small portions cannot be significant, this Court cannot determine whether the agency is complying with Circuit precedent.

B. The Service failed to consider important factors showing Colorado’s significance and the wolf’s status there.

The agency presents the factors it considers in assessing potential significance disjunctively, but for Colorado, the Service considered only one factor—Colorado’s percentage of total occupied range across the Western Segment. FWS000070-Form; SOF ¶¶ 229, 232-33. The agency did not consider any other factors from its articulated standard (e.g., high-quality habitat). By ignoring such factors to wrongly write off Colorado as insignificant, the Service “entirely fail[ed] to consider ... important aspect[s] of the problem.” *State Farm*, 463 U.S. 29, 43 (1983).

First, the Denial’s “potential significance” standard instructs the agency to consider whether a portion has “high-quality or unique-value habitat.” FWS000070-Form. The Service did not do so for Colorado, even though both habitat types exist there. In fact, in a rule designating an experimental wolf

population in Colorado—issued just three months before the Denial—the Service recognized that potential “high-quality” habitat occurs in Colorado, and that 2022 modeling shows millions of acres of “seasonal wolf habitat that contain[s] high ecological suitability and low conflict risk.” 88 Fed. Reg. 77014, 77024 (Nov. 8, 2023).

Additionally, as pictured below (FWS000561-Assessment), Colorado contains two ecoregional provinces (yellow and turquoise) not present in any other states where the Service identified current gray wolf range in the Western Segment.

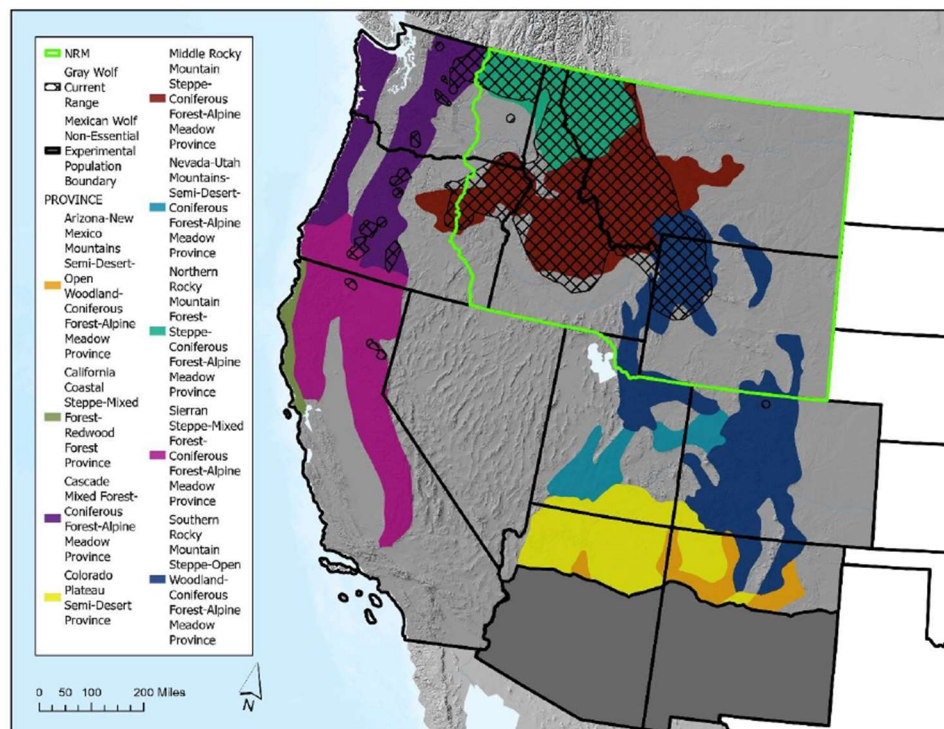


Figure 10. Ecoregional provinces, as defined by Bailey (2016), comprising potentially suitable habitat and the current range of wolves in the Western United States. The NRM is delineated in green. The Mexican Wolf Nonessential Experimental Population Area is colored in dark gray.

The Service uses these provinces as a proxy for a species’ representation—one of the “3Rs” used to assess viability—because differing ecological conditions exert unique evolutionary pressures that allow for restoration of genetic variation.

FWS000437-Assessment; FWS000559-60-Assessment; SOF ¶¶ 319-20. As it did with high-quality habitat, the Service recently recognized the presence of unique-value habitat in Colorado, explaining that reintroduction efforts there “will improve ... representation by increasing the ecological diversity of the habitats occupied by” wolves. 88 Fed. Reg. at 77025. Yet despite its previous awareness of high-quality and unique-value habitat in Colorado, the Service completely ignored these factors demonstrating potential significance.

The Service’s approach here is inconsistent with other decisions where the agency *has* considered other factors, like habitat quality, that may make a small portion significant. *See, e.g.*, 88 Fed. Reg. 41835, 41852 (June 28, 2023) (considering whether “small portion” of Okaloosa darter range had high-quality habitat and other factors). Such conduct is arbitrary and capricious because the “agency treat[ed] similar situations differently without reasoned explanation.” *Port of Seattle v. FERC*, 499 F.3d 1016, 1034 (9th Cir. 2007).

Second, range at the front edges of wolf recolonization, like in Colorado, is important because founding members’ “genetic composition can diverge rapidly from that of the source population” and “provide[] a rapid mechanism for novel

and potentially adaptive genetic variants.” FWS004318-19 (Carroll et al. 2021); SOF ¶¶ 345-46. The Service acknowledged this potential, FWS000560-Assessment, but failed to consider whether Colorado may be significant on this basis. In a similar context, however, the Service considered the possible significance of a population at the edge of a species’ current range because of its potential adaptive capacity. 84 Fed. Reg. 52598, 52604-05 (Oct. 2, 2019) (explaining scientific literature “support[s] the importance of peripheral populations for conservation”).

Third, the Service irrationally underestimated Colorado’s occupied range. The 2014 Policy defines “range” as “the general geographical area” where a “species can be found at the time [the Service] ... makes any particular status determination.” 79 Fed. Reg. at 37609. When the Service issued its Denial in February 2024, Colorado’s wolf reintroduction had begun. FWS000041-Form (acknowledging December 2023 release). In its determination of “potential significance,” though, the Service looked at occupied range only as of December 2022. FWS000070-Form (pointing to Figure 1, FWS000005-Form, showing occupied range in December 2022). The occupied range the Service considered is east of the Continental Divide, close to the Wyoming border. FWS000005-Form; SOF ¶ 379. Colorado’s wolf releases must occur west of the Divide and at least 60 miles from the Wyoming border, FWS005434 (Colorado wolf plan), so wolves

released in December 2023 expanded occupied range in Colorado. Moreover, the Service designated the *entire* state as the reintroduced, experimental population area. 88 Fed. Reg. at 77021; SOF ¶ 344. Here too, then, the Service failed to consider an important factor—the full extent of Colorado’s occupied wolf range at the time of the Denial.

The agency also unreasonably underestimated occupied range by ignoring “areas used throughout all or part of the species’ life cycle, even if they are not used regularly.” 79 Fed. Reg. at 37609 (2014 Policy). Dispersing wolves have been observed in Utah and Colorado, FWS000550-Assessment; SOF ¶¶ 22-27, yet the Service identified no occupied range in Utah and limited occupied range in Colorado, FWS000005-Form (map). But areas occupied by dispersing wolves are used as “part of the species’ life cycle,” and therefore cannot be dismissed as unoccupied.

Fourth, by summarily deeming Colorado insignificant, the Service prematurely ended its inquiry, which should consider a portion’s “potential significance” *and* “potential status.” FWS000070-Form. The status of the wolf in Colorado differs from elsewhere across the Western Segment because the species has just begun recolonizing the area, and fewer than ten wolves concurrently lived in the state between 2019 and 2022. FWS000553-Assessment. The agency identified the West Coast as warranting further review despite the small amount of

range occupied, FWS000005-Form (map),⁴ and precisely because few wolves live in that portion, FWS000070-Form; SOF ¶¶ 236-37. But it did not afford Colorado the same consideration. Such “internally inconsistent analysis is arbitrary and capricious.” *Nat’l Parks Conservation Ass’n v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015).

Further, by ending its inquiry early, the agency masked major threats to Colorado’s fledgling wolf recovery. For instance, Wyoming’s management practices “can make dispersal more difficult between Wyoming and Colorado.” FWS000612-Assessment; *see also* SOF ¶¶ 347-65 (discussing threats to dispersing wolves).⁵ And once packs form in Colorado, Wyoming’s lethal management continues to threaten them; Colorado’s first two packs likely dissolved because several members were hunted after crossing into Wyoming. FWS111275-87 (Kosmrl 2023); SOF ¶¶ 368-78. This, too, demonstrates that the Service inadequately considered an important issue, namely how withholding ESA protections in the Northern Rocky Mountains will hinder the population expansion

⁴ Because the eastern third of Oregon and Washington are within the delisted Northern Rocky Mountains, the Service only considered occupied range in the western areas of those states as part of the West Coast portion. FWS000070-Form.

⁵ Sufficient effective dispersal is crucial for population expansion and genetic health. SOF ¶¶ 6-8, 385-88.

the Service predicts will occur in Colorado—expansion that it relies on to support its finding that the Western Segment is viable.

To summarize, the Service unreasonably applied its own standard to dismiss Colorado as insignificant. In doing so, the agency avoided grappling with key indicators of Colorado’s significance and the wolf’s imperiled status there.

III. The Service also erred in its “significant portion” analysis of the West Coast.

The Service identified the West Coast as potentially significant but determined that the wolf is not endangered or threatened there. FWS000070-73-Form. The Service erred. As another Plaintiffs’ brief explains, the wolf on the West Coast is imperiled because of insufficient connectivity and small population size. It is also threatened by historical range loss, as its compromised genetics demonstrate. SOF ¶¶ 18-19, 214-18, 396-98; FWS111699-714 (von Holdt et al. 2023). Because this portion is both imperiled and potentially significant, the Service erred in failing to further consider whether the Western Segment should be listed on this basis.

CONCLUSION

This Court should grant Plaintiffs’ motion and vacate the Denial. This “traditional remedy” for unlawful agency actions is appropriate here. *Nat. Res. Def. Council*, 38 F.4th at 51.

Dated: January 24, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2) and in accordance with this Court's case management order dated July 23, 2024 (Doc. 33), I hereby certify that that this brief uses 14-point font and contains less than 5,000 words, excluding material Local Rule 7.1(d)(2)(E) omits from the word-count requirement. I relied on Microsoft Word to obtain the word count.

/s/ Collette L. Adkins
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