

LISA L. RUSSELL,
Deputy Assistant Attorney General
U.S. Department of Justice
Environment & Natural Resources Division
S. JAY GOVINDAN, Section Chief
NICOLE M. SMITH, Assistant Section Chief
ASTRID STUTH CEVALLOS, Trial Attorney (MD Bar)
JACOB JOSE, Trial Attorney (CO Bar No. 59582)
Wildlife & Marine Resources Section
Benjamin Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Tel: (202) 305-5751 (Cevallos)
(202) 341-1749 (Jose)
Fax: (202) 305-0275
Email: Astrid.Cevallos@usdoj.gov
Jacob.Jose@usdoj.gov

Attorneys for Federal Defendants

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

CENTER FOR BIOLOGICAL DIVERSITY, et
al.,

Plaintiffs,

WESTERN WATERSHEDS PROJECT, et al.,

Consolidated Plaintiffs,

ANIMAL WELLNESS ACTION, et al.,

Consolidated Plaintiffs,

v.

Lead Case
CV 24-86-M-DWM

Member Cases
CV 24-87-M-DWM
CV 24-97-M-DWM

**FEDERAL
DEFENDANTS'
BRIEF IN SUPPORT
OF CROSS-MOTION
FOR SUMMARY
JUDGMENT AND
OPPOSITION TO
PLAINTIFFS'**

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 FISH,
WILDLIFE AND PARKS; and STATE OF
UTAH,

Defendant-Intervenors.

**MOTIONS FOR
SUMMARY
JUDGMENT**

TABLE OF CONTENTS

INTRODUCTION.....	1
LEGAL BACKGROUND.....	2
I. Endangered Species Act.....	2
FACTUAL BACKGROUND.....	5
I. Gray wolf (<i>Canis lupus</i>) biology	5
II. The Service’s prior listing decisions affecting the gray wolf in the Western United States.....	6
III. The Service’s 2024 not-warranted finding	7
STANDARD OF REVIEW	8
ARGUMENT	9
I. Animal Wellness Action Plaintiffs lack standing.	10
II. The Service reasonably determined that listing the gray wolf distinct population segment in the Western United States is not warranted.	12
III. The Service reasonably determined that existing regulatory mechanisms in the Western United States, including those in Idaho, Montana, and Wyoming, are adequate to minimize human-caused mortality and other threats to the Western distinct population segment of gray wolves.	14
A. The assumptions underlying the Service’s modeling of future wolf population numbers are well-reasoned and well-supported.	23
B. The Service reasonably determined that existing regulatory mechanisms in the Western United States, including those on federal lands, are adequate to	

minimize human-caused mortality and other threats to Western wolves.	26
IV. The Service relied on the best scientific and commercial data available in making its determination.	28
A. The Service’s findings about gray wolf population size and genetic diversity are well-reasoned and well-supported by the record.	29
1. The Service reasonably determined that vonHoldt (2023) does not represent the best scientific data available on wolf population size and genetic diversity.	35
B. The Service reasonably used Idaho and Montana’s population estimates in its modeling of Western wolf population size.	38
V. The Service reasonably determined that gray wolves in the Western United States are not threatened or endangered in a significant portion of their range.	43
A. The Service appropriately considered lost historical range in the Southern Rockies.	46
B. The Service reasonably explained why it declined to evaluate occupied current range in Colorado as a potentially significant portion of the Western wolf’s range.	52
C. The Service reasonably concluded that wolves in Western Washington, Western Oregon, and Northern California are not endangered or threatened.	59
CONCLUSION	61
CERTIFICATE OF COMPLIANCE.....	62

TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>Am. Diabetes Ass’n v. U.S. Dep’t of the Army</i> , 938 F.3d 1147 (9th Cir. 2019)	11
<i>Bonnichsen v. United States</i> , 367 F.3d 864 (9th Cir. 2004)	47
<i>Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984)	48
<i>Crow Indian Tribe v. United States</i> , 965 F.3d 662 (9th Cir. 2020)	28
<i>Ctr. for Biological Diversity v. Badgley</i> , 335 F.3d 1097 (9th Cir. 2003)	14
<i>Ctr. for Biological Diversity v. Bernhardt</i> , No. 19-CV-05206-JST, 2020 WL 4188091 (N.D. Cal. May 18, 2020) ...	10, 11
<i>Ctr. for Biological Diversity v. Export-Import Bank of the U.S.</i> , 894 F.3d 1005 (9th Cir. 2018)	10
<i>Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.</i> , 690 F. Supp. 3d 322 (S.D.N.Y. 2023).....	57
<i>Ctr. for Biological Diversity v. Zinke</i> , 900 F.3d 1053 (9th Cir. 2018)	48, 49, 50, 51
<i>Defenders of Wildlife v. Norton</i> , 258 F.3d 1136 (9th Cir. 2001)	48, 49, 50
<i>Defenders of Wildlife v. Zinke</i> , 849 F.3d 1077 (D.C. Cir. 2017).....	6, 14, 20, 22, 37
<i>Defs. of Wildlife v. Salazar</i> , 729 F. Supp. 2d 1207 (D. Mont. 2010)	6

<i>Def. of Wildlife v. U.S. Fish & Wildlife Serv.</i> , 584 F. Supp. 3d 812 (N.D. Cal. 2022)	7, 28
<i>Greater Yellowstone Coal., Inc. v. Servheen</i> , 665 F.3d 1015 (9th Cir. 2011)	15, 28
<i>Humane Soc’y v. Zinke</i> , 865 F.3d 585 (D.C. Cir. 2017).....	48, 51
<i>Kern Cnty. Farm Bureau v. Allen</i> , 450 F.3d 1072 (9th Cir. 2006)	29
<i>Kimble v. Marvel Ent., LLC</i> , 576 U.S. 446 (2015)	48
<i>Loper Bright Enters. v. Raimondo</i> , 603 U.S. 369 (2024)	48
<i>Lopez v. Garland</i> , 116 F.4th 1032 (9th Cir. 2024)	49
<i>Lujan v. Defs. of Wildlife</i> , 504 U.S. 555 (1992)	10, 11, 12
<i>Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983).....	9
<i>Nat’l Family Farm Coal. v. U.S. EPA</i> , 966 F.3d 893 (9th Cir. 2022)	10
<i>San Luis & Delta-Mendota Water Auth. v. Jewell</i> , 747 F.3d 581 (9th Cir. 2014)	22, 25, 42
<i>San Luis & Delta-Mendota Water Auth. v. Locke</i> , 776 F.3d 971 (9th Cir. 2014)	28, 29, 32, 38, 43
<i>Trout Unlimited v. Lohn</i> , 559 F.3d 946 (9th Cir. 2009)	8, 12

<i>Tucson Herpetological Society v. Salazar</i> , 566 F.3d 870 (9th Cir. 2009)	50
---	----

FEDERAL STATUTES

5 U.S.C. § 706(2)(A)	8
16 U.S.C. § 1532(3)	2
16 U.S.C. § 1532(6)	3, 13
16 U.S.C. § 1532(16)	3
16 U.S.C. § 1532(20)	3, 13
16 U.S.C. § 1533	2, 3
16 U.S.C. § 1533(a)(1)	3, 4, 8
16 U.S.C. § 1533(a)(1)(D)	14, 22, 26
16 U.S.C. § 1533(b)(1)(A)	4, 22, 28, 38
16 U.S.C. § 1533(b)(3)	4
16 U.S.C. § 1533(b)(3)(A)	4
16 U.S.C. § 1533(b)(3)(B)	4
16 U.S.C. § 1533(b)(3)(B)(ii)	4
16 U.S.C. § 1533(b)(6)(A)	4
Pub. L. No. 112-10 § 1713, 125 Stat. 38, 150 (2011)	6

STATE STATUTES

Idaho Code § 36-201	16, 17
Mont. Code Ann. § 87-1-901	16, 17
Wyo. Stat. § 23-1-304	16, 17

REGULATIONS

50 C.F.R. § 424.02	47
--------------------------	----

FEDERAL REGISTER

43 Fed. Reg. 9607 (Mar. 9, 1978).....	6
61 Fed. Reg. 4722 (Feb. 7, 1996).....	12
74 Fed. Reg. 15123 (Apr. 2, 2009)	6, 16, 17
76 Fed. Reg. 25590 (May 5, 2011)	6
77 Fed. Reg. 55530 (Sept. 10, 2012).....	6, 16
79 Fed. Reg. 37578 (July 1, 2014)	3, 46, 47, 48, 51, 58
82 Fed. Reg. 20284 (May 1, 2017)	6
85 Fed. Reg. 69778 (Nov. 3, 2020).....	7
86 Fed. Reg. 51857 (Sept. 17, 2021).....	7
88 Fed. Reg. 41835 (June 28, 2023)	56, 57
88 Fed. Reg. 77014 (Nov. 8, 2023).....	55

OTHER AUTHORITIES

<i>Range</i> (n.1, sense 4), Funk & Wagnalls Standard College Dictionary (4th ed. 1973)	47
<i>Range</i> (sense 3c), Webster's New Collegiate Dictionary (9th ed. 1977)	47

INTRODUCTION

From 2009 to 2012, the U.S. Fish and Wildlife Service (“Service”) removed a large and expanding gray wolf population in the Northern Rocky Mountains from the Endangered Species Act’s (“ESA”) lists of threatened and endangered wildlife. Since then, that population has continued to grow and expand, remaining in its existing territories in the Northern Rocky Mountain states and naturally colonizing suitable habitat in western Washington, western Oregon, and California. This continued growth and range expansion has taken place under state management in Idaho and Montana, which manage wolves in the same way they manage deer, elk, and other big game wildlife, and under state management in Wyoming, which manages wolves like big game wildlife in a portion of the State and as predators that can be taken by any legal means year-round without a limit in the remainder of the State.

Against this backdrop, in 2024, the Service rationally concluded that wolves in the Western United States constitute a single distinct population segment that is neither threatened nor endangered. The population occupies diverse habitats throughout the Western United States and continues to expand to adjacent suitable habitats. Genetic diversity is strong, and the population suffers no negative genetic effects now and is unlikely to do so in the short or long term. Biologically, these wolves are not isolated; they are connected to thousands of wolves in Canada, and that connectivity bolsters the population’s numbers and fitness. In short, while potential threats exist,

none—alone or in combination—put the Western wolf population in danger of extinction now or in the foreseeable future.

Plaintiffs challenge the Service’s decision, presumably because they want the Service—not the States—to manage wolves indefinitely. Plaintiffs highlight perceived threats to wolves and quibble with the Service’s thorough consideration of the same factors and evidence. They do not cogently explain why the perceived threats mean that the distinct population segment is in danger of extinction now or “likely” to become so in the foreseeable future. Plaintiffs also misconstrue the ESA and misapply Ninth Circuit case law in arguing that the Service ignored the possibility that wolves might return to unoccupied suitable habitat within the wolves’ historical range. The Service correctly focused its inquiry on determining whether the species is threatened or endangered throughout all or a significant portion of its current range, and it appropriately considered the impact of lost historical range on the wolves’ status today.

Because the Service considered relevant factors and articulated a reasoned decision that Western wolves are neither threatened nor endangered, the Court should uphold the Service’s determination and dismiss this case.

LEGAL BACKGROUND

I. Endangered Species Act

The ESA’s primary goal is to protect threatened and endangered species and bring them “to the point at which the measures provided pursuant to [the ESA] are no longer necessary.” 16 U.S.C. § 1532(3). To that end, Section 4 of

the ESA directs the Secretary of the Interior to determine whether a species is “endangered” or “threatened.” *Id.* § 1533. A “species” includes “species,” “subspecies,” or “any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” *Id.* § 1532(16). An “endangered species” is a species that “is in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6). A “threatened species” is one that “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20).

Although the statute does not define “significant portion of its range,” the Service, together with the National Marine Fisheries Service, issued a joint policy interpreting that phrase in 2014. *See* 79 Fed. Reg. 37578 (July 1, 2014). A species’ “range” is “considered to be the general geographical area within which that species can be found at the time” the Service makes the listing decision. *Id.* at 37579.

The Service evaluates whether a species is “endangered” or “threatened” because of any of five factors:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1). The Service makes a listing determination “solely on the basis of the best scientific and commercial data available . . . after conducting a review of the status of the species.” *Id.* § 1533(b)(1)(A).

The ESA permits an “interested person” to petition the Secretary to add or remove a species from the lists of threatened and endangered species. *Id.* § 1533(b)(3). To the maximum extent practicable, within 90 days after receiving a petition, the Service must determine whether the petition presents substantial information indicating that the petitioned action may be warranted (“90-day finding”). *Id.* § 1533(b)(3)(A). Within 12 months after receiving a petition that presents substantial information indicating that the petitioned action may be warranted, the Service must review the status of the species and make a finding that (i) the petitioned action is not warranted; (ii) the petitioned action is warranted; or (iii) the petitioned action is warranted but precluded by pending proposals to determine whether any species is an endangered or threatened species (“12-month finding”). *Id.* § 1533(b)(3)(B). If the Secretary makes a 12-month finding that adding or removing a species from the list is warranted, he must publish a notice in the Federal Register that includes the complete text of a proposed rule to implement the action. *Id.* § 1533(b)(3)(B)(ii). The Secretary must act on a proposed rule within one year of its publication. *Id.* § 1533(b)(6)(A).

FACTUAL BACKGROUND

I. Gray wolf (*Canis lupus*) biology

Gray wolves are highly territorial and social predators that hunt and live in packs. FWS000425. Pack sizes vary and include groups of generally seven or fewer but occasionally up to 20 or more wolves. *Id.* A pack typically consists of a breeding pair (male and female), their pups from the current year, and offspring from previous years that have not yet dispersed, but a pack also may occasionally contain an unrelated wolf. *Id.*

Wolf populations can grow rapidly given wolves' high reproduction rates. FWS000427; FWS000620. Wolves of both sexes reach sexual maturity between two to three years of age, and breeding pairs average litters of five to six pups. FWS000426. Wolves produce young yearly, and a female may reproduce for over ten years. *Id.* Wolves disperse quickly, leaving the pack between one and three years of age, either locating social openings in existing packs or finding mates and forming new packs. *Id.* In North America, wolves typically migrate 40 to 96 miles when dispersing. *Id.* Packs easily adapt to disruptions, including human-caused mortality and disease, as members of a breeding pair can be quickly replaced from within or outside the pack, and other members of the pack can rear pups if their parents die. FWS000426–27.

Gray wolves are habitat generalists and can successfully occupy a wide range of habitats if there is enough prey and human-caused mortality is sufficiently regulated. FWS000428; FWS000555. In the Western United States, wolves occupy the Northern Rocky Mountains; the Cascade Mountains

of Oregon, Washington, and northern California; and northern Colorado. *Id.* The Western United States also contains substantial unoccupied suitable habitat. *Id.* Unoccupied suitable habitat in the central and southern Rocky Mountains in Colorado and Utah “could potentially support 600 to 2,000 wolves combined,” and wolves are currently naturally recolonizing suitable habitat in northern California, western Oregon, and western Washington. *Id.*

II. The Service’s prior listing decisions affecting the gray wolf in the Western United States

In 1978, the Service listed wolves in the lower 48 States and Mexico, excluding Minnesota, as endangered, and wolves in Minnesota as threatened. 43 Fed. Reg. 9607, 9610 (Mar. 9, 1978).

In 2009, the Service identified a distinct population segment of gray wolves in the Northern Rocky Mountains and delisted those wolves (except for wolves in Wyoming) based on recovery. 74 Fed. Reg. 15123 (Apr. 2, 2009). This Court vacated the rule. *Defs. of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010). In 2011, Congress mandated that the Service republish the rule. 76 Fed. Reg. 25590 (May 5, 2011) (reinstating the 2009 delisting rule as directed by Congress in the 2011 Continuing Appropriations Act, Pub. L. No. 112-10 § 1713, 125 Stat. 38, 150 (2011)). In 2012, the Service also removed ESA protections for wolves in Wyoming based on recovery, 77 Fed. Reg. 55530 (Sept. 10, 2012), which the D.C. Circuit upheld, *Defenders of Wildlife v. Zinke*, 849 F.3d 1077 (D.C. Cir. 2017); 82 Fed. Reg. 20284 (May 1, 2017).

In 2020, the Service promulgated a final rule delisting the gray wolf in the lower 48 States. 85 Fed. Reg. 69778 (Nov. 3, 2020). In 2022, a district court vacated the delisting rule, and the Service reinstated the gray wolf listings in accordance with that order. FWS000770; *Defs. of Wildlife v. U.S. Fish & Wildlife Serv.*, 584 F. Supp. 3d 812 (N.D. Cal. 2022). The Service appealed the district court's decision, along with intervenor-defendants, and those appeals are currently pending. *Defs. of Wildlife v. U.S. Fish & Wildlife Serv.*, Nos. 22-15529, 22-15532, 22-15534, 22-15535, 22-15536, 22-15537, 22-15626, 22-15627, 22-15628 (9th Cir.).

Thus, gray wolves in the Northern Rocky Mountains, including Wyoming, are not protected under the ESA. Gray wolves remain listed as threatened in Minnesota and endangered in the rest of the lower 48 States outside the Northern Rocky Mountains. FWS000770.

III. The Service's 2024 not-warranted finding

In 2021, Plaintiffs petitioned to list a distinct population segment of the gray wolf in either the Northern Rocky Mountains or the Western United States. FWS121419–70; FWS121471–533; FWS121539–41. The Service initially published a 90-day finding concluding that both petitions presented substantial information indicating that the petitioned listing actions may be warranted. FWS121556–58 (86 Fed. Reg. 51857 (Sept. 17, 2021)). The Service then prepared a Species Status Assessment compiling its review of the best scientific and commercial data available about the status of wolves in the Western United States. FWS000398–759. The Service circulated a draft of the

Species Status Assessment to peer reviewers and revised it in response to peer reviewers' feedback. FWS000399. In February 2024, the Service published a 12-month finding that listing a distinct population segment of gray wolves in the Western United States as endangered or threatened was not warranted. FWS000769–73. In the finding, the Service determined that the gray wolf population in the Northern Rocky Mountains is not a distinct population segment of the gray wolf and thus is not a listable “species” under the ESA. FWS000771–72. The Service also determined that, although the gray wolf population in the Western United States is a distinct population segment of the gray wolf and therefore is a listable “species” under the ESA, this population is not in danger of extinction or likely to become so in the foreseeable future because of any of the listing factors in 16 U.S.C. § 1533(a)(1), alone or in combination. FWS000772–73. Plaintiffs' challenges to the Service's 12-month finding followed.

STANDARD OF REVIEW

The Administrative Procedure Act (“APA”) provides the standard of review for Plaintiffs' claims challenging the Service's 12-month finding. *See Trout Unlimited v. Lohn*, 559 F.3d 946, 955 (9th Cir. 2009). Under the APA, courts must uphold agency action, findings, and conclusions unless they are “found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). An agency decision is arbitrary and capricious only if it “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem,

offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

The Court should dismiss Plaintiffs’ complaints and uphold the Service’s not-warranted finding for several reasons. First, one set of Plaintiffs lacks standing. Second, the Service considered the statutory listing factors and reasonably concluded that the distinct population segment of gray wolves in the Western United States is not in danger of extinction or likely to become so within the foreseeable future. Third, the Service exhaustively addressed current and projected increased threats from human-caused mortality and the potential inadequacy of existing regulatory mechanisms in reaching its determination that the Western wolf population is neither threatened nor endangered. Fourth, the Service’s determination relied on the best scientific and commercial data available about wolf population size and genetic health, as well as Montana and Idaho’s state population estimates. Fifth, the Service appropriately considered the effects of lost historical range on the Western wolf population’s status and reasonably determined that the population is neither threatened nor endangered in a significant portion of its range.

Plaintiffs disagree with the Service’s conclusions and ask the Court to substitute its own judgment for that of the agency. But the Service’s exercise of

judgment in a scientific area within its expertise is entitled to substantial deference. That deference is deserved here.

I. Animal Wellness Action Plaintiffs lack standing.

Animal Wellness Action Plaintiffs fail to meet their burden to establish standing at the summary judgment stage because they offer no “evidence [or] specific facts demonstrating each element” of standing—injury-in-fact, causation, and redressability.¹ *Ctr. for Biological Diversity v. Export-Import Bank of the U.S.*, 894 F.3d 1005, 1012 (9th Cir. 2018) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)).

First, although some of their declarations attempt to establish organizational standing based on frustration of the organizations’ missions, the declarations fail to show that the Service’s not-warranted finding has injured these Plaintiffs by forcing them to “divert any resources from core organizational functions.” *Ctr. for Biological Diversity v. Bernhardt*, No. 19-CV-05206-JST, 2020 WL 4188091, at *5 (N.D. Cal. May 18, 2020). Here, Kettle Range Conservation Group’s declarant asserts that the organization has submitted letters, petitions, or comments about wolf regulation to state agencies and has been involved in litigation related to wolves. Doc. 57-2. These activities, and therefore any resources spent on them, are part and parcel

¹ Animal Wellness Action Plaintiffs brought their own lawsuit and therefore cannot rely on the standing of the Center for Biological Diversity Plaintiffs or Western Watersheds Project Plaintiffs to bring their claims. *See Nat’l Family Farm Coal. v. U.S. EPA*, 966 F.3d 893, 908 (9th Cir. 2022) (evaluating whether “at least one Petitioner from each petition for review” has standing).

of the organization's mission to advocate for wolf protections. The same is true of Project Coyote's declarant, Doc. 57-3, one of Gallatin Wildlife Association's declarants, Doc. 57-4, and Animal Wellness Action and the Center for a Humane Economy's declarant, Doc. 57-8. These Plaintiffs thus cannot establish organizational standing because they fail to show that the Service's not-warranted finding has caused them to "divert any resources from [their] core mission or deviate from 'going about [their] business as usual.'" *Ctr. for Biological Diversity*, 2020 WL 4188091, at *5 (quoting *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1155 (9th Cir. 2019)).

Second, although some of the declarations attempt to establish representational standing based on injuries to the organizations' members' desire to observe wolves, they "plainly contain no facts" showing how the Service's not-warranted finding will cause them "actual or imminent" injury. *Lujan*, 504 U.S. at 564. It is not enough that declarants "personally observed" wolves in the *past*. Doc. 57-1; *see also* Docs. 57-6, 57-7. Nor is it enough for declarants to assert that they intend to visit places where they once observed wolves "without any description of concrete plans." *Lujan*, 504 U.S. at 564; *see* Docs. 57-1, 57-9. Moreover, to the extent that these declarants vaguely hope to observe wolves in the Western United States outside the Northern Rocky Mountains, *see* Doc. 57-9 (California), they fail to show that any such injury (assuming one exists) is "fairly traceable" to the Service's not-warranted finding, which does not change the listing status of wolves that are currently

listed outside the Northern Rocky Mountains. *Lujan*, 504 U.S. at 560–61 (cleaned up). These Plaintiffs thus lack representational standing.

The Court should therefore dismiss Animal Wellness Action Plaintiffs’ claims and brief, Doc. 57, for lack of standing.

II. The Service reasonably determined that listing the gray wolf distinct population segment in the Western United States is not warranted.

The first step in the ESA’s listing inquiry is the “‘neutral’ task of defining a species.” *Trout Unlimited*, 559 F.3d at 955. To be a listable “distinct population segment,” a population segment must be both discrete from the remainder of the species and significant to the species. FWS000006 (citing 61 Fed. Reg. 4722 (Feb. 7, 1996)). Here, the Service concluded that wolves in the Northern Rocky Mountains are not a distinct population segment because they are not markedly separated, physically or otherwise, from wolves in the Western United States outside the Northern Rocky Mountains. FWS000007–08. The Service instead determined that gray wolves in the Western United States—both within and outside the Northern Rocky Mountains—are part of the same population of gray wolves. FWS000008–09. And, relying in part on the international border with Canada, the Service determined that this population of gray wolves in the Western United States is a distinct population segment of the gray wolf. FWS000010–14. Plaintiffs do not challenge the Service’s distinct population segment analyses or conclusions.

After recognizing that the Western population of gray wolves is a listable “species,” the Service considered whether the Western distinct

population segment “is in danger of extinction throughout all or a significant portion of its range” or “is likely to become” so “within the foreseeable future.” 16 U.S.C. § 1532(6), (20); FWS000059–75.

The Service first determined that the gray wolf in the Western United States is not likely to become endangered within the foreseeable future throughout all its range. FWS000069. The Service examined all available scientific and commercial data about gray wolf population numbers and the five listing factors. FWS000062–69. It concluded that the effects of human-caused mortality, disease and parasites, and genetic diversity and inbreeding are not imminent, intense, or large enough to put the Western wolf population in danger of extinction or make it likely to become so within the foreseeable future. FWS000062. The Service also determined that other threats, including from habitat and prey availability, climate change, or disease in prey species (alone or in combination), do not affect the Western wolf distinct population segment at the population or species level, such that wolves in the West are in danger of extinction. *Id.* Finally, the Service found that the existing management and regulatory frameworks in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming, taken together, are adequate to ensure that human-caused mortality is sufficiently minimized, such that wolves in the West are not in danger of extinction or likely to become so within the foreseeable future. *Id.*

Finally, the Service concluded that the Western wolf distinct population segment is not in danger of extinction or likely to become so within the

foreseeable future throughout a significant portion of its range, including (1) Idaho, (2) Montana, (3) West Coast states outside the Northern Rocky Mountains (Washington, Oregon, and California), or (4) the Northern Rocky Mountains. FWS000070–75.

The Service used the best scientific and commercial data available in considering the statutory listing factors, and it thoroughly explained the record evidence supporting its conclusions. This is exactly what the law requires. *See Ctr. for Biological Diversity v. Badgley*, 335 F.3d 1097, 1100–01 (9th Cir. 2003) (upholding not-warranted finding that was based on a “comprehensive review of scientific published and unpublished literature, peer reviews, and raw data”).

III. The Service reasonably determined that existing regulatory mechanisms in the Western United States, including those in Idaho, Montana, and Wyoming, are adequate to minimize human-caused mortality and other threats to the Western distinct population segment of gray wolves.

The ESA directs the Service to consider whether a species would be imperiled by “the inadequacy of existing regulatory mechanisms” after delisting. 16 U.S.C. § 1533(a)(1)(D). Regulatory mechanisms are not “inadequate” just because they do not “protect a species from any conceivable impact”; rather, “the ESA requires protection only ‘against threats that would cause the species to be “an endangered species or a threatened species.”’” *Defs. of Wildlife*, 849 F.3d at 1087 (citations omitted); *see id.* at 1084 (“That appellees disagree with the Service does not undercut its reasoned determination that . . .

[the State] has established an adequate regulatory framework.”). To this end, state management measures need not equal the protections of the ESA. *See Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1032 (9th Cir. 2011).

The Service reasonably determined that Idaho, Montana, and Wyoming (“Northern Rocky Mountain states”), where gray wolves are not listed under the ESA, have sufficient regulatory and management mechanisms in place to maintain viable wolf populations. First, those states have committed to manage for 100 to 150 wolves in each state. Second, the Service correctly focused on the ESA’s causal inquiry: whether existing regulatory mechanisms are inadequate to stop the potential threat of human-caused mortality from putting the Western wolf population *at risk of extinction*. The mere existence of a threat—even one that will reduce population numbers from current levels—standing alone is not enough to list a species. Here, the Service determined that, even if wolf populations in the Northern Rocky Mountain states fell to those minimum commitments, the Western wolf population would not be endangered or threatened. Third, the Service reasonably determined that it is extremely unlikely that the states would reduce populations to those levels given logistical constraints and stated management intent.

The primary potential threat to wolves is human-caused mortality. Thus, the Service evaluated whether the existing state regulatory mechanisms are sufficient to sustain a wolf population that is not in danger of extinction, or likely to become so in the foreseeable future, in the face of this threat.

Although the passage of new laws in Idaho and Montana in 2021 aimed to

reduce the current population of wolves by expanding methods of public harvest, the Northern Rocky Mountain states are committed to adaptively managing for at least 15 breeding pairs and 150 wolves in each state.

FWS000467–68 (Idaho); FWS000480 (Montana); *see also* FWS000490–91 (discussing wolf management in Wyoming).² Considering this, the Service reasonably concluded that the states have adequate “management and regulatory frameworks” to “ensure that human-caused mortality, where it occurs, is sufficiently minimized” and wolf populations will not become threatened or endangered. FWS000062.

Indeed, nothing in the new laws passed in Montana and Idaho compromises these commitments and the ability of the states to adaptively manage wolves in a manner that maintains viability. Idaho and Montana are maintaining wolf populations above 150 wolves and 15 breeding pairs per

² The final recovery criteria for the Northern Rocky Mountain gray wolf population consisted of 30 or more breeding pairs and at least 300 wolves distributed equitably across Idaho, Montana, and Wyoming. FWS000438. To provide a buffer above these minimum recovery levels, Idaho and Montana agreed to manage for at least 15 breeding pairs and 150 wolves. *Id.*; *see also* 74 Fed. Reg. at 15132. Wyoming agreed to manage for 10 breeding pairs and 100 wolves in areas of the state known as the Wyoming Trophy Game Management Area. 77 Fed. Reg. at 55538–39. In addition, the National Park Service and tribal authorities agreed to maintain a minimum of 5 breeding pairs and 50 wolves combined in the parts of Wyoming that they manage. *Id.*; FWS000035. These commitments are codified in statute and memorialized through agreements. Mont. Code Ann. § 87-1-901, Idaho Code § 36-201; Wyo. Stat. § 23-1-304; FWS007823–26 (Idaho and Montana memoranda of understanding); FWS019768–71 (Wyoming memorandum of understanding).

state. FWS000025. In Montana, both current and proposed future wolf management plans, as well as state statute, provide that the state will ensure it maintains a population of more than 150 wolves and 15 breeding pairs. FWS012298–99; Mont. Code Ann. § 87-1-901. Similarly, in Idaho, the state’s wolf management plan, developed pursuant to state law, sets a goal of establishing a “stable, well-distributed, self-sustaining Idaho wolf population that fluctuates around an average of 500 animals annually.” FWS009500. This is well above the level required by the previous management plan and exceeds the level above which the state committed to manage. *See* 74 Fed. Reg. at 15132; *see also* Idaho Code § 36-201 (directing the state wildlife commission to authorize public harvest only “in accordance with existing laws *or approved management plans*”). And in Wyoming, Wyoming Game and Fish Commission regulations, state statute, and the state’s wolf management plan all codify Wyoming Game and Fish Department’s commitment to manage for at least 10 breeding pairs and 100 wolves within Wyoming’s Wolf Trophy Game Management Area. FWS027147; FWS000492; Wyo. Stat. § 23-1-304. Contrary to Plaintiffs’ assertions, Doc. 57 at 10, Montana and Idaho do not permit unlimited nor unregulated harvest, as both states limit allowable harvest by regulation and management. FWS000025–26.

Against this backdrop, the Service thoroughly addressed the impacts of more permissive harvest methods in the Northern Rocky Mountain states. FWS000468–73 (discussing the various new methods of public harvest and their impacts in Idaho); FWS000478–85 (discussing the same in Montana).

The Service explained that new methods of hunting and trapping do not equate to new levels of mortality. FWS000025 (“Overall, harvest rates have not always increased despite progressively less-restrictive harvest regulations in Idaho and Montana (e.g., extended seasons, removal of harvest limits, increased bag limits), and populations remained relatively stable through the end of 2020, with slight population decreases observed in Idaho and Montana at the end of 2021 and 2022.”); FWS000473 (“Despite regular changes to harvest regulations [in Idaho] that expanded opportunities for take, harvest rates have not necessarily increased commensurately, but rather have continued to fluctuate between 22 and 35 percent”); FWS000485 (concluding that annual harvest rates, while generally increasing, remain “within the range . . . that occurred in Montana between prior to the 2021 legislation that was incorporated into regulation to increase wolf harvest rates opportunities”). In both states, the expanded forms of harvest coincided with only minor increases in human-caused mortality and minor associated declines in population. FWS000470–73; FWS000483–85. While this was consistent with both Idaho and Montana’s objectives of reducing wolf populations, the Service reasonably concluded that these levels did not place the Western wolf population in danger of extinction.

In support of this analysis, the Service also projected various possible future scenarios based on allowable harvest under existing state regulatory mechanisms. When the Service modeled future wolf population numbers under a level of public harvest averaged from the last four years, the Service

identified no risk of wolves becoming in danger of extinction so long as states maintained their minimum management commitments. FWS000600–09. The Service also modeled future populations of wolves with exaggerated levels of harvest, which addressed Plaintiffs’ concerns over the potential for unexpectedly higher average rates of human-caused mortality. FWS000577–79. These most impactful scenarios included (1) the maximum harvest rate observed in Idaho and Montana since delisting plus 20 percentage points, and (2) the harvest rate needed to reduce the population in Idaho and Montana to 150 wolves each within five years, representing “a rapid (within approximately one wolf generation) decline from the current population size to the management buffer” noted above. FWS000052.

Although the models of these scenarios projected that the number of wolves in Idaho and Montana would decline in the future, they showed no risk of quasi-extinction (fewer than five wolves) in the Western wolf population and either no risk or a negligible (0.02%) risk of wolf numbers falling so low that the population would risk inbreeding depression over the next hundred years. FWS000054–55; FWS000057. And although the Service acknowledged that the projected declines in wolf numbers may cause the Western wolf population to lose some evolutionary genetic potential, the Service concluded that “connectivity to Western Canada will likely continue to provide dispersers and gene flow that will act to buffer any potential losses of genetic diversity.” FWS000058; FWS000620–FWS000622. Ultimately, even under the most impactful (and unlikely) scenario modeled—in which wolves in Idaho and

Montana are hunted or otherwise reduced to minimum management commitments since delisting, and wolves across the Western United States suffer catastrophic levels of disease—the Service projected that the Western wolf population would not be in danger of extinction within the next ten years and for the next hundred years. FWS000660–71; FWS000062–69. Given that the state management goals aim above these targets, the Service’s analysis arguably went above and beyond, and it substantiated the Service’s conclusion that state regulatory mechanisms remained sufficient to minimize the potential threat of human-caused mortality. *See Defs. of Wildlife*, 849 F.3d at 1088 (“the ESA does not require a regulation to address every ‘far-fetched “what-if” scenario’ that opponents of delisting can imagine” (citation omitted)).

Practically, the more impactful scenarios are extremely unlikely given the difficulty of achieving and sustaining the higher harvest rates modeled by the Service. FWS000587. Factors such as wolves’ ability to disperse, high reproductive rates, the amount of refugia habitat, and (in the case of agency-directed control) logistical and financial constraints would make it difficult for states to reduce and maintain wolf populations to the levels modeled, even if those harvest rates were allowable under state regulations. *See* FWS000589–92; FWS000608–09. Considering the previously observed population trends, and the biological and practical difficulties of reducing wolf populations, the Service reasoned that “sustaining statewide harvest” at levels that could reduce population sizes to fewer than 150 wolves in Idaho and Montana “while possible, is highly unlikely.” *Id.*; *see also* FWS000589; FWS000665.

Moreover, even if wolf population reductions are achieved and sustained, Idaho and Montana have demonstrated their intent to adjust wolf harvest opportunities to ensure that wolf numbers remain well above this 150-wolf level. Idaho Fish and Game’s 2023 wolf management plan sets a goal wolf population of 500 wolves (fluctuating throughout the year due to reproduction and harvest timing). FWS009500–01. Similarly, Montana’s 2023 draft wolf management plan provides a 450-wolf “benchmark” above which wolves will be managed if the plan is finalized. FWS012298; *see also* FWS000032 (discussing Montana’s previous commitment to adaptively managing wolves and becoming increasingly restrictive of public harvest as wolf population declines). The Wyoming Game and Fish Department manages for a goal population of 100 wolves, in addition to the populations in Yellowstone National Park, Grand Teton National Park, and the Wind River Reservation.³ FWS000492. Thus, while Montana’s and Idaho’s plans aim to reduce existing wolf populations, all three states have current wolf populations, management objectives, and underlying commitments of at least 100 to 150 wolves.

³ Additionally, states retain more management flexibility when they manage populations above their minimum commitments. For example, Wyoming statutes and regulations commit Wyoming to manage for at least 100 wolves in the Wyoming Trophy Game Management Area, but in practice Wyoming uses a numerical objective of 160 wolves, which is above the minimum commitment. Managing wolves at this objective allows Wyoming to maintain full management flexibility to resolve conflicts and continues to provide for public wolf harvest opportunities. FWS000588.

These management objectives, alongside state statute, undercut Plaintiffs’ unfounded assertion that the Service should anticipate that the states will break their commitments to manage wolves at a sustainable level. Doc. 57 at 15. The ESA directs the Service to determine whether a species is endangered or threatened because of the “inadequacy of *existing* regulatory mechanisms,” based solely on the best scientific and commercial data available.⁴ 16 U.S.C. § 1533(a)(1)(D), (b)(1)(A). Plaintiffs point to nothing in the record that contradicts the states’ commitments to manage their wolf populations in accordance with minimum targets.

In sum, the Service rationally concluded that “as long as Idaho and Montana close harvest seasons” as the population nears the management buffer above recovery criteria (i.e. 150 wolves each)—a level above which states have consistently and repeatedly committed to manage wolves—state regulatory mechanisms are sufficient to address the threat of human-caused mortality. FWS000608; *see San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (“[T]he agency’s decision is ‘entitled to a presumption of regularity,’ and we may not substitute our judgment for that of the agency.” (citation omitted)); *see also Defs. of Wildlife*, 849 F.3d at 1083 (the determination of what is adequate is “a quintessential judgment” call that the

⁴ Plaintiffs’ argument that the Service ignored how politicization may impact wolf management and harvest is unfounded. Doc. 57 at 13–16. To the contrary, the Service evaluated how public attitudes impact human-caused mortality, including illegal take. FWS000462–64.

Service may make so long as it “reasonably and adequately respond[s] to concerns about the reliability of” state management plans).

A. The assumptions underlying the Service’s modeling of future wolf population numbers are well-reasoned and well-supported.

When modeling future wolf populations, the Service incorporated Idaho, Montana, and Wyoming’s commitments to manage for 150 wolves each. FWS000579. Plaintiffs argue that the Service “assum[ed] . . . that it is fundamentally impossible for any single state’s wolf population to dip below 150 wolves.” Doc. 57 at 16. Not so. As Plaintiffs note, *id.*, the Service modeled wolf mortality to presume that states would halt *public harvest* of wolves pursuant to their prior commitments if populations neared 150 wolves in Idaho, Montana, and Wyoming. But Plaintiffs disregard other model projections—namely, that other forms of mortality would continue at population sizes below that number. *Id.*

The Service clearly articulated its decision to base its future population modeling on the assumption that states would stop public wolf harvest if populations dropped to 150 wolves in Idaho, Montana, and Wyoming. FWS000563–97. The Service’s projections were based “on commitments to manage wolf populations above the management buffer of 150 wolves each.” FWS000579. “However, once regulated harvest ceases in the model, lethal depredation control and disease continue to affect the populations, which means populations in each state *can drop below 150 wolves each.*” *Id.* (emphasis added). Thus, the model allowed wolf populations to drop below 150 wolves

in these three states because of continued lethal depredation control or disease. FWS000579; FWS000582–83; FWS000574–75. The record thus directly contradicts Plaintiffs’ assertion that the Service assumed wolf populations could not drop below 150 in Idaho, Montana, or Wyoming.

Moreover, as discussed in the previous section, *see supra* at 16–17; *id.* at 16 n.2; *id.* at 21 n.3, the Service’s modeling assumption that Idaho, Montana, and Wyoming would cease public harvest once their respective wolf populations dropped to 150 is reasonable and well-supported by state commitments. FWS000579; FWS000481 (discussing Montana’s new law with express requirement that the state would manage for at least 15 breeding pairs); FWS000468–69 (Idaho); FWS000025–26 (“[T]hese laws did not remove or replace the states’ previous commitments to manage for at least 15 breeding pairs and 150 wolves to ensure that a minimum of 10 breeding pairs and 100 wolves are maintained.”); FWS000052. All three states have agreed to halt hunting in the event populations decline below their management levels. In short, the model’s limit of public harvest below 150 wolves per state was reasonable because the evidence supports the Service’s assumption that states will halt hunting at that number.

Turning to the modeling results, they indicate that if public harvest stops as populations near 150 in a state, but disease and lethal depredation control continue, wolf populations would not become in danger of extinction in the foreseeable future. FWS000608–09; FWS000619–20; FWS00062–23. Under the model’s design, it was theoretically possible for the wolf population to

decline to zero, but the Service's projections indicated there is no probability of this happening given the resiliency of wolf populations. FWS000598–623.

Plaintiffs criticize the model's projection that wolf populations will continue to be viable, alleging that the model lacks significant variables and that the model assumed that wolf mortality would not continue below a population of 150. Doc. 57 at 16. Plaintiffs mischaracterize the Service's modeling. First, the Service factored in and projected different levels of public harvest, specifically in Idaho and Montana. FWS000575-81. Second, the agency incorporated a sensitivity analysis that accounted for potential inaccuracies in population estimates. FWS000607–08; FWS000648–53. Finally, the Service's model also addressed and accounted for illegal harvest and the human-caused mortality resulting from recent legislation. FWS000595; FWS000587–92. With these inputs, and as discussed above, the model allowed for populations to drop below 150 in each state. FWS000622–23.

The Service appropriately incorporated state management commitments and articulated a rational connection between its assumptions and the information available. Moreover, modeling inputs are “scientific determination[s]” that “require[] a high level of technical expertise,” and courts therefore “must be at [their] most deferential in reviewing” them. *San Luis*, 747 F.3d at 618 (citations omitted). The Court should uphold the Service's expert and well-reasoned determinations here.

B. The Service reasonably determined that existing regulatory mechanisms in the Western United States, including those on federal lands, are adequate to minimize human-caused mortality and other threats to Western wolves.

While the ESA requires the Service to consider whether a species is endangered or threatened because of “the inadequacy of existing regulatory mechanisms,” 16 U.S.C. § 1533(a)(1)(D), nothing in the ESA requires the Service to consider whether non-existent regulatory mechanisms would offer better or additional protection for the species. The Service’s conclusion that existing limitations on harvest, and the refugia habitat created by federal law, are sufficient to minimize human-caused mortality was rational, and Plaintiffs’ arguments to the contrary are wrong.

The Service extensively evaluated state harvest regulations and other state and Tribal protections in place which serve to limit the threat of human-caused mortality from hunting. FWS000024–25; FWS000029–44; FWS000449–512. Those laws and regulations would also apply to gray wolves on federal lands in those states where wolves are delisted, as states are the main regulators of harvest on most federal land. FWS000029–36. Moreover, federal law directs federal land managers, such as the U.S. Forest Service and Bureau of Land Management, to coordinate with state management agencies. FWS000527. Thus, the Service’s conclusion that state regulatory mechanisms are adequate to protect wolves applies with equal force to wolves on federal lands (which, as Plaintiffs note, Doc. 57 at 26, make up the majority of the Western wolf population’s range). FWS000525.

The Service also recognized that the geography and biological importance of certain areas of federal land, protected and codified by existing federal land management mechanisms, provided for the resiliency of wolves. Specifically, the Service noted that national parks and wilderness areas provide refugia habitat that offer wolves sufficient protection and safety from their primary threat: human-caused mortality. FWS000525–29. National parks create refugia habitat for wolves by prohibiting hunting. FWS000526. Wilderness areas provide similar benefits by prohibiting motorized or mechanized travel, thereby significantly limiting access even where harvest is allowed. FWS000527–28. Together, the management of these lands allows for wolves to escape human-caused mortality and remain resilient in the event of sustained public harvest. FWS000471; FWS000531–32; FWS001435–36 (Barber-Meyer (2021)). The Service discussed this dynamic specifically in the context of Idaho and Montana’s public lands. FWS000589 (“[E]ven under increased human pressure elsewhere . . . these refugia may make it difficult to achieve a consistently high harvest rate statewide.”). Further, these federal areas “remain strongholds for wolf breeding pairs and sources of dispersing wolves in each state,” which in turn allows wolves to maintain connectivity and recolonize other areas. FWS000441; FWS0001433–36 (Barber-Meyer (2021)).

Importantly, the refugia habitat of wilderness areas, national parks, and the sufficient limitations on hunting on federal public lands, are created by *existing* law. And the Service explained why these mechanisms, in concert with

state management, adequately address the potential threat of human-caused mortality for wolves specifically. FWS000589 (discussing the interaction of federal lands within Idaho and Montana, finding that “even under increased human pressure elsewhere . . . these refugia may make it difficult to achieve a consistently high harvest rate statewide.”); *see also Crow Indian Tribe v. United States*, 965 F.3d 662, 680 (9th Cir. 2020) (“While state regulatory mechanisms need not necessarily be legally binding, courts must review the mechanisms’ purported adequacy to see ‘if they work.’”).

Contrary to Plaintiffs’ mischaracterizations, Doc. 57 at 27–28, Ninth Circuit case law does not mandate legally enforceable wolf-specific population standards for federal public lands. *Greater Yellowstone Coal.*, 665 F.3d at 1032 (Service rationally concluded that post-listing protections were sufficient as species management strategy was buffered by the legal protections afforded by the Wilderness Act); *Def. of Wildlife*, 584 F. Supp. 3d at 832. The Service rationally concluded that existing management practices and mechanisms are sufficient to sustain a recovered wolf population.

IV. The Service relied on the best scientific and commercial data available in making its determination.

The Service based its determination that the gray wolf in the Western United States is neither threatened nor endangered on the “best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A). “[W]hat constitutes the best scientific and commercial data available is itself a scientific determination deserving of deference.” *San Luis & Delta-Mendota Water Auth. v. Locke*, 776

F.3d 971, 995 (9th Cir. 2014) (citation omitted). Plaintiffs challenge the Service's determination of the best scientific and commercial data available about wolf population size and genetic diversity as well as Montana and Idaho's state population estimates. Doc. 53 at 11–15; Doc. 57 at 19–26. Yet Plaintiffs point to no available data that the Service ignored. *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1081 (9th Cir. 2006) (“Without any evidence in the record that [the Service] ignored relevant information, we hold that [the Service] satisfied its duty to base its listing determinations on the best available data.”). The Court should reject Plaintiffs' attempts to disturb the Service's expert scientific judgment and reasoned determination of the best scientific data available.

A. The Service's findings about gray wolf population size and genetic diversity are well-reasoned and well-supported by the record.

To determine whether the Western distinct population segment is in danger of extinction or likely to become so within the foreseeable future, the Service examined whether the Western wolf population is large enough to retain sufficient genetic diversity to avoid harmful effects from inbreeding in the short term and to be able to adapt to environmental change in the long term. FWS000435. To evaluate whether the Western wolf population is large enough to stave off problems caused by a lack of genetic diversity, the Service first analyzed the effective population size of the Western wolf population, in

addition to evaluating more direct measures of genetic diversity and evolutionary potential. FWS000435–37; FWS000555–61; FWS000615–22.

Effective population size is a metric that describes how quickly genetic diversity could be lost and whether inbreeding may be increasing. FWS000435. A population with a large effective size loses genetic diversity more slowly than a population with a small effective size and is thus better able to maintain genetic diversity over time. *Id.* The Service explained that conservation biologists can use guidelines or targets to assess whether a closed or isolated population—one that is not connected to other populations of the species and thus does not have the opportunity to interbreed with individuals from other populations—is large enough to have sufficient genetic diversity. *Id.* One guideline (the “50/500 rule”) suggests that an isolated population must have an effective population size of at least 50 to avoid inbreeding depression in the short term and at least 500 to be able to adapt to environmental change in the long term. *Id.*; FWS006735 (Franklin 1980). Another guideline recommends effective population sizes of at least 100 or 1000. FWS000435; FWS006716 (Frankham 2014) (noting that the guideline is based on consideration of closed populations). However, “when data are available, a species-specific analysis of population viability is [preferable] to these generalized targets.” FWS000435; FWS006719.

To determine whether the Western wolf population has a large enough effective size to avoid harmful genetic effects, the Service first applied an estimate of the ratio between effective population size and census population

size. FWS000435. Using the best scientific and commercial data available about wolves in the Northern Rocky Mountains, the Service used a conservative range of effective-to-census population size ratios between 0.12 to 0.26.⁵ FWS000435. Applying these ratios under the 50/500 rule, the Service calculated that—if the Western wolf population were isolated, which it is not—a census population size of between 192 and 417 wolves would be needed to avoid inbreeding depression in the short term (i.e. to maintain an effective population size greater than 50), and a census population size of between 1,923 to 4,167 wolves would be needed to retain enough evolutionary genetic potential in the long term (i.e., to maintain an effective population size greater than 500). FWS000435–36. The Service found that the best available science shows a current census population of 2,797 wolves in the Western United States, which far exceeds the number of wolves needed to avoid inbreeding depression in the short term and is within the range needed to maintain sufficient evolutionary genetic potential in the long term.

FWS000410.

The Service also assessed the probability that the Western wolf population would fall below an effective population size of 50 (i.e., a census population size of 192 to 417 wolves) within the next hundred years.

⁵ Contrary to Plaintiffs' assertions, Doc. 53 at 11, the Service did not use an average effective to census population ratio of 0.17 (or 17%), but rather the full range of the 95% confidence interval it calculated from its analysis of Wildlife Genetics International data in Appendix 2 of the Species Status Assessment—0.12 to 0.26—to be conservative. FWS000638.

Depending on the scenarios the Service modeled—including a model in which Idaho and Montana immediately increase wolf harvest to over 65 percent and catastrophic levels of disease occur throughout the range—the Service found either no risk or a negligible (0.02%) risk of the Western wolf population falling below 192 to 417 wolves over that timeframe.⁶ FWS000054; FWS000608–09.

The Service further explained that the number of wolves needed for the Western wolf population to avoid negative impacts from a lack of genetic diversity is most likely far lower than the population numbers it calculated using the effective to census population size ratios and the 50/500 rule. Again, the 50/500 guideline assumes that the population is closed or isolated from other populations of the same species and therefore does not receive any additional genetic input from other populations. FWS006716. The estimates from Reed (2003) that Plaintiffs cite similarly assume populations are discrete and isolated. Doc. 53 at 8–9; FWS0000442.

As the Service discussed at length, and as Plaintiffs conspicuously ignore, the Western wolf population is *not* closed or isolated. It is connected to a healthy population of nearly 15,000 wolves in Canada. FWS000443;

⁶ Plaintiffs assert that current harvest levels exceed a “threshold” above which harvest causes wolf populations to decline. Doc. 53 at 21 (citing Creel (2010) (FWS0005678)). Even if true, population declines alone do not mean that a species is threatened or endangered. Here, instead of mechanically applying a threshold, the Service directly modeled whether harvest levels would put the Western wolf population in danger of extinction now or within the foreseeable future, and it explained why it did so. FWS000598–609. “[T]he agency has substantial discretion to choose between available scientific models, provided that it explains its choice.” *San Luis*, 776 F.3d at 997 (citation omitted).

FWS000551. Wolves dispersing from Canada breed with wolves in the Western wolf population, which increases the genetic diversity of the Western wolf population. FWS000027; FWS000443; FWS000551; FWS000555–56. Such gene flow “can reverse adverse genetic effects of small population size.” FWS006718. The Service reasonably explained that the Western wolf population is neither closed nor isolated because of evidence of gene flow between Western and Canadian populations of wolves. FWS000027. Thus, the 50/500 and 100/1000 guideline, which assumes a closed or isolated population, cannot be rigidly applied here. FWS000585.

The Service also surveyed more direct scientific evaluations of wolf population viability around the world, which show that wolves retain high levels of genetic diversity at far smaller population sizes than these generalized rules of thumb suggest. FWS000409 (“Overall, the majority of population viability analyses that have been conducted on wolf populations around the globe indicate that several hundred individuals likely provide for a viable wolf population with a low risk of extinction”); FWS000443–46. In its assessment of long-term genetic viability, the Service expressly recognized that wolves in the Western United States will likely lose some evolutionary genetic potential because of projected population declines, but that “connectivity to Western Canada will likely continue to provide dispersers and gene flow that will act to buffer any potential losses of genetic diversity.” FWS000058 (noting wolf-specific population viability assessments that show wolves maintain enough genetic diversity at population sizes between 200 and 800 wolves, and

providing the Service's direct evaluation of current and future representation); FWS000557–61; FWS000615–22; FWS011001–17 (Liberg and Sand 2012); FWS011035–103 (Liberg 2005).

Indeed, direct studies of wolves in the record demonstrate that the Western wolf population “has maintained high levels of genetic diversity and low levels of inbreeding in the decades since [its] establishment, without any indications of negative genetic effects.” FWS000555; FWS000027. The Service reasonably considered the best scientific and commercial data available about population size and direct indicators of genetic health instead of mechanically applying a rigid guideline whose assumptions do not apply to the Western wolf population.⁷

Finally, there is no real dispute that, even though wolves in the Northern Rocky Mountains have been delisted for more than ten years, the wolf population in the Western United States has expanded and continues to expand beyond the Northern Rocky Mountains through dispersal, particularly into Washington and Oregon. FWS000553–54. The Service reasonably concluded that “the best available scientific information indicates that the

⁷ Plaintiffs' assertion that the Western wolf population cannot be viable without “viable populations . . . in the majority of the nine western states” contradicts the record. Doc. 53 at 15–16, 19 (citing FWS000279). Wolves within individual Western states are part of a single, connected population, and Plaintiffs have not challenged the Service's determination that the population of wolves in the Western United States constitutes a distinct population segment. FWS000010–14. Plaintiffs point to no evidence that having fewer wolves in certain states increases extinction risk for the Western wolf population as a whole.

metapopulation in the Western United States remains large and the occupied range has continued to expand despite current levels of human-caused mortality.” FWS000554; FWS000562 (“This large population size and broad distribution contribute[] to the resiliency and redundancy of wolves in the Western United States.”).

1. The Service reasonably determined that vonHoldt (2023) does not represent the best scientific data available on wolf population size and genetic diversity.

In their discussion of wolf population size and genetic diversity, Plaintiffs ignore connectivity and gene flow between the Western and Canadian wolf populations. They also inappropriately apply a smaller effective to census population ratio for wolves from vonHoldt (2023). Doc. 53 at 11–12. Plaintiffs ignore the Service’s detailed explanation of why technical and analytical problems make the data and conclusions in vonHoldt (2023) unreliable. FWS000309–52 (December 15, 2023, memo to file); FWS024549–64 (vonHoldt (2023)).

vonHoldt (2023) found (1) declining genetic diversity in wolves in the Northern Rocky Mountains from 1991 to 2020, (2) high levels of inbreeding in wolves in the Northern Rocky Mountains compared to other sampled populations of wolves, and (3) a much lower effective-to-census population size ratio for wolves in the Northern Rocky Mountains compared to previous estimates. FWS000312. The Service explained that these three conclusions “are unreliable due to confounding technical issues with the data set”—

specifically, “high levels of missing data and low sequencing depth for individual samples.” *Id.* Given these technical problems with the data used in vonHoldt (2023), it not possible to infer that genetic diversity in wolves in the Northern Rocky Mountains is in fact declining over time (which might suggest that that population is too isolated or too small). FWS000312–18. In addition, the sequencing depths were too low for vonHoldt (2023) to infer that there are high levels of inbreeding in wolves in the Northern Rocky Mountains compared to other sampled populations of wolves. FWS000319. And because high levels of missing data and low sequencing depth make it less likely that researchers will correctly estimate genetic diversity, the effective population size estimates derived from vonHoldt’s dataset likely underestimate the effective population size of wolves in the Northern Rocky Mountains. *Id.* Therefore, the effective-to-census population size ratio calculated from this underestimated effective population size is unreliable. Finally, the Service found that vonHoldt’s much lower effective-to-census population size ratio is also unreliable because it used an analytical method that is not designed to calculate contemporary effective population size. FWS000312; FWS000319.

The Service, by contrast, used a much larger, more complete dataset than the one used in vonHoldt (2023) to calculate a range of effective-to-census population size ratios. *Compare* FWS000635 (citing WGI 2021) (noting that the dataset the Service used includes genetic data from 427 wolves from the Northern Rocky Mountains between 1995 and 2018 and has only 0.05% missing data) *with* FWS000313 (noting that vonHoldt’s dataset includes

genetic data from 137 wolves from the Northern Rocky Mountains between 1991 and 2020) and FWS000315 (showing a range of 2.1% to 24.6% missing data per individual wolf genome in vonHoldt's dataset). The Service also used an analytical method designed to estimate contemporary effective size.

FWS000635–36. In its analysis, the Service found “no significant correlations between any metric of individual heterozygosity and time . . . , indicating that genetic diversity has not changed significantly over time between 1995 and 2018.” FWS000636. And the Service calculated an average effective-to-census population size ratio of 17.1%, with 95% confidence intervals of 12.1% to 26.4%. FWS000638. As explained above, the Service used the 95% confidence interval as the range of effective-to-census population size ratios in the finding. FWS000435. The Service fully explained its reasonable analysis of the best available science on genetic diversity and effective population size in wolves in the Northern Rocky Mountains.

Plaintiffs ignore the Service's expert analysis of vonHoldt (2023) entirely. They point to no available scientific information that the Service ignored on wolf population size and genetic diversity and offer no reason to second-guess the Service's expert scientific judgment about the best scientific data available on those topics. FWS000312; *see Defs. of Wildlife*, 849 F.3d at 1089 (“[T]he Service's evaluation of this data falls within its area of expertise and is entitled to deference by the court.” (citation omitted)). The Court should reject their invitation to do so.

B. The Service reasonably used Idaho and Montana’s population estimates in its modeling of Western wolf population size.

In complying with the ESA’s mandate to make listing determinations “solely on the basis of the best scientific and commercial data available,” 16 U.S.C. § 1533(b)(1)(A), the Service is not required “to conduct new tests or make decisions on data that does not yet exist.”⁸ *San Luis*, 776 F.3d at 995. As the record shows, the Service considered and addressed critiques of both states’ wolf population estimates and accounted for these potential issues by producing its own sensitivity analysis and assessing the impacts of more conservative population figures. Such careful consideration fulfills the agency’s duties under both the APA and the ESA.

In assessing Idaho’s state population estimates, the Service considered critiques raised by Ausband (2022) and Creel (2022). FWS000538–44. First, Ausband (2022) found that, for two out of three years between 2016 and 2018, the estimates from Idaho’s Space-to-Event model closely matched those from a different estimation type, known as genetic mark-recapture. FWS001210–11 (space-to-event model estimated 196, 153, and 188 in respective years, while genetic sampling estimated 169, 184, and 123); *see also* FWS000541. However, in one year, 2018, the Space-to-Event model identified 34% more wolves than genetic sampling (188 wolves to 123 wolves). FWS001210–11. The study’s

⁸ For the same reason, Plaintiffs’ criticism that peer reviewers’ requested “modeling and analysis” of the potential impact of human-caused mortality on dispersal and connectivity “has yet to occur,” Doc. 53 at 24, does not cast doubt on the Service’s use of the best scientific data available in addressing the Western wolf population’s viability and connectivity.

authors concluded, as the Service noted, that it remained unclear whether Idaho's Space-to-Event model over-estimated the number of wolves or genetic sampling under-estimated the number of wolves in that year. *Id.*

Second, Creel (2022) expanded on the discrepancy Ausband (2022) identified. FWS005684–700; FWS005684 (“These are substantial differences, and monitoring methods that consider a one-year increase of 23% to be comparable to a one-year decrease of 32% [a 55-point difference] are perhaps not sufficiently accurate to guide management.”). However, contrary to Plaintiffs’ assertions, Doc. 57 at 21, Creel (2022) did not give an estimate for how to adjust the results of either the Space-to-Event or genetic model to account for any potential bias. *Id.* As the record shows, the Service acknowledged the differences in the population estimates produced by these two methods, but found no available estimates, published or unpublished, of whether Idaho's Space-to-Event model skewed lower or higher than the true number of wolves on the landscape, or by how much. FWS000543 (noting that due to the flaws identified by Creel (2022) and others, Idaho's model “may result in biased estimates”).

Aware of the potential for bias, but lacking available estimates of potential bias that could be used to adjust the available population estimates for wolves in Idaho and Montana, the Service conducted a sensitivity analysis to examine how different starting state population estimates could affect the Service's future population projections in each state and account for potential bias. In this way, the Service examined how uncertainty in the starting

population size could affect, or not, its evaluation of the species' viability within the foreseeable future. For this analysis, in Idaho, the Service used a range of starting populations as low as 596 wolves (which is 38% lower than the state's reported year-end estimate, and presents a margin of error higher than even Creel (2022) suggested). FWS000649–50. The Service found that changes in the starting population size in Idaho, including assuming the population in Idaho consisted of only 596 wolves today, did not result in substantial changes in the results of the Service's projection model under all scenarios (i.e., projected future population sizes remained consistent across different initial population sizes). FWS000648. Thus, the agency demonstrated that even if the initial wolf population in Idaho were approximately 38% lower than the state's reported year-end estimate, the best available science supported the Service's conclusion regarding gray wolves' viability in the foreseeable future. *Id.*

The Service also considered the critiques of Montana's population estimate and reached a similar conclusion. FWS000541–49. The Service acknowledged Creel (2022)'s warning of potential bias for Montana's integrated patch occupancy model. FWS000542. The Service also considered Crabtree (2023), on which Plaintiffs rely, Doc. 57 at 23–24, and which presented various perceived flaws regarding Montana's population model. FWS000353–97 (December 18, 2023, memo to file); FWS000542. Montana's population model uses an estimate of the total area occupied by wolves as one factor for estimating the total number of wolves. FWS000353; FWS000542.

Crabtree (2023) contends that Montana’s population model over-estimated occupied area and therefore wolf population numbers: Crabtree (2023) characterized the model as using a single observation of a wolf in a discrete area to indicate occupancy in the entire area. FWS000353. As the Service explained, drawing from a response by Sells (2023), that critique is incorrect. The model uses several factors to indicate partial occupancy (or no occupancy). *Id.* (“[I]t does not automatically include the entire cell size (600 km²) in the total area occupied if [the particular area] is partially occupied.”) Therefore, Crabtree’s “conclusion that Montana overestimates total occupied area, especially when territories overlap more than one grid cell. . . and, therefore, that Montana overestimates the number of wolves in the state, is not correct because Crabtree (2023) incorrectly interpreted Montana’s methodology.” FWS000354. Given this error, the Service, while acknowledging the remaining potential for inaccuracy, determined that Crabtree’s conclusion that Montana over-estimated wolves by 250% did not represent the best available science. *Id.*

The Service also conducted a sensitivity analysis of Montana’s population estimates to determine whether its conclusions were supportable, considering the potential critiques it considered.⁹ FWS000541–43. First, the Service acknowledged the numerous studies assessing state estimate models,

⁹ Plaintiffs mischaracterize Montana’s model as not relying on any direct data. Doc. 57 at 25. The model uses “trail cameras, visual observations, and telemetry collars.” See FWS015503; FWS016763–80.

including peer reviewers' criticism of the state's model and the possibility for over-estimation bias. FWS000542–43 (listing the various studies considered); FWS000648. As with Idaho, the Service found no reliable estimate of the amount of bias or the degree to which it should correct the state population estimations. FWS000543. Second, to assess whether the Service's use of state population data would invalidate its future projections of wolf populations, the Service applied a sensitivity analysis to Montana's initial population estimates. FWS000648. The Service found that a lower initial population (as low as 1,002 wolves) "did not result in substantial changes to the projected population size for any scenario." FWS000659.

In sum, the Service reasonably determined that "there are no published reliable estimates of potential bias, if any, for the population estimates reported in Idaho and Montana," and therefore "the best available scientific information does not allow us to determine if correcting the estimates from Idaho or Montana above or below their current values is appropriate." FWS000354. In the absence of "alternative estimates of wolf population size in these states produced from different methods," the Service rationally concluded that "the current estimates provided by the states represent the best available science." *Id.* Plaintiffs ignore the Service's reasoning, which articulated a clear and rational connection between the data before the agency and the decision it made. Plaintiffs fail to show that the limitations of the data used rendered the conclusions the Service drew not merely "weak," but "arbitrary and capricious." *San Luis*, 747 F.3d at 618 (citations omitted).

Instead, the Service squarely addressed the limitations of the available data by conducting a sensitivity analysis that assesses the effect of potential bias in initial population estimates on population projections into the foreseeable future. The Service found that its analysis of both Idaho's and Montana's wolf populations withstood the potential for uncertainty or inaccuracy of initial population estimates. Thus, the Service carefully considered the potential biases and constraints that utilizing this data could create on their assessment of the viability of the gray wolf in the Western United States.

The Service addressed and accounted for the critiques identified by Plaintiffs before explaining its application of state population estimates and its own population modeling. FWS000538–43. This expert scientific analysis and explanation were reasonable and are entitled to deference. *See San Luis*, 776 F.3d at 992 (“The APA gives an agency substantial discretion ‘to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.’” (citation omitted)).

V. The Service reasonably determined that gray wolves in the Western United States are not threatened or endangered in a significant portion of their range.

After concluding that the wolf population is not threatened or endangered throughout its entire range, the Service considered whether the Western gray wolf distinct population segment should nevertheless be listed because it is in danger of extinction or likely to become so within the foreseeable future in any of four potentially significant portions of its range:

(1) Idaho, (2) Montana, (3) West Coast states outside the Northern Rocky Mountains (Washington, Oregon, and California), and (4) the Northern Rocky Mountains. FWS000070. In accordance with its longstanding reading of “range” in the ESA’s text to mean “currently occupied range,” the Service did “not consider unoccupied historical range or unoccupied suitable habitat as potentially significant portions of the [distinct population segment’s] range.” FWS000069.

After acknowledging that the Western wolf has a wide range that could “theoretically be divided into portions in an infinite number of ways,” the Service explained its reasons for further reviewing the status of four portions of the range identified above “as potentially significant portions of the range in which the species may be in danger of extinction now or likely to become so in the foreseeable future.” FWS000070. The Service examined wolves in Idaho and Montana because those states represent a large portion of the Western wolf population’s range, and the primary threat of increased human-caused mortality comes from those states given recent legislation to increase wolf harvest there. FWS000070. The Service evaluated wolves in West Coast states because there are far fewer wolves in those states compared to the Northern Rocky Mountains, so the status of wolves there could differ from that of wolves in the rest of the population’s range, and because the wolves in those states “occupy unique ecoregional provinces not otherwise represented in the [Northern Rocky Mountains],” so that portion of the range could be significant. FWS000070. The Service “did not further analyze smaller portions

of the species' range outside of the [Northern Rocky Mountains] (e.g., occupied range within individual states outside of the [Northern Rocky Mountains]) because [it] determined [those smaller portions] could not be considered significant in light of the small proportion of occupied current range that exists in those individual states." FWS000070. Finally, the Service analyzed the status of wolves in the Northern Rocky Mountains to be responsive to the petitions, which asked the Service to list a distinct population segment of wolves in the Northern Rocky Mountains as endangered or threatened. FWS000071. Although the Service determined that wolves in the Northern Rocky Mountains are not a distinct population segment (a finding that Plaintiffs do not challenge), the Service nevertheless considered whether the Western distinct population segment of wolves could be listed as endangered or threatened because of the status of wolves in the Northern Rocky Mountains. *Id.* After examining the status of wolves in each of these potentially significant portions of the range using the best scientific and commercial data available, the Service ultimately concluded that the gray wolf is not in danger of extinction or likely to become so within the foreseeable future in any of those areas. FWS000071–75.

Plaintiffs raise three challenges to the Service's significant portion of the range analysis. First, Plaintiffs argue that the Service should have evaluated part of the gray wolf's currently unoccupied historical range in the Western United States as a potentially significant portion of the range. Second, Plaintiffs contend that the Service should have evaluated occupied range

within Colorado, which is home to a single known wolf pack, as a potentially significant portion of the range. Finally, Plaintiffs argue that the Service should have concluded that wolves in the West Coast states are in danger of extinction now or will become so in the foreseeable future. None of Plaintiffs' challenges have merit.

A. The Service appropriately considered lost historical range in the Southern Rockies.

Plaintiffs argue that the Service's finding is arbitrary because the Service did not evaluate whether the gray wolf's currently unoccupied historical range in the Southern Rocky Mountains is a potentially significant portion of its range. Doc. 55 at 7–10. Plaintiffs contend that (1) the Ninth Circuit already interpreted “range” in the statutory phrase “significant portion of its range” to mean “historical range,” and that (2) the Service ignored historical range when determining whether the distinct population segment was endangered or threatened. *Id.* at 10–16. Not so.

The ESA does not define “range.” In their 2014 policy interpreting the phrase “significant portion of the range,” the Services explained that “range” is “the general geographical area within which the species is currently found, including those areas used throughout all or part of the species' life cycle, even if not used on a regular basis.” 79 Fed. Reg. at 37583 (noting that the “‘current’ range” is “the range occupied by the species at the time the Services make a determination under section 4 of the Act”). The Service's 2024 finding did not rely on the vacated definition of “significant” in the 2014 policy, and Plaintiffs

are wrong that the definition of “range” in that policy relies in any way on the policy’s vacated definition of “significant,” Doc. 55 at 15. Rather, the reading of “range” in the policy and its application in this finding depends on the text of the Act, and that reading has never been vacated. In fact, the Ninth Circuit and D.C. Circuit have upheld that reading, as explained below. Although the ESA’s regulations also do not define “range,” they equate “[g]eographical area occupied by the species”—a phrase used elsewhere in the statute—with “range.” 50 C.F.R. § 424.02.

The plain language meaning of “range” supports the Service’s reading of that term in the ESA to mean the geographical area where a species currently exists, lives, or occurs. Contemporaneous dictionary definitions describe “range” as “the geographical area throughout which a specific plant or animal *exists*,” *Range* (n.1, sense 4), Funk & Wagnalls Standard College Dictionary (4th ed. 1973) (emphasis added), or “the region throughout which a kind of organism or ecological community naturally *lives or occurs*,” *Range* (sense 3c) Webster’s New Collegiate Dictionary (9th ed. 1977) (emphasis added).

In addition, as the Service has recognized, the present-tense phrase “is in danger” is best read as referring to current, not past, conditions. 79 Fed. Reg. at 37583–84; *cf. Bonnichsen v. United States*, 367 F.3d 864, 875 (9th Cir. 2004) (interpreting the statutory phrase “a tribe, people, or culture *that is* indigenous” to mean “*presently existing* Indian tribes” (citation omitted)). “[T]o say a species ‘is in danger’ in an area where it no longer exists—i.e., in its historical range where it has been extirpated—is inconsistent with common usage.” 79 Fed.

Reg. at 37583; *see also Humane Soc’y v. Zinke*, 865 F.3d 585, 605 (D.C. Cir. 2017) (“[F]ocusing on the species’ survival in the range it currently occupies is consonant with the purposes of the [ESA], because the threats that a species confronts where it currently lives often affect its continued survival the most and thus bear influentially on whether it should be listed.” (citation omitted)).

The Service’s reading of “range” to mean current range is the most natural reading of the statute’s text, and the Ninth Circuit has upheld it. In fact, the Ninth Circuit upheld the definition of “range” in the 2014 policy that the Service applied here. *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1066–67 (9th Cir. 2018) (citing *Humane Soc’y*, 865 F.3d at 605). That holding is entitled to statutory stare decisis, even though it relied on the then-prevailing framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024) (“[W]e do not call into question prior cases that relied on the *Chevron* framework.”). It is well-established that “stare decisis carries enhanced force” when a prior decision interprets a statute. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). Overruling this precedent would therefore require action from the Ninth Circuit sitting en banc because “to say a precedent relied on *Chevron* is, at best, ‘just an argument that the precedent was wrongly decided.’” *Loper Bright*, 603 U.S. at 412 (citation omitted).

Plaintiffs argue that this Court should nevertheless abandon the Ninth Circuit’s clear holding in *Center for Biological Diversity* and instead rely on older dicta from *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001). Doc. 55

at 14–15. But that is not how *stare decisis* works. See *Lopez v. Garland*, 116 F.4th 1032, 1045 (9th Cir. 2024) (applying decision under *Chevron* as statutory *stare decisis* even though that decision “was somewhat in tension with prior Ninth Circuit authority” (citations omitted)). This court and panels of the Ninth Circuit are bound by existing circuit precedent—here, *Center for Biological Diversity*—and cannot return to older, arguably conflicting jurisprudence. *Id.*

In any event, contrary to Plaintiffs’ assertions, *Defenders of Wildlife* does not conflict with *Center for Biological Diversity*. Doc. 55 at 11–12, 14–16. As the Ninth Circuit itself has recognized, *Defenders of Wildlife* did not hold that “range” in “significant portion of the range” unambiguously means “historical range.” *Ctr. for Biological Diversity*, 900 F.3d at 1063. Instead, *Defenders of Wildlife* concluded only that “‘significant portion of its range’ is inherently ambiguous, and therefore the Secretary has a ‘wide degree of discretion in delineating [what] ‘a significant portion of its range’ means.’” *Id.* at 1063–64 (quoting *Defs. of Wildlife*, 258 F.3d at 1145).

Defenders of Wildlife also addressed different facts. Unlike here, where the Service considered four potentially significant portions of the Western wolf’s range, in *Defenders of Wildlife* the Service had failed to even consider whether the species at issue was threatened or endangered in a significant portion of its range. See *Defs. of Wildlife*, 258 F.3d at 1140, 1145–46 (“The Secretary does not address at all . . . whether . . . the lizard was ‘extinc[t] throughout a significant portion of its range.’ This omission with respect to a significant legal issue raised by the factual circumstances would itself be a sufficient basis for

remanding the case to the Secretary to consider the question.” (citation omitted)). Under these circumstances, *Defenders of Wildlife*’s discussion of “range” is inapplicable dicta and not binding on this court.¹⁰

For these reasons, Plaintiffs’ suggestion that *Defenders of Wildlife* “determined the best reading of the ESA’s ‘significant portion of its range’ language” is flatly wrong. Doc. 55 at 11; *see also id.* at 14–16. Instead, binding Ninth Circuit precedent (*Center for Biological Diversity*) supports the Service’s reading of the statute and the approach taken here—examining the status of potentially significant portions of the Western distinct population segment’s *current* range.

Tucson Herpetological Society v. Salazar, 566 F.3d 870, 876 (9th Cir. 2009) does not alter this conclusion. That case characterized *Defenders of Wildlife* as “requir[ing] consideration of historic range” and “agree[d] that *Defenders* requires the Secretary to analyze lost historical range.” *Id.* at 876. But neither *Tucson Herpetological Society* nor *Defenders of Wildlife* (to the extent it is binding) require the Service to consider historical range within the confines of its significant portion of the range analysis. Instead, those cases allow the Service

¹⁰ To the extent that *Defenders of Wildlife* can be read as interpreting “range” to mean “historical range,” its conclusion is not persuasive. *Defenders of Wildlife* relied on the mistaken belief that the ESA asks the Service to determine whether a species is *already extinct* throughout a significant portion of its range. But the ESA asks the Service to determine whether a species *is in danger of extinction* or likely to become so in all or a significant portion of its range. This statutory language only underscores that the ESA’s “range” analysis is best read as current range.

to consider the historical range of a species, including any lost historical range, when it evaluates the five listing factors. The Service did so here. FWS000061.

Consistent with Ninth Circuit case law, the Service recognized that it must consider the historical range of a species, including any lost historical range, when it applies the five statutory listing factors. FWS000060; *Ctr. for Biological Diversity*, 900 F.3d at 1067 (noting that the Service’s significant portion of the range policy requires the Service to “consider the historical range of a species in evaluating other aspects of the agency’s listing decision, including habitat degradation” and finding that the Service did so in the not-warranted finding at issue there); *Humane Soc’y*, 865 F.3d at 606 (the Service “needs to consider the scope of the species’ historical range, and the impact that material contraction or relocation might indicate for survival within a currently constricted or confined range”). The Services’ 2014 policy likewise acknowledges that “evaluating the effects of lost historical range on the viability of the species is an important component of evaluating the current status of the species.” 79 Fed. Reg. at 37584.

The question, then, is whether the Service reasonably took the historical range of the gray wolf distinct population segment in the Western United States into account when applying the five factors. It did. The Service acknowledged that the size and distribution of the gray wolf’s range in the Western United States “remain below historical levels,” even though the range has expanded since listing. FWS000061. The Service then considered whether the loss of historical range “affects the species’ current and future condition[]

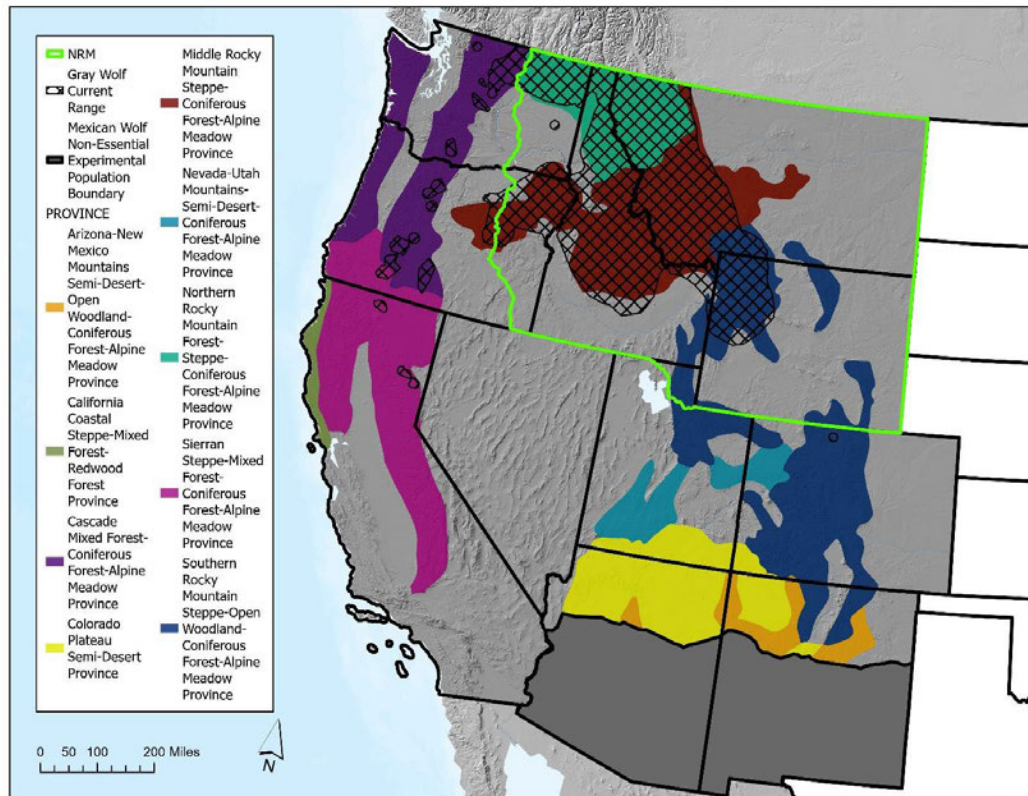
and how that may affect the ability of the gray wolf in the Western United States to maintain populations in the wild over time within its current range.” FWS000061. The Service “did not find any evidence of . . . negative demographic responses to historical range loss,” including “otherwise inexplicable population decline, compromised genetic health, [or] insufficient suitable habitat.” FWS000061.

Ultimately, Plaintiffs’ briefs make clear that their true aim is for wolves to “recoloniz[e]” suitable habitat in currently unoccupied historical range or “return[] to nearly all their original range.” Doc. 55 at 12, 14; *see also* Doc. 53 at 15–16, 19 (citing FWS000279). This argument relies on the flawed premise that a species is endangered or threatened unless it occupies all suitable habitat within its historical range. Whether a species is restored in places where it used to exist is not the standard for either listing or recovery under the ESA. Instead, the ESA directs the Service to list species if they are in danger of extinction or likely to become so within the foreseeable future throughout all or a significant portion of their range. The Service considered the wolves’ loss of historical range appropriately in answering that question here.

B. The Service reasonably explained why it declined to evaluate occupied current range in Colorado as a potentially significant portion of the Western wolf’s range.

Contrary to Plaintiffs’ assertions, Doc. 55 at 16–25, the Service fully considered whether occupied range in Colorado was a potentially significant portion of the range. It concluded that occupied range in Colorado “could not

be considered significant in light of the small proportion of occupied current range that exists in those individual states.” FWS000070 (emphasis added). Throughout the finding, the Service discussed the small number of wolves and small proportion of occupied range in Colorado. The Service explained that the distinct population segment of wolves in the Western United States is composed of “one metapopulation, structured in a constellation of subpopulations spread across six states (*and one known pack in Colorado*).” FWS000047 (emphasis added). The Service found that “[a]t the end of 2022, a minimum of two wolves were confirmed in the northcentral part of Colorado.” FWS000008; FWS014561. Plaintiffs do not address how the small current range occupied by the single known wolf pack in Colorado, represented by the small circle in northern Colorado on the map below, could constitute a potentially *significant* portion of the Western distinct population segment’s range. FWS000561 (Figure 10). Instead, Plaintiffs contend that the Service ignored other possible justifications for evaluating Colorado as a potentially significant portion of the range and underestimated the current occupied range in Colorado. The record refutes each of these alternative justifications.



To begin, the record demonstrates that the few wolves occurring in Colorado do not occupy “high-quality or unique-value habitat *relative to the rest of the habitat in the range.*” FWS000070 (emphasis added). As shown in the map above, the wolf pack in Colorado does *not* occupy a *unique* ecoregional province compared to wolves throughout the rest of the Western distinct population segment’s range. FWS000561. Rather, wolves in Colorado occupy the same ecoregional province as wolves in Wyoming, shown in dark blue on the map. *Id.* While Colorado contains two other ecological provinces, shown in turquoise and yellow on the map, no wolves currently occupy those ecological provinces. *Id.* Nor do any wolves occupy the “potential” high-quality or unique-value habitat that Plaintiffs suggest the Service “recognized” in its 2023 10(j) rule designating an experimental wolf population in Colorado.

Doc. 55 at 20–21 (citing 88 Fed. Reg. 77014, 77024 (Nov. 8, 2023)). Therefore, just as with unoccupied areas in the Southern Rocky Mountains discussed above, the areas Plaintiffs point to are not within the Western distinct population segment’s current range, and the Service reasonably declined to consider those unoccupied areas when identifying potentially significant portions of the range. Even if the Service were required to consider unoccupied areas as potentially significant portions of the range—which it is not—Plaintiffs have not pointed to any evidence in the record showing that habitat in Colorado is high-quality or has unique value *relative to the rest of the habitat in the range*.

The Service’s decision not to consider Colorado as a potentially significant portion of the Western distinct population segment’s range is consistent with the Service’s discussion of the wolf population’s resiliency and redundancy. First, members of a species occupying a particular area may be relevant to the determination of a species’ status throughout all its range (and may contribute to increased resiliency and redundancy overall) even if that area is not a significant portion of the species’ range. Second, Plaintiffs are wrong that the Service “repeatedly relied on [the single wolf pack in] Colorado to support its conclusion” that wolves in the Western distinct population segment are not endangered or threatened. Doc. 55 at 6. To the contrary, the Service’s analysis of the Western distinct population segment’s resiliency and redundancy relied on model projections that did not include wolves in

Colorado. FWS000054–56. These models showed that the projected future wolf population in Idaho, Montana, Oregon, Washington, and Wyoming faced no risk of quasi-extinction (fewer than five wolves) over the next hundred years and faced a negligible (0 to 0.02%) risk of falling below an effective population size of 192 to 417 wolves over that timeframe. FWS000054. Based on the modeling results, the Service concluded that wolves in those states—which constitute the vast majority of wolves in the Western United States—will be able to withstand random and catastrophic events into the future. The Service found that the number of wolves in Colorado “will likely increase due to dispersal from neighboring states, the growth of resident packs already in the state[], and . . . a state statute that requires the reintroduction of wolves to the state.” FWS000056–57. The Service concluded that “[t]his likely future increase in wolf abundance in . . . Colorado in the future would *further expand* the number and distribution of wolves relative to current condition[s], and would contribute to *increased* resiliency and redundancy of wolves in the Western metapopulation.” FWS000057 (emphasis added).

Contrary to Plaintiffs’ assertions, the Service’s approach does not conflict with other agency decisions that “considered other factors, like habitat quality, that may make a small portion significant,” like the Okaloosa darter finding that Plaintiffs cite. Doc. 55 at 21 (citing 88 Fed. Reg. 41835, 41852 (June 28, 2023)). There, after concluding that the Okaloosa darter may have a different status in a portion of its range, the Service considered whether that portion was “significant.” 88 Fed. Reg. at 41852. The Service concluded that it

was not significant because, among other things, it “represents a small portion (approximately [3 percent]) of the range” and “does not contribute high-quality habitat or constitute high-value habitat.” *Id.* The Service specifically pointed out that “[a]lthough these populations *contribute to the rangewide representation and redundancy* of the darter, this portion *does not constitute a large geographic area relative to the range as a whole.*” *Id.* (emphasis added); *see also Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 690 F. Supp. 3d 322, 346 (S.D.N.Y. 2023) (upholding finding that portions of the species’ range analyzed were not significant because they “represent[ed] a small proportion (10% currently) of the total populations and ha[d] a small spatial extent” (citation omitted)).

Far from undermining the Service’s approach, the Okaloosa darter finding supports the Service’s decision not to analyze Colorado as a potentially significant portion of the Western distinct population segment’s range. The finding here explains, and the record shows, that the gray wolf’s range in Colorado is an extremely small proportion of the gray wolf’s range in the Western United States, FWS000070, and does not contain high-quality or unique-value habitat relative to the rest of the range, FWS000561. This evidence supports the Service’s conclusion that the gray wolf’s range in Colorado is not a potentially significant portion of the range.

Even if the Service had considered the status of gray wolves in Colorado, Plaintiffs point to no evidence that suggests wolves in Colorado face elevated or unique threats that might cause them to have a different status from wolves in the rest of the range. The record shows that wolves in Colorado are

currently listed as endangered at the federal and state level, and state law makes it illegal for any person to hunt, take, or possess a gray wolf in Colorado. FWS000040. Thus, even without federal ESA protections, the Colorado Parks and Wildlife Commission would still have to approve any rules about take of wolves as long as they remained a state listed species. FWS000041.

Finally, Plaintiffs' argument that the Service underestimated current, occupied range in Colorado lacks merit. Although Plaintiffs assert that any area through which wolves disperse must be considered current, occupied range because such areas are "used throughout . . . part of the species' life cycle, even if they are not used regularly," Doc. 55 at 23 (quoting 79 Fed. Reg. at 37609), Plaintiffs point to no evidence that Colorado serves as an important dispersal corridor for gray wolves such that it would constitute occupied range. And Plaintiffs' critique that the Service did not consider the wolves translocated from Oregon to Colorado in December 2023 in evaluating the extent of occupied range in Colorado is flawed. Doc. 55 at 22–23. Although the Service acknowledged the December 2023 releases in its assessment of wolf management in Colorado, FWS000041, the Service used the best scientific and commercial data available in assessing wolf population numbers: the most current available state year-end population counts or estimates, which were for the year 2022. FWS000062 ("Given the lag in reporting of wolf population sizes in each state, the current-condition analysis . . . only characterizes the viability of the species through the end of 2022 (the most recent year for which

year-end population size counts or estimates were available from every state in our analysis area).”). Plaintiffs’ argument that the Service should have guessed whether and how the small number of wolves released under a nonessential experimental population designation less than two months before the publication of its finding might have altered the extent of current, occupied range in Colorado strains credulity.

C. The Service reasonably concluded that wolves in Western Washington, Western Oregon, and Northern California are not endangered or threatened.

Based on the best available science, the Service reasonably concluded that wolves in Western Washington, Western Oregon, and Northern California (“the West Coast states”) are not in danger of extinction or likely to become so within the foreseeable future for three reasons. FWS000072–73.

First, the Service explained that “the number of wolves within [the West Coast states] “has been consistently increasing and [that] wolves originating from both within and outside [the West Coast states] have been recolonizing suitable habitat in th[at] portion since 2008.” FWS000072; FWS000549–51. Modeling suggests that the number of wolves in Western Washington and Western Oregon “will likely remain relatively stable or increase in the future.” FWS000073. And wolf populations are likely to continue to expand into California within the foreseeable future. *Id.*; FWS000610–11. Thus, the Service considered and rejected Plaintiffs’ suggestion that West Coast wolves are “imperiled” because of “small population size.” Doc. 55 at 25.

Second, and relatedly, because they are connected to other wolf populations in the Western United States and Canada, wolves in the West Coast states will remain stable or grow and will maintain high levels of genetic diversity, allowing them to avoid inbreeding depression into the foreseeable future. FWS000073. Contrary to Plaintiffs’ assertion that wolves in the Western United States outside the Northern Rocky Mountains exist in isolated packs, Doc. 53 at 17–20, the best available science shows that wolves in the West Coast states “are not an isolated population but are connected to the large and genetically diverse metapopulation in the Western United States and Canada.” FWS000073; FWS000615–19. The record therefore also refutes Plaintiffs’ assertion that West Coast wolves suffer from “insufficient connectivity” and “compromised genetics.” Doc. 55 at 25.

Third, Washington, Oregon, and California all have management plans and regulatory mechanisms that aim to recover and conserve wolf populations into the future by regulating take and other stressors. FWS000072; FWS000496–97; FWS000499–500; FWS000506–07.

Plaintiffs offer no reason to second-guess the Service’s analysis. The Court should uphold the Service’s conclusion that the gray wolf in the Western United States is not endangered or threatened throughout a significant portion of its range.

CONCLUSION

For the reasons above, the Court should grant Federal Defendants' motion for summary judgment and deny Plaintiffs' motions for summary judgment.

Dated: February 21, 2025 Respectfully submitted,

LISA L. RUSSELL,
Deputy Assistant Attorney General
U.S. Department of Justice
Environment & Natural Resources Division

S. JAY GOVINDAN, Section Chief
NICOLE M. SMITH, Assistant Section Chief

/s/ Astrid Stuth Cevallos
ASTRID STUTH CEVALLOS
Trial Attorney (MD Bar)
JACOB JOSE
Trial Attorney (CO Bar No. 59582)
Wildlife & Marine Resources Section
Benjamin Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Tel: (202) 305-5751 (Cevallos)
(202) 341-1749 (Jose)
Fax: (202) 305-0275
Email: Astrid.Cevallos@usdoj.gov
Jacob.Jose@usdoj.gov

Attorneys for Federal Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E) and in accordance with this Court's July 23, 2024, Order, Doc. 33, I hereby certify that this brief uses 14-point font and contains 14,998 words, excluding material that Local Rule 7.1(d)(2)(E) omits from the word-count requirement. I relied on Microsoft Word to obtain the word count.

/s/ Astrid Stuth Cevallos
ASTRID STUTH CEVALLOS