



UNITED STATES | ENGLAND | GERMANY | CHINA

January 24, 2006

The Honorable Gale Norton
Secretary of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

By Facsimile and Certified Mail
(Return Receipt Requested)

Re: Sixty-Day Notice of Intent to Sue/ESA Section 10(j) Regulations and Memorandum of Agreement Between the Secretary of the Interior and the State of Idaho

Dear Secretary Norton:

Defenders of Wildlife, The Sierra Club, The Humane Society of the United States, The Center for Biological Diversity, Friends of the Clearwater, Help Our Wolves Live ("HOWL"), Western Watersheds Project, and The Animal Protection Institute write this letter to notify you of the lack of compliance with the Endangered Species Act ("ESA") in connection with (1) the new Section 10(j) regulations that went into effect on February 7, 2005, 70 Fed. Reg. 1286; and (2) the Memorandum of Agreement ("MOA") regarding "non-essential wolf populations" in Idaho entered into between yourself and the State of Idaho on or about January 5, 2006 (and any actions implementing that MOA), pursuant to these new Section 10(j) regulations. Specifically, in adopting the new Section 10(j) regulations and entering into the MOA, the Department of Interior and Fish and Wildlife Service ("FWS") has:

- (1) violated the ESA's requirement to conserve threatened species, see Section 4(d), 16 U.S.C. § 1533(d); Section 7(a)(1), 16 U.S.C. § 1536(a)(1); Section 3, 16 U.S.C. § 1532(3);
- (2) violated the Administrative Procedure Act ("APA") when it issued a regulation that is arbitrary and capricious, an abuse of discretion, and otherwise contradicts the ESA, 5 U.S.C. § 706(2)(A);
- (3) exceeded its statutory authority under Section 10(j) of the ESA, 16 U.S.C. § 1539(j), by delegating FWS's statutory duties under the ESA to the State of Idaho through the MOA;
- (4) violated the APA, 5 U.S.C. § 553, when it signed the MOA without notice and comment;
- (5) violated the ESA's consultation requirement by failing to consult before signing the MOA, see Section 7(a)(1), 16 U.S.C. § 1536(a)(1); and
- (6) violated the National Environmental Policy Act by failing to prepare an Environmental Impact Statement ("EIS") or Supplemental EIS prior to signing the MOA, see 42 U.S.C. § 4321 et seq.

In 1995 and 1996, experimental populations of gray wolves were reintroduced into the Yellowstone and Central Idaho Nonessential Experimental Population (“NEP”) Areas pursuant to Section 10(j) of the ESA. 16 U.S.C. § 1539(j). The wolves were introduced against the wishes of the State of Idaho, and it remains the official position of that state that wolves should be removed from the state. See House Joint Memorial No. 5. In 2002, the State of Idaho reiterated its official position, but also passed the Idaho Conservation and Management Plan “in order to use every available option to mitigate the severe impacts [of the wolves] on the residents of the State of Idaho.” The Idaho Conservation and Management Plan is a misnomer since it is a plan for reducing wolf populations to 10-15 packs through various means, including sport hunting, rather than a plan for conserving the species, as the ESA requires.

In 2003, FWS proposed delisting the endangered gray wolf from the Western Distinct Population Segment (“DPS”) under the so-called “2003 4(d) rule.” 69 Fed. Reg. 15879. However, because the 2003 4(d) rule did not apply to the experimental populations in Idaho or Yellowstone, FWS recognized that management of delisted wolves within the DPS would be more flexible than management of the experimental populations areas. Consequently, FWS promulgated separate regulations, pursuant to Section 10(j) of the ESA, to attain management parity between the two sets of regulations. See 50 C.F.R. § 17.84(n). The core principle of the new Section 10(j) regulations is that management of the experimental populations should be turned over to states with FWS-approved management plans, which includes Idaho.

On January 31, 2005, the United States District Court for the District of Oregon vacated and enjoined the 2003 4(d) rule as violative of the ESA. See Defenders of Wildlife v. Secretary, Department of the Interior, 354 F. Supp. 2d 1156 (D. Or. 2005). Nonetheless, FWS has continued to implement the new Section 10(j) regulations even though the delisting that FWS would have used as the justification for these regulations has been found unlawful. These new Section 10(j) regulations, like their 4(d) rule counterparts, also violate the ESA.

Even “non-essential” wolf populations are regarded as threatened species under Section 10(j) of the ESA. 16 U.S.C. § 1539(j)(C). The ESA requires the Secretary to issue regulations to provide for the conservation of threatened wolves, 16 U.S.C. § 1533(d), and all Federal agencies shall, in consultation with the Secretary, utilize their authority to carry out programs for their conservation, 16 U.S.C. § 1536(a)(1). The new Section 10(j) regulations, see 50 C.F.R. § 17.84(n), and the MOA violate this statutory mandate to conserve by setting forth vague standards for allowing lethal take and permitting the taking of these wolves without any showing of necessity as required under the ESA’s definition of conservation. See 16 U.S.C. § 1532(3). Without analysis or explanation, or use of the best scientific and commercial data available, FWS has simply acceded to the State of Idaho’s determination, pursued as part of an officially declared policy of wolf eradication, that it will take wolves until 10-15 packs are all that are left. Given the substantial federal investment involved in reintroducing and restoring wolves to the state, it is absurd to adopt a policy that is contrary to the duty to conserve and will in fact undo those recovery efforts.

In addition to violating the congressional mandate to conserve under Section 10(j) and Section 4(d), FWS has also exceeded its statutory authority in delegating management of the wolf populations to the State of Idaho through the new 10(j) regulations and the resultant MOA. Nothing in the statutory language of Section 10(j) of the ESA allows delegating to states ESA obligations Congress clearly intended to remain with FWS. See 16 U.S.C. § 1539(j). Nor is it reasonable to delegate management to a state whose official position calls for eradicating wolves from its territory.

Because the new Section 10(j) regulations violate the ESA, the MOA entered into with the State of Idaho violates the ESA's conservation requirement, constitutes an improper delegation of authority under the ESA, and is arbitrary and capricious and otherwise not in accordance with law. FWS has also violated its obligation under Section 7 of the ESA to consult with and provide notice and comment on the MOA. 16 U.S.C. § 1536(a)(1). Moreover, FWS failed to prepare the necessary documentation under NEPA and to prepare a supplemental EIS. 42 U.S.C. § 4321 et seq.

Unless FWS rescinds its MOA with the State of Idaho, the parties to this letter intend to pursue litigation under Section 11(g) of the ESA, 16 U.S.C. § 1540(g), for the violations of the ESA, APA, NEPA as delineated above. Additionally, should FWS permit the taking of wolves by the State of Idaho during the next sixty days, please be advised the parties reserve the right to file an emergency action pursuant to Section 11(g)(2)(C) of the ESA, 16 U.S.C. § 1540(g)(2)(C).

Dated: January 24, 2006



Brian B. O'Neill (82521)
Richard A. Duncan (192983)
Jonathan W. Dettmann (265032)
Peter C. Hennigan (31089X)
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 766-7000

ATTORNEYS FOR DEFENDERS OF
WILDLIFE, THE SIERRA CLUB, THE
HUMANE SOCIETY OF THE UNITED
STATES, THE CENTER FOR
BIOLOGICAL DIVERSITY, FRIENDS OF
THE CLEARWATER, HELP OUR
WOLVES LIVE ("HOWL"), WESTERN
WATERSHEDS PROJECT, AND THE
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