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July 15, 2019

Via Federal eRulemaking Portal

David Bernhardt
United States Department of the Interior
1849 C Street NW
Washington, District of Columbia, 20240

Re: Proposed Delisting of the Gray Wolf from the List of Endangered and Threatened Wildlife; Docket No. FWS-HQ-ES-2018-0097

Dear Secretary Bernhardt:

I am submitting these comments on behalf of the People of the State of Michigan regarding the proposal of United States Fish and Wildlife Service (Service) to remove the gray wolf from the list of endangered and threatened wildlife. 84 Fed. Reg. 9648 (Mar. 15, 2019). I am proud of the ongoing work of the Michigan Department of Natural Resources (MDNR) to manage gray wolves in Michigan. I also appreciate that the Service recognizes the MDNR has “long been an innovative leader in wolf-recovery efforts.” 84 Fed. Reg. at 9674. But Michigan’s success does not allow the Service to delist the gray wolf without regard for the rule of law.

The Service’s proposal sidesteps its statutory obligations under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (Act). Turning cooperative federalism on its head, the Service seeks to weaponize effective wolf recovery in states like Michigan against wolf populations struggling to recover in other states. Just like the Service’s other failed attempts to delist the gray wolf, this flawed proposal to declare the full recovery of gray wolves nationwide is unlawful.

For the sake of clarity, when I refer to the “gray wolf” in these comments, I am referring to the gray wolves that are currently listed as endangered under the Act, which excludes the Alaskan gray wolves that were never listed as endangered, the Minnesota gray wolves listed as threatened, the gray wolves in Montana, Idaho, the eastern third of Washington and Oregon, and north-central Utah that were delisted by Congress in 2011, and the gray wolves in Wyoming that the Service

delisted in 2012. Additionally, I use the term “gray wolf” for ease of reference, not to implicitly take a position one way or another in the ongoing taxonomic debate. *See* 84 Fed. Reg. at 9654.

Background

Under the Act, a species is defined as an “endangered species” if it “is in danger of extinction throughout all or a significant portion of its range[.]” 16 U.S.C. § 1532(6). The Service’s attempts to clarify the term “significant portion of its range” through rulemaking have, so far, been rejected by the courts, so the phrase carries its ordinary meaning. *Desert Survivors v. U.S. Dep’t of the Interior*, 336 F. Supp. 3d 1131, 1137 (N.D. Cal. 2018); 84 Fed. Reg. at 9684. When determining whether a species is endangered under the Act, the Service, at the very least, must explain its conclusion that an area in which a species “can no longer live is *not* a significant portion of its range.” *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9, 21 (D.C. Cir. 2002) (emphasis added).

To determine whether a particular species is endangered under the Act, the Secretary of the Interior must analyze five factors using the best scientific and commercial data. 16 U.S.C. § 1533(a)(1) and (b). Those five factors are: (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 must analyze the same factors when determining whether a listed species is no longer entitled to the protections afforded endangered species under the Act. *Defenders of Wildlife v. U.S. Dep’t of the Interior*, 354 F. Supp. 2d 1156, 1172 (D. Or. 2005).

Three Reasons Why This Attempt to Delist the Gray Wolf is Unlawful

First, the Service fails to explain why gray wolves no longer meet the definition of an “endangered species” under the Act, that is, whether they are “in danger of extinction throughout all or a significant portion of its range[.]” 16 U.S.C. § 1532(6). The Act requires that the Service analyze the current and historic range of a species and determine whether, at a minimum, current populations are at risk of becoming extinct. *Desert Survivors v. U.S. Dep’t of Interior*, 321 F. Supp. 3d 1011, 1066-1074 (N.D. Cal. 2018). Delisting is thus not an opportunity for the Service to decide where a species may be allowed to live. It is a process by which the Service determines whether a species is endangered where it currently lives, with reference to where the species historically lived. *Humane Society v. Zinke*, 865 F.3d 585, 603-606 (D.C. Cir. 2017).

Historically, gray wolves were found in most of North America. 84 Fed. Reg. at 9655. Today, gray wolves are established in portions of Michigan and Wisconsin but are also found in Washington, Oregon, California, North Dakota, South Dakota, Utah, Colorado, Nevada, Missouri, Indiana, Illinois, Nebraska, and Kansas. 84 Fed. Reg. at 9656. In its proposal, the Service explains why gray wolves are no longer endangered in portions of Michigan and Wisconsin. In addition, the Service acknowledges that gray wolves in some of the other states are “at increased threat from human-caused mortality or factors related to small numbers.” 84 Fed. Reg. at 9685. Inexplicably, the Service fails to analyze whether gray wolves currently living in those thirteen other states are in danger of extinction throughout all or a significant portion of its range. Instead, the Service inquires only whether the gray wolves in Michigan and Wisconsin can survive if all of the other gray wolves die off. But that is not the question Congress tasked the Service to answer. The Service’s failure to explain why gray wolves in those states are not in danger of extinction throughout all or a significant portion of its range fails to satisfy the Act’s requirements.

Second, the Service does not apply the five statutory factors for de-listing to wolves outside of the Great Lakes. 16 U.S.C. § 1533(a). The Service analyzes all five factors and their cumulative effect for gray wolves in Michigan and Wisconsin. 84 Fed. Reg. at 9569-9666. The Service, however, analyzes some of the factors for some of the other thirteen states where gray wolves currently live, but does not analyze each factor for all of them. For example, the Service analyzes human-caused mortality for the states of Michigan, Wisconsin, Oregon, Washington, and California. 84 Fed. Reg. at 9662. The Service, however, fails to investigate the effects of human-caused mortality on gray wolves in North Dakota, South Dakota, Utah, Colorado, Nevada, Missouri, Indiana, Illinois, Nebraska, or Kansas. This is not a meaningless oversight. By way of example, if the Service reviewed state law in South Dakota or Utah, it would learn that South Dakota identifies the gray wolf as a “predator/varmint” that can be shot on state or private land and that Utah *mandates* that state wildlife officials contact the Service to “immediately” remove any wolf in the state “to prevent the establishment of a viable pack.” S.D. Codified Laws §§ 41-1-1 and 41-6-80; Utah Code § 23-29-201. To state the obvious, gray wolves in those states currently face extinction. This is but one example of the Service’s refusal to engage in a complete, five-factor analysis for the current range of the gray wolf. Accordingly, the Service’s attempt to delist the gray wolf does not meet the Act’s requirements.

Finally, the Service cannot split up a listed population into a recovered subgroup and an unrecovered subgroup that will become extinct. In the Service’s most recent delisting attempt that did not survive judicial review, the U.S. Court of Appeals for the D.C. Circuit ruled the Service cannot “delist an already-protected species by balkanization.” *Humane Society*, 865 F.3d at 603. In that case, the

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Service simultaneously created the Western Great Lakes distinct population segment, delisted that segment, and declared that gray wolves were wholly recovered from extinction. *Id.* at 593-594. The D.C. Circuit ruled the Service cannot split a listed entity into a recovered subgroup and a leftover group that is written off as an “orphan to the law.” *Id.* at 603.

Now the Service proposes to repeat the same mistake. Again focusing on the success of gray wolves in Michigan and Wisconsin, the Service decides it need not analyze the status of gray wolves remaining in Washington, Oregon, California, North Dakota, South Dakota, Utah, Colorado, Nevada, Missouri, Indiana, Illinois, Nebraska, and Kansas. The Service’s “failure to address the status of the remnant is fatal,” *id.*, and thus not in accordance with the Act.

Conclusion

For these reasons, the Service should abandon this flawed attempt to delist the gray wolf. Instead of using Michigan’s leadership to the detriment of gray wolves in other states, the Service should allow the Michigan Department of Natural Resources to lead by example so that other states can manage the gray wolves within their borders into recovery, instead of into extinction.

Sincerely,

A handwritten signature in blue ink that reads "Dana Nessel". The signature is fluid and cursive, with the first letters of "Dana" and "Nessel" being capitalized and prominent.

Dana Nessel
Michigan Attorney General