



## **Comment on the Proposed Establishment of a Nonessential Experimental Population of Gray Wolf in Colorado**

Property and Environment Research Center (PERC)

Bozeman, Montana

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### **Main Points:**

- Regulations governing reintroduced species should ensure that surrounding states and landowners are not penalized and, instead, seek to make the species an asset rather than liability
- To address wolves naturally dispersing, the Service should consider revising the Northern Rocky Mountain distinct population segment to include Colorado
- Management flexibilities for the reintroduced population should not be limited to Colorado but should include any states to which the population may expand
- Rather than issuing a broad 4(d) rule with few exceptions, the Service should allow Colorado and other states' flexibility to adapt their management strategies as new information and conflicts arise

The Property and Environment Research Center (PERC) appreciates the opportunity to comment on the Fish and Wildlife Service's proposal to establish a nonessential experimental population of gray wolves in Colorado. PERC supports proactive conservation efforts to recover species, especially where they avoid counterproductive regulatory conflict. In carrying out reintroductions, PERC urges the Service to ensure that states, tribes, and landowners are not penalized for their cooperation and accommodation of wolves. Instead, the Service should seek to make the species an asset rather than a liability for the communities that live with it. This comment identifies several options for the Service to achieve this critical goal, avoid some potential legal pitfalls in the proposal, and improve the likelihood that the population contributes to the gray wolf's continued recovery in the continental United States.

### **PERC**

PERC is the national leader in market solutions for conservation, with over 40 years of research and a network of respected scholars and practitioners. Through research, law and policy, and innovative field conservation programs, PERC explores how aligning incentives for environmental stewardship produces sustainable outcomes for land, water, and wildlife. PERC has produced extensive research on how the Endangered Species Act could be better implemented to provide incentives for states, landowners, and others to contribute to

species recovery.<sup>1</sup> PERC has also supported reintroduction of species under the Endangered Species Act, provided that rules are in place to make the reintroduced population an asset rather than liability for surrounding states, tribes, and landowners.<sup>2</sup> Founded in 1980, PERC is nonprofit, nonpartisan, and proudly based in Bozeman, Montana.

### **Proactive conservation efforts, rather than regulatory mandates, are need to recover species**

Proactive conservation efforts are a critical piece of achieving the Endangered Species Act's dual goals of preventing extinctions and recovering species. The Act's regulatory provisions, while effective at preventing extinctions, fail to encourage needed habitat restoration and other recovery efforts, leading to a recovery rate for listed species of only 3%.<sup>3</sup> The key to recovering species lies not in regulatory mandates but positive incentives for proactive, voluntary conservation efforts.

While gray wolves are ubiquitous and are considered a species of "least concern" for extinction worldwide, they have long been absent from most of their historic range within the lower 48 and have been listed under the Endangered Species Act for that reason.<sup>4</sup> After several decades of conservation efforts, secure populations exist in the Northern Rocky Mountains and Great Lakes regions, both connected to even larger populations in Canada.<sup>5</sup> These populations have biologically recovered although, due to litigation, only the Northern Rocky Mountain population has been successfully delisted—and there only because Congress intervened. Since delisting, the Northern Rocky Mountain population has continued to grow and wolves from it have begun to repopulate California, Colorado, Oregon, and Washington.<sup>6</sup>

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<sup>1</sup> See PERC, [Endangered Species as Assets Instead of Liabilities](#). See also Jonathan Wood, [Road to Recovery: How restoring the Endangered Species Act's two-step process can prevent extinction and promote recovery](#), PERC Policy Rep. (2018); Jonathan H. Adler, *The Leaky Ark: The Failure of Endangered Species Regulation on Private Land*, in *Rebuilding the Ark: New Perspectives on Endangered Species Act Reform* (2011); Terry Anderson & Reed Watson, *An Economic Perspective on Environmental Federalism: The Optimal Locus of Endangered Species Authority*, in *The Endangered Species Act and Federalism: Effective Conservation through Greater State Commitment* (2011); Richard Stroup, [The Endangered Species Act: Making Innocent Species the Enemy](#), PERC Reports (1995).

<sup>2</sup> See PERC, [Comment on Establishing Experimental Populations Outside a Species' Historic Range](#) (Aug. 8, 2022). See also PERC, [Comment on Draft Colorado Wolf Restoration and Management Plan](#) (Feb. 22, 2023); PERC, [Comment on the Revision of a Nonessential Experimental Population of Black-footed Ferrets in the Southwest](#) (Sept. 2, 2021); Jonathan H. Wood, [Will sea otters soon return to San Francisco Bay?](#), PERC.org (Dec. 18, 2019).

<sup>3</sup> See *Establishing Experimental Populations*, *supra* n. 2; *Road to Recovery*, *supra* n. 1. See also Hunter Sapienza and Ya-Wei Li, [Reintroduction: An Assessment of Endangered Species Act Experimental Populations](#), Env'tl. Policy Innovation Ctr. (2021).

<sup>4</sup> See IUCN, [Canis lupus \(Grey wolf\)](#). See Fish and Wildlife Serv., *Removing the Gray Wolf from the List of Endangered and Threatened Wildlife*, 85 Fed. Reg. 69,778 (Nov. 3, 2020) (describing the history of this listing and acknowledging that the currently listed entity is not valid under the statute).

<sup>5</sup> See Fish and Wildlife Service, [Species Profile for Gray wolf \(Canis lupus\)](#), ECOS.

<sup>6</sup> See 85 Fed. Reg. at 69,788.

The return of healthy wolf populations can produce numerous benefits, including increased tourism revenue, improved riparian-area health, management of prey species, and reduced vehicle collisions.<sup>7</sup> But it can also impose costs, including livestock predation, reduced game populations, and regulatory restrictions on land management and other activities. Maximizing these benefits while addressing the costs is vital to maintain the public and local support needed to sustain wolf conservation.

Colorado voters by a slim majority approved a referendum in 2020 directing the state's Parks and Wildlife Commission to develop and implement a plan to reintroduce wolves to the Western Slope. Recognizing that wolf reintroduction would impose costs on Western Slope communities, which overwhelmingly voted against the referendum, the proposal included direction for the state to develop a plan to assist landowners in reducing conflict and to pay "fair compensation" to any livestock owners that suffer losses from wolves. The Service predicts that if wolves were introduced as planned, a stable and secure population would be established within ten years due to the quality of the habitat.<sup>8</sup>

When voters passed the referendum, gray wolves were proposed for delisting nationwide and, with the Service acknowledging that the listing was unlawful, the outcome was virtually assured.<sup>9</sup> Once delisted, Colorado's plan could proceed without federal permits or bureaucracy and the state would have maximum flexibility to manage the population and respond to any conflicts that might arise. In 2022, however, a federal court overturned the delisting, significantly complicating Colorado's plans.

The Service's proposed nonessential experimental population would allow Colorado's planned reintroduction. It proposes to define the population to cover any wolves found anywhere in Colorado. It also proposes regulations governing Colorado's management of the population and how private landowners and others respond to conflicts.

### **Reintroduced populations should be made an asset rather than a liability to surrounding communities**

Reintroduced populations, especially carnivores, can impose significant costs on surrounding landowners, by creating conflicts, lowering property values, or restricting activities.<sup>10</sup> These costs can spur local community and landowner opposition that can sink reintroduction plans or make reintroductions unsuccessful. For that reason,

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<sup>7</sup> See, e.g., Addison del Mastro, [Cars Get Safer in a 'Landscape of Fear'](#), PERC Reports (2021).

<sup>8</sup> See 88 Fed. Reg. 10,258, 10,266.

<sup>9</sup> See 85 Fed. Reg. at 69,788.

<sup>10</sup> See *Establishing Experimental Populations*, *supra* n. 2; *Road to Recovery*, *supra* n. 1.

the Service should use its considerable regulatory flexibility to ensure that experimental populations are made an asset rather than a liability to the people that live with them.<sup>11</sup>

The Service's past failure to make reintroduced populations an asset to neighboring communities and landowners has already set back species recovery efforts. Twenty-two years after the Service proposed to reintroduce grizzly bears to the Bitterroot ecosystem, not a single bear has been introduced.<sup>12</sup> "[S]ociopolitical factors were the reason no reintroduction has occurred," according to the Environmental Policy Innovation Center.<sup>13</sup> While most people in the area have a favorable view of bears, they nonetheless opposed the reintroduction effort over its anticipated regulatory burdens, keeping the plan from moving forward.<sup>14</sup> In other cases, conflicts with neighboring communities and landowners have undermined the effectiveness of experimental populations. From 2003 to 2017, the Fish and Wildlife Service has spent more than \$50 million on experimental populations of Mexican gray wolf and red wolf.<sup>15</sup> Despite this expenditure, both populations have faced serious challenges, many related to opposition from surrounding communities and landowners.<sup>16</sup>

A Colorado gray wolf population is likely to face similar headwinds. The referendum authorizing the state to develop and implement the plan was overwhelmingly opposed by residents of the areas where wolves are to be reintroduced and only passed because of support among urban voters who will not bear the costs of living with wolves.<sup>17</sup> Fortunately, the referendum provided for the state to help reduce conflicts caused by wolves and to fairly compensate landowners for costs they bear. This is a significant and positive step that will make the population less of a liability for Western Slope communities and landowners.

But it falls short of making the population an asset to them. To ensure wolves have the support they need to thrive, the Service should work with the state and local conservation organizations to establish mechanisms that reward communities and landowners for tolerating wolves and contributing to the population's establishment and growth. One way to do this would be to offer rural landowners cash payments and offer rural communities impact investments in exchange for wolf presence. But the best solution will depend on local needs and

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<sup>11</sup> See *Establishing Experimental Populations*, *supra* n. 2.

<sup>12</sup> See *Reintroduction*, *supra* n. 3, at 21.

<sup>13</sup> See *id.*

<sup>14</sup> See *id.*

<sup>15</sup> See *id.* at 17.

<sup>16</sup> See, e.g., Darryl Fears, *The effort to save red wolves in the wild is failing, a five-year review says*, Wash. Post (Apr. 25, 2018).

<sup>17</sup> See [What influenced Coloradoans on close vote to reintroduce wolves](#), Colo. State Univ. Warner College of Nat. Res. (Apr. 5, 2022).

priorities. That's why encouraging the state and local conservation groups to take the lead in creating incentive based programs is essential.<sup>18</sup>

**To address dispersing wolves, the Service should consider expanding the recovered Northern Rocky Mountain distinct population segment to include Colorado**

The proposal to establish the nonessential experimental population is complicated by the fact that wolves have already dispersed to Colorado from the Northern Rocky Mountain distinct population. The first wolf dispersed from Wyoming to Colorado in 2004, but died in a vehicle collision. In 2019 and 2020, a breeding pair of wolves dispersed to Colorado and produced offspring in 2021, becoming the first reproductively active pack in the state in recent history.

The Northern Rocky Mountain population's continued growth and natural expansion into surrounding states should be a cause for celebration. But, in this case, it presents two problems. First, when the Service designated and delisted the Northern Rocky Mountain population, it defined the population to only include wolves found in Idaho, Montana, Wyoming, and parts of Oregon, Utah, and Washington. It did so on the belief that wolves from the population would not disperse beyond that area.<sup>19</sup> We now know that this assumption was in error. Because of it, as Northern Rocky Mountain wolves spill outside of the boundary, they suddenly become subject to the Endangered Species Act and impose serious regulatory consequences on states, communities, and landowners. That's precisely why this proposed experimental population is required, despite all of the wolves naturally dispersing to Colorado and the wolves to be reintroduced originating from the recovered Northern Rocky Mountain population and, thus, raising no bona fide Endangered Species Act concerns.

Second, wolves naturally expanding into Colorado arguably preclude the Service's proposed experimental population. The Endangered Species Act requires experimental populations to be "wholly separate geographically from nonexperimental populations of the same species."<sup>20</sup> The Service acknowledges that wolves from the Northern Rocky Mountain population have, in fact, established a breeding pair in the area proposed for the experimental population.<sup>21</sup> And several commentators have objected to the proposal on the ground that it violates the Endangered Species Act.

The Service proposes two potential ways around this problem. First, it suggests that by crossing the Wyoming border wolves from the Northern Rocky Mountain population cease being a part of that population but don't become part of any other population or form any new population. Second, it suggests that the area where naturally dispersing wolves have been seen could be excluded from the experimental population area. Neither is

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<sup>18</sup> See Comment on Draft Colorado Wolf Restoration and Management Plan, *supra* n. 2.

<sup>19</sup> See 74 Fed. Reg. 15,123, 15,126–27.

<sup>20</sup> 16 U.S.C. § 1539(j).

<sup>21</sup> 88 Fed. Reg. at 10,261–62.

satisfying, especially considering the high likelihood that the naturally occurring and reintroduced wolves will merge and raise complicated questions about their status and regulations that apply to them. Indeed, a lawsuit has already been filed seeking to compel the Forest Service to regulate delisted wolves in Wyoming as if they were endangered because actions in Wyoming may affect the wolves naturally dispersing to Colorado where they receive endangered status.<sup>22</sup>

Rather than engage in interpretive jiu jitsu or arbitrary line-drawing, the Service should instead consider correcting its earlier mistake in defining the Northern Rocky Mountain distinct population segment. As that population continues to grow and members of it expand into other states, the distinct population segment should expand with them. This way, members of this population would continue to have the same status rather than their status arbitrarily changing based on which side of a state border they happen to be on. It would also solve the conundrum the Service now faces in the proposed experimental population. If the area of Colorado where wolves were naturally dispersing was part of the Northern Rocky Mountain distinct population segment, the Endangered Species Act would be no obstacle to moving wolves between one part of that population's range to another. This approach would also avoid penalizing other states that allow Northern Rocky Mountain wolves to expand into their borders.

### **The Service should not arbitrarily limit management flexibilities to Colorado**

Rather than learn the lesson that established wolf populations can disperse widely into new and unexpected areas, the Service's experimental population proposal seems to repeat that earlier error. It indicates that only the State of Colorado and its residents will have the flexibility to manage the experimental population. When these wolves eventually cross into Arizona, New Mexico, and Utah—all possibilities the proposed rule acknowledges—they would automatically be treated as endangered with all of the regulatory consequences that flow from that status.<sup>23</sup> Indeed, Utah opposes Colorado's reintroduction plan because it would result in wolves entering Utah, receiving endangered status, and leaving the state little to no flexibility to manage conflicts.<sup>24</sup>

Wolf populations growing to the point that they can disperse to other areas is recovery progress that should be rewarded, not punished. Yet the Service's proposal to define the experimental population along political boundaries rather than where the reintroduced wolves roam threatens to punish any neighboring states that accommodate wolves and contribute to the populations' success. Instead of advancing gray wolf conservation, limiting the experimental population in this way is likely to set its conservation back.<sup>25</sup>

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<sup>22</sup> See Center for Biological Diversity, [Lawsuit Launched to Protect Colorado Wolves From Hunters at Wyoming Border](#) (Feb. 22, 2023).

<sup>23</sup> 88 Fed. Reg. at 10,269.

<sup>24</sup> See Aaron Adelson & Anne Herbst, [Wolf depredation: Utah wants Colorado to pay for future losses](#), 9news.com (Apr. 5, 2023).

<sup>25</sup> The Service suggests that wolves dispersing from Colorado to other states might be returned to Colorado. But unless dispersal would undermine wolf conservation, it makes little sense to punish states that allow it and leave them only with

### **States must retain flexibility to adapt their management approach to new information and conflicts**

Finally, the Service’s proposal to limit Colorado’s flexibility to manage wolves is concerning. Under the Endangered Species Act, experimental populations are treated as threatened species, meaning that federal regulation of take or other non-federal activities affecting them do not automatically apply.<sup>26</sup> Instead, that activities may be regulated only to the extent “necessary and advisable” for the population’s conservation.<sup>27</sup>

The proposed rule would broadly forbid take and other activities affecting reintroduced wolves, with exceptions for incidental take, take of wolves actively attacking livestock, and certain other activities that the Service may authorize on a case-by-case basis. However, the Service offers no explanation whatsoever why this regulation is necessary and advisable for the population’s conservation. It does not consider how the proposed restrictions will affect private landowners and their willingness to tolerate wolves. Nor does it consider how the restrictions may bind Colorado’s ability to adapt its management strategy in the future as wolves become established and new challenges may arise. This failure to engage with the statutory standard and perform required analysis would make the regulation legally infirm.<sup>28</sup>

This failure is especially surprising here because there seems to be little need for restrictive federal regulation. The proposed wolf population would be established on a state’s own, voluntary initiative and would use wolves from a recovered and delisted population. No conceivable outcome of the reintroduction—even outright failure—would harm any wolf subject to the Endangered Species Act’s protections or the future conservation of any listed population. After investing so much time, energy, and resources in a plan to reestablish wolves in Colorado, the state should be trusted to manage the population and resolve conflicts effectively.

Similar regulations have undermined innovative and proactive state efforts to recover species. In the case of the Utah prairie dog, for instance, unnecessarily restrictive regulations blocked a state plan to relocate prairie dogs from areas where they caused conflict to conservation areas that could provide for their long term recovery.<sup>29</sup> When litigation temporarily overturned the federal regulation, the state was able to finally implement its plan, to

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the option of preventing the population’s natural expansion. Moreover, the Service is expecting states to trust that it will allow this option in perpetuity, trust that it has not always earned in similar situations. *See Will sea otters soon return to San Francisco Bay?*, *supra* n. 2.

<sup>26</sup> 16 U.S.C. § 1539. *See Road to Recovery*, *supra* n. 1.

<sup>27</sup> 16 U.S.C. § 1533(d).

<sup>28</sup> *See Road to Recovery*, *supra* n. 1. *See also* PERC, [Comment on Proposed 4\(d\) Rule for the Lesser Prairie Chicken](#) (Sept. 1, 2020) (discussing the requirements for showing a proposed rule satisfies the “necessary and advisable for the conservation” standard).

<sup>29</sup> *See* Jonathan Wood, [A prairie home invasion](#), PERC Reports (2017).

the benefit of local residents and the species.<sup>30</sup> The proposed rule would put Colorado in the same position, straight-jacketing its future management flexibility without conservation benefit.

Instead of issuing a broad prohibitory regulation that may hamstring the state's ability to manage the species and may provoke conflict over reintroduced wolves, the Service should leave the state and any neighboring state where reintroduced wolves may roam with maximum flexibility to manage the species and conflicts in an adaptive way. The Service already takes a similar approach with private landowners engaged in voluntary conservation. Under safe harbor agreements, landowners that perform voluntary conservation to benefit a listed species are guaranteed the right to reverse those efforts and return their land to its prior condition.<sup>31</sup> This reintroduction is proposed on a state's voluntary initiative and merits the same degree of flexibility to address unexpected challenges.

Alternatively, if the Service expanded the recovered Northern Rocky Mountain distinct population segment to cover areas into which the population expands, as proposed above, Colorado wolves would not be subject to federal regulation and this problem would be avoided.

### **Conclusion**

PERC appreciates the Service's proposal to establish a nonessential experimental population of gray wolves in Colorado and provide the state some flexibility to manage the population and address conflict. With some modifications, the Service can solve some existing conflicts, head off future conflicts, and set a Colorado wolf population up for success. PERC urges the Service to ensure that wolves are an asset for Colorado communities and landowners—and those of other states where these wolves may someday roam.

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<sup>30</sup> *See id.*

<sup>31</sup> U.S. Fish and Wildlife Serv., [Safe Harbor Agreements](#).