

Montana Agriculture - Legal Issues
Endangered Species Act - Effect of Endangered Species Act of Farms:
Grizzly Bear and Gray Wolf

By: Karen Budd Falen
Budd Falen Law Office L.L.C.
P.O. Box 346
Cheyenne, WY 82001
(307) 632-5105
main@buddfalen.com

I. ENDANGERED SPECIES ACT IN GENERAL

A. Species Listing

1. Definitions:

- a.** A threatened species means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant part of its range. 16 U.S.C. § 1532 (20).
- b.** An endangered species means any species which is in danger of extinction throughout all or a significant portion of its range other than insects that constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man. 16 U.S.C. § 1532(6).
- c.** Once listed, there is no substantive or management difference between threatened and endangered species.

2. Species Listing Process:

- a.** Anyone can petition to have a species listed. 16 U.S.C. § 1533.
- b.** The decision to designate a threatened or endangered species is considered rulemaking and is to be published in the Federal Register.
- c.** Listing decisions are to be based on the “best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A). Under the Endangered Species Act (“ESA”), the best scientific and commercial data available” means:

- i.** literature search only
 - ii.** no counting of species
 - iii.** no economic considerations
 - iv.** species population numbers not may not be in decline; rather the Fish and Wildlife Service can list if it believes the habitat area to be shrinking.
- 3.** Once a species is listed as threatened or endangered, prohibitions against “take” apply. 16 U.S.C. § 1540.
 - a.** “Take” means to harass, harm, pursue, hunt, shoot, wound, kill, capture, or collect, or attempt to engage in such conduct. 16 U.S.C. § 1532(19).
 - b.** “Harm” in the definition of take means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing breeding, sheltering or feeding. 50 C.F.R. § 17.3.
 - c.** Harass in the definition of “take” means intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering. 50 C.F.R. § 17.3
 - d.** “Take” may include critical habitat modification, if such modification results in the death of a listed species. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995).
 - e.** If convicted to “take,” a person can be liable for civil penalties of \$10,000 per day and possible prison time. 16 U.S.C. § 1540(a), (b).

B. Critical Habitat Designation

1. Once a species is listed as threatened or endangered, the U.S. Fish and Wildlife Service (or NOAA Fisheries¹) (“collectively “FWS”) must to the maximum extent prudent and determinable, concurrently with making a determination that a species is an endangered or threatened species, designate any habitat of such species which is then considered to be critical habitat. Id. at § 1533(a)(3).
2. Critical habitat (“CH”) must be limited to “specific areas.” 16 U.S.C. § 1532(5)(A).
3. CH must be “defined by specific limits using reference points and lines found on standard topographic maps of the area.” 50 C.F.R. § 424.12(c); see also § 424.16 (CH must be delineated on a map).
4. Ephemeral reference points (e.g., trees, sand bars) shall not be used in defining CH. 50 C.F.R. § 424.12(c).
5. For “specific areas within the geographical area occupied by the [listed] species,” the FWS may designate CH, provided such habitat includes 1) “physical or biological features;” 2) which are “essential to the conservation of the species;” and 3) “which may require special management considerations or protection.” 16 U.S.C. § 1532(5)(A)(I); 50 C.F.R. § 424.12(b).
 - a. “Physical and biological features” include the requirements of species, such as space, food, cover, shelter and areas specifically necessary for survival. 50 C.F.R. § 424.12(b).
 - b. The physical or biological elements which make up “physical and biological features” are known as “primary constituent elements.” 50 C.F.R. § 424.12(b).
 - c. “Primary constituent elements” include nesting sites, feedings sites and water quantity or quality. 50 C.F.R. § 424.12(b).
 - d. “Special management considerations or protection” can include “any methods or procedures useful in protecting physical or biological features of the environment for the conservation of the listed species.” 50 C.F.R. 424.02(j).

¹ Until recently, NOAA Fisheries was known as the National Marine Fisheries Service (“NMFS”).

6. According to FWS, habitat can also include:
 - a. potential habitat
 - b. suitable but unoccupied habitat
 - c. recovery habitat
7. The designation of CH must be “beneficial to the species.” 50 C.F.R. § 424.12(A)(1)(ii).
8. CH must be limited in scope only to that which is necessary. According to one court, “even though more extensive habitat may be essential to maintain the species over the long term, critical habitat only includes the minimum amount of habitat needed to avoid short-term jeopardy or habitat in need of immediate intervention.” Northern Spotted Owl v. Lujan, 758 F. Supp. 621, 623 (W.D. Wash. 1991).
9. CH must be designated on the basis of the best scientific data available, 16 U.S.C. § 1533(b)(2), after the FWS considers all economic and other impacts of proposed CH designation. New Mexico Cattle Growers Assoc. v. United States Fish and Wildlife Service, 248 F.3d 1277 (10th Cir. 2001) (specifically rejecting the “baseline” approach to economic analyses).
10. CH may not be designated when information sufficient to perform required analysis of the impacts of the designation is lacking. 50 C.F.R. § 424.12(a)(2).
11. CH may not be designated when “the biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.” 50 C.F.R. § 424.12(a)(2).
12. The FWS may exclude any area from CH if it determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of CH, unless it determines, based upon the best scientific and commercial data available that the failure to designate such area as CH will result in extinction of the species concerned. 16 U.S.C. § 1533(b)(2).
13. CH must be designated within two years of listing, regardless of funding concerns. Silver v. Babbitt, 924 F. Supp. 972 (D. Ariz. 1995).

14. National Environmental Policy Act (“NEPA”) compliance is mandated for CH designations in the 10th Circuit (i.e., Wyoming, Utah, New Mexico, Oklahoma, Kansas, Colorado). See Catron County Commission v. U.S. Fish and Wildlife Service, 75 F. 3d 1429 (10th Cir. 1996). However, compare Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995) (holding that NEPA compliance is not required for critical habitat designation in the 9th Circuit) (i.e., Montana, Oregon, Washington, California, Alaska, Hawaii, Nevada, Arizona).

C. Once A Species Listed, For Federal Actions Or Actions With Federal Nexus, Section 7 Consultation Applies

1. Section 7 of the Endangered Species Act (“ESA”) provides that “[e]ach Federal agency [must] in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical” §§16 U.S.C. § 1536(a)(2).
2. The first step in the consultation process is to name the listed species and identify CH which may be found in the area affected by the proposed action. §50 C.F.R. § 402.12(c-d). If the FWS determines that no species or CH exists, the consultation is complete. §Id. Otherwise, the FWS must approve the species or habitat list. §Id.
3. Once the list is approved, the action agency must prepare a Biological Assessment or Biological Evaluation (“BA”). §Id. The contents of the BA are at the discretion of the agency, but must evaluate the potential effects of the action on the listed species and critical habitat and determine whether there are likely to be adverse affects by the proposed action. §Id. at § 402.12(a, f). In doing so, the action agency must use the best available scientific evidence. §§50 C.F.R. § 402.14(d); §16 U.S.C. §1536(a)(2).
4. Once complete, the action agency submits the BA to the FWS. The FWS uses the BA to determine whether “formal” consultation is necessary. §§50 C.F.R. § 402.12(K).²

² The action agency may also request formal consultation at the same time it submits the BA to the FWS. §Id. at § 402.12(j-k).

5. During formal consultation, the FWS will use the information included in the BA to review and evaluate the potential affects of the proposed action on the listed species or CH, and to report these findings in its biological opinion (“BO”). §50 C.F.R. § 402.14(g-f).
6. Unless extended, the FWS must conclude formal consultation within 90 days, and must issue the BO within 45 days. §Id. at § 402.14(e); §§16 U.S.C. § 1536(b)(1)(A).
7. If the BO concludes that the proposed action will jeopardize the continued existence of any listed species or adversely modify critical habitat, the FWS’ BO will take the form of a “jeopardy opinion” and must include any reasonable and prudent alternatives which would avoid this consequence. §§16 U.S.C. § 1536(b)(3)(A); §§50 C.F.R. § 402.14(h). If the BO contains a jeopardy opinion with no reasonable and prudent alternatives, the action agency cannot lawfully proceed with the proposed action. §16 U.S.C. § 1536(a)(2).
8. If the BO does not include a jeopardy opinion, or if jeopardy can be avoided by reasonable and prudent measures, then the BO must also include an incidental take statement (“ITS”). §§16 U.S.C. § 1536(b)(4); §§50 C.F.R. § 402.14(I). The ITS describes the amount or extent of potential “take” of listed species which will occur from the proposed action, the reasonable and prudent measures which will help avoid this result, and the terms and conditions which the action agency must follow to be in compliance with the ESA. Id.; see Bennett v. Spear, 520 U.S. 154, 170 (1997).
9. The person applying for the federal permit can actively participate in the section 7 consultation process as an applicant.
 - a. An applicant under the ESA “refers to any person . . . who requires formal approval or authorization from a Federal agency as a prerequisite to conducting agency action.” 50 C.F.R. § 402.02.
 - b. Applicants can be involved with the federal action agency and the FWS in “early consultation”, 50 C.F.R. § 402.11(b); assist in preparing the BA, 50 C.F.R. §§ 402.12(a) to (c); and participate in the informal consultations process, during which time the FWS may “suggest modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects” 50 C.F.R. § 402.13.

D. Once Species Is Listed, ESA Section 10 Applies On Private Land

- 1.** In order to avoid the penalties for “take” of a species, and still allow the use and development of private land, the ESA also authorizes the FWS to issue ITSs to private land owners upon the fulfillment of certain conditions, specifically the development and implementation of habitat conservation plans (“HCPs”). 16 U.S.C. § 1539.
- 2.** A HCP has to include (a) a description of the proposed action, (b) the impact to the species that will result from the proposed action, (c) the steps that the applicant will take to minimize any negative consequences to the listed species by the proposed action, (d) any alternatives the applicant considered to the proposed action and why those alternatives were rejected, and (e) any other measures that the FWS may deem necessary for the conservation plan. 16 U.S.C. § 1539(a)(2)(A).
- 3.** Once a HCP is presented, the FWS must make certain findings before it can issue an ITS. Those findings include (a) the taking of the species is incidental to the proposed action, (b) the proposed action implements a lawful activity, (c) the applicant, to the maximum extent possible will minimize and mitigate any negative impacts to the listed species, (d) the HCP is adequately funded, (e) the taking will not appreciably reduce the survival and recovery of the species, and (f) any other measures deemed necessary will be carried out. 16 U.S.C. § 1539(a)(2)(B).
- 4.** As a practical, mitigation means that the applicant will either fund programs supporting the listed species or will provide or set aside land.
- 5.** Public notice and the opportunity to comment are requested prior to issuance of an ITS. 16 U.S.C. 1539(c).

II. ENDANGERED SPECIES IMPACTING MONTANA

A. Brown Bear (Grizzly)

- 1.** Current Status: The grizzly bear is listed as threatened in the coterminous 48 states outside the boundaries for the Yellowstone Distinct Population Segment (“Yellowstone DPS”). See 72 Fed. Reg. 14,866 (Mar. 29, 2007). Additionally, the population in the Bitterroot Recovery Area was listed as experimental in 2000, but the FWS decided in 2001 not to introduce any bears into the

Bitterroot Recovery Area. Thus, any bears that wander into this ecosystem would also be classified as threatened.

2. General Information

- a.** The Grizzly Bear population is divided into five recovery ecosystems, with three of these ecosystems (The Northern Continental Divide Recovery Ecosystem, the Cabinet-Yaak Recovery Ecosystem, and the Yellowstone Recovery Ecosystem) being partially in Montana. See attached map. Additionally, the Bitterroot Recovery Ecosystem is also partially located in Montana, although bears have not been seen there in 30 years.
- b.** There is no critical habitat designated. 72 Fed. Reg. 14,936 (Mar. 29, 2007).
- c.** The FWS has determined that upgrading from threatened to endangered is warranted for grizzly bears in the Cabinet-Yaak Ecosystem, the North Cascades Ecosystem, and the Selkirk Ecosystem but that upgrading is precluded by higher listing priorities. See 72 Fed. Reg. 14,874.
- d.** On March 29, 2007, the FWS published a final rule establishing the Yellowstone DPS of the grizzly bear and delisting this DPS. 72 Fed. Reg. 14,866 (Mar. 29, 2007). The Yellowstone DPS covers Idaho east of I-15 and north of U.S. Highway 30; Montana east of I-15 and south of I-90; and Wyoming south of I-90, west of I-25, Wyoming State Highway 200 and U.S. Highway 287 south of Three Forks (at the 220 and 287 intersection) and north of I-80 and U.S. Highway 30. Id. at 14,875.
- e.** Several environmental groups have filed suit in the United States District Court for the District of Idaho, challenging the grizzly bear delisting. Roddy Scheer, Greens Sue Over Yellowstone Grizzly Delisting, Emagazine.com, June 8, 2007, at <http://www.emagazine.com/view/?375>.
- f.** Montana has adopted two grizzly bear recovery plans: one for the Yellowstone DPS, and one covering the rest of western Montana, which includes the Northern Continental Divide and Cabinet-Yaak Recovery Ecosystems.

3. Likely Impacts of Listing Changes/Designation of Critical Habitat on Agriculture

a. Delisting of the Yellowstone DPS

- i.** Grizzly bears are classified as game animals, which means they cannot be taken without authorization by State wildlife agencies. 72 Fed. Reg. 14,921. It is still illegal to kill a grizzly bear except in self-defense, with a hunting license issued by a State wildlife agency, or, in the Montana portion of the DPS, if a grizzly bear is caught in the act of attacking or killing livestock. Id.
- ii.** The Forest Service will manage grizzlies as a “sensitive species” on the national forests in the Greater Yellowstone Area. 72 Fed. Reg. 14,919. This means that projects on national forests “must not result in loss of species viability or create significant trends toward federal listing.” Interagency Conservation Strategy Team, Final Conservation Strategy for the Grizzly Bear in the Greater Yellowstone Area 38 (March 2007). The Forest Service will complete a biological evaluation for any projects that may potentially affect the grizzly bear and will modify projects as necessary to ensure that they meet the habitat standards in the Final Conservation Strategy for the Grizzly Bear. Id.
- iii.** Inside the Primary Conservation Area (“PCA”),³ the number of commercial livestock allotments and sheep animal months will not increase above levels established in 1998. 72 Fed. Reg. 14,915. The Forest Service will phase out sheep grazing permits as opportunities arise with willing permittees. Id. Existing allotments could be combined or divided, as long as total acreage in the allotments does not increase. USDA Forest Service, Forest Plan Amendment for Grizzly Bear Habitat Conservation for the Greater Yellowstone Area National Forests Final Environmental Impact Statement 173 (April 2006) (“Forest Plan Amendment”). Grazing permits may be

³ The boundaries of the PCA correspond to the boundaries of the Yellowstone Recovery Area.

issued for vacant allotments to allow cattle grazing only after the Forest Service has analyzed the impact of increased cattle grazing on grizzly bears. Id. at 17. Outside the PCA, permits on allotments with recurring livestock/grizzly bear conflicts will be retired with willing permittees, when changes in management do not result in reduction of conflicts. Christopher Servheen, U.S. Fish and Wildlife Service, Grizzly Bear Recovery Plan, Supplement: Habitat-based Recovery Criteria for the Yellowstone Ecosystem 38 (2007). On the national forest, grizzly bears depredating on livestock will not be removed unless they have already been relocated once and continue to prey on livestock. Forest Plan Amendment at 173. Livestock operators on allotments with recurring grizzly bear conflicts may have the opportunity to move their cattle to vacant allotments outside the PCA if such allotments are available. Id. at 37.

- iv. “The PCA will be a secure area for the grizzly bears, with population and habitat conditions maintained that have allowed the grizzly bear population to achieve recovery and expand outside the PCA.” Final Conservation Strategy for the Grizzly Bear in the Greater Yellowstone at 38. Outside the PCA, grizzlies will be allowed to expand into biologically suitable and acceptable areas, although the objective outside the PCA is to also maintain existing resource management and recreational uses. Id.
- v. Since 98 percent of the PCA and 83 percent of suitable habitat outside the PCA is owned and managed by the federal government, the federal government⁴ has committed to managing lands within the PCA in a way that generally favors grizzly bears over livestock interests, and taking of grizzly bears will still generally be illegal, it is unlikely that delisting the grizzly bear will bring noticeable changes to ranchers in the

⁴ The Forest Service, BLM, United States Geological Service, FWS, and the states of Idaho, Montana and Wyoming have all signed a Memorandum of Understanding to implement the Grizzly Bear Conservation Strategy. Final Conservation Strategy at 12-13.

Yellowstone area. However, without the restrictions of the ESA, ranchers may see increased flexibility in dealing with livestock/grizzly bear conflicts.

- vi. It is unclear whether Defenders of Wildlife will continue to compensate livestock owners for livestock killed by grizzly bears. 72 Fed. Reg. 14,934. While Idaho and Wyoming have state funding mechanisms to compensate livestock owners, Montana will continue to rely on private groups to provide compensation. Id.

b. Changes in listing for the other recovery areas in Montana

- i. A decision to uplist the Cabinet-Yaak population to endangered would likely have little impact on agriculturalists, as there is little difference between threatened and endangered listings. However, there could be less willingness on the part of the federal land managers to deal with bears that deplete livestock.
- ii. If the Northern Continental Divide population were delisted, the USDA Wildlife Services may have more flexibility to handle livestock depredation. A.R. Dood, S.J. Atkinson, and V.J. Boccadori, Montana Fish Wildlife and Parks, Grizzly Bear Management Plan for Western Montana Final Programmatic EIS 2006-2016 35 (Dec. 2006) (“Grizzly Bear Management Plan for Western Montana”). The impacts of delisting on agriculture would likely be similar to those from delisting the Yellowstone population. However, since more than 17 percent of the Northern Continental Divide Recovery Area is privately owned, see www.fws.gov/mountain-prairie/species/mammals/grizzly/continental.htm, and the state would have more control over grizzly bear management on private lands after delisting, delisting could have beneficial impacts on private landowners in this area.
- iii. As Montana manages its bear population to achieve recovery, there likely will be additional impacts on agriculture. Montana’s goal is to “provide for a

continuing expansion of [the grizzly bear population in western Montana] into areas that are biologically suitable and socially acceptable.” Grizzly Bear Management Plan for Western Montana 2. Montana recognizes that this could result in increased livestock depredation, as well as income losses to apiary and orchard owners. Id. at 81.

c. Designation of Critical Habitat

- i.** Although no critical habitat has ever been listed for the grizzly bear, the establishment of recovery zones has achieved essentially the same purpose, as recovery zones are managed primarily for grizzly bear habitat and grizzly bears within the recovery zone are considered crucial to the grizzly’s recovery. U.S. Fish and Wildlife Service, Grizzly Bear Management Plan 18 (1993).
- ii.** Designating critical habitat could increase restrictions on agriculture, as federal agencies would be required to consult on any action that could result in adverse modification of critical habitat.

B. Gray Wolf

- 1.** Current Status: Endangered, except 1) where listed as a nonessential experimental population and 2) in the Western Great Lakes States,⁵ where it was delisted effective March 12, 2007. See 72 Fed. Reg. 6052 (Feb. 8, 2007). For Montana, the species is listed as a non-essential experimental population in the following areas:
 - a.** Yellowstone Experimental Population Area: In Montana, east of I-15 and south of the Missouri River from Great Falls, Montana, to the eastern Montana border. See 59 FR 60,252 (Nov. 22, 1994).
 - b.** Central Idaho Experimental Population Area: In Montana, south of I-90, west of I-15, and south of Highway 12 West of

⁵ The Western Great Lakes States include all of Minnesota, Wisconsin, and Michigan; the eastern half of North Dakota and South Dakota; the northern half of Iowa; the northern portions of Illinois and Indiana; and the northwestern portion of Ohio. See 72 Fed. Reg. 6052 (Feb. 8, 2007).

Missoula. See 59 FR 60266 (Nov. 22, 1994).

2. General Information

- a.** The gray wolf was first listed as endangered in 1974. 71 Fed. Reg. 6635. In 1995 and 1996, the FWS reintroduced wolves from Canada onto public lands in central Idaho and Yellowstone National Park, which were classified as nonessential experimental populations. Id.
- b.** On February 8, 2007, the FWS published a proposed rule establishing the Northern Rocky Mountain Distinct Population Segment (“NRM DPS”) of Gray Wolves (which includes all of Montana, Wyoming, Idaho, the eastern one-third of Oregon and Washington, and a small part of north central Utah and delisting the NRM DPS).⁶ 72 Fed. Reg. 6106 (Feb. 8, 2007). The gray wolf would remain endangered outside the NRM DPS (except in those areas where it already has a different listing status). Id. at 6113.
- c.** The gray wolf achieved its recovery goals at the end of 2002. 72 Fed. Reg. 6111. In late 2006, preliminary estimates indicated that there are at least 1,243 wolves in 89 breeding pairs (defined as “an adult male and an adult female that have produced at least 2 pups that survived until December 31 of the year of their birth, during the previous breeding season) in the NRM DPS. Id. at 6107, 6108. There are at least 283 wolves in 22 breeding pairs in Montana, 650 wolves in 42 breeding pairs in Idaho, and 310 wolves in 25 breeding pairs in Wyoming. Id. at 6108. The wolf population increased at an average of 26 percent annually from 1995 to 2005. Id.
- d.** Before the FWS will delist the wolf in the NRM DPS, Montana, Idaho and Wyoming must each have approved management plans. The FWS has approved Montana’s and Idaho’s plans. 72 Fed. Reg. 6106. Wyoming has now submitted a plan and has passed a statute that the FWS believes, if the plan is adopted and the statute goes into

⁶ The FWS does not consider Oregon, Washington and Utah as significant portions of the DPS because they contain little suitable habitat, they constitute a small portion of the DPS, they do not currently have any wolf packs, and, if any wolf packs do form, they will not be essential to the existence of the DPS. 72 Fed. Reg. 6119.

effect, would adequately conserve the gray wolf. 72 Fed. Reg. 36,941. However, if the statute does not go into effect or if the Wyoming Game and Fish Commission does not adopt the plan, wolves would continue to be listed as an experimental population in the significant portion of their range in Wyoming. Id. The gray wolf would still be delisted for the remainder of the NRM DPS. 72 Fed. Reg. 6106.

3. Highlights from Wyoming's Proposed Wolf Management Plan and Legislation

- a.** Wyoming will maintain at least 15 breeding pairs of wolves statewide, including the National parks, John D. Rockefeller Memorial Parkway, National Elk Refuge and potentially the Wind River Indian Reservation, with at least 7 pairs being maintained outside the Parks, Parkway, and Wind River Indian Reservation. Wyoming Game and Fish Department, Draft Gray Wolf Management Plan 1 (May 2007). Wyoming, working in coordination with the National Park Service and FWS, will ensure that the wolf population never falls below 10 breeding pairs or 100 wolves. Id.

- b.** Wolves will be managed under a dual classification system, depending on the area they occupy. Id. In northwestern Wyoming, wolves would be listed as trophy game animals. Id.⁷ Outside that area, they would be listed as predatory animals. Id.
 - i.** Management in Trophy Game Area
 - (a)** The Wyoming Game and Fish Commission will draft rules allowing regulated public take in the Trophy Game Area when the wolf population is adequate to sustain harvest. Id. at 10.
 - (b)** A landowner can take a wolf in the act of damaging private property, but the taking must be reported within 72 hours. Id. at 15.
 - (c)** The Wyoming Department of Game and Fish may issue special kill permits to landowners experiencing chronic wolf problems. Id.

⁷ A map depicting the Trophy Game Area is attached.

- ii. Predatory Animals: Take will not be regulated, although a person must report the take within 10 days of taking a wolf. Id.
- iii. A person killing a wolf for whatever reason must present the pelt and skull to the Wyoming Department of Game and Fish within 10 days of the kill. Id. at 1.
- c. The Department will pursue funding sources for a livestock compensation program in the Trophy Game Area. Id. at 21. Landowners whose livestock are killed by wolves outside the Trophy Game Area will not be compensated. Id. at 20.
- d. The Department will enter into a cooperate agreement with the United States Department of Agriculture/Wildlife Services to minimize wolf/livestock conflicts. Id. at 2.
- e. The Department will monitor interactions between wolves and wildlife and, if necessary, take management actions to minimize impacts while maintaining 7 breeding pairs of wolves outside the Parks and Parkway. Id. at 2.

4. **Likely Impacts of Listing Changes on Agriculture**

- a. Since the only change in listing relative to Montana is the proposal to delist, I will only discuss the likely impacts of delisting and a decision to continue to list on agriculture.
- b. “[C]onflict with livestock was the major reason wolves were extirpated” and “management of conflicts was a necessary component of wolf restoration.” 72 Fed. Reg. 6126. “If the wolf population continues to expand, wolves will increasingly disperse into unsuitable areas that are intensively used for livestock production. A higher percentage of wolves in those areas will become involved in conflicts with livestock, and a higher percentage of those wolves will probably be removed to reduce future livestock damage.” Id.
- c. From 1987 to 2006, 712 cattle, 1565 sheep, 91 dogs, and 30 other domestic animals were confirmed killed by wolves in Montana, Idaho and Wyoming. Sime, Carolyn et al., Montana Gray Wolf Conservation and Management 2006 Annual Report, Montana Fish Wildlife and Parks, Helena, Montana (2007) at 107, <http://fwp.mt.gov/wildthings/wolf>.

- d.** In 2005, Montana signed a cooperative agreement with the FWS that gave Montana control over wolves in Montana, with general oversight by the FWS. 72 Fed. Reg. 6128.
- e.** Current regulations in Nonessential Experimental Population Area⁸
 - i.** Livestock owners can take a wolf that is in the act of attacking livestock on private land (or public land on which he is authorized to graze, provided that livestock owner provides evidence to the MFWP within 24 hours that the livestock was wounded, harassed, molested, or killed by wolves and the MFWP can confirm the attack. 50 C.F.R. § 17.84(n)(4)(iii), (iv). “In the act of attacking” means “[t]he actual biting, wounding, grasping, or killing of livestock or dogs, or chasing, molesting, or harassing by wolves that would indicate to a reasonable person that such biting, wounding, grasping, or killing of livestock or dogs is likely to occur at any moment.” Id. at § 17.84(n)(3).
 - ii.** MFWP can issue “shoot-on-sight permits” (valid for 45 day or less) when there has been at least one past depredation, there are problem wolves that pose a significant risk to livestock, and agency lethal removal of problem wolves on the property has been authorized. Id. at §§ 17.84(n)(4)(iii)(B), 17.84(n)(4)(iv)(A).
 - iii.** MFWP can issue a one-year written take authorization to allow a livestock owner to intentionally harass (pre-planned harassment that may include tracking, waiting for, chasing, searching out and then harassing) a wolf. Id. at § 17.84(n)(4)(ii). Opportunistic harassment is legal without a permit, provided it is reported to the MFWP within 7 days. Id. at § 17.84(n)(4)(i).

⁸ On July 6, 2007, the FWS proposed a rule revising the current regulations regarding the nonessential experimental population of gray wolves that provides minor changes to achieve the flexibility intended in the 2005 rule to allow states with approved wolf management plans to take wolves. See 72 Fed. Reg. 36,942 (July 6, 2007).

- f.** In areas in Montana where wolves are listed as endangered, it is illegal to harass or kill a wolf, except in self-defense or in the defense of others. 16 U.S.C. § 1538(a)(1)(B).
- g.** Upon delisting, Montana would classify wolves as a “Species in Need of Management,” throughout the state, which would allow the State to manage wolves similar to trophy game animals. 72 Fed. Reg. 6127. MFWP would finalize more detailed administrative regulations, similar to the regulations it develops for other wildlife, that are consistent with Montana’s Wolf Management Plan and state law. *Id.* Under the Montana Plan and state regulation, wolves would be managed similar to how they are currently managed in the nonessential population areas. *Id.* Livestock producers could kill a wolf if it is seen attacking, killing or threatening to kill livestock (defined as “cattle, sheep, horses, mules, pigs, goats, emu, ostrich, poultry, and herding or guarding animals (llama, donkeys and certain special-use breeds of dogs commonly used for guarding or herding of livestock.”)).⁹ Montana Wolf Conservation and Management Plan Final Environmental Impact Statement 85 (2003). Agency control of problem wolves would continue to be incremental and in response to confirmed depredations. 72 Fed. Reg. 6127. State management of conflicts would become more protective of wolves and no public hunting would be allowed when there are fewer than 15 breeding pairs. *Id.*¹⁰ MFWP could issue special kill permits and, when the number of wolves exceeds 15 breeding pairs, allow some hunting and trapping. Montana Wolf Conservation and Management Plan Final Environmental Impact Statement at 87.
- h.** Continued listing may negatively impact livestock producers as it will continue to restrict their ability to kill wolves seen attacking or molesting their livestock outside the nonessential population area. As the wolf population continues to grow, wolves currently in the nonessential population area may move out of the nonessential population area and into other areas of Montana where they are currently listed as endangered. Thus, delisting the wolf

⁹ Wolves could only be killed if they are attacking or killing any other type of dog, and not simply for “threatening to kill.”

¹⁰ Montana has met or exceeded 15 packs in 3 out of the last 4 years. See 71 FR 6636; FWS Rocky Mountain Wolf Recovery 2005 Interagency Annual Report, p. 13.

would increase management options for ranchers outside of the nonessential population area. Montana would also have increased flexibility to issue special kill permits and to allow hunting and trapping of wolves. Montana Wolf Conservation and Management Plan Final Environmental Impact Statement at 104-05.

- i.** Under Montana’s Wolf Management Plan, wolf numbers are expected to continue to increase to between 328 and 657 wolves, and 27 to 54 breeding pairs, by 2015. 72 Fed. Reg. 6127.
- j.** The Defenders of Wildlife currently provide some financial compensation for confirmed cases of wolf depredation of wildlife. That funding may cease once wolves are delisted and any financial compensation would have to be provided by the state. Montana will not provide MFWP funds, federal matching funds intended for MFWP programs, or state revenue sources to compensate landowners for wolf depredation of livestock, which may negatively impact landowners after delisting. Montana Wolf Conservation and Management Plan Final Environmental Impact Statement at 88. However, a working group of Montana citizens and agencies is currently working on a program to compensate livestock owners for livestock losses due to wolf depredation. See Sime, Carolyn et al., Montana Gray Wolf Conservation and Management 2006 Annual Report, Montana Fish Wildlife and Parks, Helena, Montana (2007), <http://fwp.mt.gov/wildthings/wolf>; “Group Agrees to Create Wolf Reimbursement Program,” http://fwp.mt.gov/news/articl_3607.aspx (May 13, 2005).