

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17**

RIN 1018-AT61

**Endangered and Threatened Wildlife and Plants; Regulation for Nonessential Experimental Populations of the Western Distinct Population Segment of the Gray Wolf****AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service) establish a rule for the nonessential experimental populations (NEPs) of the Western Distinct Population Segment (DPS) of the gray wolf (*Canis lupus*), so that in States and on Tribal reservations with Service-approved wolf management plans, we can better address the concerns of affected landowners and the impacts of a biologically recovered wolf population. In addition, States and Tribes with Service accepted wolf management plans can petition the Service for lead management authority for experimental wolves consistent with this rule. Within the Yellowstone and central Idaho experimental population areas, only the States of Idaho and Montana currently have approved management plans for gray wolves. The State of Wyoming has prepared a wolf management plan that was not approved by the Service. No Tribes have approved management plans. Therefore, at this point in time these regulatory changes only affect wolf management within the experimental population areas in Montana and Idaho. As we discussed in our advance notice of proposed rulemaking regarding delisting the Western DPS of the gray wolf (68 FR 15879; April 1, 2003), once Wyoming has an approved wolf management plan, we intend to propose removing the gray wolf in the Western DPS from the List of Endangered and Threatened Wildlife. This rule does not affect gray wolves in the Eastern DPS, the Southwestern DPS, or the non-experimental wolves in the Western DPS.

**DATES:** The effective date of this rule is February 7, 2005.

**ADDRESSES:** The complete file for this rule is available for inspection, by appointment, during normal business hours at U.S. Fish and Wildlife Service, Office of the Western Gray Wolf Recovery Coordinator, 100 North Park, Suite 320, Helena, Montana 59601. Call 406-449-5225 to make arrangements.

**FOR FURTHER INFORMATION CONTACT:** Ed Bangs, Western Gray Wolf Recovery Coordinator, at the above address or telephone 406-449-5225, ext. 204 or at [ed\\_bangs@fws.gov](mailto:ed_bangs@fws.gov) or on our Web site at <http://westerngraywolf.fws.gov/>.

**SUPPLEMENTARY INFORMATION:****Background**

In 1994, we promulgated special rules under section 10(j) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), for the purpose of wolf reintroduction. The rules, codified at 50 CFR 17.84(i), established two nonessential experimental populations (NEPs), one for the central Idaho area and the other for the Yellowstone area, that provided management flexibility to address the potential negative impacts and concerns regarding wolf reintroduction.

On April 1, 2003, we published in the **Federal Register** (68 FR 15879) an Advance Notice of Proposed Rulemaking under the Act, announcing our intent to remove the Western DPS of the gray wolf (*Canis lupus*) from the List of Endangered and Threatened Wildlife in the near future. At the time, we indicated that the number of wolves in the Yellowstone and central Idaho NEP areas had exceeded our numerical recovery goals. We also emphasized the importance of State wolf management plans to any delisting decision; we believed these plans would be the major determinants of wolf protection and prey availability, and would set and enforce limits on human use and other forms of take, once the wolf is delisted. These State management plans will determine the overall regulatory framework for the future conservation of gray wolves, outside of Tribal reservations, after delisting. For reasons we discuss in more detail below, we are not yet prepared to propose delisting the Western DPS of gray wolves; however, we are issuing a new regulation for the NEPs in the Western DPS for States or Tribal reservations with Service-approved wolf management plans.

Gray wolf populations were eliminated from Montana, Idaho, and Wyoming, as well as adjacent southwestern Canada, by the 1930s (Young and Goldman 1944). After human-caused mortality of wolves in southwestern Canada was regulated in the 1960s, populations expanded southward (Carbyn 1983). Dispersing individuals occasionally reached the northern Rocky Mountains of the United States (Ream and Mattson 1982, Nowak 1983), but lacked legal protection there until 1974 when they were listed as endangered under the Act.

In 1982, Congress made significant changes to the Act with the addition of section 10(j), which provides for the designation of specific reintroduced populations of listed species as “experimental populations.” Previously, we had authority to reintroduce populations into unoccupied portions of a listed species’ historical range when doing so would foster the species’ conservation and recovery. However, local citizens often opposed these reintroductions because they were concerned about the placement of restrictions and prohibitions on Federal and private activities. Under section 10(j) of the Act, the Secretary of the Department of the Interior can designate reintroduced populations established outside the species’ current range, but within its historical range, as “experimental.” Based on the best scientific and commercial data available, we must determine whether experimental populations are “essential,” or “nonessential,” to the continued existence of the species. Regulatory restrictions are considerably reduced under a Nonessential Experimental Population (NEP) designation.

Without the “nonessential experimental population” designation, the Act provides that species listed as endangered or threatened are afforded protection primarily through the prohibitions of section 9 and the requirements of section 7. Section 9 of the Act prohibits the take of an endangered species. “Take” is defined by the Act as harass, harm, pursue, hunt, shoot, wound, trap, capture, or collect, or attempt to engage in any such conduct. Service regulations (50 CFR 17.31) generally extend the prohibitions of take to threatened wildlife. Section 7 of the Act outlines the procedures for Federal interagency cooperation to conserve federally listed species and protect designated critical habitat. It mandates all Federal agencies to determine how to use their existing authorities to further the purposes of the Act to aid in recovering listed species. It also states that Federal agencies will, in consultation with the Service, ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Section 7 of the Act does not affect activities undertaken on private land unless they are authorized, funded, or carried out by a Federal agency.

For purposes of section 9 of the Act, a population designated as experimental is treated as threatened regardless of the species’ designation elsewhere in its

range. Through section 4(d) of the Act, threatened designation allows us greater discretion in devising management programs and special regulations for such a population. Section 4(d) of the Act allows us to adopt regulations that are necessary to provide for the conservation of a threatened species. In these situations, the general regulations that extend most section 9 prohibitions to threatened species do not apply to that species, and the special 4(d) rule contains the prohibitions and exemptions necessary and appropriate to conserve that species. Regulations issued under section 4(d) for NEPs are usually more compatible with routine human activities in the reintroduction area.

For the purposes of section 7 of the Act, we treat NEPs as a threatened species when the NEP is located within a National Wildlife Refuge or National Park, and section 7(a)(1) and the consultation requirements of section 7(a)(2) of the Act apply. Section 7(a)(1) requires all Federal agencies to use their authorities to conserve listed species. Section 7(a)(2) requires that Federal agencies, in consultation with the Service, ensure that any action authorized, funded, or carried out is not likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat. When NEPs are located outside a National Wildlife Refuge or National Park, we treat the population as proposed for listing and only two provisions of section 7 would apply—section 7(a)(1) and section 7(a)(4). In these instances, NEPs provide additional flexibility because Federal agencies are not required to consult with us under section 7(a)(2). Section 7(a)(4) requires Federal agencies to confer (rather than consult) with the Service on actions that are likely to jeopardize the continued existence of a species proposed to be listed. The results of a conference are advisory in nature and do not restrict agencies from carrying out, funding, or authorizing activities.

In 1994, we promulgated special rules under section 10(j) of the Act for the purpose of wolf reintroduction. The rules, codified at 50 CFR 17.84(i), established two NEPs, one for the central Idaho area and the other for the Yellowstone area. We also identified protective measures and management practices necessary for the populations' conservation and recovery. As wolves in the NEPs are generally treated as a threatened species, these rules provided additional flexibility in managing wolf populations within the experimental population areas compared to outside

these areas, where wolves were listed as endangered.

Since their reintroduction in 1994, wolf populations in both experimental areas have exceeded expectations (Service 2004). This success prompted the Service to reclassify the status of gray wolves in the Western DPS, outside of the experimental population areas, to threatened (68 FR 15804) and publish a special 4(d) rule for the WDPS (found in 50 CFR 17.40(n)) that provides more flexible management for wolves outside the experimental population areas. We also published an advance notice of proposed rulemaking, indicating our intent to delist the Western DPS of gray wolves in the future (68 FR 15879).

However, the 2003 4(d) rule did not apply within the experimental population areas in Idaho or Yellowstone; as a result, management of threatened wolves in the western DPS outside of the experimental population areas became more flexible than management of wolves inside the experimental population areas. We now issue a rule for States or Tribal reservations with Service-approved wolf management plans that provides for additional flexibility within the experimental population areas in recognition of the fact that wolves are numerous in the experimental population areas. In addition, the rule provides for transition to a State and Tribal lead for wolf management in those States or reservations with Service-approved wolf management plans, with the exception of lands managed by the National Park Service or the Service. The 1994 NEP rules found at 50 CFR 17.84(i) are retained in Wyoming and on Tribal reservations within Wyoming without approved management plans.

#### Previous Federal Actions

The northern Rocky Mountain wolf (*Canis lupus irremotus*) was listed as endangered in Montana and Wyoming in the first list of species that were protected under the 1973 Act, published in May 1974 (U.S. Department of the Interior 1974). To eliminate problems with listing separate subspecies of the gray wolf and identifying relatively narrow geographic areas in which those subspecies are protected, on March 9, 1978, we published a rule (43 FR 9607) relisting the gray wolf at the species level (*Canis lupus*) as endangered throughout the conterminous 48 States and Mexico, except Minnesota, where the gray wolf was reclassified to threatened. In addition, critical habitat was designated in Minnesota and Michigan in that rulemaking.

On November 22, 1994, we designated areas in Idaho, Montana, and Wyoming as NEPs in order to initiate gray wolf reintroduction in central Idaho and the Greater Yellowstone area (59 FR 60252, 59 FR 60266). These experimental population designations contain special rules that govern the take of wolves within the geographical areas. The 1994 rules governing those experimental populations allowed for increases in the authority of States and Tribes to manage the wolves under a State or Tribal management plan approved by the Service. Specifically, the 1994 rules allowed States or Tribes to expand the definition of "livestock" for purposes of managing conflicts between wolves and livestock, and the rules also allowed States and Tribes to document adverse effects of wolves on ungulates for the purposes of managing those conflicts.

In January 1995, 15 wolves captured in Alberta, Canada, were released in central Idaho. In January 1996, an additional 20 wolves from British Columbia were released into the central Idaho experimental population area. In March 1995, 14 wolves from Alberta were released from holding pens in Yellowstone National Park. In April 1996, this procedure was repeated with 17 wolves from British Columbia (Bangs and Fritts 1996, Fritts *et al.* 1997, see Service 2004 for additional references).

On December 11, 1997, we published a proposal to revise the NEP rules in central Idaho and the Yellowstone area (62 FR 65237). This proposal attempted to clarify ambiguous language regarding wolf control options of suspected captive wolves and wolf-dog hybrids found in the wild within the experimental population areas. Due to litigation over wolf reintroduction, in which the Service ultimately prevailed, and other priorities, that proposal was never finalized. This rule resolves that ambiguous language (see (xi)(H) in this rule).

On July 13, 2000, we published a proposal (65 FR 43450) to revise the listing of the gray wolf across most of the conterminous United States. On April 1, 2003, we published a rule establishing three DPSs (Western, Eastern, and Southwestern) and reclassifying the gray wolf from endangered to threatened in the Western and Eastern DPSs except where NEPs existed (68 FR 15804). We established special rules under section 4(d) of the Act for the Western and Eastern DPSs. Also on April 1, 2003, we published two Advance Notices of Proposed Rulemaking announcing our intent to delist the gray wolf in the Eastern (68 FR 15876) and Western (68 FR 15879) DPSs in the future.

We received several petitions during the past decade requesting delisting of the gray wolf in all or part of the 48 conterminous States. We subsequently published findings that these petitions did not present substantial information that delisting gray wolves in all or part of the conterminous 48 States was warranted (54 FR 16380, April 24, 1989; 55 CFR 48656, November 30, 1990; 63 FR 55839, October 19, 1998).

### Recovery Goals

The demographic recovery goal for the WDPS is a minimum of 30 breeding pairs, each consisting of an adult male and an adult female that successfully produced at least 2 pups that survived until December 31, that are equitably distributed among 3 recovery areas/ States for 3 successive years (68 FR 15804). Our current estimates indicate wolf populations in northwestern Montana where they are designated threatened, and in central Idaho and Yellowstone where they are designated experimental, have exceeded this recovery goal. In late 2002 there were about 663 wolves and 43 breeding pairs equitably distributed throughout Montana (about 183 wolves and 16 breeding pairs), Idaho (about 263 wolves and 9 breeding pairs), and Wyoming (217 wolves and 18 breeding pairs) (Service *et al.* 2003). The year 2002 was the third successive year that the wolf population in Montana, Idaho, and Wyoming had 30 or more breeding pairs. The wolf population continues to expand in the NEP areas. At the end of 2003, the wolf population was estimated at 761 wolves and 51 breeding pairs. Montana had an estimated 182 wolves and 10 breeding pairs, Idaho had 345 wolves and 25 breeding pairs, and Wyoming had 234 wolves and 16 breeding pairs (Service *et al.* 2004). Preliminary monitoring in 2004 indicates the wolf population continues to increase, again primarily in the NEP areas (Service 2004b).

### Currently Designated Nonessential Experimental Populations of Gray Wolves

The Secretary designated two NEP areas for gray wolves in the Northern Rockies. Wolves were reintroduced into the Yellowstone NEP Area and the Central Idaho NEP Area in 1995 and 1996. The reintroductions as experimental populations were intended to further the recovery of gray wolves in the northern United States Rocky Mountains, as described in the recovery plan (Service 1987), and provide more management flexibility to address local and State concerns about wolf-related conflicts.

The Central Idaho Experimental Population Area consists of the portion of Idaho south of Interstate Highway 90 and west of Interstate 15; and the portion of Montana south of Interstate 90, west of Interstate 15, and south of Highway 12 west of Missoula (59 FR 60266; November 22, 1994).

The Yellowstone Experimental Population Area consists of the portion of Idaho east of Interstate Highway 15; the portion of Montana east of Interstate Highway 15 and south of the Missouri River from Great Falls, Montana, to the eastern Montana border; and all of Wyoming (59 FR 60252; November 22, 1994).

However, as explained below, the new regulation proposed here will not apply in Wyoming or within any Tribal reservation in Wyoming at this time.

### Current Special Regulations for the Western Distinct Population Segment

Three special rules currently apply to wolves in Montana, Idaho, and Wyoming. The two 1994 10(j) experimental population rules allow flexibility in the management of wolves, including authorization for private citizens to non-injuriously harass wolves and take wolves that are in the act of attacking livestock on private land, without a permit. These rules also provide a permit process that similarly allows the take, under certain circumstances, of wolves in the act of attacking livestock on public land. In addition, they allow opportunistic non-injurious harassment of wolves by livestock producers on private and public grazing lands, and also allow designated government employees or Service-designated agents under specified circumstances to perform non-lethal and lethal control to remove problem wolves. The 1994 rules allow States and Tribes to define unacceptable impacts on native ungulate herds and relocate wolves to reduce wolf predation. They also provide a mechanism for increased State and Tribal participation in wolf management, if cooperative agreements are developed to make them designated agents of the Service.

The 2003 4(d) rule for the Western DPS outside of the Central Idaho and Yellowstone NEP areas allows landowners and permittees on Federal grazing allotments to harass wolves in a non-injurious manner at any time. Like the 1994 10(j) rules, the 4(d) rule allows flexibility in the management of wolves, including authorization for private citizens on private land to non-injuriously harass wolves and take wolves that are in the act of attacking livestock, livestock herding or guarding

animals, or dogs without a permit. The 4(d) rule also provides a written authorization process that allows the taking, under certain circumstances, of wolves on public land in the act of attacking livestock or livestock herding or guarding animals. In addition, it allows designated government employees or Service-designated agents to perform non-lethal and lethal control to remove problem wolves under specified circumstances. The 4(d) rule allows take of wolves under written authorization in a few more circumstances than the 1994 10(j) rules. Like the 1994 10(j) rules, the 4(d) rule allows the State and Tribes to define unacceptable impacts on native ungulate herds and relocate wolves to reduce wolf predation. The 4(d) rule, like the 1994 10(j) rules, also provides a mechanism for increased State and Tribal participation in wolf management, if cooperative agreements are developed to make them designated agents of the Service. A table comparing the parameters of wolf management in this final 10(j) rule with those in the 1994 10(j) rules, and with the 4(d) rules, is included as part of this rule.

### State and Tribal Wolf Management Plans

In order to delist the Western DPS wolf population due to recovery, the demographic criteria (a minimum of 30 breeding pairs of wolves [an adult male and female wolf that raise at least 2 pups until December 31] that are equitably distributed throughout Montana, Idaho, and Wyoming for a minimum of 3 successive years) must be met, and the Service must determine, based on the best scientific and commercial data available, that the species is no longer in danger of extinction and is not likely to be in danger of extinction in the foreseeable future throughout all or a significant portion of its range. The basis for the determination is a review of the status of the species in relation to five factors identified in section 4(a)(1) of the Act—(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; and (E) other natural or manmade factors affecting its continued existence. These factors are not analyzed in detail as part of this rule because there was no proposed change in the WDPS listing status. Rather, this rule focuses on management of NEP wolves in the WDPS as we await delisting and transfer of management for

wolves in the WDPS to the States and Tribes.

State management plans have been determined by the Service to be the most appropriate means of maintaining a recovered wolf population and of providing adequate regulatory mechanisms post-delisting (*i.e.*, addressing factor D) because the primary responsibility for management of the species will rest with the States upon delisting and subsequent removal of the protections of the Act. Therefore, based on the demographic criteria mentioned above, each State needs to commit to maintain at least 10 or more breeding pairs, so the wolf population will not fall below 30 breeding pairs overall, and so that an equitable distribution of wolf breeding pairs is maintained among the three States. The northern Rocky Mountain wolf population is a three-part metapopulation and requires adequate management by all three States to ensure sufficient connectivity and distribution to remain recovered. Because the population inhabits parts of Montana, Idaho, and Wyoming, all three States must have adequate regulatory mechanisms to reasonably ensure their share of the population will remain recovered before the Service can propose it be delisted.

The Service determined that Wyoming's current State law and its wolf management plan do not suffice as an adequate regulatory mechanism for the purposes of delisting (letter from Service Director Steven Williams to Montana, Idaho, and Wyoming, January 13, 2004). Consequently, this rule, which defines the expanded authorities for States or Tribes with Service-approved plans, does not affect the portion of the Yellowstone NEP area in Wyoming. Wyoming has initiated legal action challenging our decision to not approve their wolf management plan. As the case works its way through the court system, we will attempt to continue to work with Tribes in Wyoming and the State of Wyoming to develop a Wyoming State law and State or Tribal wolf management plans that we can approve. Once we have approved a wolf management plan for the State of Wyoming, and barring the identification of any new threats to the species, we expect to propose rulemaking to remove the Western DPS of the gray wolf from the List of Endangered and Threatened Wildlife (for additional discussion, see our Advance Notice of Proposed Rulemaking at 68 FR 15879).

At this time there are few, if any, wolf breeding pairs or packs that significantly use Tribal reservation

lands in the NEPs in Montana, Idaho, or Wyoming, and the recovery and subsequent maintenance of a recovered wolf population does not depend upon Tribal reservations or Tribal wolf management. The Service has not requested wolf management plans from any Tribe within the Western DPS, and any future delisting action is unlikely to be dependent on wolf management on Tribal lands. We do not believe any Tribal treaty rights to hunt and gather on ceded lands are adversely affected by this rule.

To provide as much flexibility as possible for Tribal members who are landowners, this rule treats Tribal members' lands on reservations as private property. Therefore, on Tribal lands within Montana and Idaho, individuals may take wolves on reservation lands as allowed on other private lands under this rule, if such take is allowed by Tribal wildlife regulations. A Tribal government may not assume designated agent status and lead for wolf management until it has a Tribal wolf management plan that has been approved by the Service. Tribes in Wyoming may develop their own wolf management plan for their reservation, and once accepted by the Service, may assume designated agent status. In the absence of a Service-approved Tribal wolf management plan or cooperative agreement, the Service will issue any written authorization for wolf take on Tribal lands.

### **Summary of Comments and Recommendations**

#### *A. Soliciting Public Comment*

In our March 9, 2004, proposed rule and associated notifications, we requested that all interested parties submit comments, data, or other information that might aid in our decisions or otherwise contribute to the development of this final rule. The comment period for the proposed rule was open from March 9, 2004, through May 10, 2004. During that period we publicized and conducted two public hearings, one in Helena, Montana, on April 19, 2004, and another in Boise, Idaho, on April 20, 2004. We did not receive any requests for additional hearings and none were held. We also provided additional information at several general public meetings in order to explain the proposal, respond to questions concerning gray wolf protection and recovery, and receive input from interested parties. We contacted appropriate Federal, State, and Tribal agencies, scientific organizations, agricultural organizations, outdoor user groups,

environmental organizations, animal rights groups, and other interested parties and requested that they comment on the proposal. We conducted numerous press interviews to promote wide coverage of our proposed rule in the media. We published legal notices in many newspapers announcing the proposal and hearings, and invited comment. We posted the proposal and numerous background documents on our Web site, and we provided copies upon request by mail or E-mail and at our hearings and informational meetings. We established several methods for interested parties to provide comments and other materials, including verbally or in writing at public hearings, by letter, E-mail, facsimile, or on our Web site.

During the 60-day comment period and at our two public hearings, we received nearly 23,000 separate comments, including comments from 39 individuals or agency representatives who spoke at public hearings. These comments included form letters and petitions with multiple signatures. Comments originated from nearly all States and several countries. We revised and updated the proposed rule in order to address comments and information we received during the comment period. In the following paragraphs we address the substantive comments we received concerning various aspects of the proposed rule. Comments of a similar nature are grouped together under subject headings (referred to as "Issues" for the purpose of this summary) below, along with our response to each. In addition to the following discussion, refer to the "Changes from the Proposed Rule" section (also below) for more details.

#### *B. Technical and Editorial Comments*

*Issue 1:* Numerous technical and editorial comments and corrections were provided by respondents.

*Response 1-1:* We corrected and updated numbers and other data wherever appropriate. We edited the rule to make its purpose and wolf management strategies clearer.

*Response 1-2:* We eliminated or condensed several sections in the proposed rule because they were either no longer relevant or to improve the clarity and intent of this rule. These changes include dropping most references to wolf management and regulations outside of the Western DPS and the central Idaho and Yellowstone NEP areas; dropping detailed descriptions of the Montana and Idaho wolf management plans; and dropping or condensing sections that are no longer relevant because they applied

more to the past active wolf reintroduction program rather than the current program that maintains and manages an established recovered wolf population.

**Response 1-3:** We include a table that compares the parameters of wolf management in this final 10(j) rule with those in the 1994 10(j) rules and with the 4(d) rule.

**Issue 2:** Changes were suggested for our definitions of terms such as “reasonable belief,” “problem wolf,” “in the act,” “landowner,” “livestock,” and “active den site.” Most of the changes were recommended to improve consistency with State or other Federal rules, to improve law enforcement capabilities, or to clarify this rule.

**Response 2-1:** Allowing wolf take because of an individual’s “reasonable belief” the wolf may attack livestock appeared to invite abuse of wolf take. The Service and State law enforcement officials indicated that the term “reasonable belief” is largely unenforceable in the context of its use in the proposed rule, because it could be read to require proof of an individual’s state of mind. It could allow more liberal take of wolves than current State regulations and standards allow for defense of private property from other large carnivores managed by the States. The standards for taking wolves to protect property on private and public land were changed to make them more enforceable and also more consistent with State regulations and enforcement standards. Take will be allowed if wolves are physically attacking or “in the act of” attacking—*i.e.*, molesting, harassing, chasing—livestock, livestock guarding and herding animals, and dogs), and if an agency investigation can confirm such take based on physical evidence of an attack or threat of attack likely to occur at any moment.

**Response 2-2:** The definition of take of problem wolves “in the act” has been changed to a definition of “in the act of attacking,” meaning “the 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 is likely to occur at any moment.” Evidence of an attack must be available upon investigation. If no actual biting, wounding, grasping or killing has occurred, evidence must be available that a reasonable person would have believed that it was likely to occur at any moment. This standard does not require proof of an individual’s state of mind. Instead, the standard requires evidence that an attack was likely to occur. Such evidence may

include photographs of livestock or of the physical scene immediately following the wolf taking; indications that livestock were chased, molested or harassed, such as livestock and wolf tracks, trampled ground, broken fences, brush or vegetation, or muddied, lathered, bunched or trampled livestock; or dead or wounded livestock. This change will make take of wolves in defense of private property more enforceable and more consistent with State regulations. This standard will still allow the take of wolves that are physically attacking livestock or dogs on private lands, and livestock on public lands. We believe that by expanding the definition of “in the act” to include wolves preparing to attack livestock or dogs, we will more effectively remove problem wolves, enhance the ability of landowners and public land permittees to protect their private property, reduce the agency workload, and reduce the potential for abuse of this regulation that could result in the take of non-problem wolves, while not resulting in adverse impacts to wolf populations.

**Response 2-3:** We agree that the definition of a “problem wolf” should not include a wolf attacking any domestic animal, such as a cat, but should be more specific to the types of animals that have been attacked in the past such as horses, cattle, sheep, mules, goats, domestic bison, llamas, and dogs. The definition of a problem wolf has been changed to a wolf that attacks livestock (defined as cattle, sheep, horses, mules, goats, domestic bison, certain types of livestock herding or guarding animals) and dogs on private lands, and livestock on public lands. The Service or our designated agent(s) can designate and control a problem wolf, if it has attacked domestic animals other than livestock or dogs, two or more times in a calendar year.

**Response 2-4:** Wolves should not be labeled “problem wolves” when they are attracted, artificially fed, or baited, or when livestock are not reasonably protected. The conditions required for take of a problem wolf are—(A) Evidence of dead or wounded livestock or dogs caused by wolves or evidence that an attack on livestock or dogs by wolves is likely to occur at any moment; (B) A likelihood that additional losses will occur if no control is taken; (C) No unusual attractants or artificial or intentional feeding of wolves; and (D) On public lands, animal husbandry practices specified in approved allotment plans and annual operating plans are being followed.

**Response 2-5:** Definitions of “routinely present” and “demonstrable but non-immediate threat to human

safety” need clarification. We dropped these two phrases from the final rule. Issues regarding potential threat to private property or human safety will be reworded “as determined by the Service or our designated agent(s).”

**Response 2-6:** Some suggested that the definition for “active den site” begin earlier than April 1 or go later than June 30. From 1987 through 2004, we have monitored over 329 breeding pairs of wolves in Montana, Idaho, and Wyoming (USFWS 2004) and none were documented to have produced pups before April 1. By June 30 wolf pups are mobile and many begin moving to rendezvous sites, so we did not expand the time frame within that definition. Land-use restrictions, even around active den sites, have rarely been required to protect wolves in the past and we do not believe they will be necessary in the future (Bangs *et al.* in press).

**Response 2-7:** Some comments suggested certain sex and age classes of wolves, *i.e.*, breeding females or their pups, should be more protected than others. We dropped language from the final rule regarding more restrictive control options for females with pups or their pups. Our data indicate that after 4–6 weeks other pack members can successfully raise wolf pups, and removal of the breeding female does not mean the pups will not survive (Boyd and Jimenez 1994). Most pups are born by mid-April, and by early summer when most livestock come onto public grazing allotments, pups are mobile and can be raised by other pack members. Wolf packs are resilient to change and losing pack members, including alphas, as this happens frequently in nature even when humans are not impacting wolf pack social dynamics (Mech and Boitani 2003). We also recognize that, at times, the presence of wolf pups and their extra food requirement contribute to livestock depredation. Therefore, we have left the case-by-case decisions about wolf removal to our and our designated agent(s)’ field personnel. We believe leaving such decisions to professional personnel in the field increases management flexibility and will not affect wolf recovery or the overall level of agency-caused wolf mortality.

**Response 2-8:** Some commenters recommended a more restrictive definition for “landowner” or restricting the use of take authorization by private individuals to remove problem wolves. Under this rule “landowner” applies only to private landowners or public land permittees who actually experience confirmed wolf depredations.

### C. Legal Compliance With Laws, Regulations, and Policy

**Issue 3:** There was some confusion as to where and when the rule applies. Some believed it would immediately apply to all parts of any State with an approved management plan and others believed it would immediately apply throughout all experimental population areas. Some perceived that the new rule only applied after States with acceptable plans sign Memorandum of Agreements (MOAs) with the Secretary.

**Response 3-1:** This rule applies only to experimental areas within States or Tribal reservations with approved management plans, which at this time means only within the States of Montana and Idaho (letter from Service Director Steven Williams to Montana, Idaho, and Wyoming, January 13, 2004). Until a management plan from the State of Wyoming or a Wyoming Tribe is approved by the Service, no part of this rule applies in Wyoming or on a Tribal reservation in Wyoming. All wolf management in Wyoming remains under the aegis of the 1994 10(j) rules. When the Service approves a Wyoming or Tribal wolf management plan in that State, then this rule also will apply in Wyoming or that Tribal reservation in Wyoming. Furthermore, no Tribe in Montana or Idaho can lead wolf management on their reservation until the Tribe has a wolf management plan approved by the Service. Neither the 1994 rules nor this rule apply outside of the experimental population areas, except it provides some management options to the Service and our designated agent(s) for wolves from the experimental population area that disperse beyond the experimental population boundaries. Maps are provided to show the established experimental population areas in which this rule may apply.

**Response 3-2:** This rule becomes effective within 30 days in the experimental population areas in Montana and Idaho, as they have wolf management plans that have been approved by the Service. As soon as Wyoming or a Tribal reservation in Wyoming has a wolf management plan that is approved by the Service, this rule will become immediately effective in that respective area. While Tribal reservations in Montana and Idaho are considered as private land for individuals under the provisions of this rule, Tribal governments may not become designated agents and lead wolf management on reservations until they have a Tribal wolf management plan approved by the Service.

**Response 3-3:** The completion of an MOA with the Secretary of the DOI which is consistent with this rule allows a State or Tribe to take the lead in wolf management, to become “designated agent(s),” and to implement all parts of its approved wolf management plan that are consistent with this rule. This includes issuing written authorization for take, and making all decisions regarding implementation of the State or Tribal plan consistent with this rule. Under the MOA process, the Service will annually review the States’ and Tribes’ implementation of their plans to ensure compliance with this rule and to ensure the wolf population remains above recovery levels. States and Tribes also can become “designated agent(s)” and implement all or selected portions of this rule by entering into a cooperative agreement with the Service.

**Issue 4:** Some commenters believed the new 10(j) rule calls for a new Environmental Impact Statement (EIS) or additional section 7 consultation.

**Response 4-1:** We have carefully reviewed the requirements of the National Environmental Policy Act (NEPA) and its regulations (Council on Environmental Quality 40 CFR Section 1502.9). We believe this final rule, as well as the process by which it was developed and finalized, comply with all provisions of the Act, NEPA, and applicable regulations. The possible impacts resulting from this rule do not differ or extend beyond the scope of those examined in the 1994 EIS (Service 1994) or the 1994 10(j) rules. We do not believe the additions in this new 10(j) rule constitute substantial changes that create new environmental concerns. We present the following evidence:

In the 1994 EIS and 10(j) rules we predicted that 100 wolves in each of the 2 experimental areas would kill an annual average of 10–19 cattle and 57–68 sheep. Confirmed losses have been below predicted levels, even though wolf population levels are higher than predicted. From 1995 through 2003, wolves were confirmed to have killed 8.4–13.2 cattle, 33.6–46.3 sheep, and 2.5–2.7 dogs annually per experimental area. As predicted in the EIS, from 1987 through 2004 a cumulative total of approximately \$440,000 in private compensation has been paid to livestock producers who have had confirmed or probable livestock losses caused by wolves, including areas both inside and outside the experimental population areas. The EIS also predicted that in each of the two experimental population areas annual livestock losses would range from \$1,888 to \$30,470 annually; and in reality, annual compensation for wolf-caused losses has averaged about

\$17,000 per area since 1995. The EIS predicted economic losses (in the range of \$207,000–\$857,000), primarily due to decreases in hunting for female elk; some decreases in winter control hunts for female elk have occurred, all within predicted levels. The EIS predicted that visitation to Yellowstone National Park would increase and generate \$23,000,000 of economic activity in Montana, Idaho, and Wyoming. The popularity of wolf viewing in Yellowstone surpassed our predictions, although the economic impact is largely unknown.

The EIS predicted that the wolf population (defined by the distribution of breeding pairs) would likely remain within the EIS primary analysis area (Forest Service lands and adjacent private lands in central Idaho, and public land in and around Yellowstone National Park and private land in adjacent counties). As predicted, although individual lone wolves have dispersed widely, judging from the distribution of breeding pairs, the wolf population is contained within the EIS’s primary analysis area.

In the EIS and 1994 10(j) rules, we also anticipated that legal control of wolves to minimize livestock depredations would annually remove an average 10 percent of the experimental population. Since 1995 lethal wolf removal has annually removed an average of less than 5 percent of the experimental wolf population. We predicted that the numerical and temporal goals for wolf population recovery would be reached in late 2002, with about 129 wolves counted in late winter in each of the 2 areas. These recovery criteria were reached in late 2002, but with an estimated 271–284 wolves per recovery area, about twice the predicted levels.

We anticipate that this rule will result in some additional wolf mortality by the public over current levels. However, the combination of agency control and legal control by the public will still likely effect on average 10 percent or less of the wolf population annually and we believe will not increase human-caused mortality to a level that could reduce the wolf population below recovery levels. Thus this rule does not create impacts that were not already analyzed or anticipated in the 1994 EIS and 1994 10(j) rules. This rule also provides safeguards that we believe will maintain the wolf population above numerical recovery goals in the experimental population areas. These safeguards are discussed throughout the body and discussion of the rule, including but not limited to the conditions under which the take provisions of the rule may be

implemented. In conclusion, we are adopting the prior EIS for this rulemaking because the analysis is still applicable, *i.e.*, the conditions have not changed and the action has not changed significantly.

**Response 4-2:** We have conducted an intra-Service section 7 consultation on this rulemaking. We have determined that the original consultation (contained in Appendix 7 of the 1994 EIS) remains adequate in its analysis of the gray wolf, woodland caribou, black-footed ferret, bald eagle, whooping crane, piping plover, least tern, pallid sturgeon, sockeye salmon, chinook salmon, Kendall Warm Springs dace, Wyoming toad, five species of Snake River mollusks, and MacFarlene's four-o'clock. No impacts to these species beyond those predicted in 1994 have occurred and this rule will cause no additional impacts beyond those envisioned in 1994. Since 1994, Canada lynx, bull trout, water howellia, white sturgeon, northern Idaho ground squirrel, Spalding's catchfly, and steelhead have been listed under the Act within the experimental population areas. In our original consultation, we determined wolf recovery would not affect any of those species but did not provide justification. We have updated the consultation to include a rationale of why the proposed action would not affect these species. Finally, because three grizzly bear cubs have been killed by wolves within the action area since the original consultation, we formally consulted on the effects of the proposed action on the grizzly bear. In this consultation, we determined that the project was not likely to jeopardize the continued existence of the grizzly bear (a copy of this consultation is available; see **FOR FURTHER INFORMATION CONTACT** section, above).

**Issue 5:** Some commenters believed we improperly considered economic, political, or other factors when developing the proposed rule. Some believed we favored livestock and State interests, and others believed we favored outside interests and environmental organizations.

**Response 5:** Except when designating critical habitat, the Act prohibits economic considerations during the rulemaking process and the Administrative Procedure Act prohibits Federal agencies from providing special interest groups any special access to the rulemaking process. This rulemaking has complied with those prohibitions.

**Issue 6:** Some commenters believed we are violating the Service's mission.

**Response 6:** The USFWS mission is working with others, to conserve, protect, and enhance fish, wildlife and

plants and their habitats for the continuing benefit of the American people. A decade ago, the Service and our cooperators reintroduced wolves into the northern Rocky Mountains, and the WDFW wolf population have now exceeded numerical recovery goals outlined in the 1994 EIS. Nothing in this rule reduces the ability of the Service to achieve its mission or its responsibility under the Endangered Species Act to recover gray wolves; rather, this rule builds on the partnerships already established with the States and Tribes to manage the species.

**Issue 7:** One comment suggested the proposed rule violates the Airborne Hunting Act. Another suggested wolf control for State ungulate management violates the Wilderness Act.

**Response 7-1:** This rule does not allow public hunting of wolves, including by aircraft. It allows management agencies to remove problem wolves, using such tools as darting, netgunning, or gunning from aircraft. This type of agency activity is not a violation of the Airborne Hunting Act.

**Response 7-2:** This rule does not supersede or invalidate any other Federal, State, or Tribal laws or regulations. All wolf management activities under this rule must be conducted in compliance with all other applicable laws and regulations.

#### D. Lethal Control

**Issue 8:** Many commenters expressed varying degrees of opposition or support for the lethal control of gray wolves. Some commenters asked that we prohibit any form of lethal take; some supported killing of wolves only in defense of human life; some supported lethal control only if carried out by designated government agent(s); and others felt that lethal control should never occur on public lands. Lethal control of wolves that kill only pets also was opposed by some. Others (especially in Idaho) advocated lethal removal of all wolves. Some commented that all wolf control should be conducted in a humane manner. Others indicated that for physical evidence to be preserved, the site of the wolf take should remain undisturbed and be examined quickly to reduce the potential for abuse of the rule.

**Response 8-1:** The Service will continue to cooperate with the U.S. Department of Agriculture-Animal and Plant Health Inspection Service-Wildlife Services (USDA-APHIS-WS), State agencies, universities, and special interest groups to investigate ways to reduce the level of conflict between people, livestock, and wolves (Service

2004; Bangs *et al.* in press; Bradley 2003; Bangs and Shivik 2002; Oakleaf 2001). To date, we and our partners in wolf recovery have investigated and implemented the use of fencing; guard animals; extra herders; light, siren, and other scare devices, including those activated by wolf radio-collars; shock aversion conditioning; flagging; less-than-lethal munitions; offensive and repelling scents; supplemental feeding; harassing wolves at dens and rendezvous sites to move the center of wolf pack activity away from livestock; trapping and moving individual pack members or the entire pack; moving livestock and providing alternative pasture; investigating the characteristics of livestock operations that experience higher depredation rates; and research into the type of livestock and rate of livestock loss that are confirmed in remote public grazing allotments. We also correspond with researchers and wildlife managers around the world to learn how they deal with similar problems. While preventative and non-lethal control methods can be useful in some situations, they are not consistently reliable, and lethal control will remain an important tool to manage wolves that have learned to depredate on livestock. Lethal removal of problem wolves to the extent that it reduces the wolf population below recovery levels is not permitted. Under this rule, we or our designated agent(s) will regulate human-caused mortality of wolves in a manner that reduces conflicts between wolves and people while maintaining a recovered wolf population.

**Response 8-2:** To preserve physical evidence of a wolf attack, we require in the rule that any wolf take be reported within 24 hours and the site remains undisturbed.

**Response 8-3:** The Service treats wolves as humanely as conditions allow. We or our designated agent(s) routinely capture and release wolves for monitoring, research, and control. We train our employees in humane wildlife handling techniques. We capture wolves by leg-hold trapping, snaring, darting, and use the utmost caution to preserve the health and well-being of the captured animal. Mortalities resulting from wolf captures are below 2 percent of the animals handled. When we or our designated agent(s) must kill problem wolves, we use the most effective and humane techniques possible under field conditions. We continue to investigate non-lethal ways to reduce wolf-livestock conflicts, and we prefer to prevent livestock depredations, if possible, rather than react to them by killing depredating wolves.

**Response 8-4:** This rule clearly states that for take by landowners on their private lands or take on public land by a Federal allotment permittees of a gray wolf in the act of attacking livestock or dogs, the carcass of the wolf and the surrounding area should not be disturbed in order to preserve physical evidence that the take was conducted according to this rule. The take should be reported immediately, and the Service or our designated agent(s) will use the carcass and evidence in the area surrounding it to confirm that the livestock or dogs were wounded, harassed, molested, or killed by wolves. The take of any wolf without such evidence of a direct and immediate threat may be referred to the appropriate authorities for prosecution.

**Issue 9:** We received comments about the differentiation in wolf management between public and private lands, such as: States do not differentiate between private and public lands for defense of personal property from most resident predators and neither should the Service; the Service should not control wolves on public land; the Service should recognize the difficulties with different wolf management strategies for livestock producers in checkerboard areas of mixed public and private ownership; and the Service should recognize the special authorities of Tribes on reservations and ceded lands.

**Response 9-1:** Under this rule, any landowner can shoot a wolf attacking or “in the act” of attacking livestock or dogs on private land without prior written authorization. The rule also allows legally authorized permittees on public land, including outfitters and guides, to kill a wolf attacking or “in the act” of attacking livestock or herding or guarding animals being used as part of their Federal land-use permit on their public allotment without prior written authorization. We consider reservation lands in States with approved plans as private land to extend as much management flexibility as possible to Tribal lands. Any such take of wolves must be reported immediately and evidence of an attack or that wolves were “in the act” of attacking must be presented to agency investigators. Any take of wolves without such evidence of attack (such as wounded or dead livestock or dogs) or without evidence that a reasonable person would have believed an attack was likely to occur at any moment (such as indicators that livestock were being chased or harassed by wolves, and proximity of wolves to livestock), may be referred to the proper authorities for prosecution. The mandatory evidence and reporting provisions will reduce the number of

wolves killed by permittees, and will minimize the potential for abuse. Removing the wolves that are actually attacking livestock is a more effective method of removing problem wolves, especially on remote public lands, than agency control days after depredations have occurred. After a problem wolf is removed by a permittee, further agency control is rarely warranted, especially because immediate action by the permittee can more easily target the problem wolf, compared to agency control after-the-fact based on educated assumptions concerning the identity of the problem wolf. This provision does not allow the taking of wolves to protect hunting dogs (because they do not qualify as livestock under this rule) being used by outfitters and guides on public land, nor will it allow private individuals recreating on public land who are not public land permittees to take wolves unless in self-defense or in defense of others.

**Response 9-2:** By making the take provisions between private land and public land similar, we have reduced the confusion that might surround problem wolf management options in areas of checkerboard landownership whose borders may be difficult to ascertain.

**Issue 10:** Some commenters requested the definition of “public land permittee” be expanded to include permitted outfitters and guides.

**Response 10-1:** We dropped the written authorization requirement for take of wolves by public land permittees, including guides and outfitters, when wolves are attacking or are “in the act” of attacking livestock on their allotments during the active period of their federally-issued land-use permit. “Public land permittee” also includes Tribal members who are legally grazing their livestock on ceded public lands under Tribal treaty rights. The rule does not allow the taking of wolves on public lands when wolves attack dogs that are not being used by permittees for livestock guarding or herding. Private users of public land or people who are not active public land permittees may non-injuriously harass wolves that are attacking livestock or dogs but may not kill or injure wolves on public land for attacking livestock or dogs.

**Response 10-2:** This rule allows us or our designated agent(s) to issue “shoot on sight” written authorizations to both private landowners and public land permittees with active grazing allotments after wolf depredations have been confirmed, agency lethal control is already authorized, and wolves still present a significant threat to livestock.

Such take must be conducted in compliance with the conditions specified in the written take authorization issued by the Service or our designated agent(s).

**Issue 11:** We received comments for and against agency control of wolves in response to wolf impacts on ungulate herds. People against such control believe that wolves are part of the ecosystem and that predator and prey should be allowed to naturally fluctuate. People who supported such agency wolf control believed that wolves could significantly reduce hunter harvest of ungulates, fostering ill will and increasing the potential for illegal killing of wolves. Some were concerned about abuse of this provision and lack of public review and scientific integrity in the decision-making process. There was some question as to how wolf management for ungulates would apply in Wyoming, the only State without an accepted wolf management plan.

**Response 11-1:** Under the 1994 rules, any State, including Wyoming, or Tribe can move wolves if they document that wolf predation is negatively impacting attainment of State or Tribal goals for big game. To date, no State or Tribe has documented excessive wolf predation on native ungulate herds, warranting wolf removal, nor has any State or Tribe requested such.

**Response 11-2:** In some situations, wolf predation, in combination with other factors, could potentially contribute to dramatic localized declines in wild ungulate populations (Mech and Boitani 2003). As noted in their comments on the proposed rule, segments of the public and State fish and game agencies are concerned that if these conditions exist and wolf predation is contributing to dramatic declines in a local ungulate population, management of wolf predation should be an available option. Most, if not all, core wolf habitat in the experimental population areas is now occupied by wolf packs. Any relocated wolves are likely to settle outside of core areas and near livestock and private property—likely creating additional conflicts with local livestock producers (Bradley 2003). This rule allows wolves to be killed to resolve significant conflicts with State and Tribal ungulate management objectives.

**Response 11-3:** States and Tribes can lethally take wolves to resolve significant ungulate management issues, but only after submitting a scientific, written proposal that has undergone peer and public review. The State or Tribal proposal must define the issue, history, past and future monitoring and management and describe the data

indicating the impact by wolf predation on the wild ungulate population, what degree of wolf removal will occur, and why it believes wolf control is appropriate. The proposal must discuss other potential remedies. The Service will review the State's or Tribe's proposal once it has undergone peer and public review. The Service will only approve wolf take for ungulate management after we determine that the proposal scientifically supports wolf removal and does not compromise wolf recovery objectives.

**Issue 12:** Some comments supported and others were against translocation (capturing and releasing at a distant location) of problem wolves.

**Response 12:** Translocation of wolves to reduce wolf-livestock conflicts can be a valuable management tool when wolf populations are low and empty habitat is available (Bradley 2003). The Rocky Mountain wolf population is well above recovery levels and nearly all suitable release sites for translocated wolves are already occupied by resident wolf packs. Wolves are territorial, and resident packs may kill strange wolves in their territory. Translocating problem wolves is often unsuccessful at preventing further problems, because once a wolf has learned that livestock can be prey, it can carry that learned behavior to its new location, where it can continue being a problem wolf (Service 1999). Also, some wolves travel great distances after translocation and return to the area where they were captured and begin attacking livestock again. As a result, translocated wolves rarely contribute to recovery of the Rocky Mountain wolf population (62 FR 65237). The Service or our designated agent(s) will primarily rely on lethal control for management of wolves that attack livestock, if non-lethal methods appear ineffective, because most habitat in Montana, Idaho, and Wyoming that does not have livestock is already occupied by resident wolf packs. No wolves have been relocated in Montana, Idaho, or Wyoming since 2001. However, in rare instances, translocation may be used to resolve conflicts or excessive depredation of native wild ungulate populations.

**Issue 13:** Some recommended the Service emphasize non-lethal wolf control to resolve conflicts, including encouraging ranchers to take measures to reduce the risk of wolf depredation.

**Response 13:** The Service works with USDA-APHIS-WS, livestock organizations, private groups, and individuals to identify and publicize ways that livestock producers can reduce the risk of wolf depredation. The decision to use any of the tools offered

is strictly voluntary on the part of the livestock producer, but in the past many producers have been willing to take additional steps to reduce the risk of wolf predation. To date, a multitude of preventative and non-lethal wolf control measures have been used to reduce wolf conflicts with livestock. None are always reliable or effective, but some can have limited and temporary benefit (Bangs and Shivik 2002, see Service 2004 for additional references). The Service and our designated agent(s) will continue to investigate preventative and non-lethal management options to reduce wolf conflicts with livestock, but lethal control will continue to be an important option in many situations.

Wolf populations can remain stable while withstanding 25–35 percent human-caused mortality per year (Mech and Boitani 2003). Agency lethal control of problem wolves was predicted in the 1994 EIS to remove about 10 percent of the wolf population annually, and at that level lethal control will reduce the overall level of conflicts with livestock without reducing the wolf population. To date, agency lethal control of wolves has removed an average of less than 5 percent of the wolf population annually and the amount of lethal take allowed under this new regulation is not predicted to increase annual wolf mortality above 10 percent annually of the population or to a level that reduces the wolf population below recovery levels.

**Issue 14:** Some commenters believed the Service should not loosen restrictions on lethal take of wolves, and that we should base the take levels on scientific information, not local political pressure.

**Response 14:** We recognize that excessive human persecution of wolves is the primary reason for the decline of wolves across North America. We believe the protections of the Act, in combination with extensive public education efforts by the Service and numerous private and public partner organizations, have reduced human persecution and led to the increase in gray wolf numbers and an expansion of their range. For the wolf population to remain recovered, human-caused mortality must be regulated. This rule provides adequate regulation of human-caused mortality to prevent severe population declines. We have based our decisions about the appropriate level of wolf control on wolf biology, research, and our best professional judgment (see Service 2004 for relevant references), despite pressure from interest groups at both ends of the spectrum of human perspectives about wolves and wolf management.

**Issue 15:** Some commenters described the past persecution of wolves and expressed the belief that similar persecution will resume if the proposed rule is adopted.

**Response 15:** This final rule is not expected to significantly increase the level of human persecution of gray wolves. It does not reduce the Federal protection for illegally killing gray wolves. We believe that providing additional mechanisms for the control of problem wolves, including harassment and control options, will reduce the need for reactive agency lethal control and the incentive to illegally kill wolves. We do not believe this rule will increase the threats from human-caused mortality to the majority of the wolf population that does not exhibit problem behavior, and indeed will increase human tolerance for non-depredating wolves and will help decrease those threats.

#### *E. Other Management Concerns*

**Issue 16:** Some asked what procedural steps are required to determine “excessive population pressure” so that wolves might be hunted by the public. Others requested we not allow public hunting or trapping of wolves.

**Response 16:** This rule does not allow public hunting or trapping of wolves. We do not envision that a case of “excessive population pressure” could be made for this wolf population that would allow consideration of public hunting while wolves are listed.

#### *F. State Management Concerns*

**Issue 17:** Concern was expressed about whether State or Tribal management of gray wolves would provide adequate protection to ensure the continued viability of the wolf population. Others welcomed the State or Tribal lead in management over the Federal management, though some were concerned about funding for State and Tribal wolf management. Some thought the cost of State management should be paid by the Federal government.

**Response 17-1:** If a State or Tribe (on its reservation) is interested in assuming management responsibility for wolves while they are listed, the Service must first approve their wolf management plan. The Service must be assured that State or Tribal management will be consistent with the Act, this rule, and recovery of the species, before we may delegate management responsibility to that State or Tribe. States and Tribes with approved plans are only able to manage the wolf population within the framework established by this rule.

**Response 17-2:** We have funded State and Tribal wolf monitoring, research,

and management planning efforts for gray wolves in Montana, Idaho, and Wyoming. For the past several years, Congress has targeted funding for wolf management to Montana, Idaho, and Wyoming, and the Nez Perce Tribe. In addition, Federal grant programs are available that fund wildlife management programs by the States and Tribes. The Cooperative Endangered Species Conservation Fund, for example, provides funds to states for species and habitat conservation actions for threatened and endangered and other at-risk species.

#### *G. Native American Management Concerns*

**Issue 18:** Some felt that the Tribal wolf management roles vis-à-vis the Federal and State agencies should be clarified and recognized.

**Response 18:** This rule provides Tribes with all the same opportunities on reservation lands, *i.e.*, lands held by a Tribe in fee simple or held in trust for Tribes, that it offers the States on lands under State wildlife management authority. Tribes with Service-accepted wolf management plans and wildlife management authority and capability can assume the lead for wolf management on their reservation lands through the same MOA process with the Secretary of DOI that is available to States, or can serve as designated agents through the cooperative agreement process. This rule treats Tribal member's lands on reservations as private property within the borders of States with approved wolf management plans. Tribal individuals within reservations may take wolves according to the provisions of this rule, assuming such take is legal under Tribal regulations. In the absence of a Service-approved Tribal wolf management plan or cooperative agreement, the Service will issue any written authorization for wolf take on Tribal lands.

**Issue 19:** The Nez Perce Tribe asked for Government-to-Government discussions with the Service.

**Response 19:** The Service met with Nez Perce Tribal representatives on October 25, 2004, in Boise, Idaho, to fulfill their request for a government-to-government meeting regarding the Tribe's role in wolf management. We also acknowledged receipt of their draft wolf management plan titled "Nez Perce Tribal Gray Wolf Conservation and Management Plan." We were unable to discuss the details of this final rule at that time, and agreed to review their draft wolf management plan once this rule is promulgated. The Nez Perce Tribe has done a commendable job in the wolf recovery program since 1995.

During wolf recovery, under contract with the Service, the Nez Perce Tribe has provided such services as wolf monitoring, communications with affected and interested parties, and research. We encourage the continued cooperation and coordination between the Tribes and States to delineate the roles and responsibilities for management of wolves both inside and outside Tribal reservations. Tribal reservations within States with approved wolf management plans are considered 'private land' for the purposes of this rule. Therefore, individuals on Tribal lands may take wolves according to the provisions of this final rule for private landowners, and thereby benefit from the additional flexibility this rule provides, as long as it does not violate Tribal regulations.

**Issue 20:** Tribes have extensive treaty rights on ceded lands throughout the experimental population areas.

**Response 20:** The provisions of this rule are available to Tribal governments only on their reservation lands. Wolf management on private inholdings within reservations without approved Tribal wolf management plans will be coordinated by the Service. The States have lead resident game management authorities outside of reservations and should include any Tribal treaty rights in their State management plans. Tribal treaty rights, such as a share of the potential legal wolf harvest, are not an issue affected by this rule. This rule does recognize and encourage State and Tribal cooperative agreements to provide opportunities for increased wolf management flexibility and consistency throughout reservations, ceded lands, and other areas within States. This rule also acknowledges Tribal treaty rights for pasturing and grazing livestock on ceded lands, as specified below. This rule treats wolves on reservations in States with approved wolf management plans as if they were on private property, thereby affording individuals on those reservations additional management flexibility to deal with problem wolves.

#### *G. Memorandum of Agreement Concerns*

**Issue 21:** Two interpretations were expressed about the relationship between this rule and the proposed MOAs. Some thought this rule would go into effect immediately in any State with an approved plan, and that the MOA was a subsequent and separate process. Another interpretation was this rule would only go into effect after a State or Tribe completed an MOA with the DOI.

**Response 21:** This rule is effective in 30 days from the date of publication within any part of the experimental population area within a State or Tribal reservation that has a Service-accepted wolf management plan. The MOA process is a separate and subsequent issue. The States or Tribes can choose to become designated agents under this rule through either an MOA or a cooperative agreement.

**Issue 22:** The intent of the MOA was questioned. Some thought the MOA allowed a State or Tribe to implement this rule while others thought it allowed additional flexibility beyond that permitted by this rule.

**Response 22:** The MOA process cannot allow wolf management beyond that authorized by this rule without further public comment and modification of this rule. The MOA process gives States or Tribes the opportunity to take the lead in implementing all parts of this rule, including issuance of take authorization, and determining what types and levels of control are necessary to manage problem wolves.

**Issue 23:** Some questioned whether this rule or an MOA under this rule would cover management of areas outside the 10(j) experimental population areas.

**Response 23:** This rule and related MOAs only apply to State or Tribal management inside the experimental population areas.

**Issue 24:** A few comments addressed the exclusion of Wyoming from this rule because Wyoming lacks a Service-approved plan. Some argued Wyoming's plan should have been approved. The support was mixed, some wanting this rule to apply in Wyoming, regardless of State plan approval. Others indicated that Wyoming should not get the benefit of this rule's additional flexibility without an adequate State plan.

**Response 24:** This rule will apply in Wyoming only after Wyoming has a wolf management plan that is approved by the Service. Likewise this rule will apply to any Tribal reservation land in Wyoming only after that Tribe has a wolf management plan approved by the Service. In the absence of a Service-approved wolf management plan, the 1994 10(j) rules still apply to Wyoming and all Tribal reservations within the experimental population areas in Wyoming.

**Issue 25:** Concerning the timing of implementation of the provisions of the rule, some wanted it to be effective immediately, others wanted a phase-in period. Some indicated that if the Secretary can terminate an MOA in 90

days, the States and Tribes should be allowed to do the same.

**Response 25-1:** This rule becomes effective in 30 days from date of publication. The Secretary will review any State or Tribal petition as soon as possible; references to a 30-day timeframe for acting on the MOA have been removed.

**Response 25-2:** The language in the final rule has been changed to allow either party to terminate the MOA with 90 days notice.

#### *H. General Comments on the Proposed Experimental Rule*

**Issue 26:** The bulk of the comments from the public were very similar. While most stated the proposed rule was not protective enough of wolves, others said it was too protective.

**Response 26:** We solicited comments to identify new information and search for new ideas to improve wolf management under this rule. We addressed the substantive comments we received, and did not modify this rule because more people expressed one opinion over another.

**Issue 27:** Some believed that States with approved wolf management plans should be able to be delisted separately.

**Response 27:** We are not proposing to delist the WDPS gray wolves at this time. Therefore, comments of this nature are not addressed in this rule. In addition, at this time the Act does not allow wolves to be delisted on a State-by-State basis.

#### *I. Comments Not Germane to This Rulemaking*

Some comments went beyond the scope of this rulemaking, or beyond the authority of Service or the Act. Since these issues do not relate to the action we proposed, they are not addressed here. These comments included support or opposition for future delisting proposals. Some indicated concern that this rule might lead to the killing of wolf-like canids (dogs) by the public. Some comments indicated wolves were either not native to the experimental areas, wolf reintroduction was illegal, wolf reintroduction usurped States' rights, that the type of wolf that currently lives in Montana, Idaho, and Wyoming is a non-native wolf, or that the Service fails to use the definition of a species as proposed by Linnaeus. Many of these types of comments were discussed in the reclassification rule (68 FR 15804). We also received comments expressing support for, and opposition to, wolf recovery and the proposal (or parts of it) without further elaboration or explanation.

**Issue 28:** Where did the idea for this rule come from; was it politically motivated?

**Response 28:** The Service proposed a rule revision in 1997 (62 FR 65237) but litigation postponed development of a final rule. The States, particularly Idaho, raised the issue of a rule revision in 2002 when the WDPS wolf population first achieved its recovery goal. However, the Service did not initiate a rule revision at that time because we believed the recovered wolf population should be delisted and instead focused our resources and efforts on helping the States develop wolf management plans and on preparing a delisting proposal. However, in 2004 after the Service did not approve the Wyoming wolf plan and it appeared delisting would be delayed, we reconsidered a rule change. The Service developed this rule to assist in management of the recovered wolf population and to begin the transition to increased State and Tribal involvement while we continue our efforts to delist the recovered wolf population.

#### **Changes to the Final Rule**

As a result of comments, additional data received during the comment period, and additional analysis, several changes were made to the special rule we proposed on March 9, 2004 (69 FR 10956). Every section of the rule received some degree of specific or general public comment. The following paragraphs discuss significant changes.

Comments showed a polarization over the issues of when, where, by whom, and under what circumstances lethal control would occur. The conditions under which a private citizen can take a wolf in this final rule differ slightly from the March 2004 proposed rule. The net result of the changes will likely slightly increase the level of problem wolf take by the public on public land, and slightly decrease the level of public wolf take on private land, over that proposed in March 2004. This rule will result in a higher level of problem wolf take on both private and public land by the public than the 1994 10(j) rules (see Comparison Table). We expect this take to be minimal, but it may slightly decrease the overall rate of livestock depredation and slightly decrease agency expenditures to control problem wolves. The main potential effect of this rule is to slightly shift the ability to remove problem wolves to the affected landowners and public land permittees, from the Service and our designated agent(s). These changes will more closely align wolf management strategy with existing State management of large carnivores and the approved Montana and Idaho State wolf management plans.

Since 1995, when the first wolves were reintroduced into the experimental population areas, less than two wolves have been taken by the public each year. Six wolves have been shot on private land as they attacked livestock and eight wolves were killed on private land under "shoot-on-sight" written authorizations for chronic livestock depredations. No wolves have been killed by the public on public land, even though the Service has issued written authorizations to shoot wolves attacking livestock on grazing allotments. Overall agency take to resolve conflicts with livestock, including authorized take by the public, resulted in an average of 6.6 percent (range 0–11.2 percent) and 2.9 percent (range 0–4.8 percent) of the NEP wolves being removed annually from 1995 through 2003, in the Yellowstone and central Idaho areas, respectively. Before wolves were reintroduced in 1995, we predicted that agency wolf control (including legal regulated take in defense of private property) would remove an average 10 percent of the population annually. We do not foresee this final rule increasing wolf mortality, including regulated take by the public in defense of their private property or by States or Tribes in response to unacceptable impacts to ungulate populations, to levels that average more than 10 percent annually, or to a level that threatens wolf recovery. Mandatory reporting and the requirement for evidence of wolf attacks are similar to State requirements for taking black bears and mountain lions to protect private property. These mandatory conditions should minimize the potential for abuse of the regulations and take of non-problem wolves.

Significant changes to and clarifications of the final rule are discussed in the following sections.

**1. Proposed**—Allowed only landowners and public land permittees to opportunistically harass wolves in a non-injurious manner at any time for any reason. Such harassment was allowed only when there were not purposeful actions to attract, track, wait for, or search out the wolf. Examples of this type of harassment include scaring the wolf with noise [yelling or shooting into the air], movement [running or driving toward the wolf], or objects [throwing a rock at a wolf or releasing bear pepper spray]. Such harassment must be of a very limited duration, cannot result in any injuries to the wolf, and must be reported to us or our designated agent(s) within 7 days.

**1. Final**—Allows anyone to opportunistically harass wolves in a non-injurious manner at any time for

any reason. All the same conditions as proposed apply in that such harassment must be conducted on an opportunistic basis, may not physically harm the wolf, and there can be no purposeful actions to attract, track, wait for or search out the wolf. Such harassment must be reported within 7 days.

**Discussion**—Wolves are normally wary of humans. However, wolves can become accustomed to being around people unless people teach them to avoid close contact. We believe that allowing anyone to opportunistically harass a wolf, as long as the wolf is not injured, will not result in any physical harm to wolves, but could make them more wary of people (Bangs and Shivik 2001; Bangs et al In press). Such harassment will provide people with an extra means to protect their livestock and pets from wolf conflict, without harming the wolf. Wary wolves should be more likely to avoid areas with high levels of human activity, which should reduce conflicts with people and their livestock, thereby reducing the level of reactive lethal control. Such non-injurious harassment should also make wolves more cautious of people which could reduce the opportunity for people to illegally take wolves.

**2. Proposed**—Allowed the take of wolves attacking any domestic animal on private land or when there was a “reasonable belief” that such an attack was imminent.

**2. Final**—Allows the take of wolves attacking (actually biting, wounding, grasping) or in the act of chasing, molesting, or harassing that would indicate to a reasonable person that such biting, wounding, grasping, or killing is likely to occur at any moment. On private land, wolves can be taken without written take authorization if they are attacking livestock (defined as cattle, sheep, horses, mules, goats, domestic bison, and livestock herding or guarding animals) or dogs. On public land, wolves can be taken without written take authorization when they are attacking livestock but only by a permittee with a current Federal land-use permit that requires livestock use. On both private and public land, evidence of an attack, such as wounded livestock, or evidence that a reasonable person would have believed an attack was likely to occur at any moment, such as indicators that livestock were being chased or harassed by wolves, and proximity of wolves to livestock, must be presented to investigators. This is more protective of wolves on private land because the final rule limits this take to livestock or dogs, less protective on public land because it allows take without take authorization, and overall,

less protective of wolves than the 1994 10(j) rules or the March 2004 proposed rule.

**Discussion**—Some wildlife law enforcement agents claimed parts of the proposed rule were unenforceable. For example, we received comments that “reasonable belief” was a vague term, as used in the proposed rule, and would invite abuse and killing of non-problem wolves. The definition of “in the act of attacking” in this final rule is consistent with existing State statutes regarding the legal take of mountain lions and black bears to protect private property. This type of “defense of property” regulation has generally worked well—take of both mountain lions and black bears under such State regulations is generally limited to less than 10 individuals per year. The wording in this final rule does not require determination of a person’s state of mind; instead it requires physical evidence to verify the attack, or physical evidence that a reasonable person would have believed an attack was likely to occur at any moment. Take of wolves must be reported within 24 hours (with additional reasonable time to report take allowed if access to the site is limited). Take without such evidence may be referred to the proper authorities for prosecution. Allowing public take of problem wolves in such a manner allows for effective removal of problem wolves and reduces the likelihood of abuse of the regulations.

**3. Proposed**—Allowed take on private land of a wolf attacking any domestic animal.

**3. Final**—Only allows take on private land of a wolf attacking livestock (cattle, sheep, horses, mules, goats, domestic bison, and herding and guarding animals) or dogs. This is more protective of wolves than the proposed rule and less protective than the 1994 10(j) rules.

**Discussion**—In 1987, the first livestock depredation by wolves in Montana in recent history occurred. From 1987 through 2003, wolves have been confirmed to have killed a minimum total of 301 cattle, 804 sheep, 20 other livestock (10 goats, 9 llamas, and a foal horse), and 63 dogs in Montana, Idaho, and Wyoming. There have been a few scattered reports of suspected wolf depredations on poultry, cats, or hares—but none of these were ever confirmed. Public comment indicated that abuse of the regulation was more likely if wolf take was allowed for any domestic animal. We agreed and concluded that wolf control should be restricted to types of domestic animals that have been attacked in the past, are common in the experimental areas, are often free-ranging, and are

large enough that if they are attacked there would be physical evidence to investigate and confirm wolf involvement.

**4. Proposed**—Allowed take, by grazing permittees on public land, of wolves attacking livestock, after a confirmed depredation on livestock had already occurred and a written Federal take authorization had been issued.

**4. Final**—Allows take by some public land permittees on public land of wolves attacking or in the act of attacking livestock—without written take authorization. Public land permittees include Tribal members who are legally grazing livestock on ceded lands under recognized treaty rights. This rule does not allow take of wolves by the general public on public land or take of wolves attacking dogs, with the exception of dogs being used by permittees for herding or guarding livestock. We believed that permittees should be allowed to immediately remove problem wolves without a take authorization, if wolves are caught in the act of attacking their livestock in their area of designated use. This is less protective of wolves than the proposed rule or the 1994 10(j) rules, but should lead to more effective control with more surety that the problem wolves are the ones taken.

**Discussion**—The most effective mechanism to target and remove individual problem wolves is to immediately take wolves seen attacking or in the act of attacking livestock. We believe that such take will be limited. To date no wolf has been legally taken on public land under a written lethal take authorization by a livestock producer who saw it attacking his/her livestock. The opportunity for abuse and excessive take is reduced by requirements to report the take, hold an active Federal land-use permit for livestock use or be a Tribal member exercising recognized treaty rights, and limit such take to a specific active allotment. We do not allow lethal take of wolves to protect hunting hounds or pet dogs that are not being used by permittees to guard or herd livestock, nor do we allow lethal take of wolves by the general public recreating on public lands to protect livestock or dogs. We believe that hound hunters and the general public can adequately protect their livestock and dogs on public land by opportunistic non-injurious harassment of wolves.

**5. Proposed**—Allowed issuance to private landowners or their adjacent neighbors or public land grazing permittees written take authorization of limited duration to shoot on sight wolves on private property or adjacent

private property or active allotment, after (1) One confirmed wolf depredation on livestock or domestic animals; and (2) We determine wolves are routinely present and are a significant risk.

5. *Final*—Allows issuance to private landowners with confirmed depredation on their private property or public land livestock grazing permittees, written take authorization of limited duration to shoot on sight wolves on their private property or their active allotment, after (1) One confirmed wolf depredation on livestock or dogs on that private property or one confirmed depredation on livestock on an active grazing allotment; (2) We or our designated agent(s) determine that wolves are routinely present and are a significant risk; and (3) We or our designated agent(s) are authorized to do lethal control. Written take authorization may be issued at our or our designated agent(s); discretion on a case-by-case basis to assist in the removal of problem wolves. On private land, this is less protective of wolves than the proposed rule, and more protective than the 1994 10(j) rules that allowed “shoot-on-sight” written take authorization to be issued after the second confirmed livestock depredation, even to adjacent neighbors who did not have previous depredations on their property. On public grazing allotments, it is less protective of wolves than the proposed rule or the 1994 10(j) rules.

*Discussion*—Shoot-on-sight written take authorizations should only be issued when the agencies also are actively trying to lethally remove problem wolves, as is currently the case. Such take authorizations should be an option on public land grazing allotments, where access and agency removal of problem wolves is often more difficult. Narrowing the scope by which such take authorizations can be issued will more closely focus removal on problem adult wolves and resolution of chronic livestock depredations, and will reduce the potential for abuse. This provision of the final rule is consistent with management of large predators causing property damage on public land under current State wildlife regulations.

6. *Proposed*—Allowed States or Tribes to lethally remove wolves causing unacceptable impacts to native ungulate populations or herds, after they consulted with the Service, and identified possible mitigation measures and remedies, and only if such take would not inhibit wolf recovery.

6. *Final*—Provides a process for the States or Tribes to lethally remove wolves in response to wild ungulate impacts, similar to the proposed rule

but in a more structured, transparent, and science-based process. The State or Tribe would develop a science-based plan and make it available for peer and public review. Based on that peer review and public comment, the State or Tribe would finalize the plan and then submit it to the Service for written concurrence. The Service would approve the plan if we determine the proposal is scientifically-based and would not reduce the wolf population below recovery levels. The final rule is similar to the proposed rule and less protective of wolves than the 1994 10(j) rules, which only allowed relocation of wolves in response to wild ungulate impacts.

*Discussion*—Commenters showed a lot of mistrust over the issue of lethally removing wolves for State ungulate management objectives. To provide checks and balances in this process and satisfy our mandates under the Act that our decisions are made upon the best scientific information available, we recommend an open, transparent, science-based process. We believe that scientific studies in North America demonstrate that under some circumstances wolf predation can effect ungulate populations and hunter harvest (Mech and Boitani 2003) and predicted as much in our 1994 EIS analysis of the effects of wolf reintroduction. Because there are no large blocks of unoccupied wolf habitat in the experimental population areas, this final rule allows for the lethal removal rather than relocation of wolves that are causing significant impact to State or Tribal managed ungulate herds.

7. *Proposed*—Required the release of any breeding female and her pups if caught on public land before October 1 during an initial agency wolf control action.

7. *Final*—Allows the Service or our designated agent(s) the discretion to decide whether to remove any depredating wolf, including breeding females or their pups, on public land after the first confirmed livestock depredation. The final rule is less protective of female wolves and their pups than either the proposed rule or the 1994 10(j) rules.

*Discussion*—Pups less than 6 months of age do not have permanent teeth and are rarely directly involved in killing livestock. However, breeding females can be active hunters for the pack, and packs with pups may need to hunt more often to feed the pups. Pups older than 6 weeks have been successfully reared by pack members other than the breeding female (Boyd and Jimenez 1994). Most livestock are not grazed on public land until June, when the pups

are old enough to be raised by other pack members. Pups younger than 6 months are rarely targeted during agency wolf control actions, but the alpha female may be identified as the primary livestock killer. The final rule allows the Service or our designated agent(s) more management flexibility to make decisions in the field on a case-by-case basis depending on the best information available at the time. We do not expect this flexibility to result in any significant increase in the take of either breeding females or pups, but control may occur earlier in the year than in the past.

8. *Proposed*—Allowed the States with accepted wolf management plans to petition the Secretary to assume wolf management authority and possibly identify and implement management strategies in the accepted State wolf plan beyond those identified in the proposed rule. The Secretary would have to respond within 30 days of receipt of the petition.

8. *Final*—Allows both States and Tribes on their reservations, with approved wolf management plans, to petition the Secretary to lead implementation of this rule. Under an MOA, the States or Tribes could authorize and conduct all the wolf management activities that the Service currently conducts and implement all portions of their approved State or Tribal wolf management plan that are consistent with this rule. These activities include: (1) Wolf monitoring—such as capture, radio-collaring, telemetry monitoring, and other wolf population census techniques; (2) wolf control—such as implementing or authorizing USDA—APHIS—WS to use non-lethal or lethal control to minimize damage to private property by wolves, issue written take authorizations (less-than-lethal munitions and shoot-on-sight written take authorizations) to the public on both private and public land; (3) determining whether wolf control is needed to resolve excessive wolf predation on big game populations; (4) wolf-related research—such as investigating the relationships between wolves and livestock and the effect of wolf predation on big game populations and hunter harvest; (5) conducting wolf information and educational programs; and (6) assisting in the enforcement of regulations designed to conserve the wolf population. All or some of these authorities and responsibilities also can be assumed without an MOA, with “designated agent” status under a cooperative agreement with the Service, but routine coordination on a daily or weekly basis is required. Under a cooperative agreement, only the specific

provisions of the 10(j) rule are implemented, not the State or Tribal wolf management plan. Under an MOA, all applicable portions of the State or Tribal wolf management plan which are consistent with this rule can be implemented. The Service oversight is limited to a general review of the overall program on an annual basis to ensure the wolf population is being maintained above recovery levels.

This rule eliminates reference to the 30-day requirement to approve an MOA. The Secretary will approve the petition as soon as possible but only after he/she determines all applicable policies and laws were appropriately addressed.

States or Tribes with approved plans may not implement additional management strategies beyond those identified in this rule, without a proposed amendment to the 10(j) rule and an opportunity for public comment.

**Discussion**—Commenters pointed out that the term “designated agent” was used inconsistently in the proposed rule, and that Tribes have unique wildlife management authorities and wildlife treaty rights separate from the States. In the final rule, we clarify that

the Tribes have their own rights and separate governments and have the ability to enter into an MOA with the Secretary of DOI if they have accepted wolf management plans for their reservation lands. States or Tribes with approved wolf management plans can become designated agents for the purposes of this rule in two ways:

(1) **Cooperative Agreements**—The States and Tribes can enter into cooperative agreements with the Service to implement portions of this experimental rule, and serve as Service’s “designated agent” for all or parts of this rule. States and Tribes that develop cooperative agreements with the Service are responsible for implementing this rule as written and are required to routinely consult with the Service on all the wolf management activities the States or Tribe has agreed to implement.

(2) **MOA**—Under an MOA, the Secretary may appoint the State or Tribe to be a “designated agent” and may delegate all wolf management responsibilities to the State or Tribe, and the State or Tribe may implement all portions of this rule and applicable

portions of their management plan without day-to-day oversight by the Service. These are in addition to the authorities given to a “designated agent.” Under an MOA, the States and Tribes must report to the Service on an annual basis, and the Service review ensures that State or Tribal management maintains the wolf population at or above recovery levels.

The differences between an MOA and a cooperative agreement are that the cooperative agreement allows the States or Tribes to assist the Service to implement various parts of the Service’s wolf conservation and management program as a designated agent, while the MOA provides the States or Tribes the opportunity to independently lead their approved wolf management and conservation efforts, plus act as a designated agent. The States and Tribes may enforce their own regulations and assist in our investigations under this rule, but under either a cooperative agreement or an MOA the Service retains the lead for law enforcement investigations and prosecution of violations of this rule.

#### FINAL RULE COMPARED TO THE 1994 EXPERIMENTAL POPULATION SPECIAL RULES AND THE 2003 4(D) RULE

Refer to the regulations in 50 CFR for the complete wording and reporting requirements.

Provision	Final experimental population rules 50 CFR 17.84(n)	1994 rules 50 CFR 17.84(i)	2003 4(d) Rule 50 CFR 17.40(n)
Geographic Area .....	Same as 1994 rules. This special rule applies only to wolves within the areas of two NEPs, which together include—Wyoming, the southern portion of Montana, & Idaho south of Interstate 90 but only in States or on Tribal lands that have State or Tribal wolf management plans accepted by the Secretary.	Same as final .....	This special applies to the gray wolf in Washington, Oregon, California, Idaho, Nevada, Montana, Utah north of U.S. Highway 50, and Colorado north of Interstate Highway 70, except where listed as an experimental population in Idaho, Montana, and Wyoming.
Interagency Coordination (Section 7 Consultation).	Same as 1994 rules. Federal agency consultation with the Service on agency actions that may affect gray wolves is not required within the two NEPs, unless those actions are on lands of the National Park System or the National Wildlife Refuge System.	Same as final .....	Consultations would occur for the gray wolf as they would for any threatened species.
Take in Self Defense.	Same as 1994 rules. Any person may take a wolf in self defense or in defense of others.	Same as final .....	Same as final.
Protection of Human Life & Safety.	Same as 1994 rules. The Service, or our designated agents, may promptly remove (that is, place in captivity or kill) any wolf determined by the Service or designated agent to be a threat to human life or safety.	Same as final .....	Same as final.
Opportunistic Harassment.	Anyone can opportunistically harass gray wolves in a non-injurious manner without Service written authorization.	Landowners & permit holders on Federal land (including guides & outfitters) can opportunistically harass gray wolves in a non-injurious manner without Service written authorization.	Same as 1994 rules.

**FINAL RULE COMPARED TO THE 1994 EXPERIMENTAL POPULATION SPECIAL RULES AND THE 2003 4(D) RULE—Continued**  
 Refer to the regulations in 50 CFR for the complete wording and reporting requirements.

Provision	Final experimental population rules 50 CFR 17.84(n)	1994 rules 50 CFR 17.84(i)	2003 4(d) Rule 50 CFR 17.40(n)
Intentional Harassment.	The Service or our designated agent can issue a 1-year take authorization to private landowners & to Federal permittees after verified persistent wolf activity on their private land or allotment. The written take authorization would allow intentional & potentially injurious, (less-than-lethal munitions) but non-lethal, harassment of wolves.	No specific provision for intentional harassment were available in the 1994 rules, but since 2000 over 150 intentional take authorizations have been issued for 90-days on private land, under Section 17.32 research permits within the experimental areas. No wolves have been seriously injured.	Same as final, except written authorization is for 90 days.
Taking wolves “in the act” of attacking livestock on PRIVATE land by private individuals without prior written authorization.	Landowners on their own private land may take a gray wolf attacking (killing, wounding, or biting) or in the act of attacking (actively chasing, molesting, harassing) their livestock (includes livestock herding & guarding animals) or dogs. Such take must be reported in 24 hours & injured or dead livestock or dogs or physical evidence that would lead a reasonable person to believe that an attack would occur at any moment on livestock or dogs must be evident to verify the wolf attack.	The 1994 rules allowed wolf take on private land without written authorization, when wolves were physically biting & grasping livestock (cattle, sheep, horses, & mules). Six wolves have been killed attacking livestock since 1995.	Landowners on their own private land may shoot wolves that are biting, wounding or killing livestock, herding or guard animals, or dogs. Landowners shall provide evidence of animals wounded or kill by wolves in less than 24 hours, and Service confirms animals were wounded or killed by wolves.
Taking persistent problem wolves “in the act” on PUBLIC land by public land permittees.	“Livestock” is defined to include livestock herding or guarding animals. Public land is only Federal land. Livestock producers & some permittees with an active valid Federal grazing or outfitting/guiding permits could take wolves that were attacking or in the act of attacking livestock on their active Federal allotment or areas of use—without written take authorization. Such taking must be reported within 24 hours & physical evidence of an attack or in the act of an attack by wolves on livestock must be evident.	The 1994 rules mandated that after six breeding pairs of wolves were established in an NEP area, livestock producers & permittees with current valid livestock grazing allotments on public land could get a 45-day written authorization from the Service or our designated agents, to take gray wolves in the act of killing, wounding, or biting livestock. The Service must have verified previous attacks by wolves, & must have completed agency efforts to resolve the problem. No wolves were ever taken under these written authorizations.	Same as 1994 rules, except written authorization to livestock grazing permittees would also allow the killing of wolves attacking herding or guard animals on Federal lands and there are no limitations based upon the number of breeding pairs.
Additional taking by private citizens on their PRIVATE LAND or an active GRAZING ALLOTMENT for chronic wolf depredation.	If we or our designated agent confirm a depredation on livestock or dogs on private property or livestock on a public grazing allotment, & we have confirmed that wolves are routinely present on that property & present a significant risk to livestock or dogs, & have authorized agency lethal control—the private landowner or grazing permittee that experienced the depredation may receive written authorization from us or our designated agent to kill “shoot on sight” those problem wolves on their private land or their grazing allotment, under specified conditions.	There were no specific provision for such written authorizations in the 1994 rules. However, since 1999, about 50 shoot-on-sight written take authorizations (CFR 17.32) have been issued on private land, including adjacent neighbors, with chronic (2 or more) livestock depredations. Eight wolves have been killed.	Same as 1994 rules, but specifically allows written authorization to shoot wolves on sight maybe issued to a private property owner or adjacent private landowners after at least two separate confirmed depredations by wolves on livestock, livestock herding or guarding animals, or dogs, and the Service has determined that wolves are routinely present and present a significant risk to their livestock.

**FINAL RULE COMPARED TO THE 1994 EXPERIMENTAL POPULATION SPECIAL RULES AND THE 2003 4(D) RULE—Continued**  
 Refer to the regulations in 50 CFR for the complete wording and reporting requirements.

Provision	Final experimental population rules 50 CFR 17.84(n)	1994 rules 50 CFR 17.84(i)	2003 4(d) Rule 50 CFR 17.40(n)
Government take of PROBLEM WOLVES.	Same as 1994, with wording clarifications. The Service or our designated agent may take any wolves that attack livestock or dogs once on private or public land—or that twice in a calendar year attack domestic animals other than livestock or dogs on private land. Taking may include non-lethal measures such as aversive conditioning, nonlethal control, &/or translocating wolves or lethal control. There are no agency limitations based on the total numbers of wolves or the sex & age of the wolves being controlled. Criteria to determine when take will be initiated are—(1) physical evidence of the attack, (2) reason to believe that additional attacks will occur, (3) no evidence of unusual wolf attractants, & (4) any previously specified animal husbandry practices have been implemented, if on public lands.	“Problem wolves” are defined as wolves that attack livestock once or any domestic animal twice in a calendar year. Depredations on dogs could only be resolved by relocation of the problem wolf. Criteria to determine when take will be initiated are similar to those for the NEP—(1) evidence of the attack, (2) reason to believe that additional attacks will occur, (3) no evidence of unusual wolf attractants, & (4) any previously specified animal husbandry practices have been implemented, if on public lands. Lethal control cannot be used when five or fewer packs are present in the experimental population area, & there is additional protection of females with pups & pups prior to October 1, when five or fewer pack or present in the experimental population area.	Same as 1994 rules, except as in final rule—includes dogs, and livestock herding an guarding animals.
Government removal killing or the translocation (capture & moving) of wolves to reduce impacts on wild ungulates.	Similar to the 1994 rules, but wolves may be lethally removed by State or Tribal personnel. If gray wolf predation is negatively impacting localized wild ungulate populations at an unacceptable level, as defined by the States & Tribes (on reservations) wolves maybe lethally removed. Removal can only occur after the States or Tribes have identified other possible mitigative measures or remedies, & they have completed a peer-reviewed written proposal that has undergone public comment. The Service will determine if such removal will inhibit maintaining wolf recovery levels before any such removal could be authorized.	Under the 1994 regulation, the States or Tribes may capture & translocate wolves to other areas within the same NEP area, if the gray wolf predation is negatively impacting localized wild ungulate populations at an unacceptable level, as defined by the States & Tribes. State/Tribal wolf management plans must be approved by the Service before such movement of wolves may be conducted, & the Service must determine that such translations will not inhibit wolf population growth toward recovery levels.	Same as 1994 rules, except after 10 breeding pairs are documented, the Service, in consultation with states and tribes, may relocate wolves that are significantly impacting native ungulate herds.
Incidental take .....	Same as 1994 rules with minor word changes for clarification. Any person may take a gray wolf if the take is incidental to an otherwise lawful activity, & if reasonable due care was practiced to avoid such taking, & such taking was reported within 24 hours. (We may allow additional time if access is limited.).	The 1994 rules stated—Any person may take a gray wolf if the take is incidental to an otherwise lawful activity, & is accidental, unavoidable, unintentional, not resulting from negligent conduct lacking reasonable due care, & due care was exercised to avoid taking the wolf.	Same as final.
Permits for recovery actions that include take of gray wolves.	Same as the 1994 rules. Available for scientific purposes, enhancement of propagation or survival, zoological exhibition, educational purposes, or other purposes consistent with the Act (50 CFR 17.32).	Available for scientific purposes, enhancement of propagation or survival, zoological exhibition, educational purposes, or other purposes consistent with the Act (50 CFR 17.32).	Same as final.

**FINAL RULE COMPARED TO THE 1994 EXPERIMENTAL POPULATION SPECIAL RULES AND THE 2003 4(D) RULE—Continued**  
 Refer to the regulations in 50 CFR for the complete wording and reporting requirements.

Provision	Final experimental population rules 50 CFR 17.84(n)	1994 rules 50 CFR 17.84(i)	2003 4(d) Rule 50 CFR 17.40(n)
Additional taking provisions for agency employees.	Same as the 1994 rules, except provision (H) was added. Any employee or agent of the Service or appropriate Federal, State, or Tribal agency, who is designated in writing for such purposes by the Service, when acting in the course of official duties, may take a wolf from the wild, if such action is for—(A) scientific purposes; (B) to avoid conflict with human activities; (C) to relocate a wolf within the NEP areas to improve its survival & recovery prospects; (D) to return wolves that have wandered outside of the NEP areas; (E) to aid or euthanize sick, injured, or orphaned wolves; (F) to salvage a dead specimen which may be used for scientific study; (G) to aid in law enforcement investigations involving wolves or (H) that allows such take of wolves to prevent wolves with abnormal physical or behavioral characteristics, as determined by the Service.	The 1994 rules permitted—Any employee or agent of the Service or appropriate Federal, State, or Tribal agency, who is designated in writing for such purposes by the Service, when acting in the course of official duties, may take a wolf from the wild, if such action is for—(A) scientific purposes; (B) to avoid conflict with human activities; (C) to relocate a wolf within the NEP areas to improve its survival & recovery prospects; (D) to return wolves that have wandered outside of the NEP areas; (E) to aid or euthanize sick, injured, or orphaned wolves; (F) to salvage a dead specimen which may be used for scientific study; (G) to aid in law enforcement investigations involving wolves.	Same as final.
The States or Tribes can become “designated agents” to implement the 10j regulations through cooperative agreements with the Service or under an MOA with the Secretary of the Interior.	The States & Tribes with approved wolf plans can implement all or select parts of this rule through “designated agent” status in cooperative agreements with the Service. Agency coordination would occur on a daily or weekly basis. The States & Tribes can implement all of this rule including all compatible portions of their approved wolf management plans under an MOA with the Secretary of the Interior. No management outside the provisions of this rule is allowed unless additional public comment is solicited & this rule is modified. Under an MOA, State or Tribal coordination with the Service must only occur on a yearly basis. No public hunting or trapping can occur without a determination of excessive population pressure.	The 1994 rule had no provisions for MOAs but States & Tribes could be designated agents & implement the 10j regulations, & expand certain rule definitions—such as the definition of livestock—under cooperative agreements with the Service. No public hunting or trapping can occur without a determination of excessive population pressure.	Same as 1994 rules but States and Tribes could be designated agents & implement the 4(d) rule.
Land-use restrictions on private or Federal public lands.	Land-use restrictions may only be employed for wolf recovery purposes on National Parks & National Wildlife Refuges except between April 1 & June 30, when land-use restrictions may be employed to prevent lethal take of wolves at active den sites on Federal public lands.	The 1994 rules stated—When five or fewer breeding pairs of wolves are in an experimental population area, temporary land-use restrictions may be employed on Federal public lands to control human disturbance around active wolf den sites. These restrictions may be required between April 1 & June 30, within 1 mile of active wolf den or rendezvous sites, & would only apply to Federal public lands or other such lands designated in State & Tribal wolf management plans. When six or more breeding pairs are established in an experimental population area, no land-use restrictions may be employed on Federal public lands outside of National Parks or National Wildlife Refuges, unless that wolf population fails to maintain positive growth rates for 2 consecutive years.	Same as final.

## Required Determinations

### Regulatory Planning and Review

In accordance with the criteria in Executive Order 12866, this rule is a significant regulatory action and subject to Office of Management and Budget (OMB) review. An economic analysis is not required because this rule will result in only minor (positive) effects on the very small percentage of livestock producers in Idaho and Montana.

(a) This regulation does not have an annual economic effect of \$100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. A brief assessment to clarify the costs and benefits associated with this rule follows.

### Costs Incurred

Under this rule, various expenses that are currently incurred by the Service to manage the wolves in the NEPs would be transferred to the States or Tribes, either through a cooperative agreement or under a Memorandum of Agreement (MOA) entered into voluntarily by a State or Tribe. Although potential costs are addressed here, we do not quantify these expected expenditures. Costs would include personnel costs to implement, manage, and monitor the NEP. The personnel costs would be based upon the number of hours (and associated salary) necessary to perform these tasks. Other costs would include transportation and equipment necessary to maintain the NEP. States currently estimate their management costs will be 2–3 times higher than our current costs of \$300K per State.

We have funded State and Tribal wolf monitoring, research, and management planning efforts for gray wolves in Montana, Idaho, and Wyoming. For the past several years Congress has targeted funding for wolf management to Montana, Idaho, and Wyoming, and the Nez Perce. In addition, Federal grant programs are available that fund wildlife management programs by the States and Tribes. The Cooperative Endangered Species Conservation Fund, for example, provides funds to states for species and habitat conservation actions for threatened and endangered and other at-risk species.

### Benefits Accrued

This rule would have a beneficial economic effect in that it would reduce or remove some regulatory restrictions. The objective of the rule is to maintain wolf recovery in the WDPS, which would result in a variety of benefits. This rule will also reduce the overall level of conflicts between wolves and

livestock, particularly on private land. This rule is expected to result in more public removal of problem wolves, thereby reducing the need for reactive agency removal of problem wolves. The methods necessary to quantify these expected benefits would be prohibitively expensive to conduct. Therefore, this section is limited to qualitative analysis. The potential benefits include maintaining a recovered wolf population and reducing conflicts between wolves and humans, leading to higher local tolerance of wolves and perhaps a lower level of illegal killing.

(b) This regulation does not create inconsistencies with other agencies' actions. It is exactly the same as the other NEP rules currently in effect, in regards to agency responsibilities under Section 7 of the ESA. This rule reflects continuing success in recovering the gray wolf through long-standing cooperative and complementary programs by a number of Federal, State, and Tribal agencies. Implementation of Service-approved State or Tribal wolf management plans supports these existing partnerships.

(c) This rule will not alter the budgetary effects or entitlements, grants, user fees, or loan programs, or the rights and obligations of their recipients. Because there are no expected new impacts or restrictions to existing human uses of lands in Idaho or Montana as a result of this rule, nor in Wyoming or any Tribal reservations that remain under the 1994 10(j) rules, no entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients are expected to occur.

(d) This rule does not raise novel legal or policy issues. Since 1994, we have promulgated section 10(j) rules for gray wolves in Idaho, Montana, and Yellowstone (Idaho/Wyoming). The gray wolves in the WDPS have achieved their recovery population numbers. A status review of the species' listing status has determined that the species could be delisted once a State wolf management plan has been approved by the Service for Montana, Idaho, and Wyoming. State management plans have been determined by the Service to be the most appropriate means of maintaining a recovered wolf population and of providing adequate regulatory mechanisms post-delisting (*i.e.*, addressing factor D, "inadequacy of existing regulatory mechanisms" of the five listing factors identified under section 4(a)(1) of the Act) because the primary responsibility for management of the species will rest with the States upon delisting and subsequent removal of the protections of the Act. The States

of Idaho and Montana have Service-approved wolf management plans. For a variety of reasons, the Service determined that Wyoming's current State law and its wolf management plan do not suffice as an adequate regulatory mechanism for the purposes of delisting (letter from Service Director Steven Williams to Montana, Idaho, and Wyoming, January 13, 2004). The Service developed this rule to assist in management of the recovered wolf population and to begin the transition to increased State and Tribal involvement while we continue our efforts to delist the recovered wolf population.

### Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. The SBREFA also amended the Regulatory Flexibility Act to require a certification statement. Based on the information that is available to us at this time, we certify that this regulation will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

The majority of wolves in the West are currently protected under NEP designations that cover Wyoming, most of Idaho, and southern Montana and that treat wolves as a threatened species. Special regulations exist for these experimental populations that currently allow government employees and designated agents, as well as livestock producers, to take problem wolves. This regulation does not change the nonessential experimental designation, but does contain additional special regulations so that States and Tribes with wolf management plans approved by the Service can petition the Service to manage nonessential experimental

wolves under this more flexible rule. These changes only have effect in States or Tribes (on Tribal reservations) that have an approved management plan for gray wolves. Within the Western DPS of the gray wolf, only the States of Idaho and Montana have approved plans. Therefore, the regulation is expected to result in a small economic gain to some livestock producers in States with approved wolf management plans (*i.e.*, Idaho and Montana) within the boundary of the NEPs of gray wolves in the Western DPS (Central Idaho NEP area and Yellowstone NEP area); it will have no economic impact on livestock producers in Wyoming or on any Tribal reservations in Wyoming as at this time their plans have not been approved.

This regulation adopts certain provisions of § 17.40(n), which covers the area in northwestern Montana outside of the two NEP areas mentioned above and adjacent States, providing for more consistent management both inside and outside of the NEP areas, unless identified otherwise. Additionally, new regulations were added that expand or clarify current prohibitions. Secondly, we identify a process for transferring authorities within the experimental population boundaries to States or Tribes with approved plans.

Expanded or clarified prohibitions in this rule include the following. Intentional or potentially injurious harassment can occur by written take authorization on private land and public land. Wolves attacking not only livestock, but also dogs, on private land can be taken without a permit if they are caught in the act of attacking such animals. On public land, some permittees can take wolves attacking livestock without a permit. Written authorizations can be issued by the Service to take wolves on private land if they are a significant risk to livestock or dogs or on public lands if livestock are at risk. The new special regulation clarifies how take of wolves can occur if they are determined to be causing unacceptable impacts to wild ungulate populations. In addition, the new special regulation define livestock to include herding and guarding animals.

The new special regulation provides for States or Tribes with wolf management plans approved by the Service to transition from the provisions of this rule to the provisions of the State or Tribal wolf management plan that are consistent with Federal regulations within the boundaries of the NEP areas. States or Tribes may, at their discretion, administer this transition through new or existing agreements with the Service.

In anticipation of delisting the Western DPS of the gray wolf, we have worked closely with States to ensure that their plans provide the protection and flexibility necessary to manage wolves at or above recovery levels. Approved plans are those plans that have passed peer review and Service scrutiny aimed at ensuring that recovery levels are maintained. It is appropriate to have States which have met this approval standard begin managing wolves according to their approved plans for several reasons. The States already assume an important role in the management of this species, the goals for recovery have been exceeded, and a gradual transfer of responsibilities while the wolves are protected under the Act provides an adjustment period for both the State wildlife agencies, Federal agencies (the Service, USDA), and Tribes. The adjustment period will allow time to work out any unforeseen issues that may arise.

The reduced restrictions on taking problem wolves in this rule will make their control easier and more effective, thus reducing the economic losses that result from wolf depredation on livestock and guard animals and dogs. Furthermore, a private program compensates livestock producers if they suffer confirmed livestock losses by wolves. Since 1995, annual compensation for livestock losses has averaged \$17,000 in each recovery area. The potential effect on livestock producers in western States is very small, but more flexible wolf management will be entirely beneficial to the operations of a few individuals.

#### *Small Business Regulatory Enforcement Fairness Act*

This regulation is not a major rule under 5 U.S.C. 801 *et seq.*, the SBREFA.

(a) This regulation will not have an annual effect on the economy of \$100 million or more and is fully expected to have no significant economic impacts. The majority of livestock producers within the range of the wolf are on small ranches, and the total number of livestock producers that may be affected by wolves is small. The regulation further reduces the effect that wolves will have on individual livestock producers by eliminating some permit requirements. Compensation programs also are in place to offset losses to individual livestock producers. Thus, even if livestock producers affected are small businesses, the combined economic effects are minimal and provide a benefit to small business.

(b) This regulation will not cause a major increase in costs or prices for consumers, individual industries,

Federal, State, or local government agencies, or geographic regions and will impose no additional regulatory restraints in addition to those already in operation.

(c) This regulation will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises. Based on the analysis of identified factors, we have determined that no individual industries within the United States will be significantly affected and that no changes in the demography of populations are anticipated. The intent of this special rule is to facilitate and continue existing commercial activities while providing for the conservation of species by better addressing the concerns of affected landowners and the impacts of a biologically recovered wolf population.

#### *Unfunded Mandates Reform Act*

The regulation defines a process for voluntary and cooperative transfer of management responsibilities for a listed species back to the States. Therefore, in accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501, *et seq.*):

(a) This rule will not “significantly or uniquely” affect small governments. A Small Government Agency Plan is not required. As stated above, this regulation will result in only minor positive economic effects for a very small percentage of livestock producers.

(b) This rule will not produce a Federal mandate of \$100 million or greater in any year; that is, it is not a “significant regulatory action” under the Unfunded Mandates Reform Act. This rule is not expected to have any significant economic impacts nor will it impose any unfunded mandates on other Federal, State or local government agencies to carry out specific activities.

#### *Takings (Executive Order 12630)*

In accordance with Executive Order 12630, this rule will not have significant implications concerning taking of private property by the Federal government. This rule will substantially advance a legitimate government interest (conservation and recovery of listed species) and will not present a bar to all reasonable and expected beneficial use of private property. Because of the regulatory flexibility provided by NEP designations under section 10(j) of the Act, we believe that the increased flexibility in this regulation and State or Tribal lead wolf management will reduce regulatory restrictions on private lands and will result in minor positive

economic effects for a small percentage of livestock producers.

**Federalism (Executive Order 13132)**

In accordance with Executive Order 13132, this regulation will not have significant Federalism effects. This rule will not have substantial direct effects on the States, on the relationship between the States and the Federal Government, or on the distribution of power and responsibilities among the various levels of government. The State wildlife agencies in Idaho and Montana requested that we undertake this rulemaking in order to assist the States in reducing conflicts with local landowners and returning the species to State or Tribal management. Maintaining the recovery goals for these wolves will contribute to their eventual delisting and their return to State management. No intrusion on State policy or administration is expected; roles or responsibilities of Federal or State governments will not change; and fiscal capacity will not be substantially directly affected. The special rule operates to maintain the existing relationship between the States and the Federal government and is being undertaken at the request of State agencies. We have endeavored to cooperate with the States in the preparation of this rule. Therefore, this rule does not have significant Federalism effects or implications to warrant the preparation of a Federalism Assessment pursuant to the provisions of Executive Order 13132.

**Civil Justice Reform (Executive Order 12988)**

In accordance with Executive Order 12988, the DOI has determined that this rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of the order.

**Paperwork Reduction Act**

Office of Management and Budget (OMB) regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) require that Federal agencies obtain approval from OMB before collecting information from the public. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it

displays a currently valid control number. This rule does not contain any new collections of information other than those permit application forms already approved under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and assigned Office of Management and Budget clearance number 1018-0094, and the collection of information on experimental populations already approved under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and assigned Office of Management and Budget clearance number 1018-0095.

**National Environmental Policy Act**

In 1994, the Service issued an EIS (Service 1994) that addressed the impacts of introducing gray wolves to Yellowstone National Park and central Idaho and the NEP rule for these reintroductions. The 1994 EIS addressed cooperative agreements whereby the States of Wyoming, Montana, and Idaho could assume the lead for implementing wolf recovery and anticipated that the States and Tribes would be the primary agencies implementing the experimental population rule outside National Parks and National Wildlife Refuges. We evaluated whether any revisions to the EIS were required prior to finalizing this proposed regulation, and determined that there are no new significant impacts or effects caused by this rule beyond those previously identified and evaluated in the Service's 1994 EIS on wolf reintroduction. Thus, we are adopting the prior EIS for this rulemaking because the analysis is still applicable, *i.e.*, the conditions have not changed and the action has not changed significantly.

**Government-to-Government Relationship With Tribes (Executive Order 13175)**

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and 512 DM 2, we are coordinating this rule with affected Tribes within the Western DPS. We fully considered all of the comments on the proposed special regulation that were submitted during the public comment period and attempted to address those concerns, new data, and new information where appropriate.

The Service representatives met with members of the Nez Perce Tribe in October 2004 to discuss wolf management in Idaho.

**Energy Supply, Distribution or Use (Executive Order 13211)**

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

**References Cited**

A complete list of all references cited in this rulemaking is available upon request from our Helena office (see **ADDRESSES** section).

**List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

**Final Regulation Promulgation**

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

**PART 17—[AMENDED]**

■ 1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99-625, 100 Stat. 3500, unless otherwise noted.

■ 2. Amend § 17.11(h) by revising the existing entries in the List of Endangered and Threatened Wildlife under MAMMALS for "Western Distinct Population Segment U.S.A. (CA, ID, MT, NV, OR, WA, WY, UT north of U.S. Highway 50, and CO north of Interstate Highway 70, except where listed as an experimental population)" and "Wolf, gray U.S.A. (WY and portions of ID and MT)" to read as follows:

**§ 17.11 Endangered and threatened wildlife.**

\* \* \* \* \*  
(h) \* \* \*

Species	Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name					

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	*
<b>MAMMALS</b>							
*	*	*	*	*	*	*	*
Wolf, gray .....	<i>Canis lupus</i> .....	Holarctic .....	Western Distinct Population Segment—U.S.A. (CA, ID, MT, NV, OR, WA, WY, UT north of U.S. Highway 50, and CO north of Interstate Highway 70, except where listed as an experimental population).	T	1, 6, 13, 15, 35, 561, 562, 735, 745	N/A	17.40(n)
*	*	*	*	*	*	*	*
Wolf, gray .....	<i>Canis lupus</i> .....	Holarctic .....	U.S.A. (WY and portions of ID and MT—see 17.84(i)).	XN	561, 562, 745	N/A	17.84(i), 17.84(n)
*	*	*	*	*	*	*	*

■ 3. Amend 17.84 by adding paragraph (n), including maps, as set forth below:

**§ 17.84 Special rules—vertebrates.**

\* \* \* \* \*

(n) Gray wolf (*Canis lupus*). (1) The gray wolves (wolf) identified in paragraphs (n)(9)(i) and (ii) of this section are nonessential experimental populations. These wolves will be managed in accordance with the respective provisions of this paragraph (n) in the boundaries of the nonessential experimental population (NEP) areas within any State or Tribal reservation that has a wolf management plan that has been approved by the Service, as further provided in this paragraph (n). Furthermore, any State or Tribe that has a wolf management plan approved by the Service can petition the Secretary of the Department of the Interior (DOI) to assume the lead authority for wolf management under this rule within the borders of the NEP areas in their respective State or reservation.

(2) The Service finds that management of nonessential experimental gray wolves, as defined in this paragraph (n), will further the conservation of the species.

(3) Definitions of terms used in paragraph (n) of this section follow:

**Active den site**—A den or a specific above-ground site that is being used on a daily basis by wolves to raise newborn pups during the period April 1 to June 30.

**Breeding pair**—An adult male and an adult female wolf that, during the previous breeding season, produced at least two pups that survived until December 31 of the year of their birth.

**Designated agent**—Includes Federal agencies authorized or directed by the Service, and States or Tribes with a wolf management plan approved by the

Director of the Service and with established cooperative agreements with us or Memoranda of Agreement (MOAs) approved by the Secretary of the DOI. Federal agencies, States, or Tribes may become “designated agents” through cooperative agreements with the Service whereby they agree to assist the Service to implement some portions of this rule. If a State or Tribe becomes a “designated agent” through a cooperative agreement, the Service will help coordinate their activities and retain authority for program direction, oversight, and guidance. States and Tribes with approved plans also may become “designated agents” by submitting a petition to the Secretary to establish an MOA under this rule. Once accepted by the Secretary, the MOA may allow the State or Tribe to assume lead authority for wolf management and to implement the portions of their State or Tribal plans that are consistent with this rule. The Service oversight (aside from Service law enforcement investigations) under an MOA is limited to monitoring compliance with this rule, issuing written authorizations for wolf take on reservations without approved wolf management plans, and an annual review of the State or Tribal program to ensure the wolf population is being maintained above recovery levels.

**Domestic animals**—Animals that have been selectively bred over many generations to enhance specific traits for their use by humans, including use as pets. This includes livestock (as defined below) and dogs.

**Intentional harassment**—The deliberate and pre-planned harassment of wolves, including by less-than-lethal munitions (such as 12-gauge shotgun rubber-bullets and bean-bag shells), that are designed to cause physical

discomfort and temporary physical injury but not death. The wolf may have been tracked, waited for, chased, or searched out and then harassed.

**In the act of attacking**—The 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.

**Landowner**—An owner of private land, or his/her immediate family members, or the owner's employees who are currently employed to actively work on that private land. In addition, the owner(s) (or his/her employees) of livestock that are currently and legally grazed on that private land and other lease-holders on that private land (such as outfitters or guides who lease hunting rights from private landowners), are considered landowners on that private land for the purposes of this regulation. Private land, under this regulation, also includes all non-Federal land and land within Tribal reservations. Individuals legally using Tribal lands in States with approved plans are considered landowners for the purposes of this rule. “Landowner” in this regulation includes legal grazing permittees or their current employees on State, county, or city public or Tribal grazing lands.

**Livestock**—Cattle, sheep, horses, mules, goats, domestic bison, and herding and guarding animals (llamas, donkeys, and certain breeds of dogs commonly used for herding or guarding livestock). Livestock excludes dogs that are not being used for livestock guarding or herding.

**Non injurious**—Does not cause either temporary or permanent physical damage or death.

**Opportunistic harassment**—

Harassment without the conduct of prior purposeful actions to attract, track, wait for, or search out the wolf.

**Private land**—All land other than that under Federal Government ownership and administration and including Tribal reservations.

**Problem wolves**—Wolves that have been confirmed by the Service or our designated agent(s) to have attacked or been in the act of attacking livestock or dogs on private land or livestock on public land within the past 45 days. Wolves that we or our designated agent(s) confirm to have attacked any other domestic animals on private land twice within a calendar year are considered problem wolves for purposes of agency wolf control actions.

**Public land**—Federal land such as that administered by the National Park Service, Service, Bureau of Land Management, USDA Forest Service, Bureau of Reclamation, Department of Defense, or other agencies with the Federal Government.

**Public land permittee**—A person or that person's employee who has an active, valid Federal land-use permit to use specific Federal lands to graze livestock, or operate an outfitter or guiding business that uses livestock. This definition does not include private individuals or organizations who have Federal permits for other activities on public land such as collecting firewood, mushrooms, antlers, Christmas trees, or logging, mining, oil or gas development, or other uses that do not require livestock. In recognition of the special and unique authorities of Tribes and their relationship with the U.S. Government, for the purposes of this rule, the definition includes Tribal members who legally graze their livestock on ceded public lands under recognized Tribal treaty rights.

**Remove**—Place in captivity, relocate to another location, or kill.

**Research**—Scientific studies resulting in data that will lend to enhancement of the survival of the gray wolf.

**Rule—Federal regulations**—“This rule” or “this regulation” refers to this final NEP regulation; “1994 rules” refers to the 1994 NEP rules (50 CFR 17.84(i)); and “4(d) rule” refers to the 2003 special 4(d) regulations for threatened wolves in the Western DPS (50 CFR 17.40(n)), outside of the experimental population areas.

**Unacceptable impact**—State or Tribally-determined decline in a wild ungulate population or herd, primarily caused by wolf predation, so that the

population or herd is not meeting established State or Tribal management goals. The State or Tribal determination must be peer-reviewed and reviewed and commented on by the public, prior to a final determination by the Service that an unacceptable impact has occurred, and that wolf removal is not likely to impede wolf recovery.

**Wounded**—Exhibiting scraped or torn hide or flesh, bleeding, or other evidence of physical damage caused by a wolf bite.

(4) **Allowable forms of take of gray wolves**. The following activities, only in the specific circumstances described under this paragraph (n)(4), are allowed: opportunistic harassment; intentional harassment; take on private land; take on public land; take in response to impacts on wild ungulate populations; take in defense of human life; take to protect human safety; take by designated agents to remove problem wolves; incidental take; take under permits; take per authorizations for employees of designated agents; and take for research purposes. Other than as expressly provided in this rule, all other forms of take are considered a violation of section 9 of the Act. Any wolf or wolf part taken legally must be turned over to the Service unless otherwise specified in this paragraph (n). Any take of wolves must be reported as outlined in paragraph (n)(6) of this section.

(i) **Opportunistic harassment**. Anyone may conduct opportunistic harassment of any gray wolf in a non-injurious manner at any time. Opportunistic harassment must be reported to the Service or our designated agent(s) within 7 days as outlined in paragraph (n)(6) of this section.

(ii) **Intentional harassment**. After we or our designated agent(s) have confirmed wolf activity on private land, on a public land grazing allotment, or on a Tribal reservation, we or our designated agent(s) may issue written take authorization valid for not longer than 1 year, with appropriate conditions, to any landowner or public land permittee to intentionally harass wolves. The harassment must occur in the area and under the conditions as specifically identified in the written take authorization.

(iii) **Take by landowners on their private land**. Landowners may take wolves on their private land in the following two additional circumstances:

(A) Any landowner may immediately take a gray wolf in the act of attacking livestock or dogs on their private land, provided the landowner provides evidence of livestock or dogs recently (less than 24 hours) wounded, harassed,

molested, or killed by wolves, and we or our designated agent(s) are able to confirm that the livestock or dogs were wounded, harassed, molested, or killed by wolves. The carcass of any wolf taken and the area surrounding it should not be disturbed in order to preserve physical evidence that the take was conducted according to this rule. The take of any wolf without such evidence of a direct and immediate threat may be referred to the appropriate authorities for prosecution.

(B) A landowner may take wolves on his/her private land if we or our designated agent issued a “shoot-on-sight” written take authorization of limited duration (45 days or less), and if:

(1) This landowner's property has had at least one depredation by wolves on livestock or dogs that has been confirmed by us or our designated agent(s) within the past 30 days; and

(2) We or our designated agent(s) have determined that problem wolves are routinely present on that private property and present a significant risk to the health and safety of other livestock or dogs; and

(3) We or our designated agent(s) have authorized agency lethal removal of problem wolves from that same property. The landowner must conduct the take in compliance with the written take authorization issued by the Service or our designated agent(s).

(iv) **Take on public land**. Any livestock producer and public land permittee (see definitions in paragraph (n)(3) of this section) who is legally using public land under a valid Federal land-use permit may immediately take a gray wolf in the act of attacking his/her livestock on his/her allotment or other area authorized for his/her use without prior written authorization, provided that producer or permittee provides evidence of livestock recently (less than 24 hours) wounded, harassed, molested, or killed by wolves, and we or our designated agent(s) are able to confirm that the livestock were wounded, harassed, molested, or killed by wolves. The carcass of any wolf taken and the area surrounding it should not be disturbed, in order to preserve physical evidence that the take was conducted according to this rule. The take of any wolf without such evidence may be referred to the appropriate authorities for prosecution.

(A) At our or our designated agent(s)' discretion, we or our designated agent(s) also may issue a shoot-on-sight written take authorization of limited duration (45 days or less) to a public land grazing permittee to take problem wolves on

that permittee's active livestock grazing allotment if:

(1) The grazing allotment has had at least one depredation by wolves on livestock that has been confirmed by us or our designated agent(s) within the past 30 days; and

(2) We or our designated agent(s) have determined that problem wolves are routinely present on that allotment and present a significant risk to the health and safety of livestock; and

(3) We or our designated agent(s) have authorized agency lethal removal of problem wolves from that same allotment.

(B) The permittee must conduct the take in compliance with the written take authorization issued by the Service or our designated agent(s).

(v) *Take in response to wild ungulate impacts.* If wolf predation is having an unacceptable impact on wild ungulate populations (deer, elk, moose, bighorn sheep, mountain goats, antelope, or bison) as determined by the respective State or Tribe, a State or Tribe may lethally remove the wolves in question.

(A) In order for this provision to apply, the States or Tribes must prepare a science-based document that:

(1) Describes what data indicate that ungulate herd is below management objectives, what data indicate the impact by wolf predation on the ungulate population, why wolf removal is a warranted solution to help restore the ungulate herd to State or Tribal management objectives, the level and duration of wolf removal being proposed, and how ungulate population response to wolf removal will be measured;

(2) Identifies possible remedies or conservation measures in addition to wolf removal; and

(3) Provides an opportunity for peer review and public comment on their proposal prior to submitting it to the Service for written concurrence.

(B) We must determine that such actions are scientifically-based and will not reduce the wolf population below recovery levels before we authorize lethal wolf removal.

(vi) *Take in defense of human life.* Any person may take a gray wolf in defense of the individual's life or the life of another person. The unauthorized taking of a wolf without demonstration of an immediate and direct threat to human life may be referred to the appropriate authorities for prosecution.

(vii) *Take to protect human safety.* We or our designated agent(s) may promptly remove any wolf that we or our designated agent(s) determines to be a threat to human life or safety.

(viii) *Take of problem wolves by Service personnel or our designated agent(s).* We or our designated agent(s) may carry out harassment, non lethal control measures, relocation, placement in captivity, or lethal control of problem wolves. To determine the presence of problem wolves, we or our designated agent(s) will consider all of the following:

(A) Evidence of wounded livestock, dogs, or other domestic animals, or remains of livestock, dogs, or domestic animals that show that the injury or death was caused by wolves, or evidence that wolves were in the act of attacking livestock, dogs, or domestic animals;

(B) The likelihood that additional wolf-caused losses or attacks may occur if no control action is taken;

(C) Evidence of unusual attractants or artificial or intentional feeding of wolves; and

(D) Evidence that animal husbandry practices recommended in approved allotment plans and annual operating plans were followed.

(ix) *Incidental take.* Take of a gray wolf is allowed if the take is accidental and incidental to an otherwise lawful activity and if reasonable due care was practiced to avoid such take, and such take is reported within 24 hours. Incidental take is not allowed if the take is not accidental or if reasonable due care was not practiced to avoid such take, or it was not reported within 24 hours (we may allow additional time if access to the site of the take is limited), and we may refer such taking to the appropriate authorities for prosecution. Shooters have the responsibility to identify their target before shooting. Shooting a wolf as a result of mistaking it for another species is not considered accidental and may be referred to the appropriate authorities for prosecution.

(x) *Take under permits.* Any person with a valid permit issued by the Service under § 17.32, or our designated agent(s), may take wolves in the wild, pursuant to terms of the permit.

(xi) *Additional take authorization for agency employees.* When acting in the course of official duties, any employee of the Service or our designated agent(s) may take a wolf or wolf-like canid for the following purposes:

(A) Scientific purposes;

(B) To avoid conflict with human activities;

(C) To further wolf survival and recovery;

(D) To aid or euthanize sick, injured, or orphaned wolves;

(E) To dispose of a dead specimen;

(F) To salvage a dead specimen that may be used for scientific study;

(G) To aid in law enforcement investigations involving wolves; or

(H) To prevent wolves or wolf-like canids with abnormal physical or behavioral characteristics, as determined by the Service or our designated agent(s), from passing on or teaching those traits to other wolves.

(I) Such take must be reported to the Service within 7 days as outlined in paragraph (n)(6) of this section, and specimens are to be retained or disposed of only in accordance with directions from the Service.

(xii) *Take for research purposes.* We may issue permits under § 17.32, or our designated agent(s) may issue written authorization, for individuals to take wolves in the wild pursuant to approved scientific study proposals. Scientific studies should be reasonably expected to result in data that will lend to development of sound management of the gray wolf, and lend to enhancement of its survival as a species.

(5) *Federal land use.* Restrictions on the use of any Federal lands may be put in place to prevent the take of wolves at active den sites between April 1 and June 30. Otherwise, no additional land-use restrictions on Federal lands, except for National Parks or National Wildlife Refuges, may be necessary to reduce or prevent take of wolves solely to benefit gray wolf recovery under the Act. This prohibition does not preclude restricting land use when necessary to reduce negative impacts of wolf restoration efforts on other endangered or threatened species.

(6) *Reporting requirements.* Except as otherwise specified in paragraph (n) of this section or in a permit, any take of a gray wolf must be reported to the Service or our designated agent(s) within 24 hours. We will allow additional reasonable time if access to the site is limited. Report any take of wolves, including opportunistic harassment, to U.S. Fish and Wildlife Service, Western Gray Wolf Recovery Coordinator (100 North Park, Suite 320, Helena, Montana 59601, 406-449-5225 extension 204; facsimile 406-449-5339), or a Service-designated agent of another Federal, State, or Tribal agency. Unless otherwise specified in paragraph (n) of this section, any wolf or wolf part taken legally must be turned over to the Service, which will determine the disposition of any live or dead wolves.

(7) No person shall possess, sell, deliver, carry, transport, ship, import, or export by any means whatsoever, any wolf or part thereof from the experimental populations taken in violation of the regulations in paragraph (n) of this section or in violation of

applicable State or Tribal fish and wildlife laws or regulations or the Act.

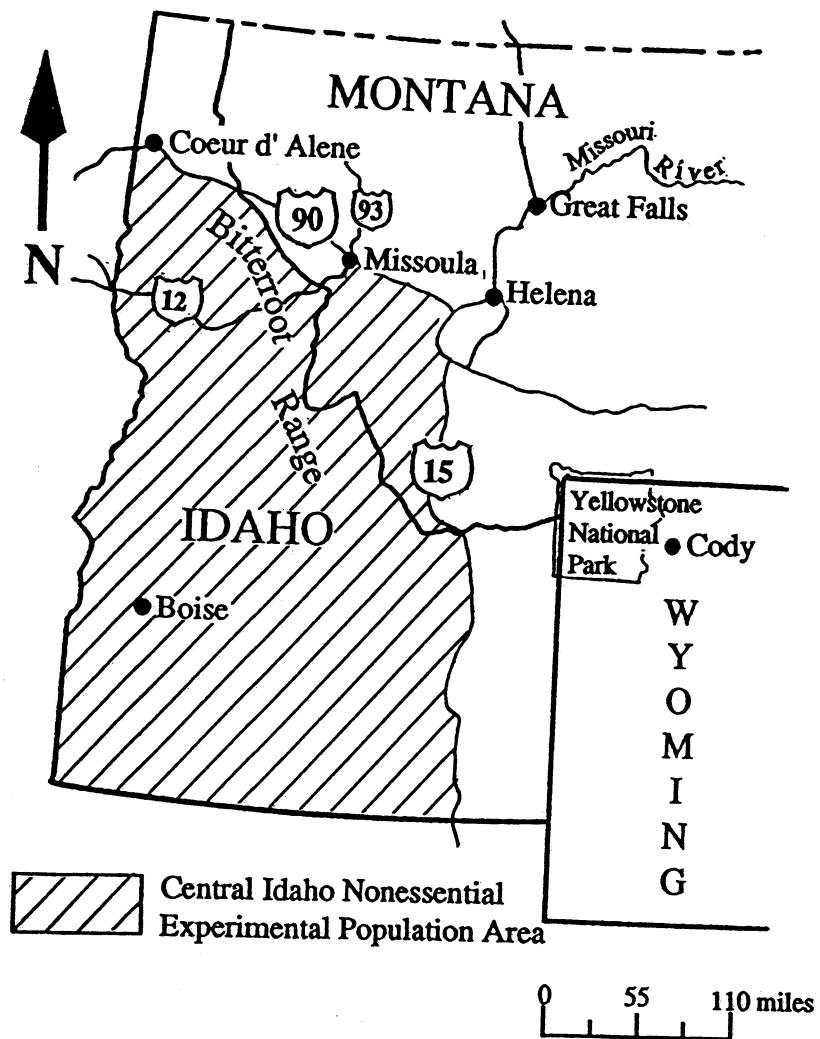
(8) It is unlawful for any person to attempt to commit, solicit another to commit, or cause to be committed any offense defined in this section.

(9) The sites for these experimental populations are within the historic range of the species as designated in § 17.84(i)(7):

(i) The central Idaho NEP area is shown on Map 1. The boundaries of the NEP area are those portions of Idaho

that are south of Interstate Highway 90 and west of Interstate 15, and those portions of Montana south of Interstate 90, Highways 93 and 12 from Missoula, Montana, west of Interstate 15.

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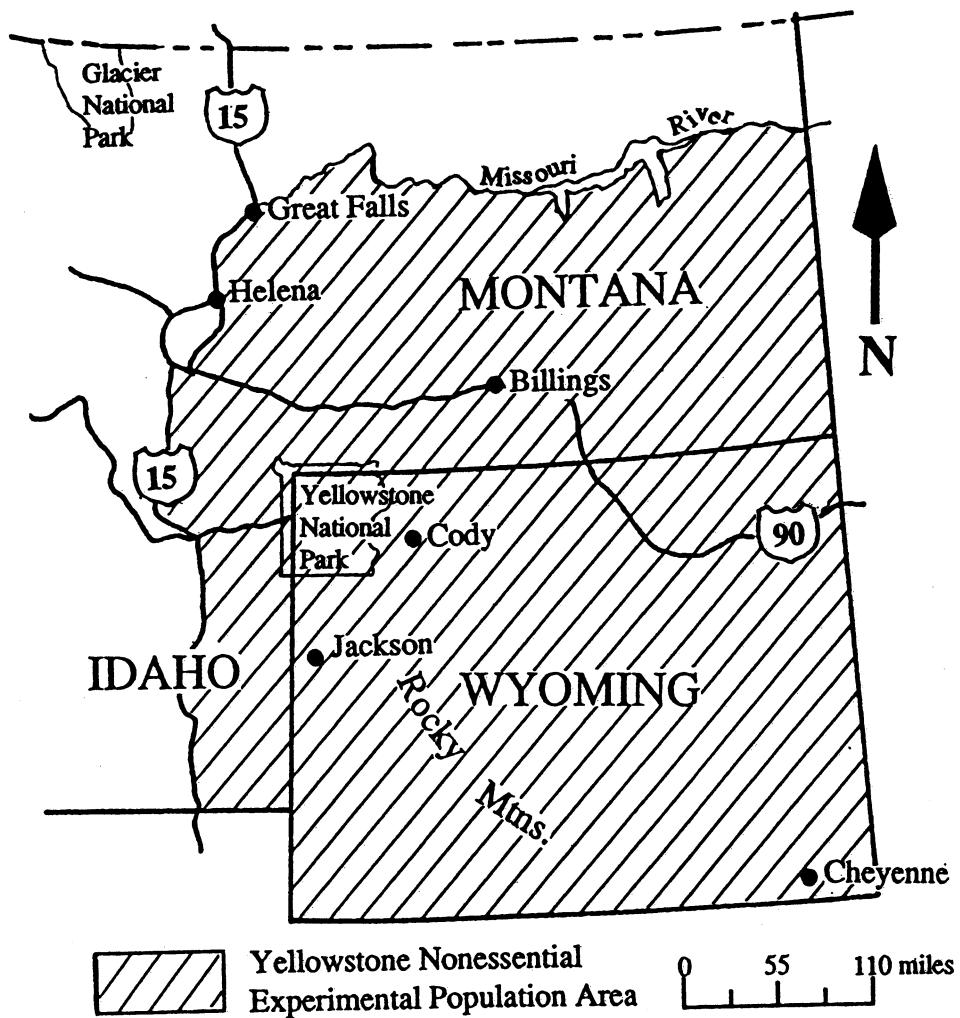


## Map 1

(ii) The Yellowstone NEP is shown on Map 2. The boundaries of the NEP area are that portion of Idaho that is east of

Interstate Highway 15; that portion of Montana that is east of Interstate Highway 15 and south of the Missouri

River from Great Falls, Montana, to the eastern Montana border; and all of Wyoming.



## Map 2

(iii) All wolves found in the wild within the boundaries of these experimental areas are considered nonessential experimental animals. In the Western Gray Wolf Distinct Population Segment (Washington, Oregon, California, Nevada, Montana, Idaho, Wyoming, and Utah and Colorado north of Highway 50 and Interstate 70), any wolf that is outside an experimental area is considered threatened. Disposition of wolves outside the NEP areas may take any of the following courses:

(A) Any wolf dispersing from the experimental population areas into other parts of the Western DPS will be managed under the special 4(d) rule for threatened wolves in the Western DPS (50 CFR 17.40(n)).

(B) Any wolf originating from the experimental population areas and dispersing beyond the borders of the Western DPS may be managed by the wolf management regulations established for that area, or may be returned to the experimental population areas if it has not been involved in conflicts with people, or may be removed if it has been involved with conflicts with people.

(10) Wolves in the experimental population areas will be monitored by radio-telemetry or other standard wolf population monitoring techniques as appropriate. Any animal that is sick, injured, or otherwise in need of special care may be captured by authorized personnel of the Service or our designated agent(s) and given appropriate care. Such an animal will be

released back into its respective area as soon as possible, unless physical or behavioral problems make it necessary to return the animal to captivity or euthanize it.

(11) *Memoranda of Agreement (MOAs).* Any State or Tribe with gray wolves, subject to the terms of this paragraph (n), may petition the Secretary for an MOA to take over lead management responsibility and authority to implement this rule by managing the nonessential experimental gray wolves in that State or on that Tribal reservation, and implement all parts of their approved State or Tribal plan that are consistent with this rule, provided that the State or Tribe has a wolf management plan approved by the Secretary.

(i) A State or Tribal petition for wolf management under an MOA must show:

(A) That authority and management capability resides in the State or Tribe to conserve the gray wolf throughout the geographical range of all experimental populations within the State or within the Tribal reservation.

(B) That the State or Tribe has an acceptable conservation program for the gray wolf, throughout all of the NEP areas within the State or Tribal reservation, including the requisite authority and capacity to carry out that conservation program.

(C) A description of exactly what parts of the approved State or Tribal plan the State or Tribe intends to implement within the framework of this rule.

(D) A description of the State or Tribal management progress will be reported to the Service on at least an annual basis so the Service can determine if State or Tribal management has maintained the wolf population above recovery levels and was conducted in full compliance with this rule.

(ii) The Secretary will approve such a petition upon a finding that the applicable criteria are met and that approval is not likely to jeopardize the continued existence of the gray wolf in the Western DPS, as defined in § 17.11(h).

(iii) If the Secretary approves the petition, the Secretary will enter into an MOA with the Governor of that State or appropriate Tribal representative.

(iv) An MOA for State or Tribal management as provided in this section may allow a State or Tribe to become designated agents and lead management

of nonessential experimental gray wolf populations within the borders of their jurisdictions in accordance with the State's or Tribe's wolf management plan approved by the Service, except that:

(A) The MOA may not provide for any form of management inconsistent with the protection provided to the species under this rule, without further opportunity for appropriate public comment and review and amendment of this rule;

(B) The MOA cannot vest the State or Tribe with any authority over matters concerning section 4 of the Act (determining whether a species warrants listing);

(C) The MOA may not provide for public hunting or trapping absent a finding by the Secretary of an extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved; and

(D) In the absence of a Tribal wolf management plan or cooperative agreement, the MOA cannot vest a State with the authority to issue written authorizations for wolf take on reservations. The Service will retain the authority to issue these written authorizations until a Tribal wolf management plan is approved.

(v) The MOA for State or Tribal wolf management must provide for joint law enforcement responsibilities to ensure that the Service also has the authority to enforce the State or Tribal management program prohibitions on take.

(vi) The MOA may not authorize wolf take beyond that stated in the experimental population rules but may be more restrictive.

(vii) The MOA will expressly provide that the results of implementing the MOA may be the basis upon which State or Tribal regulatory measures will be judged for delisting purposes.

(viii) The authority for the MOA will be the Act, the Fish and Wildlife Act of 1956 (16 U.S.C. 742a–742j), and the Fish and Wildlife Coordination Act (16 U.S.C. 661–667e), and any applicable treaty.

(ix) In order for the MOA to remain in effect, the Secretary must find, on an annual basis, that the management under the MOA is not jeopardizing the continued existence of the gray wolf in the Western DPS. The Secretary or State or Tribe may terminate the MOA upon 90 days notice if:

(A) Management under the MOA is likely to jeopardize the continued existence of the gray wolf in the Western DPS; or

(B) The State or Tribe has failed materially to comply with this rule, the MOA, or any relevant provision of the State or Tribal wolf management plan; or

(C) The Service determines that biological circumstances within the range of the gray wolf indicate that delisting the species is not warranted; or

(D) The States or Tribes determine that they no longer want the wolf management authority vested in them by the Secretary in the MOA.

Dated: December 29, 2004.

**Craig Manson,**

*Assistant Secretary for Fish and Wildlife and Parks.*

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