

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS-R6-ES-2008-009]

[92220-1113-0000; ABC Code: C3]

RIN 1018-AV39

Endangered and Threatened Wildlife and Plants; Revision of Special Regulation for the Central Idaho and Yellowstone Area Nonessential Experimental Populations of Gray Wolves in the Northern Rocky Mountains

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), have revised the 2005 special rule for the central Idaho and Yellowstone area nonessential experimental

population (NEP) of the gray wolf (Canis lupus) in the northern Rocky Mountains. Specifically, we have modified the definition of “unacceptable impact” to wild ungulate populations so that States and Tribes with Service-approved post-delisting wolf management plans (hereafter, referred to as wolf management plans) can better address the impacts of a recovered wolf population on ungulate herds and populations while wolves remain listed. We made other minor revisions to clarify the requirements and processes for submission of proposals to control wolves for unacceptable ungulate impacts. We also modified the 2005 special rule to allow persons in States or on Tribal lands with wolf management plans to take wolves that are in the act of attacking their stock animals or dogs. All other provisions of the special rule remain unchanged. As under the existing terms of the 2005 special rule, these modifications do not apply to States or Tribes without wolf management plans or to wolves outside the Yellowstone or central Idaho NEP areas.

**DATES:** The effective date of this rule is **[INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** This final rule is available on the Internet at <http://www.regulations.gov>. Once the complete decision file for this rule is completed it will be available for inspection, by appointment, during normal business hours at U.S. Fish and Wildlife Service, Office of the Western Gray Wolf Recovery Coordinator, 585 Shepard Way, 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, extension 204, at [ed\\_bangs@fws.gov](mailto:ed_bangs@fws.gov), or on our Web site at <http://westerngraywolf.fws.gov/>.

#### SUPPLEMENTARY INFORMATION:

##### Previous Federal Actions

In 1974, four subspecies of gray wolf were listed as endangered, including the NRM gray wolf (*Canis lupus irremotus*), the eastern timber wolf (*C. l. lycaon*) in the northern Great Lakes region, the Mexican wolf (*C. l. baileyi*) in Mexico and the southwestern United States, and the Texas gray wolf (*C. l. monstrabilis*) of Texas and Mexico (50 CFR 17.11(h)). In 1978, we relisted the gray wolf as endangered at the species level (*C. lupus*) throughout the conterminous 48 States and Mexico, except for Minnesota where it was reclassified as threatened (50 CFR 17.11(h)). In 2007, we delisted the Western Great Lakes distinct population segment of wolves that includes all of Minnesota, Wisconsin, Michigan, and parts of North and South Dakota, Iowa, Illinois, Indiana, and Ohio (72 FR 6051, February 8, 2007). The Northern Rocky Mountain Wolf Recovery Plan was approved in 1980 (U.S. Fish and Wildlife Service 1980, p. i) and revised in 1987 (U.S. Fish and Wildlife Service 1987, p. i).

On November 22, 1994, we designated unoccupied portions of Idaho, Montana, and Wyoming as two nonessential experimental population (NEP) areas for the gray wolf

under section 10(j) of the Endangered Species Act of 1973, as amended (Act) (50 CFR 17.84(i)). One area is the Greater Yellowstone Area experimental population, which includes all of Wyoming and parts of southern Montana and eastern Idaho. The other is the central Idaho experimental population area, which includes most of Idaho and parts of southwestern Montana. In 1995 and 1996, we reintroduced wolves from southwestern Canada into these areas (Bangs and Fritts 1996, pp. 407–409; Fritts et al. 1997, p. 7; Bangs et al. 1998, pp. 785–786). These reintroductions and accompanying management programs greatly expanded the numbers and distribution of wolves in the northern Rocky Mountains (NRM). At the end of 2000, the NRM population first met its numerical and distributional recovery goal of a minimum of 30 breeding pairs and more than 300 wolves well-distributed among Idaho, Montana, and Wyoming (68 FR 15804, April 1, 2003; Service et al. 2001, Table 4). This minimum recovery goal has been exceeded annually through 2007 (Service et al. 2002–2006, Table 4, Service et al. 2007, p.1).

On January 6, 2005, we published a revised NEP special rule increasing management flexibility of these recovered populations for those States and Tribes with Service-approved wolf management plans (50 CFR 17.84(n)). For additional detailed information on previous Federal actions, see the 1994 and 2005 NEP special rules (59 FR 60252, November 22, 1994; 59 FR 60266, November 22, 1994; 70 FR 1286, January 6, 2005), the 2003 reclassification rule (68 FR 15804, April 1, 2003), the advanced notice of proposed rulemaking to designate the NRM gray wolf population as a distinct population segment and remove the Act’s protections for this population (71 FR 6634, February 8, 2006), and the 2007 proposal to designate the NRM gray wolf population as a distinct

population segment and remove the Act's protections for this population (i.e., delist) (72 FR 6106, February 8, 2007).

## Background

Addressing Unacceptable Impacts on Wild Ungulate Populations— Both the 1994 Environmental Impact Statement for wolf reintroduction (Service 1994, pp. 6, 8) and the 1994 NEP special rules addressed the potential impact of wolf restoration on State and Tribal objectives for wild ungulate management. The 1994 NEP special rules allowed, under certain conditions, States and Tribes to translocate wolves causing unacceptable impacts to ungulate populations (50 CFR 17.84(i)).

On January 6, 2005, we published a new NEP special rule that allowed greater management flexibility for managing a recovered wolf population in the experimental population areas in the NRM for States and Tribes that had Service-approved wolf management plans (50 CFR 17.84(n)). The 2005 NEP special rule allowed those States and Tribes to lethally control wolves to address unacceptable impacts to ungulate populations, under certain conditions. The 2005 NEP special rule also required that a State or Tribal proposal to control wolves describe data indicating the ungulate herd is below management objectives, data indicating impact of wolf predation on the herd, why wolf removal is warranted, the level and duration of wolf removal, how the ungulate response would be measured, and other remedies and conservation measures. The State or Tribe also had to provide an opportunity for peer review and public comment before

submitting the proposal for Service approval. Before we could approve such proposals, we had to determine that the proposed wolf control was scientifically based and would not reduce the wolf population below recovery levels.

The 2005 NEP special rule authorized lethal take because we recognized that the wolf population had exceeded its recovery goals, extra management flexibility was required to address conflicts given the recovered status of the population, most of the suitable wolf habitat in Idaho, Montana, and Wyoming was occupied by resident wolf packs, and wolf translocations were likely to fail because no unoccupied suitable habitat remained (70 FR 1294, January 6, 2005; Bradley et al. 2005, p. 1506).

The 2005 NEP special rule's definition of "unacceptable impact" was a "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 made available for review and comment 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" (50 CFR 17.84(n)(3)). This definition set a threshold that we have found over time did not provide the intended flexibility to allow States and Tribes to resolve conflicts between wolves and ungulate populations. Current information indicates that wolf predation alone is unlikely to be the primary cause of a reduction of any ungulate herd or population in Idaho, Montana, or Wyoming (Bangs et al. 2004, pp. 89–100). No populations of wild ungulates occur in Montana, Idaho, or Wyoming where

wolves are the sole predator. Wolf predation is unlikely to impact ungulate population trends substantially unless other factors contribute, such as declines in habitat quality and quantity (National Research Council 1997, pp. 185–186; Mech and Peterson 2003, p. 159), other predators (Barber et al. 2005, p. 42–43; Smith et al. 2006, p. vii), high harvest by hunters (Vucetich et al. 2005, p. 259; White and Garrott 2005, p. 942; Evans et al. 2006, p. 1372; Hamlin 2006, p. 27–32), weather (Mech and Peterson 2003, pp. 138–139), and other factors (Pletscher et al. 1991, pp. 545–548; Garrott et al. 2005, p. 1245; Smith et al. 2006, pp. 246–250). However, in combination with any of these factors, wolf predation can have a substantial impact to some wild ungulate herds (National Research Council 1997, p. 183; Mech and Peterson 2003, pp. 155–157; Evans et al. 2006, p. 1377) with the potential of reducing them below State and Tribal herd management objectives.

The unattainable nature of the threshold set in the 2005 NEP special rule became apparent soon after its completion. In 2006, the State of Idaho submitted a proposal to the Service that indicated wolf predation was impacting the survival of adult cow elk in the Clearwater area of central Idaho and that some elk populations in the Lolo and Selway zones in this area were below State management objectives (Idaho Department of Fish and Game 2006, pp.11-12, Figures 1, 2, and 3). In the Clearwater proposal, the State of Idaho and the peer reviewers clearly concluded that wolf predation was not ‘primarily’ the cause of the elk populations’ decline, but was one of the major factors maintaining the elk populations’ status below State management objectives. Declining habitat quality due to forest maturation was the primary factor affecting the populations’ status, but black bear predation on elk calves, mountain lion predation on adults, and the

harsh winter of 1996-1997 also were major factors. Data also clearly indicated that wolf predation was one of the major causes of mortality of adult female elk, which contributed to the elk populations remaining below State management objectives. After discussions with the Service, Idaho put their proposal on hold because the proposal did not meet the regulatory standard for unacceptable ungulate impacts set by the 2005 special rule.

In this NEP special rule, we have modified the definition of “Unacceptable impact” in order to achieve the management flexibility intended by the 2005 NEP special rule. Specifically, we now define “Unacceptable impact” as “Impact to a wild ungulate population or herd where a State or Tribe has determined that wolves are one of the major causes of the population or herd not meeting established State or Tribal population or herd management goals.” This definition expands the potential impacts for which wolf removal might be warranted beyond direct predation or those causing immediate population declines. It would, in certain circumstances, allow removal of wolves when they are a major cause of the inability of ungulate populations or herds to meet established State or Tribal population or herd management goals. Management goals or their indicators might include population or herd numbers, calf/cow ratios, movements, use of key feeding areas, survival rates, behavior, nutrition, and other biological factors.

Under this NEP special rule, as was the case in the 2005 NEP special rule, proposals for wolf control from a State or Tribe with a Service-approved wolf management plan will have to undergo both public and peer review. Based on that peer review and public comment, the State or Tribe will finalize the proposal and submit it to

the Service for a final determination. This NEP special rule requires the following to be described in the proposal: (1) the basis of ungulate population or herd management objectives; (2) what data indicate that the ungulate herd is below management objectives; (3) what data indicate that wolves are a major cause of the unacceptable impact to the ungulate population; (4) why wolf removal is a warranted solution to help restore the ungulate herd to management objectives; (5) the level and duration of wolf removal being proposed; (6) how ungulate population response to wolf removal will be measured and control actions adjusted for effectiveness; and (7) demonstration that attempts were and are being made to address other identified major causes of ungulate herd or population declines or of State or Tribal government commitment to implement possible remedies or conservation measures in addition to wolf removal. Before wolf removals can be authorized, the Service must determine (1) if the State or Tribe followed the rule's procedures for submitting a proposal to remove wolves in response to unacceptable impacts; (2) if an unacceptable impact has occurred; (3) if the data and other information presented in the proposal support the recommended action; and (4) that the proposed removal would not contribute to the wolf population in the State below 20 breeding pairs and 200 wolves or impede recovery of the NRM wolf population.

The NRM wolf population is a metapopulation comprised of three primary population segments: central Idaho, northwest Montana, and the greater Yellowstone area (GYA). These population segments are spatially separated but are not completely isolated from each other. Each population segment is comprised of a varying number of packs and individuals that disperse within segments and to other segments. Exchange of

individuals from these segments also occurs with nearby wolf packs in Canada. The population segments in central Idaho, GYA, and to a lesser extent northwestern Montana, include core refugia, which are areas of relatively high concentrations of wolves on protected public lands (National Parks or Wilderness areas) or habitats with very few human-caused impacts. These refugia are primary sources for a continual supply of dispersing wolves. In this document, the term “NRM wolf population” will mean this metapopulation, and the term “wolf population(s)” will mean the segments within the NRM wolf population.

The minimum recovery goal for the NRM wolf population requires at least 30 breeding pairs and at least 300 wolves equally distributed in Idaho, Montana, and Wyoming (62 FR 15804). To ensure this goal is achieved, each of these States has committed to manage for at least 15 breeding pairs in mid-winter (ILWOC 2002, p.18; MWMAC 2003, App.1; WGFD 2007a, p.4). This objective would provide a reasonable cushion to ensure each State’s share of the wolf population does not risk falling below the minimum recovery goal of 10 breeding pairs and 100 wolves.

Because this NEP special rule will likely result in more wolf control than is currently occurring, we have established safeguards to ensure that wolf control for ungulate management purposes would not undermine the objectives in the States’ wolf management plans. Specifically, before any lethal control of wolves is authorized under this NEP special rule, we must determine that such actions will not contribute to reducing the wolf population in the State below 20 breeding pairs and 200 wolves. This safety

margin provides a buffer against unforeseen mortality events that might occur after such removal, and ensures that each State's ability to manage for 15 breeding pairs would not be compromised. This limit is a necessary and advisable precaution while wolves remain listed to ensure the conservation of the species given the additional take that might be authorized pursuant to this rule.

Providing this revision to the NEP special rule for additional management flexibility is appropriate because the NRM wolf population has met all its numerical, temporal, and distributional recovery goals (62 FR 15804). By middle of 2007, the NRM wolf population was estimated to contain 1,545 wolves in 105 breeding pairs (over 3 times the minimum numeric recovery goal for breeding pairs and more than 5 times the minimum population goal), and will exceed the minimum recovery levels for the 7th consecutive year. Montana had an estimated 394 wolves in 37 breeding pairs, Idaho had 788 wolves in 41 breeding pairs, and Wyoming had 362 wolves in 27 breeding pairs.

We do not expect this NEP special rule to adversely affect the species because wolf biology allows for rapid recovery from severe disruptions. After severe declines, wolf populations can more than double in just 2 years if mortality is reduced and adequate food is available (Fuller et al. 2003, pp. 181–183). Increases of nearly 100 percent per year have been documented in low-density suitable habitat (U.S. Fish and Wildlife Service et al. 2007, Table 4). The literature suggests that in some situations wolf populations can remain stable despite annual human-caused mortality rates ranging from about 30 to 50 percent (Keith 1983, p. 66; Fuller et al. 2003, pp. 182–184). Given

abundant prey availability, wolf populations can sustain such high levels of human-caused mortality due to their high reproductive potential and replacement of losses by dispersing wolves from nearby populations (Fuller et al. 2003, p. 183-185).

Total mortality of adults in the NRM wolf population was nearly 26 percent per year from 1994 to 2006, and the human-caused mortality was about 20 percent per year (Smith 2007). However, the NRM wolf population still continued to expand at about 24 percent annually (Service et al. 2007, p. Table 4). These data indicate that the current annual human-caused mortality rate of about 20 percent in the adult portion of the NRM wolf population could be increased to some extent without causing the NRM wolf population to decline. Wolf populations and packs within the NRM wolf population are expected to be quite resilient to regulated mortality because adequate food supplies are available and core refugia provide a constant source of dispersers to replenish breeding vacancies in packs.

Wolf populations within the portion of the NRM where this rule applies are characterized by robust size, high productivity, closely neighboring packs, and many dispersers (Service et al. 2007, Figure 1; Jimenez et al. in prep.). Wolf populations now occupy most of the suitable wolf habitat in the NRM (Service et al. 2007, Figure 1). These populations are unlikely to expand their current distributions because little unoccupied suitable habitat is available (Bradley et al. 2005, p. 1506; Service et al. 2007, Figure 1). Because suitable habitat is nearly saturated, core refugia within these populations will continue to produce a large number of 'surplus' wolves which will either

fill in social vacancies within the core refugia, die, or disperse out of the core refugia. Therefore, the core refugia would have an abundant supply of wolves ready to fill any vacancies caused by agency control for unacceptable ungulate impacts. Even when entire packs are removed, new packs are likely to form. During wolf control for livestock depredation in Wyoming, the Daniel, Green River, Carter Mountain, and Owl Creek packs all reformed after they were entirely or almost entirely removed (Jimenez et al. in prep, pp. 198-200). Bradley et al. (in press, pp.8-13) found that, following the removal of wolves for livestock depredation in the NRM wolf population, the breeding status of packs was not greatly affected, regardless of breeding status of individuals or proportion of a pack removed.

Furthermore, many ungulate herds and populations in Idaho, Montana, and Wyoming are at or above State management objectives and most of those below management objectives are most affected by factors other than wolves. Of the 78 elk game management units (GMU) in Idaho, 3 GMUs were identified to be below management objectives with wolves being one of the major causes of decline between 2003 and 2006 (IDFG 2006, pp.11-12, Figures 1, 2, and 3). Of the 35 elk herds in Wyoming, wolf packs were present in the area used by 7 herds. Wyoming Game and Fish Commission identified 3 of those 7 herds as either below management objectives or having calf/cow ratios indicating that the herd was likely to fall below management objectives soon (Wyoming Governor and Wyoming Game and Fish Commission 2005, pp. 5-6). Because nearly all suitable wolf habitat is now occupied in the NRM (Bradley et al. 2005, p. 1506; Service et al. 2007, Figure 1), the current wolf distribution is

unlikely to significantly expand and wolves are not likely to begin affecting elk in many new areas. On the other hand, increasing wolf density within already occupied wolf habitat in some areas may cause increased impacts to those elk herds or other wild ungulate herds. Therefore, we expect the need for wolf control to be relatively confined to existing areas of wolf-ungulate impacts, although the need for control in those areas may increase as wolf density increases.

Given the resilience of wolf populations, the current status of the NRM wolf population, and the number and location of ungulate populations or herds identified as below management objectives with wolves as one of the major causes, we determined that any increased mortality from wolf control actions under this rule would not affect the recovered status of the NRM wolf population in Idaho, Montana, or Wyoming.

Addressing Take To Protect Stock Animals and Dogs—The 1994 NEP special rules stated that any livestock producers on their private land may take (including to kill or injure) a wolf in the act of killing, wounding, or biting livestock (defined as cattle, sheep, horses, and mules) (50 CFR 17.84(i)). Similar provisions applied to livestock producers on public land if they obtained a permit from the Service (50 CFR 17.84(i)).

The 2005 NEP special rule expanded this provision to allow landowners in States with Service-approved wolf management plans to lethally take wolves that were “in the act of attacking” their livestock and any kind of dog on private land, where “in the act of attacking” was defined as “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.” (50 CFR 17.84(n)(3)). The expanded definition in the 2005 NEP special rule also provided Federal land permittees the ability to take wolves in the act of attacking livestock on active public grazing allotments or special-use areas. The definition of “Livestock” was expanded in 50 CFR 17.84(n)(3) as “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.”

The 1994 and 2005 NEP special rules did not cover some circumstances for potential damage of private property by wolves. For instance, landowners could lethally take wolves in the act of attacking dogs on their own private land, but could not do the same when on public lands unless the dogs were certain breeds of dogs being used for herding or guarding livestock and were being used for work on Federal lands under an active permit. Recreationists also could not lethally take wolves in the act of attacking stock animals used to transport people or their possessions.

This NEP special rule adds a new provision for lethal take of wolves in States with Service-approved wolf management plans when in defense of “stock animals” (defined as “a horse, mule, donkey, llama, or goat used to transport people or their possessions”) or any kind of dog. Specifically, this modified NEP special rule states that “any legally present person on private or public land except land administered by the

National Park Service may immediately take a wolf that is in the act of attacking the individual's stock animal or dog, provided there is no evidence of intentional baiting, feeding, or deliberate attractants of wolves. The person must be able to provide evidence that taken wolves were recently (less than 24 hours) in the act of attacking stock animals or dogs, and we or our designated agents must be able to confirm that the wolves were in the act of attacking stock animals or dogs. To preserve evidence that the take of a wolf was conducted according to this rule, the carcass of the wolf and the area surrounding should not be disturbed. The take of any wolf without such evidence of a direct and immediate threat may be referred to the appropriate authorities for prosecution.”

Since 1995, only 60 wolves (about 9 percent of the 672 wolves legally removed in agency-authorized control actions) have been legally killed by persons in defense of their private property in the NRM. Wolf depredations on stock animals accompanied by their owners have not been documented in the past 12 years, but a few instances of stock animals being spooked by wolves have been reported. Two wolves have been taken by Federal land permittees as wolves chased and harassed horses in corrals or on pickets. While this revision provides additional opportunity for persons to protect their private property, these instances are likely to be rare. Therefore, we expect no impacts on the recovered status of the NRM wolf population from this additional flexibility in the rule.

Reports confirm that 101 dogs have been killed by wolves from 1987 to 2007 (Service et al. 2007, Table 5, Service 2008, p.1), but no wolves are known to have been killed solely to protect dogs. We know of one credible and one unconfirmed report of

wolves killing pet dogs while humans have been nearby (USDA 2007, p. 1). Wolves have killed at least 35 hunting hounds, primarily on public land. In only a few of those instances, the hounds' owners were close enough that they might have been able to better protect their dogs by shooting at the wolves involved. Although we expect that take of wolves involved in conflicts with pet dogs or hunting hounds would be rare, these reports indicate that such instances could occur. This modification would allow persons in States with Service-approved wolf management plans to protect their dogs from wolf attacks.

Dispersing wolves would quickly fill vacancies created by any take of wolves to protect stock animals and dogs. Because such take of wolves is expected to be extremely low, cumulative impacts of this take combined with agency control for ungulate impacts would be negligible.

#### Summary of Peer Reviews

In accordance with our joint policy published in the Federal Register on July 1, 1994 (59 FR 34270), and the Office of Management and Budget's (OMB) Final Information Quality Bulletin for Peer Review, dated December 16, 2004, we solicited independent review of the science in the proposed NEP special rule from ten experts on wolves, ungulates, or predator-prey relationships. The purpose of such review was to ensure that our decisions on the proposed revisions to the 10(j) special regulations were based on scientifically sound data, assumptions, analyses, and conclusions. All ten peer reviewers submitted comments on the proposed rule. We considered their comments and

recommendations as we made our final decision on the proposed revisions. Substantive peer reviewer comments are summarized in the remaining paragraphs of this section as well as discussed in greater detail in the appropriate Issue/Response sections that follow.

All eight peer reviewers who specifically stated an opinion on the soundness of our proposed revisions regarding management of wolves for impacts to ungulates confirmed that our approach was reasonable. Seven of them provided additional considerations and recommendations. The remaining two peer reviewers raised some concerns and recommendations described below, but did not explicitly express opposition or support to the proposed revisions.

In general, the peer reviewers agreed with our conclusion that wolf predation is never the primary cause of ungulate population impacts but can be among major contributing factors. They also generally confirmed that the proposed safeguards are appropriate for ensuring that wolf control under the revised special regulations would not compromise wolf recovery in the NEP areas of the NRM. While none of the peer reviewers expressed concern that such wolf control would adversely impact wolf recovery, four reviewers questioned a claim in the proposal regarding the level of mortality wolf populations could sustain while maintaining positive growth. Four peer reviewers believed the proposed safety margin of 20 breeding pairs and 200 wolves and other safeguards were adequate to prevent impacts to wolf recovery, while two questioned the necessity of the additional safety margin given the resilience of wolf populations to relatively high mortality.

Two peer reviewers expressly stated that the proposed criteria, required in the NEP special rule, for Service approval of State or Tribal wolf control proposals were adequate or “sufficiently rigorous.” Three others indicated that the standards should be made more specific. One reviewer thought the proposed NEP special rule did not clearly identify criteria for assessing whether a wolf control program will result in ungulate population recovery. Their suggestions for improving the standards included requiring effectiveness monitoring and that we suggest the kind of data to be used for determining wolf predation impacts and ungulate population vigor.

Three reviewers raised a concern for a potential lack of biological validity of ungulate management objectives set by a State or Tribe. Their concerns included objectives that may be based on historical ungulate population levels in the absence of wolves, desired hunter harvest, or without consideration for the inverse relationship between density and productivity in ungulate populations.

Two peer reviewers indicated that the NEP special rule should explicitly require States and Tribes to address other major factors affecting ungulate populations along with wolf control. Two peer reviewers recommended that we define “major” for the purpose of determining when wolves may be one of the major causes of unacceptable ungulate impacts.

Two peer reviewers agreed that the proposed revised NEP special rule provided an appropriate, transparent review process to ensure science-based decisions, but another reviewer warned that, due to the complexities of predator–prey relationships and other influencing factors, trusting the peer review process to catch and identify all interactions that should be considered in a control program may be difficult.

One peer reviewer expressed a preference that hunting and trapping be used as methods of wolf control over aerial gunning or poisoning for more public acceptance of control programs. He did not make a recommendation that the preferred methods be required. None of the other peer reviewers offered opinions on control methods.

The six peer reviewers who specifically addressed the revisions addressing lethal take of wolves for the protection of stock animals and dogs stated that our approach was reasonable. There was general agreement that this additional protection was not likely to result in a level of take that would affect wolf populations. One reviewer agreed with our opinion that it might increase public tolerance of wolves.

One peer reviewer asked what kind of evidence would support a claim of “harassment” where physical evidence may be lacking. He acknowledged that such specifics need not be incorporated into the rule, but cautioned that the Service develop sound procedures addressing this issue to prevent abuse.

Summary of Comments and Recommendations

## **A. Soliciting Public Comment.**

In our July 6, 2007, proposed rule (72 FR 36942), we requested that all interested parties submit comments or information that might aid in our decisions or otherwise contribute to the development of this final rule. We also contacted the appropriate Federal, State, and local agencies, Tribes, and scientific and other interested parties and organizations and invited them to comment on the proposed rule. 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 them upon request by mail or e-mail and at our hearings and informational meetings. We established several avenues for interested parties to provide comments and other information, including verbally or in writing at public hearings, by letter, e-mail, or facsimile transmission.

The initial comment period was open from July 6, 2007, through August 6, 2007. During that period, we publicized and conducted public hearings on the proposed revised special rule in Cody, Wyoming, on July 17, 2007; in Helena, Montana, on July 18, 2007; and in Boise, Idaho, on July 19, 2007. We also held general public meetings on the same day of each hearing to provide additional information and explain our proposal. At these meetings, we also offered the public opportunity to ask questions and provide input.

A second comment period was opened from September 11, 2007, through October 11, 2007, to provide the public additional opportunity to review and comment on the proposal concurrent with a public comment period on the draft environmental assessment (EA) of the proposed revisions.

At the three hearings, 54 people testified, and we received 19 written comments. During the first comment period, we received more than 176,000 comments by e-mail. During the second comment period, we received about 86,000 additional comments by e-mail. We received a total of approximately 450 mailed and faxed comments. Comments were submitted by a wide array of parties, including the general public, environmental organizations, hunting and outfitter's groups, Tribes, agricultural agencies and organizations, and Federal, State, and local government agencies. Comments originated from throughout the country and even from people in a few other nations.

The Wyoming Game and Fish Department submitted a letter commenting on the proposed NEP special rule on August 3, 2007 (WGFD 2007b). On October 22, 2007, the Wyoming Governor issued a letter (Wyoming Governor 2007) describing how several stipulations in Wyoming law related to delisting and management of the gray wolf are being resolved. One of these stipulations included modifications to the NEP special rule. The Wyoming Governor stated that in light of the resolution of this stipulation, the comments submitted on the proposed NEP special rule are now superseded and do not require our response. Therefore, we do not respond to the comments from the Wyoming

Game and Fish Department in this document. However, we have responded to similar comments if they were raised by other parties.

Substantive comments and new information received from peer reviewers and the public during the comment period have either been addressed below or incorporated directly into this final rule. Related comments (referred to as “Issues”) are grouped together below and are followed by our responses. In addition to the following discussion, refer to the “Changes From the Proposed Rule” section for more details. We received thousands of messages supporting and protesting the proposed revisions that did not include substantive comments or new information. Although we reviewed these messages, the number of opinions was not part of the basis of our decisions on the final rule.

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

**Issue 1**—Peer reviewers and commenters provided editorial suggestions, information updates, and corrections to literature citations. Some peer reviewers thought we misstated conclusions from the Oakleaf et al. (2006, pp. 554-559) study. One peer reviewer asked if we could provide any published citations besides the personal communication (Smith 2005) regarding a 26 percent mortality rate in the NRM wolf population.

**Response 1**—We corrected and updated numbers and other data where appropriate. We edited the preamble to the rule to make its intent and purpose clearer.

The reference year for the Oakleaf et al. (2006, p. 556) wolf pack home range analysis was 2000. The study indicated that at that time relatively large tracts of suitable wolf habitat remain unoccupied in the Rocky Mountains (Oakleaf et al. 2006, p. 554). Since then, the wolf population continued to grow, as the study predicted, to 1,545 wolves in summer 2007 (Service 2008, p.1), and most habitat predicted by Oakleaf et al. (2006, Figure 2) as suitable is now occupied (Service et al. 2007, Figure 1). We have corrected the citations and text in the rule's preamble to reflect this information.

The data on wolf survival and mortality in the NRM has not been published yet, but Smith (2007) is currently preparing it for publication. We have determined that the data, although not yet published, constitutes the best scientific data available on wolf survival and mortality in the NRM. This information was gathered and compiled by State, Tribal, and Federal members of the Interagency Wolf Recovery Team and entails data from over 900 radio-collared wolves in the NRM population since 1994.

**Issue 2**—A few commenters expressed confusion over the difference between the 1994 and 2005 rules and the revised rule because we did not include the entire 50 CFR 17.84(n) regulations in the Federal Register notice for the proposed rule. Some thought we would now have four different 10(j) rules in place.

**Response 2**—In 1994 we promulgated special regulations at 50 CFR 17.84(i) for the reintroduction of two NEPs of the wolf in the NRM. In 2005, we modified the NEP special rule, 50 CFR 17.84(n), and we are doing so again in this rule. This approach does not result in multiple sets of these regulations. The regulations in 50 CFR 17.84(i), which apply to States and Tribes without wolf management plans, will remain the same, and the revised regulations in 50 CFR 17.84(n), which apply to States and Tribes with wolf management plans, will supersede the 2005 edition. We have included additional explanation in this rule’s preamble to ensure clarity of the changes.

**Issue 3**—Some peer reviewers questioned the claim in the proposed rule that the literature indicates that wolf populations could sustain an annual human-caused mortality of 30 percent or more. One peer reviewer pointed out that this statement does not provide an upper bound on mortality rate and, therefore, could be misleading. Another did not recommend that such a high rate of mortality be allowed, but acknowledged that the rule’s safeguards would preclude this concern.

**Response 3**—We corrected the rule’s preamble to indicate that the literature indicates that some wolf populations could remain stable at mortality rates of around 30 to 50 percent.

**Issue 4**—Several commenters questioned the need for the proposed revisions because they believed that the 2005 special regulation already allows for control of wolves because of ungulate impacts. Many expressed the concern that the biology and

current ungulate herd and population numbers do not justify a need for increasing flexibility for wolf control. A few commenters did not think increasing flexibility to control wolves to protect stock animals was necessary because the current special regulations already allow wolf control to protect livestock or because there is no evidence that wolves attack stock animals.

**Response 4**—As explained in the proposed rule and the preamble of this final rule, the 2005 NEP special regulations did not provide States and Tribes the intended flexibility to control wolves causing unacceptable impacts to ungulate herds or populations because such impacts have never been shown to be “primarily caused by wolf predation.” Thus, the wording in the definition of “unacceptable impact” to a wild ungulate population or herd in the 2005 special regulation set an unattainable standard for approval of wolf control and no State or Tribe was able to use the special rule for that purpose. The revision of the definition of “unacceptable impact” to include wolves as “one of the major causes” now provides the intended flexibility for wolf management by States and Tribes.

We acknowledged in the preamble of the revised rule and final EA that many ungulate populations and herds currently are at or above States’ management objectives. However, we also are aware of a few instances where herds are not meeting or soon may not meet those objectives, and evidence indicates that wolves are one of the major causes of the failure to maintain those objectives (Wyoming Governor and Wyoming Game and Fish Commission 2005, pp. 5-6; IDFG 2006, pp.11-12, Figures 1, 2, and 3). The

intention of this revision is to provide States and Tribes the flexibility to control wolves in such localized situations. We expect that such situations will continue to be few, and, along with the safeguards in the revised NEP special rule, resulting take of wolves would not have a meaningful impact on wolf populations and would not affect recovery of the NRM wolf population.

The terms “livestock” and “stock animals” were confusing to some commenters who thought the revision to increase wolf control flexibility for the latter is unnecessary. Although the animals listed in “livestock” overlap with some “stock animals” (e.g., horse, mule, donkey, llama), the latter refers to animals used for transport of people or their possessions. The revision does not supplant the definition of livestock with that of stock animals. The 2005 special regulation did not allow any person on public land, who was legally present but did not have a land-use permit to graze livestock or operate an outfitter or guiding business, to kill wolves in defense of these animals. For example, an individual using a llama to pack-in gear while recreating on public lands for his or her enjoyment was not allowed to lethally take a wolf to protect that llama under the 2005 special regulation. The revised special regulation now allows anyone legally present on private or public land, except land administered by the National Park Service, to lethally take wolves in defense of horses, mules, donkeys, llamas or goats that are being used to transport people or their possessions. The 2005 rule also did not allow outfitters and guides or the public on public land to take wolves to protect hunting dogs. The revised rule now allows anyone legally present on private or public land, except land administered by the National Park Service, to take wolves in defense of any dog.

While there have been no reports of wolves depredating stock animals accompanied by their owners in recent years, some reports indicate that wolves have been close enough to spook stock animals. Two wolves have been taken by Federal land permittees as wolves chased and harassed horses in corrals or on pickets. This demonstrates that wolves may occasionally attack stock animals. The increased flexibility in the revised special regulation will allow owners to protect their private property in the few instances when this type of situation may occur.

**Issue 5**—A large proportion of commenters were alarmed because they believed that the revisions to the 2005 NEP special rule would allow States and Tribes to kill wolves in large numbers, reduce populations to the minimum recovery numbers, or even reduce them below recovery levels. Others thought that the safety margin of 20 breeding pairs and 200 wolves per State was not adequate based on population viability analysis theories. Some stated that the constraints in the rule on wolf control are not adequate to prevent abuse of the increased management flexibility and that wolves could be killed for reasons other than those described. Others thought the rule would allow “open season” or public hunting of wolves. On the other hand, some supporters of the revised rule expressed belief that a wolf population explosion has decimated elk and moose populations. They advocated killing as many wolves as possible by any means necessary.

**Response 5**—The minimum numerical and distributional recovery goal for the NRM wolf population is at least 10 breeding pairs and at least 100 wolves in each of the States of Idaho, Montana, and Wyoming (62 FR 151804). Under this modified special rule, a State cannot be authorized to control wolves for ungulate population impacts if such control would contribute to reducing wolves to below 20 breeding pairs and 200 wolves in that State. These numbers are twice the minimum recovery goals. Therefore, this NEP special rule should not result in the reduction of the NRM wolf population to minimum recovery numbers. Furthermore, this NEP special rule’s restriction preventing wolf control below 20 breeding pairs and 200 wolves does not mean that States and Tribes will be allowed to eliminate all wolves above those levels. This is only one of many prerequisites. As in the 2005 special rule, this modified NEP special rule requires States and Tribes to address specific criteria in their proposals for wolf control and follow rigorous peer review, public comment, and Service approval processes before control can be authorized. The State or Tribe proposing to control wolves would have to demonstrate that an ungulate herd or population cannot meet management objectives and wolves are one of the major causes. They also have to scientifically demonstrate that wolf control is warranted and the proposed level and duration of wolf control is appropriate for addressing the impacts to ungulates.

As explained in the preamble, many of the elk populations in the NEP areas are currently at or above State management objectives and only a few elk herds or other ungulate populations are considered to be declining or low due to wolf predation. We also explain in the preamble that core refugia in the NRM would supply a constant source

of dispersers to fill in vacancies created by agency control. Because agency control of wolves is likely to occur in only a few discrete areas, the movement of dispersers between packs and populations, and thus connectivity, would not be disrupted.

This rule applies only to wolves in the two NRM NEP areas in States with Service-approved wolf management plans. Control of wolves in national parks and other lands administered by the National Park Service, as well as wolves listed as endangered, is not authorized by this rule.

Furthermore, the standards in this NEP special rule for approving a wolf control proposal would not allow wolves to be killed for just any reason. In their proposal, the State or Tribe must describe impacts from wolves on the ungulate herd or populations and demonstrate in the proposal that wolf control is warranted for relieving unacceptable impacts to ungulate herds or populations. If effects to ungulates by wolves are not among the major causes of the inability to achieve management objectives, wolf control would not be appropriate.

Based on records of wolf threats or attacks on dogs and stock animals, the number of incidents in which wolves might be taken under the modified special rule for these purposes is expected to be very small. Furthermore, when one wolf out of an attacking group is shot, the rest of the wolves almost invariably flee. Fleeing wolves could no longer be “in the act of attacking” and take of such wolves would be in violation of the

law. Therefore, we fully expect that abuse of the law and taking of more than one wolf during each incident to be unlikely.

This modified NEP special rule does not authorize open public hunting nor would it allow States or Tribes to use public hunting as a method for controlling wolves causing unacceptable impacts to ungulates. A State or Tribe may choose to enlist persons as designated agents of that agency to conduct highly controlled damage hunts on private property for controlling wolves, but this method would need to be included in their proposal and subject to all the NEP special rule's criteria and procedural requirements for our approval.

Evidence does not support the belief that wolves are decimating ungulate populations in the NRM. Currently many elk populations are at or above management objectives in Idaho, Montana, and Wyoming. Some populations of other ungulates, such as mule deer, bighorn sheep, and moose are depressed in some areas, but this is mostly due to causes other than wolf predation, such as disease and poor habitat quality. The need for wolf control to help restore ungulate herds or populations to State or Tribal management objectives is not pervasive, and uncontrolled removal of wolves is not necessary, appropriate, or allowable under this NEP special rule.

We agree that wolf populations tend to be resilient to regulated human-caused mortality. However, because we anticipated that the revised NEP special rule may result in more killing of wolves than is currently occurring, we established measures to ensure

that wolf control for ungulate management purposes would not undermine wolf recovery goals or the States' ability to manage for 15 breeding pairs as obligated by their Service-approved wolf management plans. Most peer reviewers noted that the rule's safeguards and safety margins were adequate to prevent abuse and that the revisions would result in little impact to the recovered wolf population. No peer reviewer expressed concern that the revisions would result in significant impacts to the recovered NRM wolf population or that the rule's safety margin is inadequate. Two peer reviewers questioned the necessity of the additional safety margin of 20 breeding pairs and 200 wolves in consideration of the resilience of wolves to take and the current recovery level safety margin of 15 breeding pairs required by the States' Service-approved wolf management plans. The additional safety margin of 5 breeding pairs above the 15 breeding pairs the States will manage for is the same size of the safety margin over the 10 breeding pairs necessary for delisting. This buffer is intended to prevent the compromise of State wolf management objectives from unforeseen events that may cause wolf declines in combination with the additional mortality from wolf control.

**Issue 6**—We received a number of comments, including from two peer reviewers, that the term “major causes” in the proposed revised definition of “unacceptable impacts” be further defined. One of the peer reviewers suggested some criteria to consider. Some commenters said that long-term studies would be necessary to show that wolves are one of the major causes of ungulate declines.

**Response 6**—Consideration of whether wolves are one of the major causes of ungulate population declines would require comparing the significance of the wolf impact with that of the other causes. Because the relationship between wolf predation and ungulate populations is very complex (Mech and Peterson 2003, pp.146) and because a host of other interconnected local factors can influence how it might affect ungulate populations (Garrott et al. 2005, pp.1245), we could not predict all the specifics in each way wolves could be one of the major causes of ungulate impacts. If we attempted to develop a specific list of required criteria, we may unintentionally exclude other valid conditions. Furthermore, even the suggested criteria from the peer reviewer included some level of subjectivity (e.g., “high proportion,” “strong evidence,” “excessive”) that would require further definition. Therefore, we believe that the validity of a State’s claim that wolves are a major cause of ungulate impacts would be better determined on a case-by-case basis, where such a determination will depend upon the adequacy of the data and science describing the conditions, and their relative importance, contributing to ungulate herd or population declines. We would rely on professional evaluation and judgment inherent in the required peer reviews and our approval process to ensure that such determinations are appropriate.

Due to the complexity of wolf–ungulate interactions, it may be difficult to unequivocally prove that wolves are one of the major causes of ungulate decline. However, reasonable inferences can sometimes be made by comparing ungulate herds or populations with similar environmental conditions where wolves are absent, are present in much smaller numbers, and are present in similar or larger numbers. We would

consider this information along with other data required by the NEP special rule and the soundness of the science presented in the proposal.

**Issue 7**—We received several suggestions that the States should be required to demonstrate that they are addressing other major causes of ungulate herd or population declines in concert with wolf control. These suggestions were in response to an interpretation that the rule requires the States or Tribes to merely to describe the other major causes in their proposals. We also received a comment that the State may not have control over all other major causes, such as climate change.

**Response 7**—Our intent was that States or Tribes would need to demonstrate that they have attempted to address other major causes or that they are committed to do so in concert with wolf control. We have refined the wording in the rule so that it more clearly expresses that intent (see Changes From the Proposed Rule section). We would not disapprove a proposal merely because the State or Tribe has no power to address certain other causes of ungulate declines. However, we would expect the proposal to describe why the State or Tribe does not have control over those issues and how they otherwise might be addressed.

**Issue 8**—Some commenters stated that social effects to wolf packs from killing alpha males and females (i.e., breeders) were not considered, nor were effects to pack structure and productivity from killing subadults and pups. Others thought removing entire packs would fragment populations and prevent genetic exchange.

**Response 8**—As explained in the preamble, wolf packs and populations are known to be very resilient to a number of causes of mortality, including human-caused, as long as there is adequate food and a surrounding population with dispersing individuals to provide replacements. Ultimately, the population's productivity in terms of recruitment and immigration is what allows it to persist under human harvest (Fuller et al. 2003, pp. 184-185). Populations with average or high productivity can withstand higher levels of take, especially if populations that can provide replacements are nearby (Fuller et al. 2003, pp. 184-185). Population size, proximity of other wolf packs, and the number of dispersing wolves influence the frequency with which alpha males and females will be replaced (Brainerd et al. in press, p. 15-16). Wolf populations in the NRM where this rule applies are characterized by robust size, high productivity, and closely neighboring packs, and have many dispersers (Jimenez et al. in prep). Therefore, social vacancies, whether from loss of breeders or nonbreeders, in these areas are likely to be quickly filled by dispersing wolves or other wolves within the pack. Often subadults and pups are the first to be removed in wolf control programs because they tend to be naïve and, therefore, more vulnerable to take. Vacancies from loss of subadults and pups, like other age-class vacancies, are likely to be readily filled by dispersers or new offspring, given the ready supply of dispersers from core refugia in the NRM. If an entire pack is removed, a new pack is likely to form for the same reasons as described earlier in this preamble. Therefore, gaps that would fragment populations and disrupt genetic exchange are not likely to occur in the NRM wolf population.

**Issue 9**—Some commenters stated that localized wolf control would create population sinks that deplete nearby source populations. Others thought wolf control to relieve unacceptable ungulate impacts would be futile because wolves would constantly fill in vacancies created by control actions.

**Response 9**—We agree that the vacancies created by wolf control (or other forms of wolf mortality) are likely to be filled with wolves from other packs. However, in the NRM this situation is not likely to constitute a population sink that depletes or affects stability of source populations (core refugia). Wolves disperse from their natal packs regardless of human-caused mortality elsewhere. Wolf populations and packs routinely turn over members (Mech 2007). Vacancies created by wolf control are most likely to be filled by young adult dispersers that leave their packs because they are unable to breed or as an evolutionary strategy to avoid inbreeding (VonHoldt et al. 2007), because they are attempting to increase access to food (Mech and Boitani 2003, p. 12), or due to social tensions in their natal pack (Mech and Boitani 2003, p. 13). Such individuals would not have directly contributed, through breeding, to the productivity of the packs they left. Although some of these dispersers may have filled other vacancies within the source population and had the potential to breed there, those vacancies will be quickly filled by other dispersing wolves or wolves within those packs (Fuller et al. 2003, p.181 and 183). As described earlier in this preamble, core refugia in the NRM wolf population provide a constant source of dispersers. While removing a pack may draw another pack into that area, approved wolf removal under this rule will not be at a rate and level (see preamble)

that would create a void large and long enough in the core refugia to impact the stability of the wolf populations in the NRM.

While vacancies created by wolf control are likely to be filled, wolf density in the control area could be temporarily lowered to the extent that would allow the ungulate herd or population to respond, depending on the proposed level and duration of control. For example, control on an annual basis for 3 to 5 years may decrease predation and relieve impacts to the herd or population enough to allow the population to return to management objective levels. As long as other major causes of ungulate population impacts have been addressed, the lowered post-control wolf density should allow the ungulate herd or population to remain at management objectives. Wolf removal as envisioned under this rule is limited in time until the ungulate herd meets its management objectives or until it is evident that wolf removal is not having a positive effect on the herd's status. If the required monitoring shows that the desired results are not achieved under the terms of the approved proposal, we would expect the State or Tribe to reevaluate whether continued control is warranted. If wolf densities and ungulate depredation return to levels that cause the ungulate herd or population to decline below management objectives again, the State or Tribe would need to submit another proposal under the processes required by this rule.

**Issue 10**—Commenters provided several reasons why they believe the NEP special rule was inappropriate, such as: (1) wolves keep ungulate herds healthy by culling the sick and weak; (2) it allows killing of wolves for preying on their natural prey;

(3) wolves are keystone predators that play an important role in the ecosystem; and (4) wolves decrease impacts of ungulate herds on riparian vegetation.

**Response 10**—Although wolves often prey on the less fit individuals of a prey population, they can also kill healthy animals resulting in additive mortality that can contribute to failure to sustain State or Tribal ungulate management objectives. We agree that ungulates are part of wolves’ natural prey base and that wolves can play an important role in ecosystem function, as do other large predators. However, the anticipated levels of wolf removal under this NEP special rule would not result in disruption of ecosystem functions or meaningful impacts on other species that benefit from wolf presence. The most dramatic improvement of riparian vegetation after the return of wolves appeared to reduce elk browsing pressure is in Yellowstone National Park, where this rule does not apply and wolf control would not be allowed. However, the magnitude of cascading ecological effects from wolves is under some debate (Ripple and Beschta 2004, p. 755), and a number of biotic and abiotic factors are believed to affect woody browse conditions along with changes in ungulate behavior due to wolf presence (Smith et al. 2003, pp.338-339). Given observations in Yellowstone National Park and depending on a variety of conditions, removal of wolves to meet State or Tribal ungulate management objectives for a particular herd or population may result in increased browsing pressure in those localized areas. However, balancing management of ungulate populations with that of plant communities and habitats outside Federal lands is under the purview of State and Tribal natural resource agencies, not the Act.

**Issue 11**—Some commenters were concerned that wolf control would prevent wolves from re-establishing in neighboring States that do not currently have wolf populations.

**Response 11**—Given the levels and extent of anticipated control of wolves for unacceptable ungulate impacts, we do not expect wolf numbers to be reduced enough to cause a meaningful reduction in the probability of dispersers reaching other States.

**Issue 12**—Some commenters believed that we improperly considered economic, political, or other factors in developing the proposed rule. Some believed we were influenced by special interests and State politicians, while others thought we favored environmental interests and the public outside the affected region. Several commenters believed that we neglected to address economic impacts to the tourist industry in the Yellowstone area and provided a citation on the economic benefits of wolves (Duffield et al. 2006, p. 51). Others expressed that wolf predation on ungulates has negatively affected local economies by reducing clients for outfitters and guides and causing elk to move from feed grounds into areas where they cause damage and transmit disease to livestock.

**Response 12**—The Act requires that the decision to list a species as threatened or endangered be based on the best available science, and this prohibits economic considerations when making that decision. However, no similar prohibition is applicable to the promulgation of a 10(j) rule, and economic and other factors, including the effects

on other wildlife populations, are appropriate for consideration. In promulgating this regulation, we have fully complied with the requirements of the Administrative Procedures Act. Moreover, we have addressed the various benefits and costs associated with this rulemaking as required by the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act (SBREFA) (see Required Determinations section). In particular, the expected level of wolf control resulting from this rule and the fact that this rule does not apply within Yellowstone National Park, where most of the public now goes to view wolves, will not affect wolf numbers and distribution in a manner that will significantly alter the opportunities for the public to observe and enjoy wolves in the wild. Therefore, we do not expect wolf-based tourism and dependent economies to be materially affected. We also acknowledge that in some situations this rule may result in economic benefits for guides and outfitters, and possibly other associated businesses, if wolf control results in higher ungulate populations that allow higher rates of hunter harvest.

**Issue 13**—Some commenters believed that we are promoting public intolerance by allowing killing of wolves for natural predation and others questioned the basis of our statement that the revision to the NEP special rule may increase public tolerance and decrease illegal take. Others suggested that public education should be used to reduce anti-wolf sentiments instead of controlling wolves.

**Response 13**—Because wolves are currently at population levels much higher than recovery goals, we believe it is appropriate to provide increased management

flexibility to address conflicts between wolves and human uses. It is not unreasonable to assume that incentives for illegal take of wolves would be diminished by providing a legal and responsible mechanism for addressing those issues that are part of the basis for intolerance of wolves. However, because data are not available to support or disclaim this premise, we have removed this claim from the EA. State and Federal agencies, such as the National Park Service (NPS), and numerous conservation organizations continue to provide the public extensive information about wolf biology, ecology, and behavior.

**Issue 14**—Some, including one peer reviewer, questioned how we would be able to determine that a killed wolf had been chasing or harassing a dog or stock animal, when such activities would not result in physical signs on the subject of the attack.

**Response 14**—Making such a determination may be difficult in some cases, especially if the incident is not reported quickly because such evidence is generally temporary in nature. The requirement for reporting within 24 hours of take of the wolf will help ensure that the evidence is 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. In such cases, we expect that the wolf carcass would be in very close proximity to the stock animal or dog or evidence that the stock animal or dog was chased, molested, or harassed by wolves. Evidence to indicate this activity may include photographs of stock animals or dogs, pickets, temporary livestock corrals or camps, the wolf carcass, and the surrounding area immediately following the taking of the wolf, and/or tracks of the stock animal or dog

and wolf, hairs, damaged vegetation, or trampled ground. Since the 2005 special rule went into effect, 27 wolves have been killed while in the act of attacking livestock and, based on the evidence, the resulting investigations resulted in determinations that most of these wolves had been chasing, molesting, or harassing livestock. In two additional incidents where wolves were killed, one person was charged and convicted for violating the law and a second person is under investigation because the evidence did not indicate that wolves were in the act of attacking livestock. Thus, staff from State and Federal agencies involved with livestock depredations have developed expertise in determining wolf activities from field evidence and in most cases can make a reasonable determination whether that evidence indicates that a wolf was in the act of attacking the stock animal or dog.

**Issue 15**—The Wildlife Services division of the U.S. Department of Agriculture’s Animal and Plant Health Inspection Service indicated that language in the proposed rule implied that dogs are safe from wolf attack if they are near humans and provided information on some reports of wolves killing pet, herding, and guarding dogs with humans nearby (USDA 2007, p.1).

**Response 15**—Although wolf attacks on dogs in the presence of humans are extremely rare, we acknowledge that the possibility exists. Hence, the revision to the NEP special rule to provide individuals the additional flexibility to defend their dogs against wolf attacks. We have added the information on reported attacks in the preamble of this final rule.

**Issue 16**—Several commenters were concerned that wolves would be killed when attracted to dogs used for hunting, or when protecting pups.

**Response 16**—The rule prohibits killing of wolves with the use of intentional baiting, feeding, or deliberate attractants of wolves. For example, it would be unlawful to knowingly approach a wolf den or rendezvous site with a dog and then attempt to shoot those wolves. Anyone who uses dogs to deliberately attract wolves to kill them while in the guise of hunting would also be in violation of the law. On the other hand, the rule is intended to allow hunters to protect their hunting dogs from wolves that are in the act of attacking their dogs, if the hunter did not knowingly attract those wolves to the dogs.

**Issue 17**—One peer reviewer thought we should clarify what take this NEP special rule would allow in national parks and asked for clarification of what the “legally present” requirement means.

**Response 17**—This NEP special rule does not authorize any take of wolves on lands administered by the National Park Service. “Legally present” means that the person is (1) on their own property, (2) not trespassing and has the landowner’s permission to bring their stock animal or dog on the property, or (3) abiding by regulations governing legal presence on public lands. As a means of clarification we have included this definition in this NEP special rule (see Changes From the Proposed Rule section).

**Issue 18**—We received requests that goats be added to the definition of stock animals in the revised NEP special rule, because goats are used as pack animals in areas of the NRM where wolves could be a threat.

**Response 18**—We revised the definition of stock animals to add goats to the list (see Changes From the Proposed Rule section).

### **C. Comments on Processes and Requirements.**

**Issue 19**—Questions arose from commenters and peer reviewers regarding how approvals of proposals to control wolves could be scientifically based, as required by the NEP special rule, should State or Tribal management objectives for ungulate populations or herds have no biological basis. Some feared that management objectives would be deliberately inflated as an excuse to kill wolves. Others, including two peer reviewers, were concerned that management objectives may be set on carrying capacity for ungulates without consideration of the presence of wolves and thus unattainable with wolves in the system. Another peer reviewer stressed that ungulate populations at high densities relative to available resources will have low productivity regardless of wolf predation. This peer reviewer suggested that we provide a list of potential morphological indices of population vigor related to resource availability (such as antler size, hind leg length, and newborn calf weight) that States and Tribes could consider in the development of management objectives.

**Response 19**—We agree that determining the scientific validity of a proposal to control wolves to restore ungulate herd or population management objectives would be difficult without a clear picture of the basis of those objectives. However, because the States and Tribes are experts in management of their ungulate populations, and management objectives may need to be determined by a number of complex factors and can change depending on conditions, we have elected not to direct specific factors the States and Tribes should consider in the establishment of their management objectives. Instead, we have added a requirement that the basis of the State or Tribal management objectives for the affected ungulate herd or population be described in the proposals for wolf control (see Changes From the Proposed Rule section). The NEP special rule also requires any such proposal for wolf control to include a description of the data indicating that the ungulate herd or population is below management objectives and why wolf control is a warranted solution to restore the herd or population to management objective levels. If management objectives are not being met because ungulate productivity is affected by its population density, the State or Tribe will still have to demonstrate in the proposal that the removal of wolves will help restore the ungulate herd or population to management objectives because wolves are a major factor in the decline of the herd or population. We believe that inclusion of such information in the proposal, combined with the required peer review and public comment processes, will enable us to make a sound science-based determination on whether the proposed wolf control is appropriate.

**Issue 20**—We received requests to include a trigger in the rule to allow wolf control when calf/cow ratios in elk populations drop below 30 calves per 100 cows.

**Response 20**—As explained in Response 19, we will rely on the States and Tribes to provide in their proposals specific information indicating that ungulate herd or population objectives cannot be met. With respect to this comment, the proposal will need to demonstrate that a specific calf/cow ratio indicates that the herd or population will be unable to meet the established management objectives that wolves are a primary cause of the inability to meet management objectives, and that wolf control will resolve this problem.

**Issue 21**—Some commenters wanted the definition of unacceptable impacts to include effects caused by wolves at key ungulate feeding areas or feed grounds. Others expressed disapproval that wolf control would be allowed for merely causing ungulate herds or populations to move from normal feeding areas.

**Response 21**—As explained in Response 19, we do not specify factors that the State or Tribe must consider in the establishment of their ungulate management objectives. If the State or Tribe proposes to control wolves because they are affecting ungulates at key feeding areas, we will expect the proposal to include information that demonstrates that management objectives cannot be met because wolves are disrupting ungulate feeding patterns and behavior. The proposal should provide support linking

wolf activities at the feeding areas with disruption of ungulate feeding, poor nutrition in ungulates, and effects to survival and recruitment of ungulates as a consequence.

**Issue 22**—Some commenters thought that the Service, rather than the State or Tribe, should select peer reviewers or at a minimum have the option to reject peer reviews of proposals to control wolves for unacceptable ungulate impacts. Others recommended that we drop the requirement for peer and public review altogether so that wolf control actions would not be delayed when critically needed.

**Response 22**—Independent peer review plays an important role in maximizing the quality, objectivity, utility, and integrity of the information upon which we will base our decisions. Peer review will help ensure that such information is the best scientific and commercial information available. Because the relationships between ungulate populations and wolves and other factors affecting such populations are highly complex, peer review from those with expertise in these relationships is even more critical in evaluating whether proposed wolf control is appropriate. Through their extensive level of experience with ungulate conservation, State and Tribal game and fish agencies have access to experts on predator–prey relationships in the academic and scientific communities. Assigning the responsibility to conduct peer reviews to each State and Tribe proposing to control wolves will result in a more efficient process.

In this final NEP special rule, we clarify that the States and Tribes will be required to follow the OMB Final Information Quality Bulletin for Peer Review (70 FR

2664, January 14, 2005), which provides the professional standards that the Service uses in soliciting peer review from independent experts who have demonstrated expertise and specialized knowledge on the relevant issues. We also added details to the NEP special rule to clarify the requirements for peer review of wolf control proposals. Specifically, before submitting a wolf control proposal to us for approval, the State or Tribe will need to obtain five independent peer reviews of the proposal. To avoid a potential appearance of conflict of interest, those peer reviews must be obtained from experts other than staff of State, Tribal, or Federal agencies directly or indirectly involved in predator control or ungulate management in Montana, Idaho, or Wyoming. The State or Tribe also must explain in their proposal how the standards of the OMB peer review bulletin were considered and satisfied (see Changes From the Proposed Rule section).

Wolf predation significantly impacting ungulate populations is known to occur only in combination with a number of other causes of population declines. The relationships between these other factors, wolves, and prey populations are very complex and rarely result in a sudden precipitous decline requiring response in less than the normal time to conduct peer reviews and a public comment process.

**Issue 23**—A number of commenters objected to approval of any State or Tribal programmatic proposal for wolf control because they feared such an approach would allow the States or Tribes to rely on claims of broad-based ungulate impacts rather than providing evidence of localized impacts to a particular herd or population. Some commenters were also concerned that peer reviewers would not be able to predict the

significance of the role of wolf predation in future ungulate impacts given the complex nature of interrelated factors affecting ungulate populations. Some also believed that programmatic proposals would limit the ability of the public to comment on issues related to local conditions and specific actions that would not be evident at the time of public review of the programmatic proposal. A commenter asked what the consequences would be if a control project was not consistent with an approved programmatic proposal. On the other hand, some promoted acceptance of programmatic proposals because such an approach would allow States and Tribes to expeditiously address wolf impacts without delay associated with peer and public review on each individual control action.

**Response 23**—The NEP special rule does not discuss programmatic proposals per se. A programmatic proposal could be approved if it adequately addresses all the criteria required by the NEP special rule to show that the science supports the need for the proposed wolf control and has undergone all the procedural requirements for submission to the Service. We expect a programmatic proposal to clearly delineate specific conditions that would warrant wolf control for the period of time and geographic area covered by the proposal. Furthermore, before we could approve a programmatic proposal, we would have to be able to determine that control under such a proposal would not contribute to reducing the wolf population in the State below 20 breeding pairs and 200 wolves.

A programmatic proposal must undergo the same peer and public review processes as would a specific proposal. As stated above, a programmatic proposal would

need to contain enough details to show that the required criteria for approving wolf control have been met. During review, peer reviewers and the public would have the opportunity to provide input on whether the details are sufficient or appropriate in such a programmatic proposal.

If a specific control action is not consistent with the approved programmatic plan, it would be subject to enforcement of the Act's existing regulations governing NEPs of the gray wolf.

As explained in our response to Issue 22, typical times for peer review and public comment processes are not expected to affect the timeliness of control actions.

**Issue 24**—Some commenters wanted the regulations to include and describe an appeal process for the approval or disapproval of a proposal to control wolves for ungulate impacts. We also received requests that the regulations require specific means for public review of proposals, such as posting proposals on the Internet and providing 60-day comment periods. Others asked how we would rescind an approval if a State or Tribe continued to control wolves if the State's population dropped below the special rule's safety margin of 20 breeding pairs and 200 wolves.

**Response 24**—We encourage States and Tribes to work closely with us while developing their proposals to ensure that all the required criteria in the regulations will be met. Based on expected coordination with the States and Tribes, we do not believe an

appeal process for disapproved proposals is necessary. We believe that transparency of the peer review and public comment processes, the NEP special rule's criteria for an approvable proposal, and our standards for the use of the best scientific and commercial information available preclude the need for an appeal process. Furthermore, should we disapprove a proposal, we would explain the reasons for the disapproval, and the State or Tribe may revise the proposal and resubmit it for further consideration.

In the NEP special rule, we intend to allow for a transparent process for review of wolf control proposals by requiring the State or Tribe to implement peer reviews and a public comment period. The methods and processes for providing adequate and reasonable public review and input will be determined by the State or Tribe submitting a wolf control proposal.

Monitoring of wolf populations (see Response 26) will provide a feedback loop that would inform the State or Tribe if the control actions are no longer appropriate or in danger of noncompliance with the regulations. If a State or Tribe continued to take wolves after the State's wolf population dropped below the rule's safety margin, the State or Tribe will be in violation of the law and subject to an investigation and further action by the Service's Division of Law Enforcement.

**Issue 25**—We received thousands of comments asking to prohibit aerial gunning as part of wolf control actions and some suggesting that the proposed revisions to the NEP special rule would violate the Airborne Hunting Act. Other commenters asked for

prohibitions on a variety of methods, including but not limited to hunting, trapping, poisoning, and killing with motorized vehicles. One peer reviewer expressed a preference for hunting and trapping over aerial gunning and poisoning to gain more public acceptance of control measures. Some commenters objected to the use of trapping and poisoning on public property. Some commenters suggested using various forms of nonlethal control before resorting to killing wolves.

**Response 25**—The States will likely use shooting from the ground and air as the primary method of control of wolves for ungulate impacts. These methods are considered the most efficient and humane of those available. Based on the experience and expertise of State agency staff, we believe the States should be allowed the flexibility to determine the appropriate methods of control within the confines of existing laws and regulations. This NEP special rule does not supersede or invalidate any other Federal, State, or Tribal laws and regulations, including the Airborne Hunting Act. All management activities under this NEP special rule must be conducted in compliance with all other applicable laws and regulations. Furthermore, if control methods result in take of wolves exceeding the level in an approved proposal under this NEP special rule, the control actions must cease and will be subject to enforcement under the Act.

We and our partners in wolf recovery continue to investigate and implement a variety of nonlethal methods of wolf management. While preventative and nonlethal control methods can be useful in some situations, they are not consistently reliable, so

lethal control remains a primary tool for managing wolves affecting ungulate populations, livestock, and domestic animals.

**Issue 26**—Some commenters, including two peer reviewers, said that the rule should include a requirement for monitoring to determine effectiveness of wolf control actions and a process for adaptive management. Some questioned how monitoring by the States or Tribes would be funded or urged us to provide such funding.

**Response 26**—In the NEP special rule’s requirement for wolf control proposals to include a description of how ungulate population responses to wolf removal will be measured, we now specify that the proposal must describe how control actions will be adjusted to maintain their effectiveness. While the wolf is listed, Idaho and Montana receive Federal funding to conduct wolf population monitoring, and we provide staff to conduct monitoring in Wyoming. Wolf control for livestock depredation is reported informally on a weekly basis and officially in annual reports. The annual reports include comprehensive information on control actions, wolf population status, and analyses of the effectiveness of wolf control for livestock depredation. This reporting mechanism will be used for wolf control actions for unacceptable ungulate impacts under this rule. We expect the annual reports to include an evaluation of the effectiveness of wolf control and other measures in relieving unacceptable impacts to ungulate herds or populations just as is done for wolf control for livestock depredation. An adaptive management framework for wolf control for unacceptable ungulate impacts may entail slight modifications to the approved control actions. However, any necessary changes that would increase level and

duration of take of wolves or impacts to wolf populations that were not considered for the approval of the control actions will require submission of a new proposal and must comply with the rule's criteria and procedures for approval. The Idaho Department of Fish and Game's proposal for wolf control, submitted in 2006 (Idaho Department of Fish and Game 2006, pp. 20-21), provides an example of the type of information on proposed monitoring that should be included.

Wolf populations in the NRM have been and will continue to be intensively monitored. This monitoring is conducted by the Service, NPS, Nez Perce Tribe, and the States of Idaho, Montana, and Wyoming and will help provide information on any effects to wolf populations from wolf control actions. Currently, Idaho and Montana receive Federal funding for wolf management and monitoring. Such funding is likely to continue at least until the wolf is delisted. While the wolf is listed, the Service provides funding and staff to conduct wolf management and monitoring in Wyoming outside the national parks. The NPS covers funding for monitoring in the national parks, but wolf control under this rule will not occur there.

**Issue 27**—A couple of commenters claimed that the proposed rule is arbitrary and capricious because (1) the post-delisting wolf management plans, required for a State or Tribe to be eligible to use the NEP special rule, would be implemented only after delisting, yet we could approve wolf control before then, and (2) the Act provides no basis for allowing wolf control before delisting based on how a State or Tribe might manage wolves after delisting.

**Response 27**—The requirement for approved post-delisting management plans for a State or Tribe to be eligible to apply the revised NEP special rule is not based on the specifics of wolf management after delisting, when the NEP special rule will no longer exist. Development of a wolf management plan demonstrates that the State or Tribe has undertaken a formal process that commits it to a management strategy for sustaining wolf recovery. This commitment assures that any proposal to remove wolves will be in alignment with long-term wolf conservation and not based solely on a goal to benefit ungulate populations. In addition, adoption of the wolf management plan will demonstrate that the wildlife agency has received the necessary local political and administrative support within the State or Tribe for implementing the plan and approved wolf control.

**Issue 28**—We received requests, including from a State agency, to increase the required reporting period after a wolf is killed from 24 to 72 hours to accommodate instances where the take occurred in remote areas.

**Response 28**—In recognition of the need for a greater reporting time in certain situations, 50 CFR 17.84(n)(6) already allows for reasonable additional time for reporting if access to a site is limited. We believe this existing provision appropriately addresses the concern raised by the commenter and that no modification is needed.

**Issue 29**—One commenter recommended that the NEP special rule specifically prohibit trapping of wolves in primary conservation areas for grizzly bears.

**Response 29**—Only two grizzly bears have been accidentally trapped since trapping wolves for monitoring and livestock control purposes began in 1986. The type of trap in one incident is now used by State or Federal agency staff only when grizzly bears are hibernating. In the other incident in Glacier National Park, a trapped bear was killed by another bear. Currently, several measures are implemented to minimize accidental trapping and safety issues for nontarget species and agency staff (unintentional trapping of bears is much more dangerous to agency staff than it is to the bears). Some of these measures include the use of transmitters on traps to detect sprung traps, careful placement of traps, and use of less odorous bait to minimize attracting bears. If a bear is accidentally trapped, agency staff dart and release it. Therefore, wolf control authorized by this NEP special rule is highly unlikely to compromise grizzly bear conservation.

**Issue 30**—Some commenters requested additional time for public comment. Some believed that we did not advertise the hearings and public comment periods sufficiently. Some objected that hearings were not held in major population areas such as Denver, Colorado, or Portland, Oregon.

**Response 30**—We provided a total of 60 days in two separate 30-day periods for public comment. We announced information on the comment period and hearings in the Federal Register notice of the proposed rule, our national Web site, and regional Web

sites in the two affected regions. We also provided legal notices of the comment period and hearings for publication in 11 major and local newspapers in Idaho, Montana, and Wyoming. We sent out press releases to print and broadcast media; members of Congress; relevant State, Tribal, Federal, and local agencies; and hundreds of interested parties in Idaho, Montana, Wyoming, Utah, Colorado, North Dakota, South Dakota, Nebraska, and Kansas. We also sent information on the opportunity for public comment to two major national environmental organizations that distributed the information to their membership, on their Web sites, and to other organizations that made similar efforts. Given that we received more than 260,000 comments from throughout the country, we believe sufficient notice and time was provided for widespread public comment. In selecting hearing locations, we believe that we achieved a balance between proximity to the most affected public in the three States where the rule would apply and the public's accessibility to the hearing locations.

**D. Comments on Legal Compliance with Laws, Regulations, and Policies.**

**Issue 31**—The proposed revised special rule is not in compliance with section 2 of the Act nor does it conform to the purposes of section 10(j) because it does not further the conservation of the species. The proposed revisions are tantamount to delisting and in violation of Section 4 of the Act by allowing take as if the species was not listed.

**Response 31**—The regulations under the Act relating to establishment of experimental populations specifically recognize the creation of special rules containing

both prohibitions and exceptions for those populations (50 CFR 17.82). Under section 10(j), such exceptions are intended to allow management practices to address potential negative impacts or concerns from reintroductions. The 10(j) special regulations of 1994 and 2005 for the NEP of the gray wolf in the NRM include provisions for managing wolf populations impacting livestock and ungulate populations. Such provisions are necessary for the continued enhancement and conservation of wolf populations because they foster local tolerance of introduced wolves. However, these revisions do not alter the protected status of the gray wolf in the NRM provided under section 4 of the Act. The reintroduction of the gray wolf into Central Idaho, Southwestern Montana, and Yellowstone National Park under the 10(j) provisions clearly furthered the conservation of the species. Since 1995, when the reintroductions first occurred, wolf populations expanded in size and distribution and reached the minimum recovery goals in 2000 and have exceeded those goals every year since then. As described above, our modifications to the provisions of the 2005 special rule do not compromise the continued conservation of these populations in this remarkable recovery success story.

**Issue 32**—One commenter thought that we should prepare an environmental impact statement rather than an EA to comply with the National Environmental Policy Act (NEPA) because the rule would allow the killing of nearly 1,000 wolves, constituting a major Federal action significantly affecting the quality of the human environment.

**Response 32**—As a result of the analysis in the EA, we made a finding of no significant impact because we concluded, among other reasons, that the likely amount of

take of wolves that the rule would authorize would be relatively low and would not compromise recovery of the NRM wolf population. Based on the current available information where wolves may be causing unacceptable impacts to ungulate populations, it is our expectation that the total number of wolves taken would be well below 1,000.

#### **E. General Comments on the Proposed Rule.**

**Issue 33**—The State of Montana supported all aspects of the revisions to the 10(j) special rule, but did not want efforts to finalize it to take priority over, and thus delay, finalizing the delisting rule.

**Response 33**—The Service remains committed to finalizing both the 10(j) rule and its decision on the proposed delisting rule in early 2008. The revised 10(j) special rule is intended to provide flexibility for wolf management in the NEP areas (including in Montana) in case the final determination on the delisting is delayed or concludes the wolf should remain listed.

#### **F. Comments Not Germane to the Revisions of the Special Regulations**

Some comments went beyond the scope of this rulemaking, or beyond the authority of the 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, assertions that wolf reintroduction was illegal and/or usurped States'

rights, and that the type of wolf that currently lives in Montana, Idaho, and Wyoming is a nonnative wolf. Many of these types of comments were discussed in the reclassification rule (68 FR 15804, April 1, 2003). We also received comments expressing support for, and opposition to wolf recovery efforts and the proposal (or parts of it) without further explanation.

### **Changes From the Proposed Rule**

As a result of comments and additional information received during the comment period, and additional analysis, we made several changes to the special rule as proposed on July 6, 2007 (72 FR 36942). We describe the specific changes below. Discussion of the basis for these changes are in our responses to the relevant comments where indicated below.

**1. Proposed**—Among the criteria States or Tribes would be required to address in a proposal to control wolves for unacceptable impacts to ungulate herds or populations was “Identifies possible remedies or conservation measures in addition to wolf removal.”

**1. Final**—The requirement is changed to “Demonstrates that attempts were and are being made to address other identified major causes of ungulate herd or population declines or the State or Tribal government commitment to implement possible remedies or conservation measures in addition to wolf removal;....” See Response 7 in Summary of Comments and Recommendations.

**2. Proposed**—Defined “stock animal” as a “horse, mule, donkey, or llama used to transport people or their possessions.”

**2. Final**—The definition of “stock animal” is changed to “a horse, mule, donkey, llama, or goat used to transport people or their possessions.” See Response 18 in Summary of Comments and Recommendations.

**3. Proposed**—Required States and Tribes to describe data showing that ungulate herds or populations are below management objectives, but did not require a description of the basis of the management objectives.

**3. Final**—In proposals for wolf control to address unacceptable ungulate impacts, in addition to other criteria States and Tribes must meet, the basis of the ungulate management objectives must be described. See Response 19 in Summary of Comments and Recommendations.

**4. Proposed**—Required States and Tribes to conduct peer review of wolf control proposals before submission to the Service for approval, but did not provide details of peer review requirements.

**4. Final**—The rule now specifies that the State or Tribe must conduct the peer review process in conformance with the OMB’s Final Information Quality Bulletin for Peer Review and obtain five peer reviews from experts on the related issues, other than those employed by State, Tribal, or Federal agencies directly or indirectly involved in predator control or ungulate management. See Response 22 in Summary of Comments and Recommendations.

**5. Proposed**—Required State or Tribal proposals to control wolves for unacceptable ungulate impacts to include a description of how ungulate population responses to wolf control would be measured, but did not address adaptive management.

**5. Final**—The rule now includes a requirement that the proposal describe how control actions will be adjusted for effectiveness. See Response 26 in Summary of Comments and Recommendations.

**6. Proposed**—Referred to the individuals to whom the take provisions in this rule would apply as “citizens”.

**6. Final**—To be consistent with the language in the Act the rule now substitutes the word “person” for “citizen”.

**7. Proposed**—Specified that individuals must be “legally present” on private or public land in order to lethally take wolves in defense of their stock animals and dogs, but did not provide a description of what we meant by “legally present”.

**7. Final**—As a means of clarification this rule now includes a definition of when a person is “Legally present”. See Response 17 in Summary of Comments and Recommendations.

#### 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 and positive economic effects on a small percentage of people in Idaho, Montana, and Wyoming.

(a) This regulation will 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, management of wolves by States or Tribes with wolf management plans is voluntary. Therefore, associated costs to States and Tribes for control of wolves causing unacceptable impacts to ungulate herds or populations are discretionary. While we do not quantify expected expenditures, these costs may consist of staff time and salary as well as transportation and equipment necessary to control wolves. Costs to the Service would include those associated with staff time and salary coordinating with States and Tribes during development of wolf control proposals and review and determination of approval of proposals.

We have funded State and Tribal wolf monitoring, research, and management efforts for gray wolves in Montana, Idaho, and Wyoming, and intend to continue to do so as long as wolves are listed in these States. For the past several years Congress has specifically provided funding for wolf management to Montana, Idaho, and Wyoming, and the Nez Perce. In addition, Federal grant programs are available that fund or partially fund wildlife management programs by the States and Tribes.

Benefits Accrued—The objectives of the proposed rule change are (1) to provide a means for States and Tribes with Service-approved wolf management plans to address the unacceptable impacts of a recovered wolf population to ungulate populations and herds, and (2) to allow persons in the boundaries of the NEP areas within any States or Tribal lands that has a Service-approved wolf management plan other than on lands administered by NPS to take wolves that are in the act of attacking their stock animals or dogs. Allowing wolf removal in response to unacceptable impacts will help maintain

ungulate populations or herds at or above State or Tribal objectives. As a result, hunters and associated businesses, including guides, outfitters, and the hunting retail industry, may benefit from increased hunting opportunities. Increased hunting opportunities provide States with additional revenue which is used for wildlife management and habitat restoration, protection, and enhancement.

Allowing take of wolves in the act of attacking stock animals or dogs would have a beneficial economic impact to the affected individuals by allowing them to protect such private property, as well as avoid the need for persons to unnecessarily replace and retrain these animals.

(b) This regulation does not create inconsistencies with other agencies' actions. Agency responsibilities for section 7 of the Act are the same for this rule as the previous NEP special rules. This rule reflects the 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 we do not foresee, as a result of this rule, any new impacts or restrictions to existing human uses of lands in Idaho, Montana, Wyoming, or any Tribal reservations that remain under the 1994 NEP special rules.

(d) OMB has determined that this rule could raise novel legal or policy issues.

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 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 revisions in this rule relax some of the previous restrictions on take of wolves and do not increase restrictions. For a discussion of how small entities may benefit from this increased flexibility see the Benefits Accrued section in the Required Determinations

section above. One study indicated that the return of wolves to the NRM infused approximately \$35.5 million to local economies from increased tourism to observe wolves in the wild (Duffield et al. 2006, p.51). The expected level of wolf control resulting from this rule and the fact that this rule does not apply within Yellowstone National Park, where most of the public goes to view wolves, will not affect wolf numbers and distribution in a manner that would significantly alter the opportunities for the public to observe and enjoy wolves in the wild. Therefore, local small entities benefiting from tourism associated with wolf-viewing are not likely to see decreases in business as the result of the revisions to this rule.

#### 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 proposed regulation further reduces the effect that wolves will have on a few persons by increasing the opportunity for them to protect their stock animals and dogs. Since there are so few small businesses impacted by this regulation, the combined economic effects are minimal.

(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 recovered wolf population.

#### Unfunded Mandates Reform Act

This rule 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.

(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 this proposed rule change pertains only to the relaxation of restrictions on lethal removal of wolves, it will not result in any takings of private property.

#### Federalism (Executive Order 13132)

This rule maintains the existing relationship between the States and the Federal Government. The State of Wyoming requested that we undertake this rulemaking in order to assist the States in reducing conflicts with local landowners and returning wolf management to the States or Tribes. We have cooperated with the States in preparation of this rule. Maintaining the recovery goals for these wolves will contribute to their

eventual delisting and their return to State management. It is a voluntary decision whether to undertake Programs and actions to take wolves under this rule. 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. 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. 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 Department of the Interior 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. A Federal 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 OMB control

number. This rule does not contain any new collections of information that would require us to obtain OMB approval. OMB approval is required if information will be collected from 10 or more persons (5 CFR 1320.3). “Ten or more persons” refers to the persons to whom a collection of information is addressed by the agency within any 12-month period, and to any independent entities to which the initial addressee may reasonably be expected to transmit the collection of information during that period, including independent State, territorial, Tribal, or local entities and separately incorporated subsidiaries or affiliates. For the purposes of this definition, “persons” does not include employees of the respondent acting within the scope of their employment, contractors engaged by a respondent for the purpose of complying with the collection of information, or current employees of the Federal government when acting within the scope of their employment, but it does include former Federal employees. This rule includes a requirement that a State or Tribe requesting approval to control wolves for unacceptable ungulate impacts submit a proposal to us. However, as these proposals will only be submitted by States or Tribes with Service-approved wolf management plans, we do not anticipate that it will affect 10 or more persons, as defined above. Therefore, OMB approval and a control number are not needed for information collections associated with these proposals. Existing information collections already approved under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. include permit application forms, assigned OMB control number 1018-0094, and the notification requirements in our experimental population regulations under 50 CFR 17.84, assigned OMB control number 1018-0095.

## National Environmental Policy Act (NEPA)

We have prepared an environmental analysis and finding of no significant impact, as defined under the authority of the NEPA of 1969. These documents are available from the Office of the Western Gray Wolf Recovery Coordinator (see ADDRESSES section) or from our Web site at <<http://westerngraywolf.fws.gov/>>.

## 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 have coordinated with affected Tribes within the experimental population areas of Idaho, Montana, and Wyoming on this rule. We have fully considered all comments on the proposed special regulations that were submitted by Tribes and Tribal members during the public comment period and have attempted to address those concerns, new data, and new information where appropriate.

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

On May 18, 2001, the President issued Executive Order 13211 requiring agencies to prepare Statements of Energy Effects when undertaking certain actions that significantly affect energy supply, distribution, and use. 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.

#### 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 § 17.84 by revising paragraph (n) as follows:

a. In paragraph (n)(3), revise the term “unacceptable impact” and, in alphabetical order, add the terms “legally present,” “stock animal,” and “ungulate population or herd,” to read as set forth below; and

b. In paragraph (n)(4), revise the first sentence following the heading and paragraph (n)(4)(v) and add paragraph (n)(4)(xiii) to read as set forth below:

§ 17.84 Special rules—vertebrates.

\* \* \* \* \*

(n) \* \* \*

(3) \* \* \*

\* \* \* \* \*

Legally present—A Person is legally present when (1) on their own property, (2) not trespassing and has the landowner’s permission to bring their stock animal or dog on the property, or (3) abiding by regulations governing legal presence on public lands.

\* \* \* \* \*

Stock animal—A horse, mule, donkey, llama, or goat used to transport people or their possessions.

Unacceptable impact—Impact to ungulate population or herd where a State or Tribe has determined that wolves are one of the major causes of the population or herd not meeting established State or Tribal management goals.

Ungulate population or herd—An assemblage of wild ungulates living in a given area.

\* \* \* \* \*

(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 except land administered by National Parks; 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; take for research purposes; and take to protect stock animals and dogs. \* \* \*

\* \* \* \* \*

(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 State or Tribes must prepare a science-based document that:

(1) Describes the basis of ungulate population or herd management objectives, what data indicate that the ungulate population or herd is below management objectives, what data indicate that wolves are a major cause of the unacceptable impact to the ungulate population or herd, why wolf removal is a warranted solution to help restore the ungulate population or herd to State or Tribal management objectives, the level and duration of wolf removal being proposed, and how ungulate population or herd response to wolf removal will be measured and control actions adjusted for effectiveness;

(2) Demonstrates that attempts were and are being made to address other identified major causes of ungulate herd or population declines or the State or Tribe commits to implement 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. The State or Tribe must:

(i) Conduct the peer review process in conformance with the Office of Management and Budget's Final Information Quality Bulletin for Peer Review (70 FR 2664, January 14, 2005) and include in their proposal an explanation of how the bulletin's standards were considered and satisfied; and

(ii) Obtain at least five independent peer reviews from individuals with relevant expertise other than staff employed by a State, Tribal, or Federal agency directly or indirectly involved with predator control or ungulate management in Idaho, Montana, or Wyoming.

(B) Before we authorize lethal removal, we must determine that an unacceptable impact to wild ungulate populations or herds has occurred. We also must determine that the proposed lethal removal is science-based, will not contribute to reducing the wolf population in the State below 20 breeding pairs and 200 wolves, and will not impede wolf recovery.

\* \* \* \* \*

(xiii) Take to protect stock animals and dogs. Any person legally present on private or public land, except land administered by the National Park Service, may immediately take a wolf that is in the act of attacking the individual's stock animal or dog, provided that there is no evidence of intentional baiting, feeding, or deliberate attractants of wolves. The person must be able to provide evidence of stock animals or dogs recently (less than 24 hours) wounded, harassed, molested, or killed by wolves, and we or our designated agents must be able to confirm that the stock animals or dogs were wounded, harassed, molested, or killed by wolves. To preserve evidence that the take of a wolf was conducted according to this rule, the person must not disturb the carcass and the area surrounding it. The take of any wolf without such evidence of a direct and immediate threat may be referred to the appropriate authorities for prosecution.

\* \* \* \* \*

Dated: December 27, 2007

/s/ Kenneth Stansell

Acting Director, U.S. Fish and Wildlife Service

Billing Code 4310-55-P