

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO**

Civil Action No. _____

CENTER FOR NATIVE ECOSYSTEMS, a non-profit corporation;
BIODIVERSITY CONSERVATION ALLIANCE, a non-profit corporation;
CENTER FOR BIOLOGICAL DIVERSITY, a non-profit corporation;
DEFENDERS OF WILDLIFE, a non-profit corporation; and
NATURAL RESOURCES DEFENSE COUNCIL, a non-profit corporation,

Petitioners,

v.

KEN SALAZAR, Secretary, United States Department of the Interior; and
ROWAN GOULD, Acting Director, U.S. Fish and Wildlife Service,

Respondents.

PETITION FOR REVIEW OF AGENCY ACTION

INTRODUCTION

1. This case challenges the decision of the U.S. Department of the Interior (“DOI”) and the U.S. Fish and Wildlife Service (“FWS”) to remove the Preble’s meadow jumping mouse, Zapus hudsonius preblei, from the list of threatened and endangered species in the state of Wyoming pursuant to the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 et seq., and to list it as threatened, instead of endangered, in the state of Colorado. See Final Rule to Amend the Listing for the Preble’s Meadow Jumping Mouse, 73 Fed. Reg. 38,790 (July 10, 2008) (“Final Rule”).

2. The Preble's meadow jumping mouse ("Preble's") is a tiny rodent with a body approximately three inches long and a 4 to 6-inch long tail. This species has large hind feet, long hind legs, an indistinct dark, broad stripe on its back that runs from head to tail, and is bordered on either side by gray to orange-brown fur. This shy, largely nocturnal mouse spends most of its time out of sight, foraging beneath long grasses for seeds, fruit, fungi, and insects. For a mouse, it is slow to reproduce, having two litters each year with an average of five young in each litter. Biologists believe that the species arrived in Colorado and Wyoming during the last ice age and remained after the glaciers receded. In the drier post-glacial climate, the mouse was confined to streamside ecosystems where moisture was plentiful. Its range now stretches from the foothills of southeastern Wyoming southward along the eastern edge of the Front Range to Colorado Springs.

3. In the last century, widespread habitat loss and fragmentation due to development, water diversions, overgrazing, water pollution, and gravel and sand mining resulted in a rapid decline of already rare Preble's populations. By 2030, the Front Range of Colorado and Wyoming is expected to grow to 5.7 million residents, and resulting pressures on the Preble's fragile streamside habitat will only increase. An indicator of the health of its ecosystem, the Preble's also faces threats from the impacts of global climate change.

4. Due to habitat loss and the mouse's disappearance from much of the urban corridor in Colorado and Wyoming, the Preble's mouse was protected as Threatened under the Endangered Species Act in 1998. On July 9, 2008, the FWS issued a final rule eliminating protections for the Preble's in Wyoming while keeping the Colorado populations on the endangered species list. Wyoming Preble's mice now have no federal protection.

5. The removal of protections for Preble's in Wyoming is one of several decisions issued by the FWS since receiving a March 2007 memorandum from the

Department of the Interior’s Office of the Solicitor that adopted a novel interpretation of the Endangered Species Act that allows the agency to neglect all but the most threatened part of an endangered species’ range in making listing decisions.

6. Plaintiffs challenge the Final Rule because it relies on an interpretation of the ESA term “significant portion of its range” in the definitions of “endangered” and “threatened” species, 16 U.S.C. §§ 1532(6), 1532(20) that, as applied here, is contrary to the plain language and patent purpose of the statute. DOI and FWS also violated section 4(h) of the ESA, 16 U.S.C. § 1533(h), by establishing “agency guidelines” to define the phrase “significant portion of its range” without adequate notice and public comment.

7. Additionally, FWS’s decision to delist the Preble’s in Wyoming—an area crucial to the recovery of the mouse—violates the ESA because it was not based on the best scientific data available or a reasonable analysis of the ESA’s five statutory listing factors, *id.* § 1533. It also violates the agency’s overarching obligation under the ESA to “conserve” a listed species and to “utilize [its] authorities in furtherance of the purposes of [the Act] by carrying out programs for the conservation of endangered species and threatened species.” 16 U.S.C. §§ 1531(c), 1536(a)(1).

8. Finally, the determination that the Preble’s is only threatened and not endangered in Colorado is also contrary to the best scientific data available and the five statutory listing factors.

JURISDICTION AND VENUE

9. This action arises under the ESA, 16 U.S.C. § 1531 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. § 551, 701 *et seq.* (“APA”). This Court has jurisdiction over this action pursuant to 16 U.S.C. § 1540(g) and 28 U.S.C. §§ 1331 and 1346. Plaintiffs have properly given notice to Defendants of their claims under the ESA in accordance with 16 U.S.C. § 1540(g)(2).

10. Venue is proper in the District of Colorado pursuant to 28 U.S.C. § 1391(e), as this civil action is brought against an agency of the United States and officers

and employees of the United States acting in their official capacities and under the color of legal authority, a substantial part of the events giving rise to the claim occurred in Colorado, no real property is involved in this action, and at least one Plaintiff resides in this judicial district. This case is also related to Mountain States Legal Foundation v. Salazar, No. 08cv2775, which is pending before this Court.

PARTIES

11. Plaintiff CENTER FOR NATIVE ECOSYSTEMS (“CNE”) is a non-profit 501(c)(3) public interest conservation organization located in Denver, Colorado dedicated to the conservation and recovery of native species and ecosystems across Utah, Colorado, and Wyoming. To further its mission, CNE participates in administrative processes, legal actions, public outreach, organizing, and education to protect imperiled species like the Preble’s and prevent their extinction. CNE has actively advocated for Preble’s conservation since at least 2002. CNE’s extensive Preble’s conservation efforts have included handling live wild mice in the field while assisting researchers; organizing and participating in habitat restoration field trips designed specifically to benefit the mouse; conducting tours of mouse habitat for the media; meeting with U.S. Fish and Wildlife Service staff to advocate for mouse protection (including a field visit with Service staff to mouse habitat in Wyoming); educating members of Congress about the mouse’s plight; providing testimony at public hearings about the mouse’s status; extensively commenting on the Service’s actions involving the mouse including the critical habitat designation, delisting proposals, the 4(d) rule, and several Habitat Conservation Plans; participating in the science panel convened by the Service about the mouse’s taxonomic status; and bringing litigation to attempt to halt mouse habitat degradation on U.S. Forest Service lands in Wyoming. The Preble’s represents an important indicator of the health of riparian areas in Colorado and Wyoming, and CNE greatly values the clean drinking water and open space and wildlife habitat that conserving Preble’s habitat helps provide.

12. CNE's members, staff, and officers regularly seek to observe the Preble's and to use and benefit from Preble's habitat for recreational activities, and they will continue to pursue opportunities to observe, conserve, and actively restore mouse habitat and assist mouse researchers in the field. Removal of protections for mice in Wyoming harms CNE's interests by making mice and their habitat in Wyoming more vulnerable to destruction, by making recovery of the mouse more difficult by leaving only the most fragmented and degraded habitat protected under the Act, and by increasing the chances that the entire subspecies will go extinct. This decision also affects many other species for which CNE is advocating because protections in Wyoming also benefited many other wildlife species relying on those riparian areas, and because the new interpretation of "significant portion of the range" threatens to deny protections to all imperiled species that would have otherwise been protected throughout the entirety of their ranges. The aesthetic, recreational, professional, and organizational interests of CNE and its members, staff, and officers are impaired by Defendants' failure to afford the species the full protection to which it is entitled under the ESA. In particular, in addition to impairing the ability of the members, staff, and officers of CNE to derive recreational, professional, aesthetic, and other benefits from the Preble's, the Service's decision to strip the Preble's of all ESA protection in Wyoming requires CNE to expend more of its limited organizational resources on efforts to conserve the Preble's throughout its range than would otherwise have been in the case. In addition, the Service's adoption of a dramatically new approach to defining "significant portion of its range" without affording the public a prior opportunity for comment violated CNE's and the other plaintiffs' procedural rights under section 4(h) of the ESA.

13. Plaintiff BIODIVERSITY CONSERVATION ALLIANCE ("BCA") is a non-profit 501(c)(3) corporation with offices in Laramie, Wyoming. The mission of BCA is to protect wildlife and wild places in Wyoming and surrounding states, particularly on public lands. BCA concentrates its efforts on the forests, prairies, and

rivers of Wyoming, western South Dakota, and northern Colorado. BCA focuses on entire ecosystems and individual species, particularly those that are in need of immediate conservation help but do not have a high public profile. BCA's guiding principle is that all species and ecosystems deserve protection. BCA employs three primary strategies to gain increased protection for wild species and their habitats: (1) educating the public and decision makers about the importance of conserving biological diversity and wild lands; (2) advocating directly through citizen alerts, written comments, meetings, technical analyses, etc., for the conservation of wildlife and sensitive habitats, and concurrently advocating for less damaging alternatives to ill-conceived development proposals, and (3) opposing by lawsuit and administrative protest developments that threaten rare species or sensitive ecosystems.

14. To accomplish this mission, it is necessary to first determine where sensitive species and sensitive habitats exist. BCA has conducted field work to photograph, map, and characterize Preble's meadow jumping mouse habitat and to document occurrences. These efforts have been supplemented by conducting literature searches and interviews with scientists as part of our efforts to gain protections for Preble's and its habitat under the ESA. The aesthetic, recreational, professional, and organizational interests of BCA are impaired by Defendants' failure to afford the species the full protection to which it is entitled under the ESA.

15. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("the Center") is a non-profit 501(c)(3) corporation with offices in San Francisco and Joshua Tree, California, as well as in Arizona, New Mexico, Oregon, and Washington, D.C. The Center for Biological Diversity works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center is actively involved in species and habitat protection issues throughout the United States and the world, including protection of plant and animal species from the impacts of global warming. The Center has more than 40,000 members throughout the United States and

the world.

16. The Center brings this action on its own institutional behalf and on behalf of its members, many of whom regularly enjoy and will continue to enjoy educational, recreational, and scientific activities regarding the Preble's and other species harmed by Defendants' new definition of "significant portion of its range." The interests of the Center and its members in observing, studying, and otherwise enjoying the Preble's and other endangered and threatened species and their critical habitats, and in obtaining and disseminating information regarding the survival of endangered and threatened species and their critical habitats, have been harmed by defendants' actions.

17. Plaintiff DEFENDERS OF WILDLIFE ("Defenders") is a non-profit 501(c)(3) organization headquartered in Washington, D.C. with field offices in Alaska, California, Colorado, Florida, Idaho, Montana, New Mexico, Oregon, Canada and Mexico. Founded in 1947, Defenders is a science-based conservation organization with more than 500,000 members nationwide. Defenders is dedicated to the protection of all native wild animals and plants in their natural communities, and the preservation of the habitat on which they depend. Defenders advocates new approaches to wildlife conservation that will help keep species from becoming endangered, and it employs education, litigation, research, legislation, and advocacy to defend wildlife and their habitat. Defenders is one of the nation's leading advocates for endangered species and has been involved in issues of ESA implementation for more than 30 years.

18. Defenders brings this action on its own institutional behalf and on behalf of its members who derive scientific, aesthetic, recreational, and spiritual benefit from the endangered and threatened species and their habitats that will be impacted by Defendants' new definition of "significant portion of its range." The interests of Defenders' members in observing, studying, and otherwise enjoying endangered and threatened species and their critical habitats, and in obtaining and disseminating information regarding the survival of endangered and threatened species and the critical

habitats have been harmed by defendants' actions. In particular, these regulations will increase the likelihood that many of the Preble's and other endangered and threatened species and critical habitat that Defenders' members observe, study, photograph, and otherwise enjoy will be adversely affected.

19. Plaintiff NATURAL RESOURCES DEFENSE COUNCIL ("NRDC") is a national environmental advocacy group. The NRDC is headquartered in New York and maintains offices in San Francisco, Los Angeles, Washington, D.C., New York City, Chicago, Illinois, Beijing, China, and Livingston, Montana, and Boulder, Colorado. Through advocacy, education, litigation, and other efforts, NRDC works to preserve threatened and endangered wildlife across the United States and around the world, including Colorado and Wyoming. NRDC members and staff have been actively engaged in efforts to conserve the Preble's for years, including the participation of an NRDC conservation geneticist in scientific meetings and review of the Preble's taxonomic status. The NRDC has over 400,000 members nationwide, over 12,000 of whom reside in the states of Colorado and Wyoming.

20. NRDC brings this action on its own institutional behalf and on behalf of its members who derive scientific, aesthetic, recreational, and spiritual benefit from the Preble's and the other endangered and threatened species and their habitats that will be impacted by Defendants' new definition of "significant portion of its range." The interests of NRDC's members in observing, studying, and otherwise enjoying endangered and threatened species and their critical habitats, and in obtaining and disseminating information regarding the survival of endangered and threatened species and the critical habitats have been harmed by defendants' actions. In particular, these regulations will increase the likelihood that the Preble's and many of the endangered and threatened species and critical habitat that NRDC's members observe, study, photograph, and otherwise enjoy will be adversely affected.

21. Defendant KEN SALAZAR, United States Secretary of the Interior, is the highest ranking official within the U.S. Department of the Interior and, in that capacity, has ultimate responsibility for the administration and implementation of the ESA with regard to terrestrial endangered and threatened species, and for compliance with all other federal laws applicable to the Department of the Interior. He is sued in his official capacity.

22. Defendant ROWAN GOULD is Acting Director of the U.S. Fish and Wildlife Service, a federal agency within the Department of the Interior authorized and required by law to protect and manage the fish, wildlife, and native plant resources of the United States, including enforcing and implementing the ESA. The Service has been delegated primary authority for day-to-day administration of the ESA with respect to terrestrial species.

FACTUAL ALLEGATIONS

23. The Preble's is a small, shy, largely nocturnal mouse with a distinct dark broad stripe on its back that runs from head to tail, bordered on either side by gray to orange-brown fur. Preble's have large hind feet, long hind legs, and are capable of impressive athletic feats. Using its long tail as a rudder, a Preble's can launch itself 18 inches into the air and switch direction mid-flight. It can travel three feet in a single jump and can also swim. Preble's live primarily in heavily vegetated, shrub-dominated riparian (streamside) habitats and immediately adjacent upland habitats along the foothills of southeastern Wyoming south to Colorado Springs along the eastern edge of the Front Range of Colorado. The Preble's typically hibernates from September or October until May.

24. FWS listed the Preble's as a threatened species throughout its range in Colorado and Wyoming on May 13, 1998, 63 Fed. Reg. 26,517, after determining that the species was in decline and faced continued threats linked to widespread loss and fragmentation of riparian habitat due to overgrazing and urban, recreational, and water

development.

25. On June 23, 2003, FWS designated critical habitat for the species in portions of Colorado and Wyoming, finding that habitat and populations in both states were essential to the species' survival. 69 Fed. Reg. 37,276.

26. On December 23, 2003, the state of Wyoming and a group of Colorado water users and developers petitioned FWS to remove the Preble's meadow jumping mouse from federal protection on the basis of unpublished taxonomic studies by Ramey et al. (2003 and 2004)¹. On February 2, 2005, FWS published a 12-month finding that the petitioned action was warranted and a proposed rule to remove the Preble's from the list of threatened and endangered species. 70 Fed. Reg. 5404. The finding relied on Ramey's unpublished study, which concluded that the Preble's was not a distinct subspecies.

27. Further scientific review—including a genetic study commissioned by FWS and conducted by the U.S. Geological Survey's Biological Research Division and the report of a scientific panel convened by FWS through the Sustainable Ecosystems Institute—rejected Ramey's conclusions and found that the Preble's was indeed a valid subspecies, and thus a listable entity under the ESA. Among other things, the review concluded that Ramey used insufficient genetic data to resolve subspecific limits and additionally, multiple samples in Ramey's study were contaminated, thereby leading to erroneous results.

28. On January 4, 2007, the state of Wyoming filed suit over FWS's failure to publish a final determination on the 2005 proposed delisting rule. On June 22, 2007, FWS and Wyoming reached a settlement agreement that required FWS to withdraw the 2005 proposal or issue a new proposed regulation concerning the status of the Preble's.

¹ See, e.g., Ramey, R.R., II, H. Liu, and L. Carpenter, Testing the taxonomic validity of Preble's meadow jumping mouse (*Zapus hudsonius preblei*) (2004); Unpublished report to the Governor of Wyoming and U.S. Fish & Wildlife Service (revised), Denver, CO. Denver Museum of Nature and Science, Denver, Colorado.

29. The ESA defines an endangered species as one that is “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). On March 16, 2007, the Solicitor of DOI issued a memorandum opinion, without opportunity for public comment or formal rulemaking, entitled, “The Meaning of ‘In Danger of Extinction Throughout All or a Significant Portion of Its Range,’” that abandons a longstanding agency interpretation of a key provision of the ESA. The opinion limits protection for endangered species by defining the word “range” to include only the range in which a species currently exists, not the historic range of the species where it once existed. This portion of the Solicitor’s opinion flatly contradicts various court decisions requiring the agency to consider historic range. See, e.g., Tucson Herpetological Soc’y v. Salazar, No. 07-16641, 2009 U.S. App. LEXIS 10910 (9th Cir., Jan. 16, 2009); Defenders of Wildlife v. Norton, 258 F.3d 1136 (9th Cir. 2001). The opinion also permits the Secretary to list and delist a species in less than its presently occupied range—a significant reversal of longstanding policy. FWS’s actions in this case rely extensively on this opinion.

30. On November 7, 2007, FWS formally abandoned its prior position that the Preble’s was not a valid subspecies and proposed to revise the listing of the Preble’s to “specify over what portion of its range the subspecies is threatened” in light of the Solicitor’s March 16 opinion. 72 Fed. Reg. 62,992. Specifically, FWS proposed keeping the species listed as threatened in Colorado and delisting it in Wyoming. Plaintiffs submitted extensive comments objecting to the proposed delisting of the Preble’s in Wyoming.

31. On July 10, 2008, FWS published its final revised listing determination for the Preble’s. 73 Fed. Reg. 39,790. The decision to remove legal protections in Wyoming and retain the mouse as threatened rather than endangered in Colorado is the principal subject of this complaint. Plaintiffs filed a 60-day notice of intent to sue for violations of the ESA on September 4, 2008. As set forth below, the listing action

suffers from numerous legal and scientific defects.

CLAIMS FOR RELIEF

32. For each of the Claims in this Complaint, Plaintiffs incorporate by reference each and every allegation set forth in this Complaint as if set out in full below.

FIRST CLAIM

(As Applied to the Preble's, Defendants' Interpretation of the ESA Phrase "Significant Portion of Its Range" is Contrary to the ESA)

33. The ESA permits the listing of any "species," which is defined to include any "subspecies of fish, wildlife or plant" and "any distinct population segment of species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16). The Act defines an "endangered" species as one that is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A "threatened" species, likewise, is one that is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

34. In making listing decisions under the ESA, FWS must first assess whether the candidate at issue is taxonomically a full species, subspecies, or, in the case of vertebrates, a distinct population segment. Next FWS must determine whether the species is threatened or endangered in accordance with five listing factors specified in 16 U.S.C. § 1533(a). See 50 C.F.R. § 424.11(c). If the review concludes that the species is endangered or threatened throughout "all or a significant part" of its range, then the entire entity must be listed accordingly. The ESA authorizes listing and delisting decisions at the species, subspecies, or DPS levels; it does not authorize piecemeal listings and delistings of portions of a species, subspecies, or DPS. 16 U.S.C. §§ 1533(a), 1532(16).

35. On March 16, 2007, DOI's Office of the Solicitor issued an opinion entitled "The Meaning of 'In Danger of Extinction Throughout All or a Significant Portion of its Range.'" The opinion forms the basis of the FWS's decision to delist the Preble's in Wyoming, and is being interpreted to allow state-by-state listings of other

species. See, e.g., Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and To Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15,123 (April 2, 2009) (delisting the northern Rockies distinct population segment in Idaho and Montana but not in Wyoming).

36. Defendants’ adoption of this policy interpreting the phrase “significant portion of its range,” and specifically its application here, represents a dramatic reversal of longstanding agency policy and practice, is contrary to the plain language of the ESA, and undermines the purpose of the ESA to afford sufficient species protection to not only stave off species’ extinction, but to bring about the species’ recovery.

SECOND CLAIM

(Defendants’ Decision to Delist the Preble’s in Wyoming Relies on an Interpretation of the ESA Phrase “Significant Portion of Its Range” That Is Contrary to the ESA and Otherwise Arbitrary and Capricious)

37. As detailed above, in making listing decisions under the ESA, FWS must first assess the candidate’s taxonomic status and then determine whether the species is threatened or endangered in accordance with five listing factors specified in 16 U.S.C. § 1533(a)(1). See 50 C.F.R. § 424.11(c). If the review concludes that the species is endangered or threatened throughout “all or a significant part” of its range, then the entire entity must be listed accordingly.

38. In this case, FWS concluded that the Preble’s was threatened throughout a significant portion of its range, but retained the listing only in Colorado. Preble’s meadow jumping mice in Wyoming now receive no federal protection despite FWS’s finding in the final critical habitat designation and draft recovery plan that populations in Wyoming are essential to the conservation and recovery of the species as a whole. By arbitrarily dividing the range of an imperiled species at the state line, and protecting only the populations in Colorado, FWS has violated the plain language of the ESA, which does not permit listing of portions of a species other than subspecies or distinct population segments, and has undermined the recovery purpose of the ESA.

THIRD CLAIM

(The Decision to Delist the Prebles in Wyoming Violates the ESA's Listing Factors and Agency Regulations)

39. The ESA and FWS regulations state that a species shall be listed or reclassified if the Secretary determines, on the basis of the best scientific and commercial evidence available, that the species is threatened or endangered as a result of one or more of the following factors:

- (1) The present or threatened destruction, modification, or curtailment of its habitat or range;
- (2) Over utilization for commercial, recreational, scientific, or educational purposes;
- (3) Disease or predation;
- (4) The inadequacy of existing regulatory mechanisms; or
- (5) Other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1); 50 C.F.R. § 424.11(c). By regulation, “A species may be delisted only if such data substantiates that it is neither endangered nor threatened” because it has (1) gone extinct, (2) recovered, or (3) the original scientific or commercial data available at the time of listing were in error. 50 C.F.R. § 424.11(d).

40. Defendants delisted the Preble's meadow jumping mouse in Wyoming despite the fact that none of the above criteria was met. The Preble's is not extinct, has not recovered, and none of the original findings supporting imperilment throughout all or a significant portion of its range has been refuted. Indeed, FWS has not even demonstrated that the species' circumstances in the state of Wyoming have significantly improved. Because FWS has made no attempt to demonstrate compliance with the statutory factors relevant to listing and delisting species, its action delisting the Preble's in Wyoming contravenes the ESA and FWS's own regulations.

41. In particular, the ESA requires that adequate regulatory mechanisms be in place in the affected states to support conservation of a listed species post-delisting. FWS concedes, however, in the listing rule that “[i]f delisted, State and local regulations would do little to conserve the Prebles or its habitat on private lands.” 73 Fed. Reg. 39,790, 39,829 (July 10, 2008). FWS has failed to explain why the lack of adequate state or local regulations protecting the species’ habitat in both Wyoming and Colorado is not a sufficient basis to warrant listing the Preble’s in Wyoming. Accordingly, the FWS’s failure to list the Preble’s in Wyoming is arbitrary and capricious.

FOURTH CLAIM

(The Decision to Delist the Preble’s in Wyoming Is Not Based on the Best Available Science)

42. In addition to the listing factors outlined in 16 U.S.C. § 1533(a), the ESA requires that listing determinations be based “solely on the basis of the best scientific and commercial data available ... after taking into account those efforts, if any being made by any State ... or any political subdivision of a State ... to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices.” 16 U.S.C. § 1533(b)(1)(A). FWS regulations further state: “The Secretary shall make [listing decisions] solely on the basis of the best available scientific and commercial information regarding a species’ status, without reference to possible economic or other impacts of such determination.” 50 C.F.R. § 424.11(b).

43. Even if FWS may list a species as endangered or threatened in only part of its range, FWS’s decision to deny protections entirely in Wyoming was arbitrary and capricious and violates the ESA’s listing factors and the requirement that such decisions be based on the best available science. Both at the time of listing in 1998 and when it subsequently issued a draft recovery plan for the species in 2003, FWS determined that loss and fragmentation of riparian habitat were the primary factors threatening the Preble’s in both Colorado and Wyoming. Ten years later, the available scientific data confirms “that habitat overall has continued to decline in quality and quantity” and that to

the extent direct habitat impacts have slowed at all, this is the result of the protections afforded the species under the ESA. 73 Fed. Reg. 39,790, 39,818 (July 10, 2008). Accordingly, the FWS's revised determination that in Wyoming impacts to the Prebles' habitat from the "conversion of grasslands to farms and livestock grazing" and oil and gas development are no longer sufficient threats to warrant the species' listing is contrary to the best scientific data available.

44. The Wyoming population plays an important role in recovery of the species as a whole, precisely because habitat in the state is less degraded than in Colorado. Dr. Thomas Nupp, one of the peer reviewers to the final rule, warned FWS that "if the subspecies is likely to become endangered in the foreseeable future, doesn't it make sense to preserve habitat that is not imminently threatened with destruction? As pointed out in the document the amount of habitat for Preble's mouse is declining in Colorado even under protection from the ESA.... It seems to be chasing one's tail to place a degrading habitat under regulatory protection, while removing protection from a less threatened habitat." Peer review of Thomas Nupp at 2-3. Preble's mice in Wyoming represent the highest latitude populations, and thus may be essential in conserving the species. Mice in Wyoming extend over 150 miles north of the northern extent of the occupied range in Colorado, according to GIS data provided by the Service. Because the mouse is a habitat specialist relying on linear riparian corridors restricted to a narrow range, it will be challenging for the species to adapt to climate change. Protecting the highest latitude populations in existence now makes good biological sense to allow for potential shifts further northward or to compensate for range retraction in the southern portion of the current distribution.

45. In addition, some of the highest elevation populations currently are found in Wyoming. Only 14% of the confirmed Preble's mouse locations included in the GIS data provided by the Service occur in Wyoming, but four of the ten highest elevation Preble's meadow jumping mouse populations are found in Wyoming, including the two

highest populations recorded for the subspecies. Therefore, higher elevation populations are overrepresented in the Wyoming data. The mean elevation for Colorado populations is 1881m while the mean for Wyoming populations is 1922m. Conserving the highest elevation populations now makes sense for the same reasons articulated above for higher latitude populations.

46. Delisting in Wyoming is also inconsistent with the species' draft recovery plan. The 2003 draft recovery plan states that: "The recovery planning approach is based upon the assumption that if certain criteria are met for certain existing populations, Preble's can be delisted. These criteria require that specific populations are maintained in designated habitats distributed throughout the existing range, the populations and habitats are secure from decline due to the threats listed above, the populations are self-sustaining and persistent, a long-term management plan and cooperative agreement is completed, and there is effective public involvement." Given the documented decline of the mouse in Colorado, the degradation and fragmentation of habitat in Colorado, and the potential effects of climate change on the species' distribution, the mouse's recovery may not be possible without the support of the Wyoming populations. FWS did not follow the best available science in delisting the Preble's meadow jumping mouse.

FIFTH CLAIM

(The Decision to Delist the Preble's in Wyoming Violates FWS's Duty Under Section 7(a)(1) of the ESA to Conserve Listed Species)

47. Section 7 of the ESA directs all federal agencies to use their existing authorities to conserve threatened and endangered species, 16 U.S.C. § 1536(a)(1), and to "insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical habitat] of such species." *Id.* § 1536(a)(2).

48. Agency actions subject to this requirement include "all activities or programs of any kind authorized, funded, or carried out, in whole or in part" by the

agency, and “actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02.

49. FWS’s decision to delist the Preble’s in Wyoming undermines, rather than advances, the conservation of the Preble’s meadow jumping mouse. Defendants have simply failed to “utilize their authorities in furtherance of the purposes of” the Endangered Species Act, and have failed to “carr[y] out programs for the conservation of endangered species and threatened species” in violation of 16 U.S.C. § 1536(a)(1).

SIXTH CLAIM

(The Decision to List the Preble’s As Threatened Instead of Endangered in Colorado Is Not Based on the Best Available Science or the ESA’s Listing Factors)

50. As described above, the available scientific data confirms “that habitat overall has continued to decline in quality and quantity” and that to the extent direct habitat impacts have slowed at all, this is the result of the protections afforded the species under the ESA. 73 Fed. Reg. 39790, 39818 (July 10, 2009). FWS also concedes that “[i]f delisted, State and local regulations would do little to conserve the Prebles or its habitat on private lands.” *Id.* at 39,829.

51. Indeed, FWS has stated that much of the Preble’s riparian habitat in Colorado has already been severely altered or destroyed by development-related activities. Already only 1 of 17 historically occupied sites currently supports the Preble’s. *Id.* at 39,796. According to FWS, “with current and projected human population increases and commensurate increases in urban and rural development, road construction, and water use, the ongoing loss and modification of riparian habitat will continue in much of the Prebles’ Colorado range.” *Id.* at 39,834. In the FWS’s words, “The best currently available information suggests that at least half of the Prebles’ current range in Colorado is on private land with potential for future development. In the absence of the [Endangered Species] Act’s protections, most of this habitat could be lost or degraded within the foreseeable future.” *Id.*

52. Imminent development threatens the continued viability of the species. According to FWS, “Additional planned residential and commercial development projects that would adversely affect Prebles’ habitat in Colorado are continually being reviewed by the Service. Since listing, protections afforded under the Act have slowed, but not eliminated, the loss of Prebles’ habitat due to residential and commercial development in Colorado. We conclude that in the absence of the protections under the Act, Prebles’ habitat in Colorado and the populations it supports would be lost at a greatly increased rate from residential and commercial development.” *Id.* at 39,819.

53. With respect to Colorado, the FWS has failed to provide any legally sufficient or even rational basis for concluding that the continued loss and deterioration of the species’ habitat in that state is insufficient to warrant an endangered listing, particularly when that habitat is viewed in isolation from populations in Wyoming, as the agency has done here. FWS’s determination that impacts to the Preble’s and its habitat from, among other things, urbanization and oil and gas development are not sufficient threats to warrant the species’ listing as endangered is contrary to the best scientific data available. *Id.* at 39,823. Likewise, given the inadequacy of existing regulatory mechanisms, FWS’s failure to list the Preble’s as endangered in Colorado is arbitrary and capricious.

SEVENTH CLAIM

(DOI Failed to Provide Appropriate Public Notice and Comment on its Guidance Relating to the Interpretation of “Significant Portion of Its Range”)

54. The ESA requires that the Secretary “establish, and publish in the Federal Register, agency guidelines” to ensure that the purposes of Section 1533 are “achieved efficiently and effectively.” 16 U.S.C. § 1533(h). Such guidelines include “criteria for making the findings required under such subsection with respect to petitions.” *Id.* The Secretary “shall provide to the public notice of, and opportunity to submit written

comments on, any guideline (including any amendment thereto) proposed to be established under this subsection.” Id.

55. The March 16, 2007, Solicitor’s opinion and FWS’s adoption of it in this and other listing decisions constitutes a “guideline[]” setting forth “criteria for making the findings required” for listing and delisting decisions and must be preceded by public notice and comment before being adopted as agency policy. DOI and FWS thus violated the ESA and the APA by adopting this guidance without required public notice and opportunity to submit written comments.

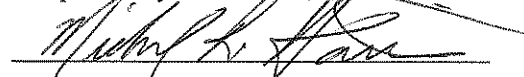
PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Court:

1. declare that Defendants’ Final Rule violates the APA and the ESA;
2. set aside and remand the Final Rule in accordance with the Court’s ruling;
3. reinstate the prior listing of the Preble’s in Colorado and Wyoming pending remand;
4. reinstate the prior critical habitat designation for the Preble’s in Colorado and Wyoming pending remand;
5. declare and set aside as unlawfully promulgated the March 16, 2007, Solicitor’s Opinion;
6. award plaintiffs their costs and attorneys’ fees; and
7. grant plaintiffs such other and further relief as this Court may deem just and proper.

DATED: June 23, 2009

Respectfully submitted,



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