



HAGEMAN & BRIGHTON, P.C.

ATTORNEYS AT LAW

222 East 21st Street
Cheyenne, Wyoming 82001

Telephone: (307)635-4888 Facsimile: (307)635-7581

Harriet M. Hageman
hhageman@hblawoffice.com

Kara Brighton
kbrighton@hblawoffice.com

Magdalene M. Allely
malley@hblawoffice.com

April 3, 2009

Ken Salazar
Secretary of the Interior
United States Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

VIA CERTIFIED MAIL

Rowan Gould
Acting Director
United States Fish & Wildlife Service
1849 C Street, NW
Washington, D.C. 20240

VIA CERTIFIED MAIL

Stephen Guertin
Region 6 Director
United States Fish & Wildlife Service
134 Union Blvd.
Lakewood, Colorado 80228-1807

VIA CERTIFIED MAIL

Re: **60-day Notice of Intent to File Civil Suit for Violations of the
Endangered Species Act
Gray Wolf**
Our File No.: 20260

Dear Secretary Salazar, Acting Director Gould, and Regional Director Guertin:

Hageman & Brighton, P.C., represents a coalition of associations and entities comprised of *the* Wyoming Wool Growers Association, Wyoming Stock Growers Association, Wyoming Association of Conservation Districts, Rocky Mountain Farmers Union, Wyoming Outfitters & Guides Association, Wyoming Association of County Predatory Animal Boards, Cody Country Outfitters and Guides Association, Predator

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Management District of Niobrara County, Sportsmen for Fish & Wildlife Wyoming, and Wyoming Farm Bureau Federation (hereafter collectively referred to as the “Wyoming Wolf Coalition”). Pursuant to the requirements of 16 U.S.C. § 1540(g)(1)(A) and (C), we hereby provide you with this notice of intent to commence a civil action against Secretary Salazar (Secretary), Acting Director Rowan Gould (Director), and Regional Director Guertin (Director) in their official capacities, and the United States Department of Interior, Fish and Wildlife Service (the Secretary, Directors and Agency being collectively referred to below as the “FWS”), seeking injunctive and other relief for the violation of the requirements of the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 et seq., its implementing regulations, FWS policies, and the applicable interagency peer review guidelines. Most specifically, we intend to file a civil action pursuant to 16 U.S.C. §§ 1533 and 1539(j); 50 C.F.R. §§ 424.11 and 424.13; 50 CFR Part 17; the FWS internal policies regarding recovery of species; and the peer review guidelines. These claims arise from the decision of the FWS to remove the gray wolves from the list of threatened and endangered species in the Northern Rocky Mountain states of Idaho and Montana and parts of Washington, Oregon, and Utah, and to retain such listing in the State of Wyoming. These claims also arise from the decision of the FWS to reject the Wyoming Wolf Management Plan.

BACKGROUND

On November 22, 1994, the FWS issued its Final Rule for the “reintroduction” into the Yellowstone National Park of the gray wolf (*Canis lupus*) as a non-essential experimental population pursuant to 16 U.S.C. § 1539(j) (section 10(j)). One of the stated purposes of the “non-essential experimental” designation was to provide the FWS with the necessary management techniques and methods to assure that historical uses of public and private lands would not be disrupted by wolf recovery activities. See Final Rule, 59 Fed. Reg. 60252, 60255. The “non-essential experimental” population designation was used to assure that depredating wolves would be controlled. *Id.*; see *also* the 1987 Northern Rocky Mountain Wolf Recovery Plan (Recovery Plan). As stated in the Final Rule, “The [Recovery Plan] recommended use of the Act’s section 10(j) authority to reintroduce experimental wolves in the Park. **By** establishing a nonessential experimental population, more liberal management practices may be implemented to address potential negative impacts or concerns regarding reintroduction.” 59 Fed. Reg. at 60253.

The proposal was to “reestablish” a viable wolf population in the Yellowstone Recovery Area, which was one of three wolf recovery areas identified in the Recovery Plan. The “Primary Objective” of the Recovery Plan was to “remove the Northern Rocky Mountain wolf from the endangered and threatened species list by securing and maintaining a minimum of ten breeding pairs of wolves in each of the three recovery areas for a minimum of three successive years.” Recovery Plan at 10. The FWS chose as one of the recovery areas the Yellowstone National Park for “reintroduction” of the gray wolf for several reasons, including the fact that the Park was under Federal jurisdiction, it had high-quality wolf habitat and good potential release sites, and it was far from the natural southern expansion of wolf packs from Montana. See Final Rule, **59** Fed. Reg. at **60254**. The FWS also found it important that “[m]ost of the reintroduction area is remote and sparsely inhabited wild lands.” Id. at **60256**.

The FWS, recognizing the overwhelming controversy associated with “reintroducing” the gray wolf into Yellowstone Park, sought to minimize or avoid the public’s concerns regarding the impact of the gray wolf. In its attempt to gain the public support that it believed was critical to the success of wolf “reintroduction”, the FWS adopted numerous conditions for the management of the “reintroduced” gray wolf in the Yellowstone Recovery Area. For example, the Recovery Plan identified the criteria for selecting recovery areas and management zones for the gray wolf. The three management zones defined by the Recovery Plan were established to minimize wolf-human livestock conflicts, while at the same time allowing for wolf recovery within the geographic confines of the Yellowstone Recovery Area. “Zone I” was defined as containing “key habitat components in sufficient abundance and distribution on an annual basis to sustain ten breeding pairs of wolves. It should generally be an area greater than 3,000 contiguous square miles with less than 10% private land (excepting railroad grant lands) and less than 20% subject to livestock grazing.” See Recovery Plan at **23**. Management “Zone II” was established as a “buffer” zone, and Management Zone III was defined as being undesirable for wolf presence: “this zone contains established human activities such as domestic livestock use or other human activities or developments in sufficient degree to render wolf presence undesirable.” Id. at **24**.’

¹ The “Zone Management Concept” is defined in the Recovery Plan Glossary as follows: “A management concept by which management priority and concern is de-emphasized beyond a central core area. For this document there will be three

In 2002, the FWS requested Wyoming to develop a gray wolf management plan. The Wyoming Game & Fish Department (WGF) drafted the Wyoming Plan after extensive consultation with the FWS. In 2003, at Wyoming's request, Craig Manson, Assistant Secretary for Fish and Wildlife and Parks within the Department of Interior, reviewed Wyoming's proposed statutory scheme for managing gray wolves to determine whether the proposed legislation would satisfy the "adequate regulatory mechanism" protection required by the ESA. Mr. Manson agreed that Wyoming's proposed legislation regarding monitoring, management authorities, and maintenance of fifteen (15) wolf packs in Wyoming satisfied the "adequate regulatory mechanism" requirement of the ESA. The Wyoming Legislature subsequently enacted the regulatory scheme into law.

Following the Legislative action, the Wyoming Game and Fish Commission approved the final version of the Wyoming Plan. The Plan was then submitted to the FWS for its review and approval. The FWS retained an independent panel of twelve (12) wolf management experts to provide a peer review of the Wyoming Plan. Eleven (11) of the twelve experts provided written reviews; ten (10) of those eleven experts concluded that the Wyoming Plan would, collectively with the Idaho and Montana gray wolf management plans, maintain the recovery goal population numbers in the Northern Rocky Mountain Recovery Area.

In January, 2004, the FWS rejected the Wyoming Plan. It did so despite concluding that "from a strictly science perspective, yes, the plans were deemed adequate." (Testimony of Paul Hoffman, Deputy Assistant Secretary of the Interior for Fish and Wildlife and Parks, appearing before the Joint Travel, Recreation, Wildlife and Cultural Resources Committee of the Wyoming Legislature). Mr. Hoffman further testified that the FWS's rejection of Wyoming's Plan was based on "litigation risk management principles." The FWS also relied upon political considerations and speculation regarding future actions by the States of Montana and Idaho in terms of wolf management.

management zones: Zone I will give strong emphasis to wolf recovery; Zone II will be a buffer zone; and Zone III will contain established human activities such as domestic livestock use or developments in sufficient degree as to render wolf presence undesirable. Maintenance and improvement of habitat for wolves are not management considerations in Zone III." Recovery Plan at 46.

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The Wolf Coalition filed suit challenging the FWS 2004 rejection of the Wyoming Plan. Finding that such decision was not “final” for purposes of judicial review, the Wolf Coalition’s (and the State of Wyoming’s) lawsuit was dismissed.

The FWS rejected and denied the State of Wyoming’s Petition to Delist the Canadian gray wolf in the summer of 2006. The State of Wyoming eventually filed a lawsuit challenging that decision, which challenge was resolved by a stipulation, whereby the State agreed to modify the Wyoming Plan and the FWS agreed to approve it, recognizing that it provided the necessary protections for sustaining a recovered wolf population in the State of Wyoming. The State of Wyoming met all of its obligations and commitments. The FWS, however, refused to defend Wyoming’s Wolf Management Plan. The result was a decision by Judge Malloy, a District Court Judge for the District of Montana, enjoining the FWS’s efforts to delist the Canadian gray wolf in all three States.

Rather than support and defend Wyoming’s Wolf Management Plan – a Plan that meets all of the requirements of the endangered species act, the FWS has hung the State of Wyoming out to dry. More specifically, the FWS has violated the endangered species act and caused substantial injury to the Wyoming Wolf Coalition Members, with such injury increasing exponentially until such time as the FWS carries out its obligations and authority to properly manage the wolves and to allow the State of Wyoming to do so pursuant to its scientifically-sound and appropriate Plan,

The FWS’s decision to reject the Wyoming Plan violates the ESA, which requires the Secretary and Directors to base decisions “solely upon the best scientific and commercial data available. . . .” 16 U.S.C. § 1533(b)(1)(A). Ten of the eleven peer reviewers that were commissioned by the FWS concluded that the Wyoming Plan would provide an adequate regulatory mechanism to protect and preserve the Northern Rocky Mountain wolf population and meet the applicable recovery goals that were identified in the Recovery Plan. The FWS has also concluded that Wyoming’s modified Plan provides an adequate regulatory mechanism to protect and preserve the Northern Rocky Mountain wolf population and to meet the recovery goals. Despite having ten of its own peer reviewers approve Wyoming’s original Wolf Management Plan was sufficient to provide and “adequate regulatory mechanism” to protect the species at or above recovery levels. Despite that finding, and in an effort to work with the FWS to obtain delisting of a species that has clearly met all recovery goals, the State of Wyoming adopted an even more stringent and protective

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statutory and regulatory scheme. Despite making those concessions, the FWS continues to allow itself to be hijacked and controlled by certain organizations that have no intention of allowing the Canadian gray wolves to be delisted, regardless of what the “best scientific and commercial data available” may show. **As** a result, the Wyoming Wolf Coalition members have suffered, and will continue to suffer irreparable injury. The citizens of the State of Wyoming will continue to suffer substantial and irreparable injury. The Canadian wolf population will continue to grow unchecked, thereby severely injuring our livestock industry, our outfitting and guides industry, our sportsmen’s group, the financial stability of our Counties, and our travel and tourism industry.

The gray wolf population has far exceeded the recovery goals that were developed and adopted as part of the reintroduction efforts for the Yellowstone Recovery Area. The gray wolf population has severely damaged Wyoming’s wildlife resources, including elk, moose, deer, bighorn sheep, and antelope. The gray wolf population has severely damaged the Wyoming Game & Fish Commission’s ability to manage wildlife and raise revenue. The gray wolf population has severely damaged the outfitting and sportsmen industries. The gray wolf population has severely damaged Wyoming’s agricultural interests, killing cattle, sheep, and horses, and limiting the viability of grazing permits. The gray wolf population has severely damaged Wyoming’s tourism industry. The gray wolf population has severely impacted Wyoming’s revenue base. The gray wolf population has severely damaged the interests and property rights of the Wolf Coalition members.

The FWS has failed to manage the gray wolf population as required by the Recovery Plan, the Final Rule, and ESA. The FWS has failed to comply with the conditions that it adopted to ensure public support for its “reintroduction” efforts. At the same time that the FWS has failed and refused to adequately manage the gray wolf population, and has failed and refused to comply with its own conditions, it has unlawfully refused to allow Wyoming to do so.

The actions of the FWS have caused injury to, and will continue to cause injury to, members of the Wyoming Wolf Coalition. **As** such, and in accordance with the requirements of 16 U.S.C. § 1540(g)(2), the Wyoming Wolf Coalition Members intend to file a civil action for the purpose of enjoining the FWS from violating and continuing to violate the ESA, its implementing regulations, FWS policies, and the applicable interagency peer review guidelines. The Wyoming Wolf Coalition also intends to seek **an** injunction requiring the

FWS to undertake an environmental impact statement of its decision to delist the Canadian gray wolf in Idaho and Montana, and in parts of Washington, Oregon and Idaho, and to exclude Wyoming from the delisting Rule.

GENERAL ALLEGATIONS

1. The Wolf Coalition members have a direct and substantial interest in the recovery and management of the gray wolf in the Yellowstone Recovery Area and throughout the State of Wyoming. In the absence of recovery and management of the species, under the current interpretation and application of the ESA by the FWS, not only will the goals and purposes of the ESA be unfulfilled, but members of the Wyoming Wolf Coalition are likely to suffer continued and serious adverse impacts to their legally protected interests.
2. Pursuant to 16 **U.S.C.** § 1533(b) and (c), the Secretary must make his decisions “solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State **or** foreign nation . . . to protect such species. . . .” The FWS’s decision to reject the Wyoming Plan was not based upon the “best scientific and commercial data available,” but on political considerations, “litigation risk management” principles, and speculation. The ESA specifically prohibits the FWS **from** relying upon such considerations.
3. The FWS’s decision to delist the Canadian gray wolf in Montana and Idaho, and in parts of Washington, Oregon and Utah, was not based on the “best scientific and commercial data available.”
4. The FWS’s decision to delist the Canadian gray wolf in Montana and Idaho, and in parts of Washington, Oregon, and Utah violates the Recovery Plan and the FEIS.
5. The FWS’s refusal to delist the Canadian gray wolf in Wyoming violates the Recovery Plan, the **ESA**, the FEIS, and was not based on the “best scientific and commercial data available.”

6. The FWS's decision to treat Wyoming differently than the other states in relation to the decision to delist is a violation of the ESA, the FEIS, the 10(j) rule, and was not based on the "best scientific and commercial data available."
7. Pursuant to 16 U.S.C. § 1533(f), "the Secretary shall develop and implement [recovery] plans . . . for the conservation and survival of endangered species and threatened species listed pursuant to this section. . . ." Each plan is to contain "objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list." The Recovery Plan related to the "reintroduction" of the gray wolf into Wyoming was adopted in 1987. The "objective, measurable criteria" defined in that Recovery Plan has not only been met, but exceeded, yet the FWS refuses to allow Wyoming to manage the gray wolf pursuant to the Wyoming Plan.
8. The FWS has failed and refused to manage the gray wolf population in such a manner as to protect the historical and current uses of public and private lands. The **FWS** has failed and refused to adequately control depredating wolves. As a result, the gray wolf population has severely damaged Wyoming's wildlife resources and agricultural interests. The **FWS's** rejection of the Wyoming Plan only exacerbates that problem and will lead to further problems with depredating wolves and to unreasonable and catastrophic losses to Wyoming's wildlife populations.
9. The Recovery Plan that was adopted pursuant to 16**U.S.C**§ 1533(f) identifies certain management techniques that the FWS committed to undertake to minimize the damage and destruction caused by the gray wolf population to wildlife and livestock populations. The FWS has failed and refused to implement and use those management techniques to protect against the damage and destruction caused by the gray wolf population.
10. The FWS has failed and refused to enforce the management zones that were adopted to protect the citizens of Wyoming, including the Wolf Coalition members, when it chose to "reintroduce" a gray wolf population into Yellowstone National Park. Conversely, the Wyoming Plan was developed and adopted for the purpose of enforcing the "management zones" and to assure protection for wolves in and around the Yellowstone Recovery Area. The key habitat components **as** protected by the

Wyoming Plan far exceeds 6,000 contiguous square miles (over double the contiguous square miles required by the Recovery Plan). The Wyoming Plan provides protection for private lands and seeks to avoid conflict between the gray wolf and livestock producers. The Wyoming Plan seeks to protect the wildlife populations, including elk, moose, deer, bighorn sheep, and antelope. The FWS rejected the Wyoming Plan for the specific purpose of encouraging the propagation of the gray wolf (a) outside of the more than 6,000 square miles that Wyoming has set aside for protection and outside of the designated Yellowstone Recovery Area, (b) onto private lands and (c) into areas that have been historically grazed by livestock and wildlife, thereby increasing the conflict between wolves and livestock and thereby increasing wildlife depredations and wildlife kills throughout the State.

11. The FWS improperly seeks to expand the recovery area beyond the area addressed and analyzed in the Recovery Plan, the Final Rule, and the Final Environmental Impact Statement (FEIS).
12. The FWS has failed and refused to follow and comply with the 1987 Recovery Plan and the Final Rule.
13. The Final Rule states that the FWS “will” aid livestock producers by maintaining an effective control program that minimizes livestock losses due to wolves. The FWS has failed to implement and carry out such a program. The FWS’s rejection of the Wyoming Plan inhibits effective control to minimize livestock losses.
14. The FWS’s failure and refusal to follow the Final Rule, the Recovery Plan, the ESA implementing regulations, its own internal policies, and the interagency peer review guidelines has and will continue to destroy Wyoming’s wildlife populations.
15. The FWS has improperly refused to grant to Wyoming expanded authorities under Section 10(j) of the ESA to manage the gray wolf population. See March 9, 2004 Proposed Rule, 69 Fed. Reg. 10956.
16. The Wyoming Wolf Coalition hereby adopts by reference the State of Wyoming’s April, 2009 60-day Notice of Intent to File Civil Suit for Violations of the Endangered

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Species Act, which Notice is attached **hereto and incorporated** herein by **this reference**.

CONCLUSION

The monetary and conservation efforts that have been undertaken by the State of Wyoming, certain Counties, sportsmen groups, outfitters, wildlife organizations, and landowners, to protect and enhance our wildlife populations is being consumed by an unmanaged predator. The monetary and labor investment by livestock owners to establish and protect their herds is being consumed by an unmanaged predator. The Wyoming Plan balances the various interests involved, while ensuring that Wyoming's wildlife and livestock populations are protected. The Wyoming Plan was adopted to implement the intent of the Final Rule and the Recovery Plan, and satisfies the requirements of the ESA. The FWS should be required to approve the Wyoming Plan, and include the State of Wyoming in the delisting rule and process.

16 U.S.C. § 1540(g) requires the Wolf Coalition to wait sixty (60) days after written notice has been given to the Secretary before suit may be filed challenging the violations described above. The Wolf Coalition intends to file such a civil suit, and will seek a temporary restraining order, declaratory and injunctive relief, the costs of the litigation (including reasonable attorney's fees, expert witness fees and costs), and compensation for the FWS's unlawful taking of private property.

If you have any questions, please do not hesitate to contact Hageman & Brighton.

Sincerely yours,

HAGEMAN & BRIGHTON



Harriet M. Hageman

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cc: Bruce Salzburg, Wyoming Attorney General
Jay Jerde, Senior Assistant Attorney General
Wyoming Wool Growers Association
Wyoming Stock Growers Association
Wyoming Association of Conservation Districts
Rocky Mountain Farmers Union
Wyoming Outfitters & Guides Association
Wyoming Association of County Predatory Animal Boards
Cody Country Outfitters and Guides Association
Predator Management District of Niobrara County
Sportsmen for Fish & Wildlife Wyoming
Wyoming Farm Bureau Federation



Office of the Attorney General

Governor
Dave Freudenthal

Attorney General
Bruce A. Salzburg

Administration
123 State Capitol
Cheyenne, Wyoming 82002
307-777-7841 Telephone
107-777-6869 Fax

Chief Deputy Attorney General
Elizabeth C. Gagen

April 2, 2009

Ken Salazar
Secretary of the Interior
United States Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

via Certified Mail

Rowan Gould
Acting Director
United States Fish and Wildlife Service
1849 C Street, NW
Washington, D.C. 20240

via Certified Mail

Stephen Guertin
Director
United States Fish and Wildlife Service
Mountain-Prairie Region
134 Union Boulevard
Lakewood, CO 80228-1807

via Certified Mail

Re: 60-day Notice of Intent to Sue for Violations of the Endangered Species Act — Gray Wolf (*canis lupus*)

Dear Secretary Salazar, Acting Director Gould, and Regional Director Guertin:

For the third time in the past five years, the United States Fish and Wildlife Service ("Service") has rejected the gray wolf management scheme adopted by the State

of Wyoming (“State”) and demanded that the State adopt a statewide trophy game classification for wolves, even though the best scientific data available confirms that the State’s current wolf management scheme satisfies the legal requirements for delisting in the Endangered Species Act (“ESA”). In doing so, the Service has yet again decided that political expediency should trump its unambiguous legal obligations under the ESA.

Although the Service cites a litany of reasons for rejecting the State’s wolf management scheme, the Service does not cite any legitimate biological reason to show that the State’s scheme will prevent the State from maintaining its share of the recovered wolf population after delisting. Because the best scientific data available confirms that the State’s wolf management scheme will adequately protect the gray wolf population in Wyoming after delisting, the Service was legally required to approve the State’s management scheme and to delist the gray wolf population in Wyoming. By ignoring the unambiguous “best science” mandate in the ESA, the Service has **left** the State with no alternative but to seek judicial review in federal district court to force the Service to comply with the **ESA**.

Notice of Intent to Sue

In accordance with the 60-day notice requirement in 16 **U.S.C. § 1540(g)(2)** of the ESA, you are hereby notified that the State of Wyoming intends to file a civil action against the United States Department of the Interior (“Interior”), the Service, and each of you in your respective official capacities to enjoin continuing violations of the ESA, the ESA implementing regulations, and the **APA**, and to compel you to comply with these laws. The State’s claims arise from the Service’s final agency action in adopting a new **rule** to create a northern Rocky Mountain distinct population segment (“NRM DPS”) for the gray **wolf** and to remove the NRM DPS, except in Wyoming, from the list of endangered or threatened species. *See* 74 Fed. Reg. 15123-15188 (April 2, 2009). In making this delisting decision, the Service (acting on behalf of the Secretary of the Interior) violated **5 U.S.C. § 706**, **16 U.S.C. § 1533**, and the implementing regulations thereto. The State intends to bring suit pursuant to **16 U.S.C. § 1540(g)(1)(C)** of the **ESA** and **5 U.S.C. § 701** through 706 of the **APA**.

The Service’s delisting decision was arbitrary, capricious, an abuse of discretion, in excess **of** statutory right, contrary to the evidence before the Service, and not supported **by** substantial evidence. In making the delisting decision, the Service violated the **APA**, the **ESA** and/or the **ESA** implementing regulations as follows:

I. Failure to comply with the “best science” mandate in 16 U.S.C. § 1533.

The unambiguous language in the **ESA** limits the type of information the Service may consider in evaluating the adequate regulatory mechanism factor in the petition to delist. In 1982, Congress amended the listing/delisting provisions in the **ESA** to require that listing and delisting decisions be based “solely” upon the best scientific and commercial data available. In enacting this amendment, Congress explained that the amendment was intended “to remove from the process of listing or delisting of species any factor not related to the biological status of the species.” The Service thus has a non-discretionary duty to consider only biological information in evaluating the adequacy of existing regulatory mechanisms and shall not consider any factors not related to the biological status of the species.

In evaluating the adequacy of the State’s wolf management scheme, the Service failed to comply with the non-discretionary “best science” requirement in 16 U.S.C. § 1533 as follows:

A. Dual Status

Despite the unambiguous non-discretionary “best science” mandate in the **ESA**, the Service repeatedly has allowed politics and public relations concerns to influence its decisions related to the delisting of the northern Rocky Mountain gray wolf population. In 2004, the then-Director of the Service rejected the State’s original wolf management scheme based upon political and public relations concerns about the predator classification for wolves in Wyoming and concern over how federal courts might react to the term “predator” in litigation concerning the final delisting rule. In 2006, the Service denied the State’s petition to delist for these same reasons. The Service had no legitimate biological or science-based reasons for rejecting the State’s initial wolf management scheme in 2004 and in denying the State’s petition to delist in **2006**.

In December 2007, the Service finally adhered to the **ESA** “best science” mandate and approved the State’s wolf management scheme. The State’s 2007 wolf management scheme included the exact same dual classification framework as the State’s current wolf management scheme.

However, with the adoption of the above-referenced final delisting rule, the Service has reversed its **2007** finding with respect to the dual classification issue and once again insists that the State must adopt a statewide trophy game classification for wolves. **74** Fed Reg. at **15** 149. The Service’s finding on the dual status issue contradicts the best scientific data available and, as a result, the Service has no biological or scientific basis

for finding that the dual classification for wolves in Wyoming renders the State's wolf management scheme inadequate.

In 2003, the dual classification management concept was peer reviewed by 11 of "the top recognized wolf researchers, wolf management and livestock depredation experts in North America," each of whom was selected by the Service. In addition, in January 2004, Ed Bangs, the Western Gray Wolf Recovery Coordinator for the Service, reviewed the biological sufficiency of the dual classification.

Of the 11 peer review experts who reviewed the dual classification concept, only three expressed concerns about the predator classification. However, none of these peer reviewers concluded that the State must classify wolves **as** trophy game animals statewide in order to maintain the State's share of the recovered wolf population. In addition, in January 2004 Mr. Bangs expressly approved the dual classification management concept for wolves in Wyoming, stating that "[w]hile we do not believe dual status in and of itself will preclude Wyoming from maintaining its share of a recovered wolf population, the area where wolves are managed as 'trophy game' **has** to be large enough to completely encompass a recovered wolf population." **As** the Service has stated repeatedly, the current trophy game area in Wyoming is large enough to allow the State to maintain its share of the recovered wolf population.

Despite the aforementioned opinions **of** the peer reviewers and Mr. Bangs (or, more likely, because of those opinions), the Service now contends that the demand for a statewide trophy game classification for wolves is necessary to ensure natural genetic connectivity. 74 Fed. Reg. at 15142, 15183. However, the Service does not cite any biological or scientific evidence to support the natural genetic connectivity theory. **If** the Service has no biological evidence to support the natural genetic connectivity theory, then, as a matter of law, the Service cannot rely on the natural genetic connectivity theory as a reason for insisting that the State adopt a statewide trophy game classification for wolves.

The Service does not cite any biological or scientific evidence to support the genetic connectivity theory because the Service has none. If ensuring genetic connectivity between the Wyoming wolf population and the wolf populations in Idaho and Montana is the goal, then the Service has absolutely no biological basis for requiring that wolves be classified as trophy game in southern and eastern Wyoming because there is no evidence **to** confirm (or to reasonably suggest) that wolves have, or likely **will**, move between Idaho, Montana, and Wyoming outside of the current trophy game management area in Wyoming, let alone through areas in southern and eastern Wyoming.

The Service also declares that the State's "2008 plan commits to maintaining genetic connectivity, but under State law they have no management authority or means in the predatory animal area to actually fulfill that promise." 74 Fed. Reg. at 15170. The Service cites no biological evidence to support this conclusory statement. To the contrary, because the Service concedes that it has no idea where the existing wolf corridors are located, 74 Fed. Reg. at 15183, the Service cannot rationally support its conclusion that having a dual classification for wolves in Wyoming will limit genetic connectivity. Moreover, given that the Service concedes that "natural connectivity is not and has never been required to achieve our recovery goal" for wolves in the NRM DPS, 74 Fed. Reg. at 15183, the Service cannot rely on genetic connectivity as a reason for finding that the State's wolf management scheme is not adequate.

Given the complete lack of biological evidence to support the Service's demand for a statewide trophy game classification, it appears as though the Service has made this demand in a misguided attempt to address concerns raised in the preliminary injunction order issued by the Montana District Court in *Defenders of Wildlife v. Hall*, 565 F.Supp.2d 1160 (D. Mont. 2008). If so, then the Service has violated the "best science" mandate in the ESA. As a matter of law, this unappealed preliminary injunction order has no binding legal effect outside of the context of the preliminary injunction proceeding. Thus, the Service is not bound by the Montana District Court's findings in the preliminary injunction order. By relying on the findings in the preliminary injunction order as the reason for requiring a statewide trophy game classification, the Service has considered a factor not related to the biological status of the gray wolf in evaluating the adequacy of the State's gray wolf management scheme.

B. Conclusory Findings Unsupported by Any Science

Throughout the Federal Register notice for the final delisting rule, the Service makes numerous conclusory findings that are not supported by any biological analysis or evidence. For example:

- The Service dictates that the State must "manage for at least 7 breeding pairs and at least 70 wolves outside of the National Parks." 74 Fed. Reg. at 15142, 15176, 15179. According to the Service, this 7/70 requirement is necessary: (1) "to provide adequate buffers to prevent the population from falling below recovery levels," 74 Fed. Reg. at 15142, 15176; (2) "to preserve connectivity," 74 Fed. Reg. at 15142, 15176; (3) "[to] provide dispersing wolves more social openings and protection from excessive human-caused mortality, 74 Fed. Reg. at 15142, 15176 and (4) "[to] ... maintain a sufficiently large number of wolves in the GYA." 74 Fed. Reg. at 15142, 15176. The Service cites

no biological evidence to support either the "adequate buffer" theory or the "connectivity" theory.

- The Service states that "[o]ne flaw with Wyoming's approach is the law's dependence on the National Parks to contribute at least 8 breeding pairs toward a total goal of at least 15 breeding pairs statewide." 74 Fed. Reg. at 15171. To support this statement, the Service points out that Yellowstone had less than eight breeding pairs in 2005 and 2008. 74 Fed. Reg. at 15171. The Service's reliance on the 2005 and 2008 breeding pairs numbers as proof that the State's wolf management scheme is not adequate shows a complete lack of understanding of basic wildlife management biology. Viewed in isolation, a one year decline in the number of breeding pairs in YNP is not relevant in determining whether the State **is** maintaining its share of the recovered wolf population. At a minimum, the Service must look at the trend over a consecutive three year period to determine whether the number of breeding pairs truly is declining. For example, history has shown that the so-called "substantial decline" in breeding pairs in Yellowstone in 2005 was nothing more than a one-year aberration that in no way jeopardized the long term viability of the recovered wolf population in Wyoming, **as** Yellowstone had 10 breeding pairs in both 2006 and 2007. Moreover, since 2001, Yellowstone has had at least 10 breeding pairs in five different years — **2002**, 2003, 2004, 2006, and 2007. Based on a three-year rolling average from 2001 to 2008, Yellowstone has averaged 10.6 breeding pairs of wolves for each three year period during that time span. Thus, the facts show that the Service has no biological basis for concluding that the State's wolf management scheme is flawed because it relies on the National Parks to contribute at least eight breeding pairs of wolves.

- The Service repeatedly insinuates that the geographic size of the predator management area (approximately 88% of Wyoming) in and of itself renders the State's wolf management scheme inadequate. However, **as** the Service has repeatedly acknowledged, even though the predator management area covers approximately 88% of the surface area in Wyoming, this area "consists largely of habitat unsuitable for wolf pack establishment and persistence" and has not supported persistent wolf packs since 1995. By comparison, the trophy game management area covers only 12% of the surface area in Wyoming, but encompasses 70% of the suitable wolf habitat in Wyoming. The remaining 30% of suitable habitat is only theoretically suitable for wolves because this habitat **is** unlikely to be successfully occupied by persistent wolf packs. Wyoming can maintain its share of the recovered wolf population in the trophy game management area even though the trophy game area encompasses only 12% of the surface area in Wyoming. The relative size of the predator management area versus the trophy game management area is not relevant in evaluating whether Wyoming's wolf management

laws are adequate to maintain Wyoming's share of the recovered wolf population in the NRM DPS.

Claims that wolves can be shot on sight in 88% of Wyoming make good press, but are irrelevant to the issue framed by the ESA. The question is whether the **12%** of Wyoming that is within the trophy game management area is sufficient to maintain the State's share of the recovered wolf population into the foreseeable future. There is no biological evidence that the trophy game management area is insufficient to maintain the State's share of the recovered wolf population.

- In an apparent attempt to justify the demand for the State to adopt a statewide trophy game classification for wolves, the Service contends that a statewide trophy game classification: (1) "**is** ... advisable given the dispersal capabilities **of** wolves"; (2) "will allow more flexibility to devise a management strategy, including regulated harvest that provides **for** self-sustaining populations above recovery goals"; (3) "prevents a patchwork of different management statuses"; (4) "will be easier for the public to understand and, thus, will be easier to regulate"; (5) "[S]tatewide trophy game status ... is similar to State management **of** other resources like mountain lions and black bears"; (6) "is consistent with the current regulatory scheme in that the entire State is currently nonessential, experimental"; and (7) "will assist Service Law Enforcement efforts that might otherwise be difficult if predatory animal status was allowed in portions of Wyoming". 74 Fed. Reg. at 15149, **15183**. None of these contentions are supported by any biological or scientific evidence or analysis.

11. The Service arbitrarily rejected the State's wolf management scheme based, in part, on an incorrect interpretation of the State's wolf management statutes.

In evaluating whether the State's wolf management scheme is adequate, the Service repeatedly misinterprets the State's wolf management statutes. For example, based on selected language from WYO. STAT. ANN. § 23-1-304(n), the Service opines that this statute "mandates aggressive management until the population outside of the National Parks fall [sic] to **6** breeding pairs." 74 Fed. Reg. at 15171. The Service then surmises that in **2008**, the State would have fallen to the minimum recovery goal number of 10 breeding pairs because there would have been only four **breeding** pairs in Yellowstone and **six** breeding pairs in Wyoming outside of the National Parks.

The unambiguous language in WYO. STAT. ANN. § 23-1-304(n) does not require the Department to "aggressively" manage **wolves** until there are only six breeding pairs in Wyoming outside of the National Parks. The statute unambiguously directs the

Commission to adopt a rule to provide for the suspension or cancellation of lethal take permits "if further lethal control *could* cause delisting of wolves under the [ESA]." (Emphasis added). Chapter 21, Section 8(d) of the Commission Rules provides for the "immediate" cancellation or suspension of lethal take permits if further lethal control: (1) "may prevent" the Department from managing for at least 15 breeding pairs in Wyoming *and* at least seven breeding pairs in Wyoming outside of the National Parks; or (2) "may result in the re-listing of gray wolves under the [ESA]."

Viewed together, WYO. STAT. ANN. § 23-1-304(n) and Chapter 21, Section 8(d) of the Commission Rules require the Department to cancel or suspend lethal take permits if it appears that further lethal control *may* result in the number of breeding pairs outside of the National Parks to decrease to less than seven breeding pairs. Accordingly, the Service is wrong when it states that WYO. STAT. ANN. § 23-1-304(n) "mandates aggressive management until the population outside of the National Parks fall [sic] to 6 breeding pairs." 74 Fed. Reg. at 15171.

As another example, the Service states that the maximum size of the trophy game area is set by statute. 74 Fed. Reg. at 15170-15171. This statement belies the unambiguous language in WYO. STAT. ANN. § 23-1-304(a), which authorizes the Commission to designate the trophy game area by rule "as necessary to reasonably ensure at least seven (7) breeding pairs" of wolves are located in Wyoming and outside of the National Parks. This statute empowers the Commission to expand the size of the current trophy game area if doing so is necessary to reasonably ensure that the State can maintain at least seven breeding pairs of wolves in Wyoming and outside of the National Parks.

The Service's incorrect interpretations of Wyoming law render the final delisting decision arbitrary and capricious. As a matter of law, the Service must defer to the State regarding the proper interpretation of the State's wolf management statutes and rules. The Service's failure to defer to the State on the statutory interpretation issues also makes the final delisting decision arbitrary and capricious.

III. The Service improperly rejected the Chapter 21 wolf rules in evaluating the adequacy of the State's wolf management scheme.

In reviewing the adequacy of the State's wolf management scheme, the Service cited three reasons for rejecting the Commission's wolf management rules set forth in Chapter 21. First, the Service determined that the Chapter 21 rules "are still dependent on Wyoming statute and at times appear to promise actions that Wyoming statute prohibits." 74 Fed. Reg. at 15149. Second, the Service concluded that the Chapter 21 rules are not an adequate regulatory mechanism because, at the time of the Service's

review, the rules were "emergency" rules which would last only for 120 days. 74 Fed. Reg. at 15171-15172. And, finally, the Service determined that the Chapter 21 rules are inadequate because the rules did not address two "legislative shortcomings" — "a trophy game area that can be diminished and a statute that permits the [Department] to manage the population toward the minimum recovery goals in a manner that allows reduction of the wolf population to below recovery levels." 74 Fed. Reg. at 15172. These reasons lack either a factual or legal basis and, as a result, the Service's decision to reject the Chapter 21 rules is arbitrary and capricious and violates the APA and the ESA.

The unambiguous language in the ESA precludes the Service from questioning whether the Chapter 21 rules are consistent with the State's wolf management statutes in evaluating whether the State's regulatory mechanisms are adequate. The Service may only consider biological information in evaluating the adequacy of existing regulatory mechanisms. The issue of whether the Chapter 21 rules exceed statutory authority is a state administrative law question, not a biological matter. If the Service has concerns about whether the Chapter 21 rules are consistent with Wyoming statute, then the Service must defer to the State's interpretation of its own laws and administrative rules. Accordingly, as a matter of law, the Service cannot rely on concerns about the legal implementation of the Chapter 21 rules as a reason for finding that the State's regulatory mechanisms are not adequate. By doing so, the Service acted arbitrarily and capriciously because it relied on a factor Congress did not intend for the Service to consider in the adequate regulatory mechanism analysis. This legal reality notwithstanding, the Chapter 21 rules are consistent with the State's wolf management statutes.

The Service also had no legal basis for rejecting the Chapter 21 rules because they were emergency rules. The ESA requires the Service to evaluate the existing regulatory mechanisms when determining whether a species should be delisted. When the Service evaluated the State's regulatory mechanisms, the emergency Chapter 21 rules had the force and effect of law and were a part of the existing State regulatory mechanisms.* Neither the ESA nor the implementing regulations for the ESA authorize the Service to reject the Chapter 21 rules simply because the rules were emergency rules at the time of the Service's evaluation. By rejecting the Chapter 21 rules because they were emergency rules, the Service acted arbitrarily and capriciously because it relied on a factor Congress did not intend for the Service to consider in the adequate regulatory mechanism analysis.

Moreover, the Service was on notice that the Commission had started the formal rulemaking process for the Chapter 21 rules contemporaneously with the adoption of the emergency rule. The final Chapter 21 rules became effective on March 12, 2009.

Finally, the Service's "legislative shortcomings" argument ignores the unambiguous language in the Chapter 21 rules and the Wyoming wolf management statutes. The Service's focus on "a trophy game area that can be diminished" arises from the preliminary injunction in which the Montana District Court expressed concerns about the "malleable nature" of the trophy game area in Wyoming.

As a matter of law, the Service cannot rely on speculation that the size of the trophy game area might change at some time in the future as a reason for finding that Wyoming's wolf management scheme is inadequate. The ESA requires the Service to evaluate the adequacy of "existing" regulatory mechanisms in determining whether a species should be delisted. The unambiguous language in the ESA thus prohibits the Service from relying on future or speculative regulatory mechanisms in making a delisting decision. Any concerns about the alleged "malleability" of the trophy game area necessarily must be based on improper speculation about some future action the Wyoming Game and Fish Commission may or may not take and therefore cannot be considered in assessing whether the State's wolf management scheme is adequate to maintain the State's share of the recovered wolf population.

The Service's improper speculation notwithstanding, the current boundary of the trophy game area in Wyoming is established in Chapter 21, Section 3(j) of the Commission Rules. Pursuant to Chapter 21, Section 4(c) of the Commission Rules, the Commission cannot diminish the trophy game area described in Section 3(j) unless, based upon the best scientific data available, the Commission determines that diminishing the trophy game area will not prevent the Commission from achieving the management objectives of at least 15 breeding pairs (comprising at least 150 wolves) in Wyoming. Sections 3(j) and 4(c) thus establish a stable, constant area where wolves are classified as trophy game animals and not the "metaphorical moving target" suggested by the Montana District Court. Moreover, as the Service repeatedly has recognized, the area encompassed by this trophy game area is sufficient to support at least 15 breeding pairs of wolves (comprising at least 150 wolves). Accordingly, the existing trophy game area in Wyoming is sufficient to allow the State to maintain its share of the recovered wolf population.

The Service's concern that the Chapter 21 rules are inconsistent with "a statute that permits the [Department] to manage the population toward the minimum recovery goals in a manner that allows reduction of the wolf population to below recovery levels" also apparently arises from the preliminary injunction order issued by the Montana District Court. In the preliminary injunction order, the Montana District Court expressed concerns about the State's commitment to manage for 15 breeding pairs of wolves in

Wyoming. The Montana district court based its concerns on WYO. STAT. ANN. § 23-1-304 (a), (j), and (n).

The Chapter 21 rules confirm the State's commitment to manage for at least **15** breeding pairs of wolves in Wyoming. In Section 4(a) of Chapter 21, the Commission unambiguously commits to manage for at least 15 breeding pairs of wolves in Wyoming, with at least seven of those breeding pairs located in Wyoming and primarily outside of the National Parks. In addition, Chapter 21, Section 4(b) states as follows:

If the Commission determines that there are less than eight (**8**) breeding pairs located inside of the National Parks for two (2) consecutive years, then the Department shall manage for a sufficient number of breeding pairs and wolves in the area of the WTGMA located outside of the National Parks to achieve the management objective described in Section 4(a).

Read together, Sections 4(a) and 4(b) in Chapter **21** clarify that the State **is** committed to managing for at least **15** breeding pairs of wolves (comprising at least 150 wolves) in Wyoming. Given that Chapter 21 of the Commission Rules has the force and effect of law, this clear management commitment satisfies the adequate regulatory mechanisms requirement for delisting.

The Service's complaints about managing to 15 breeding pairs and 150 wolves ignores the fact that the 15 breeding pairs/150 wolves management goal include a **5** breeding pairs and 50 wolves "buffer." The recovery goal is, and always has been, 10 breeding pairs and 100 wolves. Hence, according to the Service, managing to 15 breeding pairs and 150 wolves is sufficient to maintain the recovered population.

The three subsections in WYO. STAT. ANN. § 23-1-304 that the Montana District Court cited as raising questions about the State's commitment to manage for **15** breeding pairs are consistent with the unambiguous language of Sections 4(a) and 4(b) in Chapter 21 in the Commission Rules. In accordance with WYO. STAT. ANN. § 23-1-304(a), the Commission annually shall set bag limits and seasons for areas where wolves are classified as trophy game animals "only as reasonably necessary to ensure *at least* seven (7) breeding pairs of gray wolves are located in [Wyoming] and primarily outside of [the National Parks] at the end of the current calendar year." (Emphasis added). The open-ended phrase "at least" gives the Commission and the Department absolute discretion to manage for more than seven breeding pairs of wolves in the area of Wyoming outside of the National Parks if doing so is necessary for the State to maintain its share of the

recovered wolf population. The unambiguous language in WYO. STAT. ANN. § 23-1-304(a) is consistent with Sections 4(a) and 4(b) in Chapter 21 of the Commission Rules.

The unambiguous language in WYO. STAT. ANN. § 23-1-304(j) also is consistent with Sections 4(a) and 4(b) in Chapter 21 of the Commission Rules. In accordance with WYO. STAT. ANN. § 23-1-304(j), the Department "*is authorized* to take any action necessary to protect big and trophy game populations in this state from predation by gray wolves" as long as there are at least seven breeding pairs of wolves in Wyoming and primarily outside of the National Parks. (Emphasis added). The passive verb phrase "is authorized" gives the Department discretion to take action to address wolf predation on wild ungulate herds in Wyoming, but does not require the Department to do so. Moreover, WYO. STAT. ANN. § 23-1-304(j) must be interpreted in light of the legislative intent in enacting WYO. STAT. ANN. § 23-1-304. The Wyoming Legislature enacted WYO. STAT. ANN. § 23-1-304 "to provide appropriate state management and control of gray wolves in order ... to prevent future listing of the gray wolf as an experimental nonessential population, endangered species, or threatened species." 2003 WYO. SESS. LAWS, ch. 115, §4(a). Thus, in exercising its discretion under WYO. STAT. ANN. § 23-1-304(j), the Department cannot take any action that may result in the relisting of the gray wolf. Given the discretionary nature of WYO. STAT. ANN. § 23-1-304(j) and the legislative intent underlying WYO. STAT. ANN. § 23-1-304, WYO. STAT. ANN. § 23-1-304(j) is consistent with the commitment in the Commission Rules to manage for at least 15 breeding pairs of wolves in Wyoming.

Finally, the unambiguous language in WYO. STAT. ANN. § 23-1-304(n) is consistent with Sections 4(a) and 4(b) in Chapter 21 of the Commission Rules. In accordance with WYO. STAT. ANN. § 23-1-304(n), the Department shall promulgate rules for the issuance of lethal take permits to address chronic wolf predation and that such permits shall be issued "as long as there are seven (7) breeding pairs within [Wyoming] and outside of [the National Parks]." However, WYO. STAT. ANN. § 23-1-304(n) further provides that "the rules shall provide for suspending or cancelling permits if further lethal control could cause relisting of wolves under the [ESA]." Therefore, if circumstances dictate that the Department must manage for more than seven breeding pairs of wolves in Wyoming outside of the National Parks to maintain the State's share of the recovered wolf population, then lethal take permits may be cancelled or suspended as needed to achieve this management objective. The unambiguous language in WYO. STAT. ANN. § 23-1-304(n) is consistent with the commitment in the Commission Rules to manage for at least 15 breeding pairs of wolves in Wyoming.

IV. The Service arbitrarily changed position on the dual status issue.

In December 2007, the Service determined that the State's wolf management scheme was adequate to allow the State to maintain its share of the recovered wolf population into the foreseeable future. The State's 2007 wolf management scheme established a dual status classification for wolves and defined a trophy game management area and a predator management area for wolves.

In the final delisting rule, the Service rejected the State's current wolf management scheme based in part on a finding that the dual status classification for wolves in the current scheme will prevent the State from maintaining its share of the recovered wolf population into the foreseeable future. The dual status classification for wolves, the trophy game management area, and the predator area in the State's current wolf management scheme are exactly the same as dual status classification, the trophy game management area, and the predator management area in the 2007 wolf management scheme.

The Service acknowledges that it approved the State's wolf management scheme in 2007 because the trophy game area is "large enough to support [the State's] share of a recovered wolf population." 74 Fed. Reg. at 15170, 15183. However, the Service has not provided a reasoned analysis to explain why the dual classification in the current wolf management scheme (which is exactly the same as the dual classification in the **2007** management scheme) will not allow the State to maintain its share of the recovered wolf population. Without such a reasoned analysis, the Service's change in position on the dual status issue is arbitrary and capricious as a matter of law.

In an apparent attempt to **justify** its change in position, the Service lists seven purported benefits to be gained from having a statewide trophy game classification for wolves in Wyoming. 74 Fed. Reg. at 15149, 15183. These alleged benefits notwithstanding, the Service's change in position on the dual status issue is arbitrary and capricious because the Service does not explain how or **why** these alleged benefits of statewide trophy game classification are necessary to ensure that the State will maintain its share of the recovered wolf population after delisting.

V. The Service applied an incorrect standard of review in evaluating the adequacy of the State's wolf management scheme.

In the Federal Register notice for the final delisting rule, the Service has demanded that the State adopt trophy game status for wolves statewide. In making this demand, the Service repeatedly applied an incorrect standard in evaluating whether the State's **wolf**

management scheme is adequate to allow the State to maintain its share of the recovered wolf population after delisting. For example, the Service: (1) asserts that adopting a statewide trophy game classification will provide “the best way” for the State to satisfy the adequate regulatory mechanism requirement for delisting, 74 Fed. Reg. at 15149; (2) rejects the dual classification concept because “[s]uch a management strategy is not required to manage **wolf** density and distribution and was not used by other States,” 74 Fed. Reg. at 15175; and (3) contends that a statewide trophy game classification “is ... advisable given the dispersal capabilities of wolves[.]” 74 Fed. Reg. at 15183.

In evaluating whether the State’s wolf management scheme is adequate, the Service must review the best scientific data available to determine whether the management scheme will allow the State to maintain its share of the recovered wolf population in the NRM **DPS**. If the State’s chosen management scheme satisfies this standard, the Service has no legal authority to reject the State’s scheme because a specific strategy in the State’s management scheme “is not required,” or to require the State to adopt an alternative in the State’s management scheme that the Service thinks may be “advisable” or “the best way” to manage wolves, or because other states have done something different. The Service’s application of an incorrect standard in evaluating the State’s wolf management scheme makes the decision to reject the management scheme arbitrary and capricious.

VI. The Service has arbitrarily redefined the recovery criteria for the State by requiring the State to manage for more than 15 breeding pairs of wolves.

Since 2003, the Service has demanded that Idaho, Montana, and Wyoming each maintain at least 15 breeding pairs and at least 150 wolves after delisting to ensure that the wolf population in the **NRM DPS** will continue to be recovered into the foreseeable future. This 15 breeding pair/150 wolves management goal provides assurance that the delisted wolf populations in the three states will not drop below the minimum recovery goals of 10 breeding pairs and 100 wolves in each state.

In the Federal Register notice for the final delisting rule, the Service demands that the State commit to managing for at least seven breeding pairs and at least **70** wolves in Wyoming outside of the National Parks, regardless of the number of breeding pairs in the National Parks. 74 Fed. Reg. at 15142, 15176, 15179. This unprecedented new demand effectively redefines the post-delisting recovery criteria for the State **and** forces the State to maintain a disproportionate share of the recovered wolf population in the **NRM DPS**.

For example, in 2004, Yellowstone had 16 breeding pairs of wolves. Had the new seven breeding pairs/70 wolves requirement been in place in 2004, the State would have

been force to maintain 23 breeding pairs of wolves. If the 15 breeding pair/150 wolves management goal ensures that the State will maintain its share of the recovered wolf population, the Service has no legitimate reason for effectively requiring the State to manage for more than **15** breeding pairs by imposing the arbitrary seven breeding pairs/70 wolves requirement for areas in Wyoming outside of the National Parks.

According to the Service, the seven breeding pairs/70 wolves requirement: (1) "is necessary to provide adequate buffers to prevent the population from falling below recovery levels; (2) "will provide dispersing wolves more social openings and protection from excessive human-caused mortality; and (3) "will ... maintain a sufficiently large number of wolves in the GYA[.]" 74 Fed. Reg. at 15142, 15176. However, the Service does not explain how or why the seven breeding pairs/70 wolves requirement accomplishes these ends. Without such an explanation, the Service's attempt to force the State to maintain a disproportionate share of the recovered wolf population in the NRM DPS is arbitrary and capricious.

VII. The delisting decision is arbitrary and capricious because the explanation of the decision is riddled with inconsistent statements and incorrect facts.

In the Federal Register notice for the final delisting rule, the Service makes numerous inconsistent statements. For example:

- The Service argues that a statewide trophy game classification "prevents a patchwork of different management statuses", and "will be easier for the public to understand and thus will be easier to regulate[.]" 74 Fed. Reg. at 15149, 15183. However, in the final delisting rule, the Service creates a management scheme for Wyoming which applies three different sets of wolf management rules depending upon geographic region — wolves in the National Parks will be delisted (but fully protected from lethal take), the 2005/2008 Section 10(j) rules will apply on the Wind River Indian Reservation, and the 1994 Section 10(j) rules will apply to all other areas in Wyoming.
- To justify requiring the State to adopt a statewide trophy game designation, the Service contends that having a dual status classification "limits natural genetic connectivity." 74 Fed. Reg. at 15149, 15183. However, the Service concedes that "natural connectivity is not and has never been required to achieve our recovery goal" for wolves in the NRM DPS. 74 Fed. Reg. at 15 183.
- The Service claims that WYO. STAT. ANN. § 23-1-304 is flawed because it could result in the occasional one-year drop below the 15 breeding pair requirement. 74 Fed. Reg. at 15171. However, the Service will not consider a re-listing status review unless

the wolf population in either Idaho or Montana drops below **15** breeding pairs for three consecutive years. **74** Fed. Reg. at **15133, 15155, 15186**.

The Service also makes numerous factual statements that are incorrect in the Federal Register notice for the final delisting rule. For example,

- The Service contends that, in July 2008, the Department modified a lethal take permit “to include a total of nine people, some of whom had no apparent connection to the property.” **74** Fed. Reg. at **15171**. This statement is factually incorrect.
- The Service insinuates that the Department issued a lethal take permit to a federal grazing permittee who had not experienced any depredations on his allotment during the current calendar year. **74** Fed. Reg. at **15171**. The Department did not issue a lethal take permit to this permittee.
- The Service contends that “[l]ikely wolf dispersal patterns indicate that dispersing wolves moving into the **GYA** from Idaho or Montana tend to move through the predatory area.” **74** Fed. Reg. at **15176**. However, the study cited in support of this statement does not corroborate the Service’s conclusion.

The foregoing list identifies some of the numerous inconsistencies and inaccuracies in the Federal Register notice for the final delisting rule. The extent and substance of these inconsistencies and inaccuracies renders the final delisting rule arbitrary and capricious.

Conclusion

In accordance with 16 U.S.C. § 1540(g), the State must wait **60** days after the date of this notice before seeking judicial review to remedy the above-cited violations of law. In the civil action, the State may seek declaratory and injunctive relief and its costs of litigation, including reasonable attorney fees.

The 60-day notice requirement in the **ESA** is intended to give you an opportunity to correct the above-cited violations and thereby avoid the need for the State to file suit seeking a court order to compel you to comply with the **ESA**. The State hopes that you **will** act promptly to correct the violations cited above and to delist the gray **wolf** population throughout Wyoming. However, if you elect not to do so, the State stands ready to pursue litigation to compel you to comply with the legal requirements in the **APA**, the **ESA**, and the **ESA** implementing regulations.

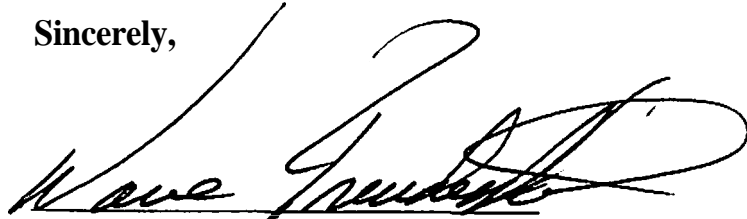
Secretary Salazar, Acting Director Gould, and Regional Director Guertin

April 2, 2009

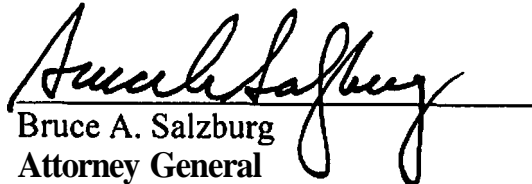
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Please contact Wyoming Attorney General, Bruce A. Salzburg, at (307) 777-7841 if you wish to discuss this matter further.

Sincerely,

A handwritten signature in black ink, appearing to read "Dave Freudenthal", written over a horizontal line.

Dave Freudenthal
Governor

A handwritten signature in black ink, appearing to read "Bruce A. Salzburg", written over a horizontal line.

Bruce A. Salzburg
Attorney General