

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING )

Petitioner, )

WYOMING WOLF COALITION, )

Petitioner-Intervenors, )

vs. )

Civil No. 09-CV-118-J

UNITED STATES DEPARTMENT OF )  
THE INTERIOR; UNITED STATES FISH )  
& WILDLIFE SERVICE; KEN SALAZAR, )  
in his official capacity as Secretary of the )  
United States Department of the Interior; )  
ROWAN GOULD, in his official capacity )  
as Acting Director of the United States )  
Fish and Wildlife Service; and STEPHEN )  
GUERTIN, in his official capacity as the )  
Regional Director of the Mountain-Prairie )  
Region of the United States Fish and Wildlife )  
Service, )

Respondents. )

BOARD OF COUNTY COMMISSIONERS )  
of the COUNTY OF PARK, STATE OF )  
WYOMING, )

Petitioners, )

vs. )

Civil No. 09-CV-138-J

UNITED STATES DEPARTMENT OF )  
THE INTERIOR; UNITED STATES FISH )

**JOINT OPENING BRIEF**

By Petitioners State of Wyoming and  
Board of County Commissioners of  
the County of Park, State of Wyoming

& WILDLIFE SERVICE; KEN SALAZAR, )  
in his official capacity as Secretary of the )  
United States Department of the Interior; )  
ROWAN GOULD, in his official capacity )  
as Acting Director of the United States )  
Fish and Wildlife Service; and STEPHEN )  
GUERTIN, in his official capacity as the )  
Regional Director of the Mountain-Prairie )  
Region of the United States Fish and Wildlife )  
Service, )

Respondents. )

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**Statement of Prior or Related Cases**

The following cases are cases that previously have been filed in this Court and are related to this case:

1. *State of Wyoming v. U.S. Dep't of Interior*,  
U.S.D.C. (Wyo.) Docket No. 04-CV-123-J  
*reported as*  
360 F.Supp.2d 1214 (D. Wyo. 2005), *aff'd*,  
*State of Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262 (10<sup>th</sup> Cir. 2006)
2. *State of Wyoming v. U.S. Dep't of Interior*,  
U.S.D.C. (Wyo.) Docket No. 06-CV-245-J

## INTRODUCTION

This case arises from the refusal of the United States Fish and Wildlife Service (“Service”) to admit that it violated the Endangered Species Act (“ESA”) in 2004, and again in 2006, when it demanded that the State of Wyoming (“State”) adopt a statewide trophy game classification for wolves in the State’s wolf management scheme.

In both instances, the Service allowed political and public relations considerations and speculative concerns about post-delisting lawsuits to influence its decision, even though the Service’s own biologists and an independent panel of peer review biologists believed that classifying wolves as predators throughout most of Wyoming would not threaten the viability of the gray wolf population in the northern Rocky Mountain region, as long as the State classified wolves as trophy game in northwestern Wyoming.

In 2008, the Service finally approved the State’s wolf management scheme and delisted the northern Rocky Mountain wolf population. The approved management scheme classified wolves as trophy game in northwestern Wyoming and as predators throughout the remainder of Wyoming.

A few months after the delisting decision, a federal district court in Montana issued a preliminary injunction which relisted the northern Rocky Mountain wolf population. In the preliminary injunction order, the court chastised the Service for not



explaining why the dual classification for wolves in Wyoming was approved in 2008 when it had been rejected in 2004 and 2006.

This rebuke from the court left the Service with only one option if it wanted to save the delisting rule — the Service had to admit that it was wrong to demand the statewide trophy game classification in 2004 and 2006. Rather than admit this, the Service instead rescinded the delisting rule and eventually revoked its previous approval of the State's wolf management scheme.

The Service now once again refuses to delist wolves in Wyoming unless the State adopts a statewide trophy game classification for wolves. The ESA requires the Service to base its delisting decisions solely on biological information. The Service does not have (and never has had) any biological reason for demanding that the State adopt a statewide trophy game classification. In making this demand, the Service has chosen pride over its legal obligation to follow the unambiguous requirements in the ESA and, in doing so, has left the State with no choice but to seek judicial review in this Court to force the Service to comply with the ESA.

#### **STATEMENT OF JURISDICTION**

On April 2, 2009, the above-named Respondents (collectively “the Service”) published a rule (“final delisting rule”) in the Federal Register which creates a distinct population segment for gray wolves in the northern Rocky Mountain region (“NRM

DPS”) and delists wolves everywhere in the NRM DPS except Wyoming. 74 Fed. Reg. 15123-188 (April 2, 2009). That same day, the State gave the Service written notice of its intent to file suit to challenge the delisting rule. (AR 2009 028960-028976). On June 2, 2009, the State filed the Petition for Review in this case. (Docket Doc. 1). This Court has jurisdiction over the claims asserted in this case pursuant to 28 U.S.C. § 1331, 16 U.S.C. § 1540, and 5 U.S.C. §§ 701-706.

#### **STATEMENT OF THE ISSUE**

I. Did the Service act arbitrarily, capriciously, and otherwise not in accordance with law in finding that the State’s wolf management scheme does not satisfy the “adequate regulatory mechanisms” requirement for delisting in the Endangered Species Act (“ESA”)?

#### **STATEMENT OF THE CASE**

The State seeks judicial review of the rejection of the State’s wolf management scheme and the corresponding decision not to delist wolves in the Wyoming portion of the NRM DPS.

#### **STATEMENT OF THE FACTS**

##### **Reintroduction and Recovery of Wolves in the Northern Rocky Mountain Region**

In November 1994, the Federal Respondents adopted a final rule which authorized the introduction of experimental, non-essential gray wolf populations into Yellowstone

National Park (“Yellowstone”) and into central Idaho. (2004 AR: 823). In 1995 and 1996, the Service released a total of 31 gray wolves from southwestern Canada into Yellowstone. (2004 AR: 832).

The recovery goals for the NRM DPS wolf population are “[30] or more breeding pairs (an adult male and an adult female that raise at least 2 pups until December 31) comprising 300+ wolves in a metapopulation (a population that exists as partially isolated sets of subpopulations) with genetic exchange between the subpopulations” for three successive years. 74 Fed. Reg. at 15131, 15139. The gray wolf population in the NRM DPS first met the recovery goals in 2002 and has exceeded the recovery goals each year since then. 74 Fed. Reg. at 15135. By the end of 2008, the number of gray wolves living in the NRM DPS had increased to at least 1639 wolves and at least 95 breeding pairs, with at least 302 wolves and at least 22 breeding pairs living in Wyoming. (Id.).

#### **House Bill 229 and the First Wyoming Gray Wolf Management Plan**

In 2003, the Wyoming Legislature enacted House Bill 229 (“HB229”) to govern the classification and management of gray wolves in Wyoming after delisting. (See Attach. A). HB 229 required, *inter alia*, that: (1) the Wyoming Game and Fish Department (“Department”) manage for 15 wolf packs in Wyoming and for seven wolf packs living in Wyoming outside of the National Parks; (2) gray wolves to be classified as “trophy game animals” in the National Parks and those federally designated wilderness

areas contiguous to the National Parks as defined by the United States Congress as of January 1, 2003, and as “predatory animals” in all other areas of Wyoming; and (3) the Wyoming Game and Fish Commission (“Commission”) evaluate the location of the boundary for the trophy game area on a regular basis and to possibly move the boundary to expand or contract the size of the trophy game area depending upon the number of wolf packs in Wyoming. (Attach. A.)

In July 2003, the Commission approved the Wyoming Gray Wolf Management Plan (“first Wyoming Plan”). (2004 AR: 194-236). In the first Wyoming Plan, the Department committed to maintaining a minimum of 15 packs within Wyoming and to maintaining seven of the 15 packs outside of the Yellowstone and Grand Teton National Parks and the John D. Rockefeller, Jr. Memorial Parkway (“National Parks”). (2004 AR: 197, 206). If the number of wolf packs dropped to seven or less outside of the National Parks, the Commission would have immediately promulgated a rule to classify the gray wolf as trophy game in an area called the Northwest Wyoming Wolf Data Analysis Unit (“DAU”). (2004 AR: 208).

#### **Peer Review of the First Wyoming Plan**

In September 2003, Ed Bangs, the Western Gray Wolf Recovery Coordinator for the Service, forwarded the first Wyoming Plan for an independent scientific review by 11 of the “top recognized wolf researchers, wolf management and livestock depredation

experts in North America.” (2004 AR: 400-405, 428). In November 2003, 10 of the 11 peer review experts determined that the first Wyoming Plan, together with wolf plans adopted by Idaho and Montana, collectively would conserve a recovered wolf population in the three states. (2004 AR: 471, 451, 482, 479, 457, 432, 435, 467, 466, 473).

### **The Service’s Internal Review of the first Wyoming Plan**

In early January 2004, Mr. Bangs gave Service Director Steve Williams a memorandum which detailed the “scientific and biological perspective and recommendations” of Mr. Bangs and his staff regarding the adequacy of the first Wyoming Plan. (2004 AR: 90166). In this memorandum, Mr. Bangs explained that “[w]hile we do not believe that 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.” (2004 AR: 90170). He further explained that the predator classification for wolves in Wyoming is not “a significant biological issue” as long as the State established a permanent trophy game area in northwestern Wyoming. (Id.). Mr. Bangs then concluded that “[t]he current ‘expanded’ DAU [in the first Wyoming Plan] appears large enough to assure that the Department can maintain the wolf pack objective outside the Park and it should be made permanent prior to delisting.” (Id.; *see also* 2004 AR: 90171).

Mr. Bangs also gave Director Williams a draft letter for his signature which explained the Service's reasons for rejecting the first Wyoming Plan. (2006 AR: 12913-12915). In this draft letter, Mr. Bangs recommended that the Service tell the State that the dual classification for wolves is acceptable as long as the State permanently classifies wolves as trophy game within the DAU in northwestern Wyoming. (2006 AR: 12914).

### **The Rejection of the first Wyoming Plan**

On January 13, 2004, Mr. Williams notified the Department that the Service had rejected the first Wyoming Plan. (2004 AR: 505-507). In the letter sent to the State, Director Williams disregarded Mr. Bangs' recommendation regarding the dual classification of wolves in Wyoming and instead demanded that the predator classification be eliminated. (*Compare* 2006 AR: 12913-12915 *with* 2008 AR: 14824-26). Clint Riley, the Special Assistant to Director Williams, characterized the demand to eliminate the predator classification as being the result of "policy calls on the 'predator' status[.]" (2004 AR: 519; unredacted copy in 2006 administrative record).

### **The First Wolf Lawsuit in Wyoming District Court**

In April 2004, the State filed suit in federal district court in Wyoming ("Wyoming District Court") seeking judicial review of the Service's rejection of the first Wyoming Plan. (U.S.D.C. (Wyo.) Docket No. 04-CV-123-B, Doc. No. 1). The Wyoming District Court dismissed the action for lack of jurisdiction after concluding that the rejection of

the first Wyoming Plan was not a “final agency action” for purposes of the APA. *See Wyoming v. U.S. Dep’t of Interior*, 360 F.Supp.2d 1214, 1245 (D. Wyo. 2005). The State appealed the case to the Tenth Circuit Court of Appeals, which affirmed the Wyoming District Court decision. *See State of Wyoming v. U.S. Dep’t of Interior*, 442 F.3d 1262 (10<sup>th</sup> Cir. 2006).

#### **The State’s Petition to Delist**

In July 2005, the State filed a petition asking the Service establish a distinct population segment for gray wolves in the northern Rocky Mountain region (“NRM DPS”) and to delist the NRM DPS. (2006 AR: 17789-17895). In the petition to delist, the State argued that the wolf management statutes enacted in HB 229 and the first Wyoming Plan satisfied the adequate regulatory mechanisms requirement for delisting. (*Id.*). In October 2005, the Service announced that the State’s petition to delist presented “substantial scientific and commercial information indicating that the northern Rocky Mountain gray wolf population may qualify as a DPS and that this DPS may warrant delisting.” 70 Fed. Reg. 61770-775 (Oct. 26, 2005).

#### **The Advanced Notice of Rulemaking**

In February 2006, the Service announced its intent to conduct rulemaking to establish an NRM DPS for the gray wolf. 71 Fed. Reg. 6634-6660 (Feb. 8, 2006). The Service again reiterated that the State’s wolf management scheme was not adequate for

the same three reasons identified by Director Williams in his January 2004 letter. 71 Fed. Reg. at 6654-6655, 6657.

### **The Denial of the Petition to Delist**

On August 1, 2006, the Service denied the State's petition to delist based solely upon a finding that the State's wolf management statutes and the first Wyoming Plan were not adequate to maintain the State's "numerical and distributional share" of the wolf population in the proposed NRM DPS. 71 Fed. Reg. 43410-43432 (Aug. 1, 2006). In reaching this decision, the Service voiced only one specific criticism of the predator classification for wolves, stating that "[s]uch unregulated take could eliminate wolves from some otherwise suitable habitat in northwestern Wyoming and reduce population levels to a point at which wolves in the [northern Rocky Mountains] are, within the foreseeable future, likely to become in danger of extinction throughout a significant portion of their range." 71 Fed. Reg. at 43430 (emphasis added).

The Service also did not expressly find that the predator classification for wolves *per se* would prevent the State from maintaining its share of the recovered wolf population. To the contrary, the Service stated that the Department "needs to be given the regulatory authority to adaptively manage [wolves]: throughout suitable habitat in Wyoming, outside of the National Park/Wilderness units, to account for wide fluctuations in wolf population levels." 71 Fed. Reg. at 43430 (emphasis added).



In the press release announcing the denial of the petition to delist, the Service explained that, before the gray wolf will be proposed for delisting, "Wyoming State law" must clearly authorize the Department and the Wyoming Plan to, *inter alia*, classify wolves as trophy game animals outside of the National Parks in northwestern Wyoming. (2006 AR: 15618).

#### **The Second Wolf Lawsuit in Wyoming District Court**

In October 2006, the State filed suit in Wyoming District Court seeking judicial review of the Service's denial of the State's petition to delist. After the case was fully brief and argued, the Wyoming Legislature amended the State's wolf management statutes. (*See* Attach. B). When these amendments took effect, this Court dismissed the case as moot. (2009 AR: 25850-51).

#### **The Proposed Rule to Delist the Gray Wolf in the NRM DPS**

In February 2007, the Service published notice of a proposed rule ("proposed delisting rule") to establish an NRM DPS for the gray wolf and to delist the DPS. 72 Fed. Reg. 6106-6139 (Feb. 8, 2007). The proposed delisting rule set forth two alternative delisting proposals. Under one alternative, if the State amended its wolf management scheme as demanded by the Service, then the Service would delist wolves throughout the entire NRM DPS, including throughout all of Wyoming. (*Id.*).

However, if the State did not make the demanded changes, then the Service proposed to delist all of the proposed NRM DPS except for “a significant portion of the range in the Wyoming portion of the NRM DPS.” (*Id.*). The Service described the “significant portion of the range” in Wyoming outside of the National Parks is the area west of State Highway 120, along the western border of the Wind River Reservation, and the Forest Service lands north of Boulder, Wyoming, to the Idaho border. 72 Fed. Reg. at 6119.

Under this proposal: (1) wolves living in the National Parks would be delisted; (2) wolves living in the “significant portion of the range” in Wyoming outside of the National Parks would “retain their nonessential experimental status under Section 10(j) of the [ESA],” 72 Fed. Reg. at 6119; and (3) wolves living throughout the remainder of Wyoming would be delisted (and therefore classified as predators under state law). (*Id.*)

In addition to describing the proposed alternatives, the Service explained:

The Service and Wyoming have continued to discuss approaches to post-delisting wolf management in Wyoming that would address our respective concerns and allow the Service to approve Wyoming’s wolf management strategy. Ideas under consideration by the Wyoming legislature in the 2006 session include[:] (1) The concept of a state Trophy Game Area large enough to adequately support the wolf population levels required for Wyoming, with predator status (with mandatory reporting of all take) in the remainder of the State; (2) acknowledgement that the State would manage for 15 breeding pairs in mid-winter and that the State’s responsibility is 7 breeding pairs outside the National Parks, based on the assumption that segment of the Wyoming wolf population will be supplemented by 8

breeding pairs living on lands managed by the National Park Service; and (3) that the State of Wyoming would be responsible for assuring that the absolute minimum of 10 breeding pairs and 100 wolves required to achieve Wyoming's share of the overall wolf recovery goal would be conserved. If such a regulatory framework was established by Wyoming law and was to be implemented by a Wyoming state plan, the Service intends to approve it.

72 Fed. Reg. at 6131 (emphasis added). The Service specifically described a boundary for a trophy game area in Wyoming that is large enough to support the State's share of the recovered wolf population. 72 Fed. Reg. at 6132. This boundary proposed by the Service is the same as the current trophy game boundary established in Chapter 21 of the Rules and Regulations of the Commission.

### **House Bill 213 and the Second Wyoming Plan**

In March 2007, the Wyoming Legislature enacted House Bill 213 ("HB 213"), which substantially revised the State's wolf management statutes. (Attach. B). The amendments in HB 213 provided, *inter alia*, that: (1) the Commission shall adopt a rule to establish an initial boundary for the trophy game area based upon statutorily prescribed guidelines; (2) the Commission may diminish the initial trophy game boundary line if doing so "does not impede the delisting of gray wolves and will facilitate [the State's] management of wolves"; (3) the management goals for wolves is based on "breeding pairs" instead of "packs"; (4) the Department will manage for at least seven breeding pairs of wolves in Wyoming outside of the National Parks. (Id.).

In April 2007, Region 6 Director Mitch King and Mr. Bangs revised the first Wyoming Plan to incorporate the statutory changes made by HB 213. (2008 AR: 11832-79). The State reviewed these changes and suggested corrections for some technical and typographical errors. (2008 AR: 14386-89). The Commission approved the revised wolf management plan ("second Wyoming Plan") in November 2007. (2008 AR: 11094-136).

#### **Peer Review of the Proposed Delisting Rule**

In April 2007, the Service asked eight wildlife biologists ("2007 peer reviewers") to peer review the proposed delisting rule. (2008 AR: 627-58, 663-65). None of the 2007 peer reviewers disagreed with, or otherwise opposed, the regulatory framework the Service stated it would approve if adopted by the State. (Id.). This proposed regulatory framework provided that wolves would be classified as predators throughout most of Wyoming. *See* 72 Fed. Reg. at 6131.

#### **The Reopening of the Public Comment Period on the Proposed Delisting Rule**

In July 2007, the Service reopened the comment period for the proposed delisting rule to give the public an opportunity to comment on the statutory changes made by HB 213 and on the second Wyoming Plan. 72 Fed. Reg. 36939-942 (July 6, 2007). The Service also asked the 2007 peer reviewers to reconsider their peer review comments in light of the State's new wolf management scheme. (2008 AR: 11202; 11183-84). None of the peer reviewer's disagreed with, or otherwise opposed, the State's new wolf

management scheme. (2008 AR: 11182-89, 11196-11201). Thus, the 2007 peer reviewers effectively approved the State's current wolf management scheme when they approved of the Service's proposed delisting rule after reconsidering the proposal in light of the State's wolf management scheme.

### **The First Delisting Rule**

In late February 2008, the Service adopted a final rule ("first delisting rule") to establish an NRM DPS for the gray wolf and to delist the NRM DPS. 73 Fed. Reg. 10514-560 (Feb. 27, 2008). The delisted NRM DPS encompassed all of Idaho, Montana, and Wyoming, and portions of Oregon, Utah, and Washington. 73 Fed. Reg. at 10514.

In the Federal Register notice for the first delisting rule, the Service included a detailed analysis of the State's current wolf management scheme. 73 Fed. Reg. at 10549-50. Based on this analysis, the Service concluded that the State's "regulatory framework provides adequate regulatory assurances that a viable wolf population will be maintained in the NRM DPS." 73 Fed. Reg. at 10550. The Service explained that the trophy game area established by the State "is clearly large enough to support 15 breeding pairs and 150 wolves" and that any wolves killed in the predatory animal area "are not necessary to sustain a recovered wolf population in the NRM DPS because they would be so few, scattered, and temporary." 73 Fed. Reg. at 10549-50.

The Service also analyzed the genetic connectivity issue in two different sections in the Federal Register notice for the first delisting rule. 73 Fed. Reg. at 10539-41; 10553-54. The Service cited numerous instances of wolves dispersing between Idaho, Montana, and Wyoming, including a male wolf from Idaho that has paired with a female wolf in Yellowstone. 73 Fed. Reg. at 10553. After what the Service described as a “careful consideration of all of the available information” on the genetic connectivity issue, the Service concluded that the alleged lack of genetic connectivity between the states in the NRM DPS was not a threat to the recovered wolf population. 73 Fed. Reg. at 10533, 10540, 10553.

### **The First Wolf Lawsuit in Montana District Court**

In April 2008, 12 different conservation groups (“plaintiffs”) filed suit in federal district court in Montana (“Montana District Court”) seeking judicial review of the first delisting rule. (2009 AR: 34744-70). The plaintiffs also asked for a preliminary injunction to reinstate ESA protections for gray wolves in the northern Rocky Mountain region. (2009 AR: 34776-804). The State intervened in the case and responded to the motion for preliminary injunction. (2009 AR: 31136-56)...

In July 2008, the Montana District Court granted the motion for preliminary injunction and reinstated ESA protections for gray wolves in the northern Rocky Mountain region pending resolution of the merits of the case. *Defenders of Wildlife v.*

*Hall*, 565 F.Supp.2d 1160, 1178 (D. Mont. 2008). The Montana District Court preliminarily determined, *inter alia*, that the plaintiff's were likely to succeed on four different issues regarding the State's current wolf management scheme because the Service:

(1) did not adequately explain why it approved the State's wolf management statute, which relied on Yellowstone to have eight breeding pairs of wolves to satisfy the State's obligation to maintain at least 15 breeding pairs, when the Service previously had determined that expecting Yellowstone to have eight breeding pairs is "unrealistic";

(2) did not adequately explain why it approved the State's wolf management scheme, which has a dual classification for wolves (trophy game and predator), even though the Service previously had demanded that the State adopt a statewide trophy game classification for wolves;

(3) did not explain why it approved the State's wolf management scheme even though WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I) provides that the Commission may decrease the size of the trophy game area if doing so does not impede the delisting of gray wolves; and

(4) did not consider whether the State's depredation control law (WYO. STAT. ANN. § 23-3-115(a)) is similar to the 10(j) regulations that governed wolf management in

Wyoming from reintroduction until delisting. *Defenders of Wildlife*, 565 F.Supp.2d at 1172-76.

After the preliminary injunction was issued, the Service asked the Montana District Court to vacate the first delisting rule and to remand the matter to the Service for reconsideration. (2009 AR: 30268-78). The Montana District Court vacated the rule and remanded the matter to the Service on October 14, 2008. (2009 AR: 30258-60).

### **The Second Reopening of Public Comment on the Proposed Delisting Rule**

In late October 2008, the Service reopened the public comment period on the proposed delisting rule with the intent of making a new listing determination. 73 Fed. Reg. 63926-932 (Oct. 28, 2008). With respect to the State's wolf management scheme, the Service asked for public comment on: (1) "the ability of Wyoming State law and their management plan" to satisfy [the requirement for the State to maintain 15 breeding pairs of wolves; and (2) "the size and malleability of the trophy game area, including whether a larger or Statewide trophy game area designation for wolves is necessary." 73 Fed. Reg. at 63932.

### **The Chapter 21 Emergency Rule**

On October 27, 2008, the Commission approved changes to Chapter 21 as an emergency rule. (Attach. C). These changes provided that: (1) the Commission will manage for at least 15 breeding pairs and 150 wolves in Wyoming with at least seven



breeding pairs located primarily outside of the National Parks; (2) the Commission will manage for enough breeding pairs and wolves in Wyoming outside the National Parks to meet the numeric management objectives if there are less than eight breeding pairs of wolves in the National Parks for two consecutive years; and (3) the Commission shall not diminish the trophy game management area defined in Chapter 21 unless the best scientific information available shows that doing so will not prevent the Commission from achieving the management objectives. (Id.).

### **The Current Wyoming Plan**

In November 2008, the Commission approved changes to the Wyoming Plan ("current Wyoming Plan"). (2009 AR: 35275-319). These changes incorporated the changes made in the Chapter 21 emergency rule.

The Department notified the Service in a timely manner of the adoption of the Chapter 21 emergency rule and the current Wyoming Plan. (2009 SAR: 452). In January 2009, the State notified the Service that the Commission had started the process of adopting a final Chapter 21 rule which is the same in every respect as the Chapter 21 emergency rule. (2009 SAR: 1-2). The final Chapter 21 Rule took effect on March 12, 2009. (Attach. D).

### **The Announcement, and Subsequent Withdrawal, of the Current Delisting Rule**

In January 2009, the Service announced that wolves would be delisted throughout the NRM DPS except in Wyoming. (2009 AR: 1737-39). The day after this announcement, the Service notified the State that its “regulatory framework does not provide adequate regulatory mechanisms to assure that the Northern Rocky Mountain gray wolf population would retain its recovered status in Wyoming if the protections of the [ESA] were removed.” (2009 AR: 1640).

On January 20, 2009, the Service withdrew the final rule to establish the NRM DPS and to delist wolves throughout the NRM DPS except in Wyoming (“current delisting rule”) from the Office of the Federal Register at the request of the Obama administration. (2009 AR: 1670-71). After further administrative review of the proposal, Secretary of the Interior Ken Salazar affirmed the decision to adopt the current delisting rule. (2009 AR: 1076-77).

### **The Current Delisting Rule**

In April 2009, the current delisting rule was published in the Federal Register. 74 Fed. Reg. 15123-188 (April 2, 2009). The current delisting rule delists wolves in all of Idaho and Montana and parts of Oregon, Utah, and Washington, but retains federal management of wolves throughout all of Wyoming. 74 Fed. Reg. at 15123.

In adopting the current delisting rule, the Service determined that the State's "regulatory framework does not provide the adequate regulatory mechanisms to assure that [the State's] share of a recovered NRM wolf population would be conserved if the protections of the [ESA] were removed." 74 Fed. Reg. at 15172. The Service then explained that

[i]n order to constitute adequate regulatory mechanisms, Wyoming's regulatory framework needs to: Designate and manage wolves as a trophy game species statewide; manage for at least 15 breeding pairs and at least 150 wolves in mid-winter in [Wyoming] and at least 7 breeding pairs and at least 70 wolves in mid-winter outside the National Parks; authorize defense of property take in a manner that is similar to the current regulatory scheme; consider all sources of mortality, including all hunting and defense of property mortality in its total statewide allowable mortality levels; and manage the population to maintain high levels of genetic diversity and to continue ongoing genetic exchange.

74 Fed. Reg. at 15179.

#### **SUMMARY OF THE ARGUMENT**

The Service has no legitimate biological reason for requiring the State to adopt a statewide trophy game classification for wolves. The best scientific data available shows that the size of the trophy game area in the State's wolf management scheme is adequate to allow the State to maintain its share of the NRM DPS wolf population after delisting. The Service's reasons for requiring the statewide trophy game classification have no

basis in fact or law. The Service's other reasons for rejecting the State's wolf management scheme also lack merit.

The Service violated the ESA when it deemed the Chapter 21 emergency rule to be inadequate because the rule was only in effect for 120 days. The Chapter 21 emergency rule was a part of the State's existing regulatory mechanisms. The Service had a mandatory duty under the ESA to evaluate the Chapter 21 emergency rule on its merits.

The Service has arbitrarily redefined the recovery criteria for the State by requiring the State to manage for at least seven breeding pairs and 70 wolves outside of the National Parks, regardless of the number of breeding pairs in the National Parks. While the State can voluntarily assume this additional regulatory burden in the interests of conserving the wolf population in Wyoming, the Service has no authority under the ESA to require the State to do so.

#### **STANDARD OF REVIEW**

Administrative decisions involving the ESA are reviewed under the standards set forth in Section 706(2) of the APA. *Biodiversity Legal Found. v. Babbitt*, 146 F.3d 1249, 1252 (10<sup>th</sup> Cir. 1998). In accordance with Section 706(2), the reviewing court shall hold unlawful and set aside agency action found to be arbitrary, capricious, contrary to

constitutional right, in excess of statutory limitations, or otherwise not in accordance with law. *See* 5 U.S.C. § 706(2)(A)-(C).

An agency decision is arbitrary or capricious if: (i) the agency entirely failed to consider an important aspect of the issue; (ii) the agency's explanation for the decision was counter to the evidence before it; (iii) the agency relied on factors that Congress did not intend for it to consider; or (iv) the agency's decision is so implausible that it could not be attributed to the product of agency expertise. *Colorado Envt'l Coal. v. Dombeck*, 185 F.3d 1162, 1167 (10<sup>th</sup> Cir. 1999).

To satisfy the "arbitrary and capricious" standard, the agency must examine the relevant data and articulate a satisfactory explanation for its decision, including a rational connection between the facts found and the choice made. *Citizens' Comm. to Save Our Canyons v. United States Forest Serv.*, 297 F.3d 1012, 1035 (10<sup>th</sup> Cir. 2002). When a federal agency adopts a new rule to replace a prior rule, the agency must provide a "reasoned explanation" for the new rule if the new rule "rests upon factual findings that contradict those which underlay" the prior rule or when the prior rule "has engendered serious reliance interests that must be taken into account." *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, — U.S. —, 129 S. Ct. 1800, 1810 (2009). In this "reasoned explanation," the agency must make clear its reasons "for disregarding facts and

circumstances that underlay or were engendered by” the prior rule. *Fox Television Stations*, 129 S. Ct. at 1811.

The final delisting rule at issue rests upon numerous factual findings that contradict the facts which support the first delisting rule. For example, the Service now contends that its prior approval of the State’s dual classification scheme was wrong because the Service “failed to consider the impacts of the predatory animal area to genetic connectivity.” 74 Fed. Reg. at 15170. Yet, in adopting the first delisting rule, the Service claimed to have carefully considered “all of the available information” on the genetic connectivity issue and concluded that the alleged lack of genetic connectivity between the states in the NRM DPS was not a threat to the recovered wolf population. 73 Fed. Reg. at 10533, 10540, 10553.

The first delisting rule also “engendered serious reliance interests that must be taken into account[.]” Before HB 213 was enacted, the Service publicly announced that it would approve the State’s management scheme if the scheme satisfied three specific requirements — HB 213 addressed those requirements. (*Compare* 72 Fed. Reg. at 6131 *with* Attach. B). In addition, the Commission adopted the second Wyoming Plan based upon specific amendments proposed by the Service. (*Compare* 2008 AR: 11832-79 *with* 2008 AR: 11094-11136). Thus, for the foregoing reasons, the heightened standard of review articulated in the *Fox Television Stations* case applies in this case.

## ARGUMENT

### **I. The rejection of the State's wolf management scheme was arbitrary and capricious.**

The Service contends that it reanalyzed the State's wolf management scheme based on "concerns" expressed by the Montana District Court in the preliminary injunction order. 74 Fed. Reg. at 15170. After the preliminary injunction order was issued, the Commission amended the Chapter 21 rule as follows to clarify the State's wolf management scheme with respect to three of the four issues the Montana District Court suggested were problematic:

- Section 4(b) now includes an explicit commitment to maintain at least 15 breeding pairs of wolves in Wyoming, regardless of the number of breeding pairs in the National Parks;

- Section 4(c) now provides that the Commission will not decrease the size of the trophy game area in Wyoming unless the best scientific information available indicates that doing so will not prevent the State from maintaining its share of the NRM DPS wolf population; and

- Section 3(b) now defines the phrase "doing damage to private property" in WYO. STAT. ANN. § 23-3-115(c) to make the State's defense of property statute consistent with the current Section 10(j) regulations (50 C.F.R. §17.84(i)). (*See Attach. C*).

These clarifications to the Chapter 21 rule adequately address any concerns regarding the State's commitment to manage for 15 breeding pairs of wolves, the "malleable" nature of the trophy game area, and the State's defense of property statute. Thus, the statewide trophy game classification is the primary reasons why the Service rejected the State's wolf management scheme.

The evidence in the administrative record shows that the Service has no legitimate biological reason for requiring the State to adopt a statewide trophy game classification for wolves. To satisfy the requirements for delisting, the State's wolf management scheme need only be "adequate" to allow the State to maintain its share of the NRM DPS wolf population after delisting. Given the Service's post-delisting management goals for the wolf population in Wyoming, the State's wolf management scheme is "adequate" to satisfy the delisting requirements if the scheme will allow the State to manage for at least 15 breeding pairs and at least 150 wolves. As explained in detail below, the best scientific information available proves that the dual classification for wolves as established in the State's wolf management scheme will allow the State to maintain its share of the recovered wolf population after delisting.



**A. The best scientific information available proves that having a predator classification for wolves will not prevent the State from maintaining its share of the recovered wolf population.**

The ESA dictates that the Service “shall” evaluate five specific delisting criteria “solely on the basis of the best scientific and commercial data available[.]” *See* 16 U.S.C. § 1533(b). Congress did not define the phrase “best scientific ... data available” in the ESA, and no federal court has provided a precise or complete definition of the phrase. However, the best science requirement in 16 U.S.C. § 1533 prompted the Department of the Interior to adopt the Interagency Policy for Peer Review in Endangered Species Act Activities (“1994 Peer Review Policy”). *See* 59 Fed. Reg. 34270 (July 1, 1994). The Service follows the 1994 Peer Review Policy “to ensure the best biological and commercial information is being used in the decisionmaking process[.]” (*Id.*).

When analyzing the adequacy of existing regulatory mechanisms in a delisting analysis, the Service applies a two step approach to ensure it complies with the best science mandate. First, the Service biologists assess the regulatory mechanisms to determine if they are adequate to allow for delisting. (*See, e.g.*, 2004 AR: 308, 335). If so, then, pursuant to the 1994 Peer Review Policy, the Service enlists biologists from outside of the agency to assess the regulatory mechanisms. (*Id.*); 59 Fed. Reg. at 34270. Thus, the biological opinions of both the Service biologists and the peer review biologists

play a role in determining whether the best science supports the Service's findings regarding the adequacy of the regulatory mechanisms being reviewed.

In this case, both the Service biologists and the peer review biologists believe that the dual classification for wolves in the State's wolf management scheme will not prevent the State from maintaining its share of the recovered NRM DPS wolf population. Together, these opinions represent the best scientific data available with respect to the dual classification issue.

**1. The biological opinion of Ed Bangs, the Service's lead wolf biologist**

Ed Bangs consistently has held the biological opinion that classifying wolves as predators throughout most of Wyoming will not prevent the State from maintaining its share of the recovered wolf population in the NRM DPS. In the biological evaluation of the adequacy of the first Wyoming Plan, Mr. Bangs explained that

[w]hile we do not believe that 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. ... While "predatory animal" designation will almost certainly inflame national public opinion against any potential Service efforts to propose wolf delisting, we do not believe that it is a significant biological issue if only applied outside a sufficiently large (but permanent) proposed "trophy game" DAU in northwestern Wyoming.

(2004 AR: 90170)(emphasis added). He further opined that "[t]he current 'expanded' DAU [in the first Wyoming Plan] appears large enough to assure that the Department can

maintain the wolf pack objective outside the Park and it should be made permanent prior to delisting.”<sup>1</sup> (Id.). Mr. Bangs repeated this opinion in his recommendations in the conclusion of the biological assessment.<sup>2</sup> (2004 AR: 90171).

In the draft letter explaining the Service’s reasons for rejecting the first Wyoming Plan, Mr. Bangs suggested the Service give the State the following directions regarding the dual classification for wolves:

The 7 pack trigger between trophy game and predatory animal status must be eliminated. Wolves can still be managed in Wyoming under dual classification of “trophy game” and “predatory animal” but as a minimum, all wolves in the Northwest Wyoming Data Analysis Unit (DAU) must be permanently classified as trophy game regardless of the total number of packs in Wyoming or total number of packs outside of the National Parks and Parkway.

(2006 AR: 12914)(emphasis added). Read together, the biological assessment and the corresponding draft letter show that, in January 2004, Mr. Bangs believed that classifying wolves as predators throughout most of Wyoming satisfies the adequate regulatory

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<sup>1</sup> Mr. Bangs reiterated this opinion in a separate letter to the Department on July 16, 2003. (2004 AR: 363-64).

<sup>2</sup> During the legislative session in which HB 229 was enacted, Mr. Bangs reviewed the wolf legislation pending before the Wyoming Legislature. (2006 AR: 12135-37). In his notes on the proposed legislation, Mr. Bangs wrote: “I’ll finally comment about the whole [Wyoming] predator status approach. I know that we can live with dual status but it at least has to be over big enough area to support a viable wolf population.” (2006 AR: 12137)(emphasis added).

mechanisms requirement in the ESA as long as wolves are classified as trophy game in a fixed geographic area at least as large as the DAU in the first Wyoming Plan.

Comments made by Mr. Bangs before the first Wyoming Plan was adopted corroborate this conclusion. During the development of the first Wyoming Plan (after HB 229 was enacted), Mr. Bangs repeatedly stated that having a predator classification for wolves in Wyoming could satisfy the adequate regulatory mechanisms requirement for delisting. In April 2003, Mr. Bangs told a radio reporter that

predator status would mean no wolves in those areas and was a public relations problem, but biologically it was fine- if [Wyoming] managed for a wolf population in the GYA. There is no reason there should be wolves in many parts of [eastern Wyoming].

(2004 AR: 90097; 2006 AR: 12842) (emphasis added). Mr. Bangs made similar statements both internally and publicly throughout the remainder of 2003. (See 2004 AR: 90066, 90137; 2006 AR: 12839, 13602). In July 2003 briefing paper to the officials from the Service and the National Park Service, a Department of the Interior official corroborated the Mr. Bangs' biological assessment of the predator classification in Wyoming, explaining that

[w]hile the predatory animal classification may be controversial, [Service] biologists believe it will not adversely affect the continued recovery of wolves since, for the most part, the area where wolves would be classified as predatory animals lies outside suitable wolf habitat.

(2006 AR: 12058).

Comments made by Mr. Bangs after the Service rejected the first Wyoming Plan confirm that he continued to believe that having a predator classification for wolves throughout most of Wyoming would not prevent the State from maintaining its share of the recovered wolf population. In an email to several other Service employees in late February 2006 (five months before the Service denied the petition to delist), Mr. Bangs stated that the Department

needs [management] authority to manage wolves over a large enough part of the state to assure that if the wolf population is having problems ... they can react soon enough to avoid a crisis. ... The GMU [sic] west of Cody and [north] of Pinedale is large enough to maintain their share and I doubt wolves will be anywhere else anyway.

(2006 AR: 17905)(emphasis added).

Approximately two weeks after the Service officially rejected the State's petition to delisting Mr. Bangs told the Region 6 Director that "[i]f the trophy game area was as big as the recommended 2003 [Wyoming] Wolf Data Analysis Unit & permanent ... my biological concerns are all addressed." (2008 AR: 11174). Mr. Bangs reiterated this opinion on multiple occasions in December 2006. (2008 AR: 11159-60, 11148, 11142-43)

Even after the Montana District Court issued the preliminary injunction order, Mr. Bangs continued to believe that, biologically, a predator classification for wolves throughout most of Wyoming satisfies the requirements for delisting. In late August

2008, Mr. Bangs reviewed some changes the State was proposing to make to the Chapter 21 rule to address some of the concerns of the Montana District Court. Chapter 21, Section 5 designates wolves as predators everywhere in Wyoming outside of the current trophy game area. Mr. Bangs described Section 5 as “sad but accurate.” (2009 AR: 5495; 35343). He further commented that

I do think predatory animal is biologically barely OK depending upon how much trophy area is managed, & if it included very little of the suitable habitat in [Wyoming]. 30% may be too much for the court to buy for a [significant portion of the range] argument.

(Id.)(emphasis added).

Mr. Bangs reiterated this opinion after the Service announced that it would adopt the final delisting rule at issue in this case. In March 2009, when asked to explain what the State might need to do to gain Service approval of its wolf management scheme, Mr. Bangs stated, *inter alia*, “[t]he area where wolves are listed as trophy game and managed by [the Department] needs to be state-wide (or at the very minimum [at] least several times larger than 12% of Wyoming).” (2009 AR: 712) (emphasis added).

The foregoing evidence proves that Mr. Bangs believes that the State can have a dual classification for wolves as long as the area where wolves are classified as trophy game is large enough to maintain the State’s share of the NRM DPS wolf population. The evidence also proves that Mr. Bangs believes the size of the trophy game area in the State’s wolf management scheme is large enough to maintain the State’s share of the

NRM DPS wolf population. (2006 AR: 17905; 2008 AR: 11174, 11159-60, 11148, 11142-43).

## **2. The biological opinions of peer review experts**

Two different groups of biologists employed outside of the Service also believe that a dual classification for wolves in Wyoming will not prevent the State from maintaining maintain its share of the recovered wolf population. In 2003 and in 2007, the Service asked two different groups of wildlife management biologists to peer review the State's wolf management scheme and to give an opinion on whether the management scheme is sufficient to maintain the State's share of the recovered wolf population. (2004 AR: 430-482; 2008 AR: 627-58, 663-65). In each instance, peer review was solicited as required by the 1994 Peer Review Policy. 74 Fed. Reg at 15138.

After reviewing the first Wyoming Plan, none of the 2004 peer review experts concluded that a statewide trophy game classification for wolves in Wyoming is necessary for the State to maintain its share of the recovered wolf population. (2004 AR: 430-482). Only four of the peer reviewers expressed concerns about the predator classification for wolves in the first Wyoming Plan. (2004 AR: 461, 466, 476, 478). Yet, despite their concerns, none of the four peer review experts concluded that a statewide trophy game classification for wolves in Wyoming is necessary for the State to maintain its share of the recovered wolf population.

In July 2007, Mr. Bangs asked the 2007 peer review experts to re-consider their previously submitted comments in light of the second Wyoming Plan. (2008 AR: 11202). After this reconsideration, none of these peer reviewers determined that the State must adopt a statewide trophy game classification for wolves in order to maintain the State's share of the recovered NRM DPS wolf population. (2008 AR: 11183, 11185, 11188-89, 11195-97, 11201).

The opinions of Mr. Bangs and the peer review experts represent the best scientific data available on the issue. They all agree that having a dual classification for wolves in Wyoming will not prevent the State from maintaining its share of the recovered NRM DPS wolf population. Therefore, the Service violated the best science requirement in the ESA when it ignored the opinions of these biologists and instead deemed the State's wolf management scheme inadequate because the management scheme included a dual classification for wolves.

**3. The Service applied an incorrect standard of review in evaluating the adequacy of the State's dual classification for wolves.**

In explaining why the State must have a statewide trophy game classification, the Service (1) asserted that adopting the classification will provide "the best way" for the State to satisfy the adequate regulatory mechanism requirement for delisting, 74 Fed. Reg. at 15149; (2) rejected 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; (3) explained that a statewide trophy game classification “is ... advisable given the dispersal capabilities of wolves,” 74 Fed. Reg. at 15183; and (4) ultimately concluded that “[w]e believe the entire State of Wyoming should be managed as a trophy game area.” (Id.). These findings show that the Service incorrectly applied an incorrect legal standard in evaluating the State’s wolf management scheme.

In conducting a status review of a listed species, the Service must determine whether the species is no longer endangered or threatened based upon five delisting criteria, including “the inadequacy of existing regulatory mechanisms[.]” *See* 16 U.S.C. §§ 1533(a), (c)(2)(B); 50 C.F.R. § 424.11(d). In conducting the status review of wolves in the NRM DPS, the Service assessed whether the “post-delisting regulatory mechanisms in each portion of the NRM DPS are adequate to maintain the recovered status of the NRM DPS.”<sup>3</sup> 74 Fed. Reg. at 15166. Given that the State must manage for “at least 15 breeding pairs and at least 150 wolves in mid-winter” to maintain its share of the recovered wolf population in the NRM DPS (*see* 74 Fed. Reg. at 15132), the State’s wolf management scheme must be deemed “adequate” for purposes of delisting if the

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<sup>3</sup> In the context of a delisting status review, the Service typically addresses whether the existing regulatory mechanisms are “adequate” to conserve the species at recovery levels after delisting (as opposed to being “not inadequate”).

management scheme will allow the State to maintain at least 15 breeding pairs and at least 150 wolves in mid-winter.

In approving the State's wolf management scheme in 2007, the Service determined that the State's current trophy game area "is clearly large enough to support 15 breeding pairs and 150 wolves even if Yellowstone Park had none (a very unlikely scenario). Therefore the [current trophy game area] is large enough to maintain [the State's] commitment to the NRM wolf metapopulation on its own." 73 Fed. Reg. at 10549. The Service has not recanted this finding. The State's wolf management scheme therefore satisfies the "adequate regulatory mechanisms" requirement for delisting. Accordingly, the Service had no legal authority to reject the State's scheme because a dual classification for wolves "is not required," or to demand that the State adopt a statewide trophy game classification because the Service thinks it is "advisable" or "the best way" to manage wolves, or because the Service "believes" the State "should" manage wolves that way.

**4. The Service's reasons for requiring the statewide trophy game classification lack merit.**

Even though Mr. Bangs and the peer review experts believe that the dual classification for wolves is biologically sound, the Service asserted seven different reasons for requiring the State to adopt a statewide trophy game classification for wolves. *See* 74 Fed. Reg at 15183. None of the proffered reasons has merit.

**a. Genetic connectivity**

The Service first argued that a statewide trophy game classification is necessary to foster and maintain genetic connectivity between the wolf populations in Idaho, Montana, and Wyoming. 74 Fed. Reg. at 15170, 15183. This argument arises from the 1994 EIS recovery goals for the NRM DPS wolf population, which require, *inter alia*, that there be “genetic exchange” between the wolf populations in Idaho, Montana, and Wyoming. *See* 74 Fed. Reg. at 15139.

With respect to the dual classification for wolves in the State’s current regulatory management scheme, the Service explained that

[w]e previously approved this approach [in the first delisting rule] because the 12 percent of Wyoming where wolves would be managed as a trophy game species included 70 percent of the State’s suitable wolf habitat and was presumed to be large enough to support Wyoming’s share of the recovered wolf population. This approach failed to consider the impacts of the predatory animal area to genetic connectivity.

74 Fed. Reg. at 15170. The Service also asserted that “[w]e ... should have evaluated the potential for genetic connectivity more closely[] when we determined the 2007 plan was sufficient.” 74 Fed. Reg. at 15149. These “explanations” are specious for three reasons.

First, the Service acknowledged that “natural connectivity is not and never has been required to achieve our recovery goal[.]” 74 Fed. Reg. at 15183; *see also* 74 Fed. Reg. at 15133-15135. If natural genetic connectivity is not required to satisfy the

recovery goals, then the Service has no legal authority under the ESA to require the State to change its wolf management scheme to encourage such connectivity.

Second, and more importantly, having a statewide trophy game classification is not necessary to achieve the genetic connectivity contemplated by the recovery goals. The recovery goals require genetic exchange between the wolf populations in Idaho, Montana, and Wyoming. The locations of the wolf packs in the three states confirm that a statewide trophy classification for wolves in Wyoming is not necessary to promote genetic exchange between the three states.

No wolf packs live in the eastern half of Montana or in the southeastern Idaho where the Idaho border meets the western border of Wyoming (near the southern third of Lincoln County, Wyoming). (2009 AR: 40962, 41116). All of the wolf packs in Wyoming live in northwestern Wyoming. (2009 AR: 40907). Given the relative proximity of the wolf packs in the three states, there can be no legitimate wolf dispersal corridors between Montana and Wyoming east of the Big Horn mountain range and between Idaho and Wyoming south of the Wyoming Range. Therefore, having a predator classification for wolves east of the Big Horn mountain range and south of the Wyoming Range absolutely will not limit wolf movements between the three states.

Finally, the Service has no evidence to show that the current predator area in Wyoming (which includes the Big Horn mountain range and the Wyoming Range) will

prevent such movement. The Service concedes that it has no idea where the existing wolf migration corridors are located. *See* 74 Fed. Reg. at 15183 (“exact migratory corridors are not known”). Although the Service surmises that important wolf dispersal areas exist in “parts of western Wyoming outside the current trophy game boundary, such as the Wyoming Range adjacent to Idaho and valleys north of Kemmerer” and that “[d]ispersing wolves from Idaho that bred in the GYA likely crossed this area and survived during the winter breeding season, resulting in natural genetic connectivity[,]” *see* 74 Fed. Reg. at 15159, these findings are speculative and factual unfounded.

The Service also misrepresented the biological authority it cited to support the genetic connectivity theory. The Service cited both “Boyd *et al.* 1995” and “Oakleaf *et al.* 2005, p. 559” for the proposition that “[w]olf dispersal patterns indicate that dispersing wolves moving into the GYA from Idaho or Montana are likely to move through the predatory animal area.” 74 Fed. Reg. at 15176, 15183. Neither authority supports the Service’s finding. The 1995 Boyd article identifies potential dispersal routes from Canada into Glacier National Park, and from Glacier National Park into Idaho and western Montana. (2009 AR: 36325-28). The 2005 Oakleaf article identifies 10 possible wolf dispersal corridors, but none of these corridors pass through the predatory area in Wyoming. (2009 AR: 38170 Fig. 3).

In the final analysis, the Service has no evidence to support its finding that a statewide trophy game classification is necessary to ensure genetic connectivity between Wyoming and Idaho or Montana. Moreover, the Service cannot rationally rely on genetic connectivity as a reason for requiring a statewide trophy game classification if the Service does not know where wolves are migrating between the three states.

**b. The remaining six justifications**

In addition to the genetic connectivity theory, the Service lists six other justifications for requiring a statewide trophy game classification for wolves in Wyoming. 74 Fed. Reg at 15183. Two of these justifications are so misplaced that they warrant further discussion.

The Service argues that the State must adopt a statewide trophy game classification because doing so will “prevent[] a patchwork of different management statuses[.]” 74 Fed. Reg. at 15183. However, the Service currently manages wolves in Wyoming under “a patchwork” of different management regulations. Three different sets of federal regulations govern wolf management in Wyoming — wolves in the National Parks are not proactively managed within the park boundaries; wolves within the boundaries of the Wind River Indian Reservation are managed under the 2005/2008 Section 10(j) rules (50 C.F.R. § 17.84(n)); and wolves in the remainder of Wyoming are managed under the 1994 Section 10(j) rules (50 C.F.R. § 17.84(i)). *See* 74 Fed. Reg. at

15184. This “do as I say, not as I do” reasoning by the Service is the very definition of arbitrary and capricious.

The Service also argues that a statewide trophy game classification is necessary to be “consistent with the current regulatory scheme in that the entire State is currently nonessential, experimental[.]” 74 Fed. Reg. at 15183. This reasoning ignores the fact that the current federal wolf management scheme and the State’s wolf management scheme serve different purposes under the ESA. The current federal wolf management scheme (50 C.F.R. § 17.84(i)) is intended to promote the recovery of wolves in the northern Rocky Mountains. *See* 70 Fed. Reg. 1286, 1287 (Jan. 6, 2005). The State’s management scheme is intended to ensure that the State can maintain its share of the recovered NRM DPS wolf population after delisting. In managing wolves to maintain recovery levels, the State can implement more aggressive management tools (like hunting) than those allowable under the current federal wolf management scheme. *See* 74 Fed. Reg. at 15147. In enacting the ESA, Congress did not intend for a state to manage a delisted species in exactly the same manner as the Service managed the species while it was listed.

The Service’s remaining four justifications are not supported by any biological evidence or a reasoned explanation and therefore have no merit as a matter of law. *See Fox Television Stations*, 129 S. Ct. at 1810-11. Notably, even though the Service listed

seven reasons to explain why the State should adopt a statewide trophy game classification, the Service never said that the having a predator classification for wolves throughout most of Wyoming will prevent the State from maintaining its share of the recovered NRM DPS wolf population.

**5. The location of suitable wolf habitat in Wyoming proves that a statewide trophy game classification is unnecessary.**

The best scientific information available regarding suitable wolf habitat in Wyoming also shows that a statewide trophy game classification is unnecessary. Suitable wolf habitat is defined as “areas that have a 50 percent or greater chance of supporting breeding pairs or persistent wolf packs.” 74 Fed. Reg. at 15157. According to scientific evidence relied on by the Service, there is no suitable wolf habitat throughout most of Wyoming.

The Service has determined that the suitable wolf habitat in Wyoming “is depicted in Oakleaf *et al.*’s (2006) map on page 559. Generally, suitable habitat is located in ... northwest Wyoming (see figure 1 in 73 FR 63926, October 28, 2008).” 74 Fed. Reg. at 15158; *see also* 73 Fed. Reg. at 10537. Both the Oakleaf map and the map in Figure 1 in the October 28, 2008, Federal Register notice indicate that there is no suitable wolf habitat in Wyoming east of the Big Horn mountains and south of the Wyoming Range and the Wind River mountains. (*See* AR 2009: 38170; 73 Fed. Reg. at 63931). Since the Service acknowledges that “pack establishment in areas of unsuitable habitat is extremely



unlikely,” 74 Fed. Reg. at 15183, there is no legitimate biological reason why the State must classify wolves as trophy game animals anywhere in Wyoming east of the Big Horn mountain range and south of the Wyoming Range and the Wind River mountains.

More importantly, the trophy game area established in the State’s wolf management scheme is large enough to allow the State to maintain its share of the NRM DPS wolf population. Although the trophy game area encompasses only 70 percent of the suitable wolf habitat in Wyoming (74 Fed. Reg. at 15170, 15183), the Service has concluded that

[t]he Trophy Game Area designated by [the State] is clearly large enough to support 15 breeding pairs and 150 wolves even if Yellowstone Park had none (a very unlikely scenario). Therefore the Trophy Game Area is large enough to maintain [the State’s] commitment to the NRM wolf metapopulation on its own.

73 Fed. Reg. at 10549. The Service further has explained that

the area of Wyoming outside the Trophy Game Area is not considered significant to the recovery of gray wolves in the Northern Rocky Mountains; nearly all wolves that have attempted to occupy the portion of Wyoming outside the Trophy Game Area have been involved in conflicts and lethally removed under Service management; and that stagnant distribution patterns since recovery objectives were achieved indicate there is limited suitable habitat in Wyoming for the NRM DPS wolf population to expand significantly beyond the three core recovery areas.

73 Fed. Reg. at 10550 (citations omitted). The Service also has determined that any wolves killed in the predatory animal area “are not necessary to sustain a recovered wolf

population in the NRM DPS because they would be so few, scattered, and temporary.” 73 Fed. Reg. at 10542. The Service has not recanted these findings. Thus, the best available scientific evidence confirms that there is no legitimate biological reason to require the State to classify wolves as trophy game anywhere in Wyoming outside of the current trophy game area.

**6. The Service improperly relied on factors other than biology in demanding that the State adopt a statewide trophy game classification for wolves.**

The evidence in the administrative record shows that the Service relied on factors other than the biological evidence in demanding that the State adopt a statewide trophy game classification for wolves. The Service’s reliance on non-biological factors as a reason for demanding the statewide trophy game classification violates the ESA.

The Service must evaluate the adequacy of the State’s wolf management scheme “solely on the basis of the best scientific and commercial data available.” See 16 U.S.C. § 1533(b). Congress added the term “solely” to 16 U.S.C. § 1533(b) in 1982 “to remove from the process of listing or delisting of species any factor not related to the biological status of the species.” H.R. REP. NO. 97-567, at 20 (1982); *see also* H.R. CONF. REP. NO. 97-835, at 20 (1982). The Service thus may consider only biological information in evaluating the adequacy of existing regulatory mechanisms and may not consider any factors not related to the biological status of the species in making such an evaluation.

The evidence indisputably shows that Director Williams relied on factors other than the biological status of the gray wolf population in making the decision in January 2004 to require the State to adopt a trophy game classification. According to Director Williams' Special Assistant, the demand to eliminate the predator classification was the result of "policy calls on the 'predator' status[.]" (2004 AR: 519). The evidence in the administrative record shows that the "policy" considerations involved political and public relations concerns and concerns about post-delisting litigation.

In April 2003, Mr. Bangs prepared an "options" memorandum for the Secretary of the Interior in which he commented that "[t]he Service's attitude and position towards wolves and wolf delisting will be used as a major public relations issue to symbolize the current administration's environmental philosophy." (2006 AR: 12851). Mr. Bangs further explained that, "[o]n a national level, the predator classification is a huge public relations problem, regardless of biological justification." (Id.). Mr. Bangs repeatedly voiced this opinion throughout the summer and fall of 2003, when the first Wyoming Plan was being drafted by the Department, reviewed internally by Service biologists, and peer reviewed. (See 2004 AR: 347-348, 90097, 90137, 90170; 2006 AR: 12128, 12842, 12845, 12063, 13602, 12839, 12058).

Mr. Bangs also cautioned Director Williams about the potential political consequences with respect to the states of Idaho and Montana if the Service approved a

predator classification for wolves in Wyoming. In a briefing memorandum submitted to Director Williams five days before he rejected the first Wyoming Plan, Mr. Bangs warned that, “[i]f Wyoming’s plan is accepted as is, the States of Montana and Idaho will cry ‘foul’ on the dual status afforded to Wyoming.” (2006 AR: 11937). Mr. Bangs voiced similar concerns to the Secretary of the Interior in an April 2003. (2006 AR: 12855).

Director Williams’ superiors in the Department of the Interior were concerned both with the public perception of the word “predator” and with the potential of post-delisting litigation as a result of approving the predator classification. In February 2003, Secretary of the Interior Gale Norton advised State officials “that she was troubled by the use of the word predator” in HB 229. (2004 AR: 286). Secretary Norton voiced similar concerns June 2003. (2004 AR: 303). In July 2003, Mr. Bangs urged the Department to re-consider the predator classification for wolves in Wyoming because “Interior Secretary Gale Norton has commented that she is ... concerned about the use of the designation ‘predator.’” (2004 AR: 343).

In a May 2003 letter to the Wyoming Legislature, the Assistant Secretary for Fish and Wildlife and Parks explained that the Service preferred that wolves be classified as trophy game statewide because “[w]e want to do as much as we can to ensure that a decision to delist wolves will be sustainable in the event of litigation and subsequent

judicial scrutiny.” (2004 AR: 290). In testimony before the Joint Travel, Recreation, Wildlife, and Cultural Resources Interim Committee of the Wyoming Legislature in January 2004, the Deputy Assistant Secretary for Fish and Wildlife and Parks for the Department of the Interior repeatedly cited litigation concerns as the reason why the Service rejected the Wyoming Plan in January 2004. (2006 AR: 13982, 13986, 14005, 14039-14040). When the committee chairman summed up the testimony by saying that “[i]t’s perception and how a judge in the East will view it,” the Deputy Assistant Secretary responded:

Yes, Mr. Chairman, it all hinges on what we believe is our ability to defend a rule to delist wolves if a rule goes final. It is based on our experience in these kinds of matters in litigation in the past. ... [T]he law says make decisions based on the science, but legal analysis is an appropriate overlay after the scientific analysis is done, and from a strictly science perspective, yes, the plans were deemed adequate. It’s the legal considerations that prompt us to say no at this time.

(2006 AR: 14006-14007)(emphasis added).

Mr. Bangs also expressed concerns about litigation regarding the approval of the predator classification. In a July 2003 letter urging the Department regarding the first Wyoming Plan, Mr. Bangs noted that

predatory animal status ... could raise millions of dollars and provide a unifying justification for those groups who have most strongly supported wolf restoration, share animal fairness and humane concerns, but mistrust any type of state management-ie. the very organizations that are most likely to litigate over wolf delisting.

While the Service is mandated to focus on science and biology, public attitudes and comments will influence subsequent litigation.

(2004 AR: 347-348). He voiced similar concerns in April 2003. (2004 AR: 90096).

The foregoing evidence confirms that non-biological factors contributed to Director Williams' 2004 decision regarding the statewide trophy game classification. These non-biological factors also contributed to the Service's demand for the trophy game classification in 2006, as the Service essentially formalized Director Williams' 2004 decision when it rejected the State's petition to delist.

The Service's current demand for the statewide trophy game classification is inextricably linked to the 2004 and 2006 decisions. The Montana District Court preliminarily determined that the Service did not adequately explain why it had approved the dual classification for wolves in Wyoming in the first delisting rule despite the fact that the Service had insisted upon a statewide trophy game classification in 2004 and 2006. In response to this finding, the Service rescinded the first delisting rule, revoked its previous approval of the State's wolf management scheme, and once again has demanded that the State adopt the statewide trophy game classification.

Given that the best scientific information available supports the dual classification for wolves in the State's wolf management scheme, the Service's actions permit only one reasonable inference — the Service does not want to admit that the demand for the statewide trophy game classification in 2004 and 2006 was based on non-biological

factors and therefore violated the best science requirement in the ESA. The new demand for the statewide trophy game classification thus represents nothing more than reassertion of the prior demands and therefore necessarily must have the same basis. As a result, the current demand for the statewide trophy game classification also is based on non-biological factors and therefore violates the ESA.

**B. The Service improperly rejected the Chapter 21 wolf management rule 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 Chapter 21 wolf management rule. 74 Fed. Reg. at 15171-72. Each of these reasons lacks either a factual or legal basis and, as a result, the Service's decision to reject the Chapter 21 rule is arbitrary and capricious.

**1. The "emergency" rule reason**

The Service first concluded that the Chapter 21 rule is not an adequate regulatory mechanism because, at the time of the Service's review, the rule was an "emergency" rule which would last only for 120 days. 74 Fed. Reg. at 15171-15172. However, the ESA requires the Service to evaluate the existing regulatory mechanisms when determining whether a species should be delisted. See 16 U.S.C. § 1533(a)(1)(D)(emphasis added).

As used in the context of the phrase "existing regulatory mechanisms," the word "existing" means "to continue to be: maintain being." See WEBSTER'S THIRD NEW INT'L

DICTIONARY 796 (1986)(definition of “exist”). Thus, for purposes of evaluating whether wolves in the NRM DPS should be delisted, the State’s “existing” regulatory mechanisms are the regulatory mechanisms having legal effect at the time the Service conducted the status review.

The Service completed its status review for wolves in the NRM DPS on January 14, 2009. (*See* 2009 AR: 1737). The Chapter 21 emergency rule was filed on October 27, 2008. (*See* Attach. D). In Wyoming, an emergency rule is effective when filed and remains in effect for 120 days. *See* WYO. STAT. ANN. § 16-3-103(b). Thus, when the Service evaluated the State’s regulatory mechanisms, the emergency Chapter 21 rule had the force and effect of law and was a part of the existing State regulatory mechanisms.

Moreover, the Service was on notice that the Commission had started the formal rulemaking process for the Chapter 21 rule contemporaneously with the adoption of the emergency rule. (2009 SAR: 1-2). The final Chapter 21 rule became effective on March 12, 2009, three weeks before the final delisting was published in the Federal Register. (*See* Attach. D). In addition to violating federal law by not considering the Chapter 21 emergency rule during the status review, the Service also acted arbitrarily and capriciously by not reopening the status review to consider the final Chapter 21 rule.

Neither the ESA nor the implementing regulations for the ESA authorize the Service to reject the Chapter 21 rule simply because the rule was an emergency rule at the



time of the Service's evaluation. As a result, the decision to reject the State's wolf management scheme is arbitrary and capricious.

**2. The "in excess of statutory authority" reason**

Second, the Service determined that the Chapter 21 emergency rule is "still dependent on Wyoming statute and at times appear to promise actions that Wyoming statute prohibits." 74 Fed. Reg. at 15149. However, the Service did not explain how the Chapter 21 emergency rule "promise[s] actions that Wyoming statute prohibits." (Id.). The lack of such an explanation renders this finding arbitrary and capricious. *See Fox Television Stations*, 129 S. Ct. at 1810-11.

The Service's failure to explain this finding notwithstanding, the ESA precludes the Service from questioning whether the Chapter 21 emergency rule is 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. *See* 16 U.S.C. § 1533(b). The issue of whether the Chapter 21 emergency rule exceeds statutory authority is a state administrative law question, not a biological matter. Accordingly, the Service cannot rely on concerns about the legal implementation of the Chapter 21 emergency rule as a reason for finding that the State's regulatory mechanisms are not adequate.

Moreover, a state agency's interpretation of a statute the agency is charged with administering is entitled deference if the interpretation does not conflict with legislative intent. *See In re Loberg*, 2004 WY 48, ¶9. In Wyoming, a state agency rule is a "statement of general applicability that implements, interprets, and prescribes law [or] policy[.]" WYO. STAT. ANN. § 16-3-101(b)(ix). The Chapter 21 emergency rule thus embodies the Commission's and the Department's interpretation and implementation of the State's wolf management statutes. The Chapter 21 emergency rule also is consistent with the legislative intent regarding the State's wolf management statutes. (*See* Ex. A, § 4). Accordingly, the Service must defer to the Chapter 21 emergency rule as a proper interpretation of the State's wolf management statutes.<sup>4</sup>

### 3. The "legislative shortcomings" reason

Finally, the Service determined that the Chapter 21 emergency rule was inadequate because the rule did not address two "legislative shortcomings" — "a trophy game area that can be diminished and a statute that encourages the [Department] to manage the population toward the minimum recovery goals in a manner that allows the

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<sup>4</sup> In this case, the Service has acknowledged as much. (*See* 2004 AR: 90015)("It is up to Wyoming to determine if their state plan is compatible with state law."); *see also* 2006 AR: 12853 at ¶5). Moreover, as a matter of practice, the Service has asked the State to interpret its own statutes and then deferred to that interpretation. *See, e.g.*, 72 Fed. Reg. 14866, 14898 (March 29, 2007)(in the context of grizzly bear delisting, the Service asked the Wyoming Attorney General to interpret a state statute and then relied on the State's interpretation).

possible reduction of the wolf population to below recovery levels.” 74 Fed. Reg. at 15172. The first alleged shortcoming lacks merit as a matter of law and the second alleged shortcoming has no basis in fact.

**a. The alleged “possibly moving the trophy game area” shortcoming**

The Service’s reference to “a trophy game area that can be diminished” arises from the definition of “trophy game animal” in WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I). This definition describes a geographic area within which wolves will be classified as “trophy game animals,” then provides that “[t]his described area may be diminished by rule of the [C]ommission if the [C]ommission determines the diminution does not impede the delisting of gray wolves and will facilitate [the State’s] management of wolves.” (Id.).

The Service describes this alleged “shortcoming” as follows:

The first condition is not useful since wolves would have been already delisted for [the State’s] law to apply. As previously determined, a smaller trophy game area is not sufficient to maintain [the State’s] share of a recovered NRM gray wolf population. Our previous analysis failed to consider the possibility that the [Commission] would alter these boundaries.

74 Fed. Reg. at 15171 (citation omitted)(emphasis added).

The ESA requires the Service to evaluate to the adequacy of “existing” regulatory mechanisms in determining whether a species should be delisted. *See* 16 U.S.C. § 1533(a)(1)(D). The ESA thus prohibits the Service from relying on future or speculative

regulatory mechanisms in making a delisting decision. *See accord.*, *Defenders of Wildlife v. Kempthorne*, 535 F.Supp.2d 121, 131 (D.D.C. 2008)(in making listing decision, ESA prohibits Service from relying on future or speculative regulatory mechanisms); *Fed'n of Fly Fishers v. Daley*, 131 F.Supp.2d 1158, 1165 (N.D. Cal. 2000)(Service may not rely on future actions in making listing decisions); *Oregon Natural Resources Council v. Daley*, 6 F.Supp.2d 1139, 1155 (D. Or. 1998)(same). The Service's concern that the size of the trophy game area may be decreased necessarily must be based on improper speculation about some future action the Commission may or may not take. Therefore, the fact that the Commission has statutory authority to decrease the size of the trophy game area cannot be considered in evaluating whether the State's wolf management scheme is adequate to maintain the State's share of the recovered wolf population.

**b. The alleged “managing ... toward minimum recovery goals” shortcoming**

The Service cited temporary decreases in the Yellowstone wolf population in 2005 and 2008 as evidence that the State's wolf management statutes “encourage” the Department to manage the wolf population toward the minimum recovery goals. 74 Fed. Reg. at 15172. To this end, the Service also asserted that the wolf management statutes are “flaw[ed]” because they “depend[] on the National Parks to contribute at least 8

breeding pairs toward the total goal of at least 15 breeding pairs statewide.” 74 Fed. Reg. at 15171.

These arguments insinuate that occasional decreases in the Yellowstone wolf population will jeopardize the recovery status of the NRM DPS wolf population if the State manages for only seven breeding pairs of wolves outside of the National Parks (the minimum allowable under the State’s wolf management statutes). Such is not the case. To understand why, this Court need only review the wolf population numbers in Wyoming from 2002 through 2008 in light of the Service’s criteria for invoking a relisting status review for wolves in the NRM DPS.

In the years since the recovery goals first were met, Yellowstone consistently has had more than eight breeding pairs of wolves annually.<sup>5</sup> From 2002 through 2008, Yellowstone had less than 8 breeding pairs in only two years — 2005 and 2008. (2009 AR: 39892, 39933, 39991, 40303, 40552, 40819, 40899). Assuming, *arguendo*, the State had managed for only 7 breeding pairs outside of the National Parks in 2005 and 2008, the total wolf population in Wyoming for those two years would have been 14 breeding pairs in 2005 and 13 breeding pairs in 2008. In each such scenario, the one year drop

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<sup>5</sup> Mr. Bangs believes that “unlikely” that the wolf population in Yellowstone would ever drop below a level that jeopardized the State’s share of the recovered wolf population. (2008 AR: 22307; *see also* 2008 AR: 5825)

below 15 breeding pairs in Wyoming would not have prompted the Service to conduct a relisting status review.

The Service's relisting criteria are an objective litmus test for determining if the State is maintaining its share of the NRM DPS wolf population. The Service will initiate a status review to determine whether the wolves in the NRM DPS should be relisted if: (1) the wolf population in the State falls below 10 breeding pairs and 100 wolves at the end of the year; (2) the wolf population in the State falls below 15 breeding pairs and 150 wolves at the end of the year for three consecutive years; or (3) a change in state laws or management objectives would significantly increase the threat to the wolf population. 74 Fed. Reg. at 15133. As long as the wolf population in Wyoming does not fall below any of the relisting benchmarks, the State is maintaining its share of the NRM DPS wolf population.

Despite the temporary decreases in the Yellowstone wolf population in 2005 and 2008, none of the Service's triggers for a relisting status review would have been tripped had the State managed for only seven breeding pairs outside of the National Parks. Thus, the Service's concerns about the State managing for only seven breeding pairs outside of the National Parks has no basis in fact.

The fact that the total number of breeding pairs would have dropped below 15 twice in a four year period of time if the State had managed for only seven breeding pairs

of wolves outside of the National Parks does not mean that the recovery status of the NRM DPS wolf population would have been jeopardized. The Service insisted on the five breeding pairs buffer "to ensure the population never falls below the minimum recovery goal of 10 breeding pairs and 100 wolves per [s]tate." 74 Fed. Reg. at 15171. The foregoing examples confirm that the requirement for the State to manage for five breeding pairs more than the minimum recovery goal number should work as planned, even if State maintains only seven breeding pairs outside of the National Parks.

In the final analysis, the evidence in the administrative record indisputably confirms that the "legislative shortcomings" excuse for rejecting the Chapter 21 emergency rule has no basis in law or fact. As a result, the Service rejection of the Chapter 21 rule as inadequate is arbitrary and capricious.

**C. 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.**

As a requirement for delisting, 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. 74 Fed. Reg. at 15171. 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. (Id.).

The Service now has demanded 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 demand effectively redefines the post-delisting recovery criteria for the State and forces the State to maintain a disproportionate share of the NRM DPS wolf population. For example, in 2007, Yellowstone had 10 breeding pairs of wolves. (2009 AR: 40819). Had the new seven breeding pairs/70 wolves requirement been in place in 2007, the State would have been force to maintain 17 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, then 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.

The State's wolf management statutes provide that the state will manage for at least seven breeding pairs of wolves outside of the National Parks, even though 15 breeding pairs/150 wolves management goal imposed by the Service does not have a geographic requirement. While the State can voluntarily assume this additional regulatory burden in the interests of conserving the wolf population in Wyoming, the Service has no authority under the ESA to require the State to do so.



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.

**D. The Service’s other demanded changes have no merit.**

The Service has identified five criteria that the State’s wolf management scheme must satisfy in order to be deemed adequate for purposes of delisting. 74 Fed. Reg. at 15179. For two of these criteria — that the State must “authorize defense of property take in a manner that is similar to the current regulatory scheme” and must “consider all sources of mortality, including hunting and defense of property mortality in its total statewide allowable mortality levels — the Service has not provided a reasoned explanation for the demand. Without such an explanation, these demands are arbitrary and capricious. *See Fox Television Stations*, 129 S. Ct. at 1810-11.

### CONCLUSION

For the foregoing reasons, the Service's rejection of the State's wolf management scheme as inadequate is arbitrary, capricious, and otherwise not in accordance with law. The State respectfully requests that this Court: (1) set aside the portion of the final delisting in which the Service deems the State's wolf management scheme inadequate; (2) remand that portion of the final delisting rule to the Service with explicit directions to approve the State's wolf management scheme as an "adequate regulatory mechanism" for purposes of the ESA; and (3) order the Service to amend the final delisting rule to delist wolves throughout all of Wyoming and to do so no later than one month from the date of this Court's order.

DATED this 9<sup>th</sup> day of November, 2009.

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**Fed. R. App. P. 32(a)(7)(B) Certificate of Compliance**

In accordance with Fed. R. App. P. 32(a)(7)(B), I certify that this brief contains 13,860 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This word count was obtained by using the word count function of the Microsoft Word 2007 word processing program. The word count includes all footnotes. This brief was written in 13 point Times New Roman font using the Microsoft Word 2007 word processing program.

/s/ Jay Jerde  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 9<sup>th</sup> day of November, 2009, the foregoing **JOINT OPENING BRIEF** was electronically filed through the CM/ECF system, which caused the following parties to be served by electronic means, as more fully reflected on the Notice of Electronic Filing, to the following:

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# ATTACHMENT A

*State of Wyoming v. United States Department of the Interior et al.*

Docket No. 09-CV-118-J

House Bill 229: 2003 Wyo. Sess. Laws 269

269 SESSION LAWS OF WYOMING, 2003 Ch. 115

<del>(xxxiii)</del> (xxxiv) Resident license to capture falcons for falconry purposes .....	25.00
<del>(xxxiv)</del> (xxxv) Nonresident license to capture falcons for falconry purposes .....	170.00
<del>(xxxv)</del> (xxxvi) License to hunt with falcon; game birds, small game animals .....	10.00
<del>(xxxvi)</del> (xxxvii) Special bird license (use on game bird farms only) .....	15.00
<del>(xxxvii)</del> (xxxviii) Resident turkey license .....	10.00
<del>(xxxviii)</del> (xxxix) Nonresident turkey license .....	50.00
<del>(xxxix)</del> (xl) Wyoming interstate game tag .....	3.00
<del>(xl)</del> (xli) Resident game bird license; all game birds except turkey .....	10.00
<del>(xli)</del> (xlii) Resident small game license .....	10.00

**Section 2.** This act is effective January 1, 2004.

Approved March 4, 2003.

## Chapter 115

### PREDATOR AND TROPHY GAME MANAGEMENT

Original House Bill No. 229

AN ACT relating to wildlife; providing for the reclassification, harvesting and other regulation of gray wolves as trophy game animals as specified; monitoring gray wolves; providing for the regulation of wolf hybrids; providing a definition of livestock for purposes of the game and fish provisions; providing for meetings and for rulemaking; prohibiting the private ownership of wolves and wolf hybrids; providing a statement of legislative intent; providing for implementation and reports; making conforming amendments; and providing for an effective date.

*Be It Enacted by the Legislature of the State of Wyoming:*

**Section 1.** W.S. 23-1-108 and 23-1-304 are created to read:

**23-1-108. Delisting of gray wolves as experimental, nonessential population, endangered species or threatened species.**

Gray wolves shall be deemed removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming upon final publication in the Federal Register by appropriate federal agencies removing the gray wolf from all listings as an experimental nonessential population, endangered species or threatened species in Wyoming.

**23-1-304. Classification of gray wolves.**

(a) The commission shall determine the classification of gray wolves as provided in this section. In making this classification the commission shall rely upon information provided by department personnel and shall consult with the Wyoming animal damage management board created by W.S. 11-6-303 and the director of the Wyoming department of agriculture, and consider any additional information provided by that board and by that director.

(b) The department shall provide to the commission at least a quarterly monitoring report on the number of gray wolf packs within this state and their general location. Within thirty (30) days of receiving a department report the commission shall at a public meeting:

(i) Determine if there are less than seven (7) packs of gray wolves located in this state and primarily outside of Yellowstone National Park, Grand Teton National Park and John D. Rockefeller, Jr. Memorial Parkway and less than fifteen (15) packs within this state, including Yellowstone National Park, Grand Teton National Park and John D. Rockefeller, Jr. Memorial Parkway. If such a determination is made:

(A) The commission shall adopt rules and regulations to classify the gray wolf as a trophy game animal and prohibit the taking of gray wolves except as provided by W.S. 23-3-115(c), within that area of the state the commission determines is necessary to reasonably ensure seven (7) packs of gray wolves are located in this state and primarily outside of Yellowstone National Park, Grand Teton National Park and John D. Rockefeller, Jr. Memorial Parkway at the end of the current calendar year;

(B) At any time that gray wolves are classified as trophy game animals outside of any area specified in W.S. 23-1-101(a)(xii)(B)(I), the commission shall:

(I) Meet in public not less than once every ninety (90) days to review the classification and determine the need for its continuance;

(II) In consultation with the director of the Wyoming department of agriculture, upon receipt of information from the department of agriculture, consider the reclassification of wolves in all or a portion of such area at the commission's next scheduled meeting, or at an earlier meeting of the commission as the commission deems desirable or necessary.

(ii) Maintain the classification of gray wolves as a predatory animal and trophy game animal as specified in W.S. 23-1-101(a)(viii) and (xii)(B)(I), if it determines there were at least seven (7) packs of gray wolves located in this state and primarily outside of Yellowstone National Park, Grand Teton National Park and John D. Rockefeller, Jr. Memorial Parkway or at least fifteen (15) packs within this state, including Yellowstone National Park, Grand Teton National Park and John D. Rockefeller, Jr. Memorial Parkway as of the end of the preceding calendar quarter.

(c) For purposes of this section "pack" means five (5) or more gray wolves traveling together. If a group of gray wolves consists of more than ten (10) animals known to be traveling together, the commission may, at its discretion, recognize the number of packs within such a group to be equal to the number of reproductively mature females bearing young found within that group of wolves.

(d) The department shall institute and maintain an active program of population monitoring statewide. In all areas of the state, except where otherwise provided, any person who harvests a wolf shall notify the department where the harvest occurred within ten (10) days. Any information regarding the number or nature of wolves legally harvested within the state of Wyoming shall only be released in its aggregate form and no information of a private or confidential nature shall be released without the written consent of the person to whom the information may refer. Information identifying any person legally harvesting a wolf within this state is solely for the use of the department or appropriate law enforcement offices and is not a public record for purposes of W.S. 16-4-201 through 16-4-205.

(e) The department shall actively monitor big game animal herd populations statewide to determine whether and to what extent the gray wolf is negatively impacting big game animal herds, and thereby hunting opportunities. To the extent permitted by this title, the department shall manage the gray wolf population as necessary to ensure the long-term health and viability of any big game animal herd that is being threatened in this state.

(f) This section shall apply from and after the date gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming as provided by W.S. 23-1-108.

**Section 2.** W.S. 11-6-302(a)(ix) and (x), 23-1-101(a)(viii) and (xii), 23-1-102(a) by creating a new paragraph (xvi), 23-1-103, 23-1-302(a) by creating a new paragraph (xxix), 23-2-101(j) by creating a new paragraph (xlii), 23-2-104(e), 23-2-303(d), 23-3-102(b), 23-3-115 by creating a new subsection (c), 23-3-301 and 23-3-304(a) are amended to read:

#### 11-6-302. Definitions.

(a) As used in this article:

(ix) "Predatory animal" means:

(A) Coyote, jackrabbit, porcupine, raccoon, red fox, skunk, wolf or stray cat; and

(B) Until the date gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming as provided by W.S. 23-1-108, "predatory animal" includes wolves. After that date, "predatory animal" shall include any gray wolf not within an area of the state in which the gray wolf is:

(I) Designated as a trophy game animal under subdivision (x)(B)(I) of this subsection; or



(II) Classified as a trophy game animal by the game and fish commission pursuant to W.S. 23-1-304(b)(i)(A).

(x) "Trophy game animal" means:

(A) Black bear, grizzly bear or mountain lion; and

(B) From and after the date gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming as provided by W.S. 23-1-108:

(I) "Trophy game animal" shall include any gray wolf within those tracts of land within the boundaries of Wyoming designated as Yellowstone National Park, Grand Teton National Park, the John D. Rockefeller, Jr. Memorial Parkway, and those federally designated wilderness areas contiguous to these national parks and this parkway as defined by the United States congress as of January 1, 2003; and

(II) "Trophy game animal" shall include any gray wolf within any area of the state where gray wolves are classified as trophy game animals by the game and fish commission pursuant to W.S. 23-1-304(b)(i)(A).

**23-1-101. Definitions of wildlife.**

(a) As used in this act:

(viii) "Predatory animal" means:

(A) Coyote, jackrabbit, porcupine, raccoon, red fox, ~~wolf~~, skunk or stray cat; and

(B) Until the date gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming as provided by W.S. 23-1-108, "predatory animal" includes wolves. After that date, "predatory animal" shall include any gray wolf not within an area of the state in which the gray wolf is:

(I) Designated as a trophy game animal under subdivision (xii)(B)(I) of this subsection;

(II) Classified as a trophy game animal by the commission pursuant to W.S. 23-1-304(b)(i)(A).

(xii) "Trophy game animal" means:

(A) Black bear, grizzly bear or mountain lion; and

(B) From and after the date gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming as provided by W.S. 23-1-108:

(I) "Trophy game animal" shall include any gray wolf within those tracts of land within the boundaries of Wyoming designated as Yellowstone National Park, Grand Teton National Park, the John D. Rockefeller, Jr. Memorial Parkway, and those federally designated wilderness areas contiguous to these national parks and this parkway as defined by the United States congress as of January 1, 2003; and

(II) "Trophy game animal" shall include any gray wolf within any area of the state where gray wolves are classified as trophy game animals by the commission pursuant to W.S. 23-1-304(b)(i)(A).

**23-1-102. General definitions.**

(a) As used in this act:

(xvi) "Livestock" means horses, mules and asses, rabbits, llamas, cattle, swine, sheep, goats, poultry, or other animal generally used for food or in the production of food or fiber, and guard animals actively engaged in the protection of livestock. Bison are considered livestock unless otherwise designated by the Wyoming livestock board and the commission.

**23-1-103. Ownership of wildlife; purpose of provisions.**

For the purpose of this act, all wildlife in Wyoming is the property of the state. It is the purpose of this act and the policy of the state to provide an adequate and flexible system for control, propagation, management, protection and regulation of all Wyoming wildlife. There shall be no private ownership of live animals classified in this act as big or trophy game animals or of any wolf or wolf hybrid.

**23-1-302. Powers and duties.**

(a) The commission is directed and empowered:

(xxix) After the date gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming as provided by W.S. 23-1-108, to classify gray wolves as predatory or trophy game animals in accordance with W.S. 23-1-304, and to regulate the number of gray wolves which may be taken under a license issued under this act.

**23-2-101. Fees; restrictions; nonresident application fee; non-resident licenses; verification of residency required.**

(j) Subject to W.S. 23-2-101(f), the following hunting licenses and tags may be purchased for the fee indicated and subject to the limitations provided:

(xlii) From and after the date gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming as provided by W.S. 23-1-108:

- (A) Resident gray wolf license ..... \$15.00
- (B) Nonresident gray wolf license ..... \$150.00

**23-2-104. Archery licenses; special seasons; prohibition against firearms; equipment.**

(e) When hunting antelope, bighorn sheep, black bear, deer, mountain goat or mountain lion the longbow hunter must be equipped with a longbow of not less than forty (40) pounds draw weight or possessing the ability to cast a hunting arrow of four hundred (400) grain weight at least one hundred sixty (160) yards. When hunting elk, grizzly bear or moose, the longbow hunter must be equipped with a longbow of not less

than fifty (50) pounds draw weight or possessing the ability to cast a hunting arrow of five hundred (500) grain weight at least one hundred sixty (160) yards. The crossbow hunter must be equipped with a crossbow of not less than ninety (90) pounds draw weight which has a minimum draw length of fourteen (14) inches (from front of bow to back of string in the cocked position), a positive safety mechanism, and, except as provided in subsection (f) of this section, which must be cocked by hand without the aid of leverage-gaining devices. Crossbow bolts must be at least sixteen (16) inches long. The broadhead of arrows or bolts shall be of sharp steel with a minimum cutting width of one (1) inch. The provisions of this subsection relating to the hunting of antelope, bighorn sheep, black bear, deer, mountain goat and mountain lion shall also apply to the hunting of the gray wolf as a trophy game animal from and after the date gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming as provided by W.S. 23-1-108.

**23-2-303. Trapping licenses; tagging; traps and snares; penalty; confiscation.**

(d) All traps and snares used for furbearing or predatory animals shall be permanently marked or tagged with the name and address of the owner or the identification number assigned to the owner by the department. Any identification number attached to a trap or snare pursuant to this subsection is solely for the use of the department or appropriate law enforcement officers and is not a public record for purposes of W.S. 16-4-201 through 16-4-205. No trap or snare shall be set for furbearing or predatory animals within thirty (30) feet of any exposed bait or carcass over five (5) pounds in weight. As used in this subsection, "exposed bait or carcass" means the meat or viscera of any part of a mammal, bird or fish, excluding dried bones. In addition, all snares used for taking furbearing or predatory animals shall be equipped with a break-away locking device that is designed to release at two hundred ninety-five (295) pounds of pressure or less and a snare loop not to exceed twelve (12) inches in diameter measured side to side. Unless otherwise specified in this section, all traps, excluding snares set for furbearing animals and predatory animals and quick kill body grip traps as defined by commission rule and regulation, shall be checked by the owner at least once during each seventy-two (72) hour period from the time the traps were set. Quick kill body grip traps shall be checked by the owner not less than once each seven (7) day period from the time the traps were set. All wildlife caught in any trap or snare shall upon discovery, be removed immediately by the owner. Violation of this subsection constitutes a ninth degree misdemeanor. After the date gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming as provided by W.S. 23-1-108 the commission may enact rules and regulations setting forth the specifications for traps and snares used for the taking of gray wolves and the time period for checking such traps and snares. Except as otherwise provided by commission rule, the provisions in this section regulating the trapping of furbearing and predatory animals shall apply to the trapping of gray wolves.

**23-3-102. Taking certain game animals without license or during a closed season prohibited.**

(b) Any person who takes any bighorn sheep, mountain goat, mountain lion, ~~or~~ grizzly bear or gray wolf where classified as a trophy game animal without the proper license except as otherwise permitted by this act is guilty of a 4th degree misdemeanor.

**23-3-115. Taking black bear, mountain lion, gray wolf, bobcat, weasel, badger, squirrels or muskrat for damaging property.**

(c) The provisions of subsection (a) of this section relating to the taking of animals doing damage to private property shall apply to gray wolves from and after the date gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming as provided by W.S. 23-1-108. The owner, employee or lessee acting under authority of this section shall notify the department of the killing of a gray wolf within an area of the state in which the gray wolf is classified as a trophy game animal. The notification shall be made within ten (10) days of the kill unless the gray wolf was taken in an area where wolves have been classified as trophy game animals pursuant to W.S. 23-1-304(b)(i)(A) in which case the notification shall be made within seventy-two (72) hours.

**23-3-301. Importation and sale of wildlife prohibited; exceptions.**

(a) No person shall import into Wyoming from any source any living antelope, bear, deer, elk, moose, mountain goat, mountain lion, bighorn sheep, wolf, wolf hybrid nor any living wildlife except as otherwise permitted by this act.

(b) No person shall sell any living antelope, bear, deer, elk, moose, mountain goat, mountain lion, bighorn sheep, wolf, wolf hybrid or falcon except as permitted by the commission.

**23-3-304. Certain trapping devices unlawful; game for bait prohibited; baiting big game animals prohibited; penalties.**

(a) No person shall take or wound any game animal, game bird, or game fish by use of any pit, pitfall, net, trap, deadfall, poison, or other similar device except as otherwise provided. From and after the date gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming as provided by W.S. 23-1-108, gray wolves may be taken with a trap or snare only as allowed by and in accordance with rules and regulations of the commission.

**Section 3.** Nothing in this act shall prohibit the ownership of a wolf hybrid if the animal was owned before the effective date of this act by a person then residing in this state.

**Section 4.**

(a) It is the purpose of this act, unless the introduction of the gray wolf into Wyoming is determined by lawful authorities not to have been in accordance with federal law, to provide appropriate state manage-

ment and control of gray wolves in order to facilitate the removal of the gray wolf from its listing as an experimental nonessential population, endangered species or threatened species in Wyoming and to prevent future listing of the gray wolf as an experimental nonessential population, endangered species or threatened species.

(b) In providing appropriate state management and control of gray wolves, the state acknowledges the need to fill the current vacuum of management of this species within the state. The state retains all rights to investigate and, if determined by state officials to be appropriate, take legal actions against the federal government relating to the introduction of the gray wolf into the boundaries of this state.

(c) In order to accomplish the purposes of this act, the game and fish commission shall enter into a memorandum of understanding with appropriate federal agencies under which the commission and federal agencies shall endeavor to manage the prey base for gray wolves in a manner to maintain a sufficient prey base in Yellowstone National Park, Grand Teton National Park and John D. Rockefeller, Jr. Memorial Parkway within the state for at least eight (8) packs of wolves. The game and fish commission shall endeavor to manage big game populations providing a prey base for seven (7) packs of gray wolves in all other areas of the state in such a manner as to mitigate to the greatest extent possible, adverse effects on opportunities for licensed hunters to take big game.

(d) The game and fish commission shall report to the joint travel, recreation, wildlife and cultural resources interim committee not later than September 1, 2003, regarding the implementation of this act.

**Section 5.** This act is effective immediately upon completion of all acts necessary for a bill to become law as provided by Article 4, Section 8 of the Wyoming Constitution.

Approved March 4, 2003.

## Chapter 116

### VOLUNTEER HEALTH CARE PROFESSIONALS CERTIFICATION

Original House Bill No. 149

AN ACT relating to volunteer health care professionals; providing a volunteer license for retired dentists and dental hygienists, optometrists, physicians, osteopaths, nurses and physician assistants as specified; conforming provisions; and providing for an effective date.

*Be It Enacted by the Legislature of the State of Wyoming:*

**Section 1.** W.S. 33-15-131, 33-21-157, 33-23-117 and 33-26-601 are created to read:

# ATTACHMENT B

*State of Wyoming v. United States Department of the Interior et al.*

Docket No. 09-CV-118-J

House Bill 213: 2007 Wyo. Sess. Laws 420

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(ii) The distribution, by regional provider contracting with the state, of those additional hires;

(iii) The number of developmental preschool service providers receiving training; and

(iv) The number of children impacted by services provided, specifying:

(A) The number of children receiving services as a component of individualized education programs or individualized family service plans; and

(B) The number of children impacted by services but not as a component of individualized education programs or individualized family service plans.

**Section 4.** This act is effective July 1, 2007.

Approved March 1, 2007.

## Chapter 168

### GAME AND FISH-WOLF MANAGEMENT

Original House Bill No. 218

AN ACT relating to game and fish; providing for classification of gray wolves; providing for aggressive management of wolves; providing for monitoring of wolf population and movements; providing for rules and regulations; providing for a contingent repeal; providing for a report; and providing for a contingent effective date.

*Be It Enacted by the Legislature of the State of Wyoming:*

**Section 1.** This act shall be effective only if W.S. 23-1-109 as created by this act is in effect in accordance with the provisions of that section. The legislative service office is authorized and directed to publish the provisions of this act in the manner which most effectively displays the contingencies provided in this act.

**Section 2.** W.S. 23-1-109 is created to read:

**23-1-109. State management of gray wolves.**

(a) Subject to subsections (b) and (c) of this section, this section shall become effective after the date that gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming, and Wyoming has legal right to exercise full and continuous management authority over gray wolves in the entire state of Wyoming subject only to federal preemption.

(b) This section shall not become effective until such time all claims in U.S. District Court Docket No. 06CV-245J, brought by the state of Wyo-

ming concerning laws passed by the Wyoming legislature and found at 2003 Wyoming Session Laws, Chapter 115, have been resolved by a final order issued by the federal district court for the district of Wyoming and that order is no longer subject to potential or ongoing appeal to any federal appellate court with jurisdiction over the district court decision, or until such claims have been settled by the state of Wyoming and all federal agencies which may be party to that action.

(c) On and after February 29, 2008, this section shall not be effective if the United States fish and wildlife service has not:

(i) Published a final rule delisting gray wolves in the manner specified in W.S. 23-1-108 in the entire state of Wyoming; and

(ii) Either:

(A) Published a final rule modifying existing 10(j) rules, under 50 C.F.R. § 17.84, governing management of wolves as an experimental nonessential population, which provides for management of wolves where predation is causing unacceptable impacts to wild ungulate herds and which addresses wolf-wild ungulate conflicts occurring at state operated feedgrounds; or

(B) Executed an agreement with the state of Wyoming which provides adequate protection for Wyoming's wild ungulates. The determination of adequate protection shall be made by certification of the governor as provided in subsection (f) of this section, if necessary to determine whether this section is effective. In making the determination of adequate protection the governor shall consult with the Wyoming game and fish commission.

(d) For purposes of this section, a wild ungulate herd may be experiencing unacceptable impacts from wolf predation where the herd has declined below population objectives or is in danger of doing so and:

(i) The wild ungulate herd in question is located within at least a portion of the home range of a documented wolf pack;

(ii) The annual report of wolf population published by the United States fish and wildlife service provides, or the game and fish department has documented, that at least fifteen (15) breeding pairs exist in the designated trophy game area specified in W.S. 23-1-101(a)(xii)(B)(I) and all national parks within the boundaries of Wyoming; and

(iii) The department determines that wolf predation is having an impact on the recruitment rate of the affected wild ungulate herd and the governor certifies that determination as provided in subsection (f) of this section, if necessary to determine whether this section is effective.

(e) For purposes of this section, wolf-wild ungulate conflicts occurring at state operated feedgrounds shall include any situations in which wolves:

(i) Cause wild ungulates to move from those feedgrounds;

(ii) Cause a mixing of livestock and wild ungulates; or



(iii) Cause wild ungulates to pose extraordinary safety hazards on state public roadways.

(f) The governor shall certify to the secretary of state the occurrence of any acts which affect whether this section is effective. The effective date or dates of this section shall be determined upon the date each such certification is made and filed with the secretary of state.

**Section 3.** W.S. 11-6-302(a)(ix)(B)(II), (x)(B)(I), (II) and by creating a new subsection (b), 23-1-101(a)(viii)(B)(II), (xii)(B)(I), (II) and by creating a new subsection (b), 23-1-302(a)(xxix), 23-1-304(a), (c), (d), (e) and by creating new subsections (g) through (p) and 23-3-115(c) are amended to read:

**11-6-302. Definitions.**

(a) As used in this article:

(ix) "Predatory animal" means:

(B) Until the date gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming as provided by W.S. 23-1-108, "predatory animal" includes wolves. After that date, "predatory animal" shall include any gray wolf not within an area of the state in which the gray wolf is:

(II) Classified as a trophy game animal by the game and fish commission pursuant to W.S. ~~23-1-304(b)(i)(A)~~ 23-1-304(a).

(x) "Trophy game animal" means:

(B) From and after the date gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming as provided by W.S. 23-1-108:

(I) "Trophy game animal" shall include any gray wolf within those tracts of land within ~~the boundaries of Wyoming designated as Yellowstone National Park, Grand Teton National Park, the John D. Rockefeller, Jr. Memorial Parkway, and those federally designated wilderness areas contiguous to these national parks and this parkway as defined by the United States congress as of January 1, 2003; and the following described area, subject to modification as authorized in this subdivision:~~ northwest Wyoming beginning at the east boundary of the Shoshone National Forest and the Wyoming-Montana state line; southerly along said forest boundary to the common boundary between the Shoshone National Forest and the Wind River Indian Reservation; westerly and then southeasterly along the Shoshone National Forest boundary to the Union Pass Road (USFS Road 263); southerly along said road until it intersects the north boundary of the Upper Green River Cattle Association's grazing allotment on forest service lands; following the eastern boundary of said allotment southerly and westerly to the point it intersects the Bridger-Teton National Forest boundary; westerly along said forest boundary to U.S. Highway 189-191; northwesterly along said highway to U.S. Highway 26-89-191 at Hoback Junction; northerly along said highway to Wyoming Highway 22; westerly along said highway to the Wyoming-Idaho state line; north along said state

line to the Wyoming-Montana state line; north and then east along said state line to the east boundary of the Shoshone National Forest. This described area may be diminished by rule of the game and fish commission if the game and fish commission determines the diminution does not impede the delisting of gray wolves and will facilitate Wyoming's management of wolves; and

(II) "Trophy game animal" shall include any gray wolf within any area of the state where gray wolves are classified as trophy game animals by the game and fish commission pursuant to W.S. ~~23-1-304(b)(i)(A)~~ 23-1-304(a).

(b) To the extent necessary to achieve federal government delisting of the gray wolf, the governor may direct the game and fish commission to adopt a boundary between the area in which the wolf is treated as a trophy game animal and the area where it is treated as a predator at any place between the area described in subdivision (a)(x)(B)(I) of this section and the following described area: northwest Wyoming beginning at the junction of Wyoming Highway 120 and the Wyoming-Montana state line; southerly along Wyoming Highway 120 to the Greybull River; southwesterly up said river to the Wood River; southwesterly up said river to the Shoshone National Forest boundary; southerly along said boundary to the Wind River Indian Reservation boundary; westerly, then southerly along said boundary to the Continental Divide; south-easterly along said divide to the Middle Fork of Boulder Creek; westerly down said creek to Boulder Creek; westerly down said creek to the Bridger-Teton National Forest boundary; northwesterly along said boundary to its intersection with U.S. Highway 189-191; northwesterly along said highway to the intersection with U.S. Highway 26-89-191; northerly along said highway to Wyoming Highway 22 in the town of Jackson; westerly along said highway to the Wyoming-Idaho state line; north along said state line to the Wyoming-Montana state line; north, then east along said state line to Wyoming Highway 120. Any boundary change adopted pursuant to this subsection shall be certified and effective as provided in W.S. 23-1-109(f).

#### 23-1-101. Definitions of wildlife.

(a) As used in this act:

(viii) "Predatory animal" means:

(B) Until the date gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming as provided by W.S. 23-1-108, "predatory animal" includes wolves. After that date, "predatory animal" shall include any gray wolf not within an area of the state in which the gray wolf is:

(II) Classified as a trophy game animal by the commission pursuant to W.S. ~~23-1-304(b)(i)(A)~~ 23-1-304(a).

(xii) "Trophy game animal" means:

(B) From and after the date gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming as provided by W.S. 23-1-108:

(I) "Trophy game animal" shall include any gray wolf within those tracts of land within ~~the boundaries of Wyoming designated as Yellowstone National Park, Grand Teton National Park, the John D. Rockefeller, Jr. Memorial Parkway, and those federally designated wilderness areas contiguous to these national parks and this parkway as defined by the United States congress as of January 1, 2003; and the following described area, subject to modification as authorized in this subdivision:~~ northwest Wyoming beginning at the east boundary of the Shoshone National Forest and the Wyoming-Montana state line; southerly along said forest boundary to the common boundary between the Shoshone National Forest and the Wind River Indian Reservation; westerly and then southeasterly along the Shoshone National Forest boundary to the Union Pass Road (USFS Road 263); southerly along said road until it intersects the north boundary of the Upper Green River Cattle Association's grazing allotment on forest service lands; following the eastern boundary of said allotment southerly and westerly to the point it intersects the Bridger-Teton National Forest boundary; westerly along said forest boundary to U.S. Highway 189-191; northwesterly along said highway to U.S. Highway 26-89-191 at Hoback Junction; northerly along said highway to Wyoming Highway 22; westerly along said highway to the Wyoming-Idaho state line; north along said state line to the Wyoming-Montana state line; north and then east along said state line to the east boundary of the Shoshone National Forest. This described area may be diminished by rule of the commission if the commission determines the diminution does not impede the delisting of gray wolves and will facilitate Wyoming's management of wolves; and

(II) "Trophy game animal" shall include any gray wolf within any area of the state where gray wolves are classified as trophy game animals by the commission pursuant to W.S. 23-1-304(b)(i)(A) 23-1-304(a).

(b) To the extent necessary to achieve federal government delisting of the gray wolf, the governor may direct the game and fish commission to adopt a boundary between the area in which the wolf is treated as a trophy game animal and the area where it is treated as a predator at any place between the area described in subdivision (a)(x)(B)(I) of this section and the following described area: northwest Wyoming beginning at the junction of Wyoming Highway 120 and the Wyoming-Montana state line; southerly along Wyoming Highway 120 to the Greybull River; southwesterly up said river to the Wood River; southwesterly up said river to the Shoshone National Forest boundary; southerly along said boundary to the Wind River Indian Reservation boundary; westerly, then southerly along said boundary to the Continental Divide; southeasterly along said divide to the Middle Fork of Boulder Creek; westerly down said creek to Boulder Creek; westerly down said creek to the Bridger-Teton National Forest boundary; northwesterly along said boundary to its intersection with U.S. Highway 189-191; northwesterly along said highway to the intersection with U.S. Highway 26-89-191; northerly along said highway to Wyoming Highway 22 in the town of Jackson; westerly along said highway to the Wyoming-Idaho state line; north along said state line to the Wyoming-Montana state line; north.

then east along said state line to Wyoming Highway 120. Any boundary change adopted pursuant to this subsection shall be certified and effective as provided in W.S. 23-1-109(f).

#### 23-1-302. Powers and duties.

(a) The commission is directed and empowered:

(xxix) After the date gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming as provided by W.S. 23-1-108, to classify gray wolves as predatory or trophy game animals in accordance with W.S. 23-1-304, and to regulate the number of gray wolves which may be taken under a license issued under this act or as necessary to carry out the commission's duties under this act.

#### 23-1-304. Classification of gray wolves.

(a) ~~The commission shall determine the classification of gray wolves as provided in this section. In making this classification the commission shall rely upon information provided by department personnel and shall consult with the Wyoming animal damage management board created by W.S. 11-6-303 and the director of the Wyoming department of agriculture, and consider any additional information provided by that board and by that director by rule and regulation establish areas within the state where gray wolves are classified as trophy game animals and set seasons and bag limits within those areas. The areas designated, seasons and bag limits shall be set annually in a manner the commission determines, through rule and regulation, only as necessary to reasonably ensure at least seven (7) breeding pairs of gray wolves are located in this state and primarily outside of Yellowstone National Park, Grand Teton National Park and John D. Rockefeller, Jr. Memorial Parkway at the end of the current calendar year.~~

(c) For purposes of this section "pack" "breeding pair" means five (5) or more gray wolves traveling together. If a group of gray wolves consists of more than ten (10) animals known to be traveling together, the commission may, at its discretion, recognize the number of packs within such a group to be equal to the number of reproductively mature females bearing young found within that group of wolves an adult male and an adult female gray wolf raising at least two (2) pups of the year until December 31. The number of breeding pairs shall be certified by the department prior to January 31 of each year.

(d) The department shall institute and maintain an active program of population monitoring statewide. Population monitoring shall include the use of global positioning systems and radio collaring of gray wolves, including use of aerial tracking, necessary to accurately determine the population and movement of gray wolves in the state. The commission is authorized to enter into memoranda of understanding with the United States fish and wildlife service or other federal agencies to fund the purchase of the necessary technology and to ensure accurate and adequate monitoring of wolf population levels and movements through global positioning systems and radio collar tracking. In all areas of the state, except where otherwise provided, any person who harvests a wolf shall

notify the department where the harvest occurred within ten (10) days. Any information regarding the number or nature of wolves legally harvested within the state of Wyoming shall only be released in its aggregate form and no information of a private or confidential nature shall be released without the written consent of the person to whom the information may refer. Information identifying any person legally harvesting a wolf within this state is solely for the use of the department or appropriate law enforcement offices and is not a public record for purposes of W.S. 16-4-201 through 16-4-205.

(e) The department shall actively monitor big game animal herd populations statewide to determine whether and to what extent the gray wolf is negatively impacting big game animal herds, and thereby hunting opportunities. To the extent permitted by this title, and notwithstanding other provisions of this title by those means authorized by the commission, the department shall manage the gray wolf population as necessary to ensure the long-term health and viability of any big game animal herd that is being threatened in this state.

(g) The commission is authorized, through rule and regulation, to use aggressive management techniques including the use of aerial hunting and hazing by the department and issuance of permits to private landowners to take wolves to protect private property including, but not limited to, livestock and other domesticated animals from wolf depredation.

(h) Within forty-eight (48) hours of receiving notification from a landowner or his designee that any gray wolf in the state has harassed, injured, maimed or killed livestock or any domesticated animal, the department shall respond. The department may use the aggressive management techniques authorized under subsection (g) of this section or any other management methods necessary, to minimize the harassing, injuring, maiming or killing of livestock and other domesticated animals.

(j) At any time that there exists the number of breeding pairs of gray wolves specified in subsection (a) of this section, the department is authorized to take any action necessary to protect big and trophy game populations in this state from predation by gray wolves. The department shall give priority to areas where the wild ungulate herd is experiencing unacceptable impacts from wolf predation.

(k) The commission is authorized to enter into memoranda of understanding with any federal agency or other state's wildlife agency to carry out any provision of this section and Wyoming's wolf management plan, including the use of aerial hunting.

(m) The commission shall promulgate rules and regulations requiring lethal control of wolves harassing, injuring, maiming or killing livestock or other domesticated animals and for wolves occupying geographic areas where chronic wolf predation occurs. The rules and regulations shall provide that nonlethal control actions will be used if lethal control could cause relisting of wolves under the endangered species act or if requested by the livestock or domesticated animal owner or agent.

(n) The commission shall promulgate rules and regulations providing for issuance of annual permits to landowners or livestock owners for removing wolves which are harassing, injuring, maiming or killing livestock or other domesticated animals and for wolves occupying geographic areas where chronic wolf predation occurs. The permits shall be issued as long as there are seven (7) breeding pairs within the state and outside of Yellowstone National Park, Grand Teton National Park and John D. Rockefeller, Jr. Memorial Parkway. The rules shall provide for suspending or cancelling permits if further lethal control could cause relisting of wolves under the endangered species act.

(o) The commission shall promulgate rules and regulations establishing a fair compensation program to compensate for wolf predation on livestock as provided in W.S. 23-1-901.

(p) The director shall report to the joint travel, recreation, wildlife and cultural resources interim committee and the joint agriculture, state and public lands and water resources interim committee regarding the rules provided for in this section not later than October 1, 2007.

**23-3-115. Taking black bear, mountain lion, gray wolf, bobcat, weasel, badger, squirrels or muskrat for damaging property.**

(c) The provisions of subsection (a) of this section relating to the taking of animals doing damage to private property shall apply to gray wolves from and after the date gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming as provided by W.S. 23-1-108. The owner, employee or lessee acting under authority of this section shall notify the department of the killing of a gray wolf within an area of the state in which the gray wolf is classified as a trophy game animal. The notification shall be made within ten (10) days of the kill unless the gray wolf was taken in an area where wolves have been classified as trophy game animals pursuant to W.S. ~~23-1-304(b)(i)(A)~~ 23-1-304(a) in which case the notification shall be made within seventy-two (72) hours.

**Section 4.** 2003 Wyoming Session Laws, Chapter 115, Section 4(c) is amended to read:

**Section 4.**

(c) In order to accomplish the purposes of this act, the game and fish commission shall enter into a memorandum of understanding with appropriate federal agencies under which the commission and federal agencies shall endeavor to manage the prey base for gray wolves in a manner to maintain a sufficient prey base in Yellowstone National Park, Grand Teton National Park and John D. Rockefeller, Jr. Memorial Parkway within the state for at least eight (8) ~~packs-breeding pairs~~ of wolves. The game and fish commission shall endeavor to manage big game populations providing a prey base for seven (7) ~~packs-breeding pairs~~ of gray wolves in all other areas of the state in such a manner as to mitigate to the greatest extent possible, adverse effects on opportunities for licensed hunters to take big game.



Section 5. W.S. 23-1-304(b) is repealed.

Section 6. Subject to sections 1 and 2 of this act, this act is effective July 1, 2007.

Approved March 2, 2007.

## Chapter 169

### CHILD SUPPORT-INCOME WITHHOLDING

Original House Bill No. 21

AN ACT relating to child support enforcement; amending responsibilities for preparation and mailing of income withholding orders and related notices as specified; amending penalties for noncompliance as specified; and providing for an effective date.

*Be It Enacted by the Legislature of the State of Wyoming:*

**Section 1.** W.S. 20-6-202(a)(xi), 20-6-203, 20-6-206(a)(ii), 20-6-210(a)(intro), (iii), (b)(iii)(intro), (vi) and (c), 20-6-211(a)(intro), (b) and (c), 20-6-212(d), 20-6-213(b), 20-6-214(c) and 20-6-218(b), by creating new subsections (c) and (d) and by renumbering (c) as (e) are amended to read:

#### **20-6-202. Definitions.**

(a) As used in this act:

(xi) "Notice to payor" means the notice provided by W.S. 20-6-210 to the employer pursuant to the income withholding order;

#### **20-6-203. Notices; method of service.**

All notices required by this act shall be served by certified mail return receipt requested or first class mail to the last known address of the addressee or shall be personally served as provided by the Wyoming Rules of Civil Procedure. If mailed, notice shall be deemed given when deposited in the United States mail, postage prepaid. Proof of mailing shall be sufficient proof of notice.

#### **20-6-206. Contents of income withholding order.**

(a) The income withholding order shall:

(ii) Order the payor to comply with all the terms of the notice to payor and all subsequent notices ~~from the clerk~~ served upon the payor;

#### **20-6-210. Notice to payor.**

(a) The notice to payor shall be prepared and the original notice filed with the clerk ~~before an income withholding order is and a copy of the notice mailed or served pursuant to W.S. 20-6-203 to the payor. The notice to payor shall be prepared and to the obligor by:~~

# ATTACHMENT C

*State of Wyoming v. United States Department of the Interior et al.*

Docket No. 09-CV-118-J

Rules and Regulations of the Wyoming Game  
& Fish Commission Chapter 21 (emergency rule)



## WYOMING GAME AND FISH COMMISSION

### CHAPTER 21

#### GRAY WOLVES DESIGNATED AS TROPHY GAME ANIMALS

##### EMERGENCY RULE

(For the 120 days the emergency rules are in effect, the following rules shall apply. Emergency rules are no longer in effect 120 days after filing with the Secretary of State.)

Section 1. Authority. This regulation is promulgated by authority of W.S. §23-1-102, §23-1-108, §23-1-302, §23-1-304, §23-3-115.

Section 2. Regulation. The Wyoming Game and Fish Commission adopts the following regulation for gray wolves designated as trophy game animals. This regulation will go into effect from and after the date gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming. This regulation shall remain in effect until modified or repealed by the Commission.

Section 3. Definitions. For the purpose of this regulation, definitions shall be as set forth in Title 23 Wyoming Statutes, and the Commission shall also adopt the following definitions:

(a) "Chronic wolf predation area" means a geographic area limited to a specific parcel of private land or a specific grazing allotment described on the permit within the Wolf Trophy Game Management Area where gray wolves have repeatedly (twice or more within a two (2) month period immediately preceding the date on which the owner applies for a lethal take permit) harassed, injured, maimed or killed livestock or domesticated animals.

(b) "Doing damage to private property" means the actual biting, wounding, grasping, or killing of livestock or domesticated animals, or chasing, molesting, or harassing by gray wolves that would indicate to a reasonable person that such biting, wounding, grasping, or killing of livestock or domesticated animals is likely to occur at any moment.

(c) "Domesticated animals" means those individual animals which have been made tractable (easily managed or controlled) or tame. For the purpose of this regulation, only the following animals are considered domesticated:

Domesticated alpaca (*Lama pacos*), domesticated camel (*Camelus bactrianus* and *Camelus dromedarius*), domesticated emu (*Dromaius novaehollandiae*), domesticated

ostrich (*Struthio camelus*), domesticated peafowl (*Pavo cristatus*), domesticated rhea (*Rhea americana* and *Rhea pennata*), domesticated vicuna (*Vicugna vicugna*), domesticated yak (*Bos grunniens*) and domesticated dogs (*Canis familiaris*) not used in the protection of livestock.

(d) "Immediate family" means the owner's spouse, parents, grandparents or lineal descendants and their spouses.

(e) "Lethal Take Permit" means a permit issued by the Department to an owner to shoot not more than two (2) gray wolves on individual parcels of private land or grazing allotments as designated on the permit for a period not to exceed December 31 of the year the permit was issued.

(f) "National Parks" means Yellowstone National Park, Grand Teton National Park and the John D. Rockefeller, Jr. Memorial Parkway.

(g) "Owner" means the owner, lessee, immediate family, employee, or other person who is charged by the owner with the care or management of livestock or domesticated animals.

(h) "Unacceptable impact on a wild ungulate population or herd" means an decline in a wild ungulate population or herd that results in the population or herd not meeting the State population management goals or recruitment levels established for the population or herd. The Department shall determine whether a decline in a wild ungulate population or herd constitutes an "unacceptable impact" based upon the best scientific data and information available.

(i) "Wild ungulate population or herd" means an assemblage of wild ungulates living in a given area.

(j) "Wolf Trophy Game Management Area" (WTGMA) means all lands where gray wolves shall be considered trophy game animals described as northwest Wyoming beginning at the junction of Wyoming Highway 120 and the Wyoming-Montana state line; southerly along said highway to the Greybull River; southwesterly up said river to the Wood River; southwesterly up said river to the Shoshone National Forest boundary; southerly along said boundary to the Wind River Indian Reservation boundary; westerly, then southerly along said boundary to the Continental Divide; southeasterly along said divide to the Middle Fork of Boulder Creek; westerly down said creek to Boulder Creek; westerly down said creek to the Bridger-Teton National Forest boundary; northwesterly along said boundary to its intersection with U.S. Highway 189-191; northwesterly along said highway to the intersection with U.S. Highway 26-89-191; northerly along said highway to Wyoming Highway 22 in the town of Jackson; westerly along said highway to the Wyoming-Idaho state line; north along said state line to the Wyoming-Montana state line; north, then east along said state line to Wyoming Highway 120.

Section 4. Gray Wolves Designated as Trophy Game Animals. Gray wolves found in that portion of Wyoming described as the WTGMA are hereby designated as trophy game animals and managed under the authority of the Wyoming Game and Fish Commission.

(a) The Commission shall manage for at least fifteen (15) breeding pairs (comprising of at least 150 gray wolves) within the WTGMA, with at least seven (7) of those breeding pairs in the WTGMA located primarily outside of the National Parks.

(b) 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 objectives described in Section 4(a).

(c) The Commission shall not diminish the area of the WTGMA as defined in Section 3(h) unless, based upon the best scientific data and information available, the Commission determines that diminishing the area for the WTGMA will not prevent the Commission from achieving the management objectives described in Section 4(a).

Section 5. Gray Wolves Designated as Predatory Animals. Gray wolves in Wyoming, excluding gray wolves located inside the WTGMA as set forth in this regulation, are hereby designated as predatory animals. Gray wolves taken within the area where gray wolves are classified as predatory animals shall be reported by the person taking any gray wolf to a district game warden, district wildlife biologist or Department personnel at a Game and Fish Regional Office within ten (10) days of take. The person taking a gray wolf shall provide the sex, the location of the site of kill (identified by the section, township, range or UTM coordinates), the name and address of the person taking the gray wolf, and date of kill.

Section 6. Monitoring Gray Wolves. To the extent practicable, the Commission is committed to managing gray wolves in Wyoming so that genetic diversity and connectivity issues do not threaten the gray wolf population. This will be accomplished by encouraging the incorporation of effective migrants into the gray wolf population. Conservation measures will include, but are not limited to, working with other States to promote natural dispersal into and within the WTGMA and, if necessary, by relocation or translocation.

The Department shall institute and maintain a gray wolf population-monitoring program. Global Positioning System or VHF radio tracking collars may be placed on gray wolves handled by the Department during population monitoring, conflict resolution or nuisance management activities or any non-lethal control actions where gray wolves are captured or handled by the Department. The Department may enter into memoranda of understanding with other state or federal agencies to monitor gray wolf population levels and movements. Any person taking a gray wolf in the state of Wyoming wearing a radio

tracking device (including, but not limited to an electronic collar or ear tag) shall surrender the device to the Department within reporting dates for taking gray wolves as set forth in this regulation.

Section 7. Lethal Control of Gray Wolves in the Wolf Trophy Game Management Area. The Department may utilize aggressive management techniques to protect private property, including livestock and domesticated animals within the WTGMA.

(a) Any gray wolf doing damage to private property may be taken and killed by the owner as provided in Wyoming Statute §23-3-115(c). The carcass of a gray wolf shall not be removed from the site of kill and the area around the carcass shall not be disturbed until investigated by the Department. The owner shall notify a district game warden, district wildlife biologist or Department personnel at a Game and Fish Department Regional Office within seventy-two (72) hours of the take. The owner shall provide the location of the site of kill (identified by the section, township and range, or UTM coordinates), the name and address of the person taking the gray wolf, and the date of kill.

(b) Upon discovery that a gray wolf or wolves are harassing, injuring, maiming or killing livestock or domesticated animals, or occupying a chronic wolf predation area, the owner may notify the Department. Upon verification by the Department or personnel from other agencies operating under the authority of a signed memorandum of understanding with the Commission and upon request of the owner, the Department shall:

(i) issue a gray wolf lethal take permit to the owner;

(ii) authorize USDA-APHIS-Wildlife Services personnel in accordance with the provisions of a signed memorandum of understanding with the Commission to remove the offending gray wolf or wolves; or,

(iii) authorize Department personnel to lethally remove the offending gray wolf or wolves.

(c) Gray wolves may be lethally removed when the Department determines that gray wolf predation is having an unacceptable impact on a wild ungulate population or herd or when wolf-wild ungulate conflict is occurring at any State operated feedground.

(d) The provisions of subsection (b) and (c) of this section shall not apply if the lethal removal of gray wolves:

(i) may prevent the Department from achieving the management objectives described in Section 4(a); or

(ii) may result in the re-listing of gray wolves under the Endangered Species Act.

Section 8. Issuance of a Lethal Take Permit.

(a) A Lethal Take Permit shall only be issued when there are:

(i) At least fifteen (15) breeding pairs (comprising of at least 150 gray wolves) in the WTGMA; and

(ii) At least seven (7) breeding pairs of gray wolves inside the WTGMA located primarily outside of the National Parks.

If the requirements of Section 8(a) are satisfied, the Department shall issue Lethal Take Permits when requested by an owner in the WTGMA and upon verification by Department personnel, or personnel from USDA-APHIS-Wildlife Services operating under authority of an approved memorandum of understanding, when gray wolf predation upon livestock or domesticated animals has occurred, or for the take of gray wolves in a chronic wolf predation area.

(b) Lethal Take Permits shall only allow for the take of gray wolves by the use of legal firearms. Lethal Take Permits shall not allow the take of gray wolves from aircraft.

(c) Lethal Take Permits shall be issued for not more than two (2) gray wolves for the specific private land parcel or specific grazing allotment as designated on the permit, and shall state the name, address and phone number of the permittee, other authorized persons, and be signed by the permittee and a Department representative.

(d) Lethal Take Permits shall be immediately suspended or cancelled if the Department determines that further lethal control:

(i) may prevent the Department from achieving the management objectives described in Section 4(a); or

(ii) may result in the re-listing of gray wolves under the Endangered Species Act.

Notification of suspension or cancellation of Lethal Take Permits shall be provided via personal notification, first class mail or by telephone or facsimile to all current permittees.

(e) The permittee, or other authorized persons listed on the permit shall notify a Department representative named on the Lethal Take Permit as soon as practicably possible (not to exceed 24 hours) by personal contact, or phone contact of the take of a gray wolf under the authority of a Lethal Take Permit.

(f) Failure by the permittee, or other authorized persons listed on the permit to abide by all provisions and conditions stipulated in this section shall be cause for the Department to cancel the permit.

(g) Lethal Take Permits shall expire on December 31 of the year issued, unless the permit is canceled in accordance with the other provisions of this section.

(h) Lethal Take Permits shall not be issued outside the geographic area defined as the WTGMA. Gray wolves, which are classified as predatory animals can be taken without a license in any legal manner and at any time as provided by W.S. §23-2-303(d), §23-3-103 (a), §23-3-112, §23-3-304 (b), §23-3-305 and §23-3-307.

Section 9. Non-lethal Control of Gray Wolves in the Wolf Trophy Game Management Area.

(a) Non-lethal control shall be initiated when deemed appropriate by the Department or when requested by the owner, but may be discontinued at the discretion of, and upon determination by the Department that lethal control is necessary to mitigate continued harassment, injury, maiming or killing of livestock or domesticated animals.

(b) Non-lethal control actions shall be initiated if further lethal control:

(i) may prevent the Department from achieving the management objectives described in Section 4(a); or

(ii) may result in the re-listing of gray wolves under the Endangered Species Act.

Section 10. Savings Clause. If any provision of this regulation is held to be illegal or unconstitutional, such a ruling shall not affect other provisions of this regulation that can be given effect without the illegal or unconstitutional provision; and, to this end, the provisions of this regulation are severable.

WYOMING GAME AND FISH COMMISSION

By

Jerry Galles, President

Dated: October 27, 2008

# ATTACHMENT D

*State of Wyoming v. United States Department of the Interior et al.*

Docket No. 09-CV-118-J

Rules and Regulations of the Wyoming Game  
& Fish Commission Chapter 21

Effective 03/12/2009

## WYOMING GAME AND FISH COMMISSION

### CHAPTER 21

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Effective 03/12/2009

(d) "Immediate family" means the owner's spouse, parents, grandparents or lineal descendants and their spouses.

(e) "Lethal Take Permit" means a permit issued by the Department to an owner to shoot not more than two (2) gray wolves on individual parcels of private land or grazing allotments as designated on the permit for a period not to exceed December 31 of the year the permit was issued.

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Effective 03/12/2009

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Effective 03/12/2009

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(i) issue a gray wolf lethal take permit to the owner;

(ii) authorize USDA-APHIS-Wildlife Services personnel in accordance with the provisions of a signed memorandum of understanding with the Commission to remove the offending gray wolf or wolves; or,

(iii) authorize Department personnel to lethally remove the offending gray wolf or wolves.

(c) Gray wolves may be lethally removed when the Department determines that gray wolf predation is having an unacceptable impact on a wild ungulate population or herd or when wolf-wild ungulate conflict is occurring at any State operated feedground.

(d) The provisions of subsection (b) and (c) of this section shall not apply if the lethal removal of gray wolves:

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Effective 03/12/2009

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(f) Failure by the permittee, or other authorized persons listed on the permit to abide by all provisions and conditions stipulated in this section shall be cause for the Department to cancel the permit.

Effective 03/12/2009

(g) Lethal Take Permits shall expire on December 31 of the year issued, unless the permit is canceled in accordance with the other provisions of this section.

(h) Lethal Take Permits shall not be issued outside the geographic area defined as the WTGMA. Gray wolves, which are classified as predatory animals can be taken without a license in any legal manner and at any time as provided by W.S. §23-2-303(d), §23-3-103 (a), §23-3-112, §23-3-304 (b), §23-3-305 and §23-3-307.

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Section 10. Savings Clause. If any provision of this regulation is held to be illegal or unconstitutional, such a ruling shall not affect other provisions of this regulation that can be given effect without the illegal or unconstitutional provision; and, to this end, the provisions of this regulation are severable.

WYOMING GAME AND FISH COMMISSION

By

\_\_\_\_\_  
Jerry Galles, President

Dated: January 29, 2009