WILLIAMS LAW FIRM, P.C.
JAMES D. JOHNSON, ESQ.
235 E. Pine, P.O. Box 9440
Missoula, Montana 59807-9440
Tel: (406) 721-4350 Fax: (406) 721-6037
E-mail: james@wmslaw.com

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO
Clive J. Strong
Chief, Natural Resources Division
Steven W. Strack, Specially Admitted
Deputy Attorney General
700 W. State Street, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010
Tel: (208) 334-2400 Fax: (208) 854-8072
E-mail: steve.strack@ag.idaho.gov

Attorneys for Defendant-Intervenor State of Idaho

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

DEFENDERS OF WILDLIFE, et al., Plaintiffs, -vs- ROWAN GOULD, in his official capacity as Acting Director of the U.S. Fish and Wildlife Service, et al., Defendants, and SAFARI CLUB INTERNATIONAL, et al., Defendant-Intervenors.	CV 08-14-M-DWM STATE OF IDAHO'S RESPONSE TO ORDER TO SHOW CAUSE

INTRODUCTION

In 1994, the United States Fish and Wildlife Service ("Service") transplanted a small number of Canadian wolves into Central Idaho and Yellowstone National Park. The wolves were designated as nonessential, experimental populations ("NEPs"), and it was the Service's intent that the NEP status "would remain in effect until wolf recovery occurs." 59 Fed. Reg. 60,266, 60,271 (Nov. 22, 1994). To underscore such intent, the NEP rules were accompanied by a commitment to remove wolves designated as NEPs from the wild and revoke the experimental population regulations if "legal actions or lawsuits change the wolves status to endangered under the [Endangered Species] Act." Id. at 60,273; cf. 73 Fed. Reg. 4,720 (Jan. 28, 2008) (excluding commitment).

Seventeen years later, the wolf populations in the two NEPs and in the northwestern Montana natural recovery area are well past recovery levels and are genetically-connected via individual wolves dispersing between the three populations. Ironically, with genetic connectivity now well-established, this Court asks not whether connectivity justifies delisting, but whether such connectivity requires that the status of the NEPs be downgraded to endangered.

The notion that the ESA compels such a giant step backward stands logic on its head. A thriving population of well over 1,000 wolves in the two NEPs would be relegated to endangered status based on a nationwide 1978 listing that has no relevance to the current status of gray wolves in the northern Rocky Mountains. Such an irrational result would fly

in the face of the best available science, and would conflict diametrically with the very purpose of the NEP "wholly separate" requirement, which is to protect natural populations of the same species and avoid potentially complicated law enforcement issues. Wyoming Farm Bureau Federation v. Babbitt, 199 F.3d 1224, 1235-36 (10th Cir. 2000); accord, United States v. McKittrick, 142 F.3d 1170, 1175 (9th Cir. 1998). Nothing in the show cause order, or in the administrative record, suggests that the continued NEP status of wolves in Central Idaho and the Greater Yellowstone Area poses any threat to natural populations of the gray wolf or poses barriers to effective enforcement of the ESA.

Fortunately, the Court's inquiry, and the undesirable consequences of removal of the NEP status, are easily answered: for the reasons stated herein, continuation of the NEP status is consistent with the provisions of section 10(j) of the ESA and its implementing regulations.

ARGUMENT

1. ESA section 10(j) defines the term "experimental population" to mean "any population (including any offspring arising solely therefrom) authorized by the Secretary for release under paragraph (2), but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species." 16 U.S.C. § 1539(j). By regulation, the Service has expanded on such definition to provide:

> Where part of an experimental population overlaps with natural populations of the same species on a particular occasion, but is wholly separate at other times, specimens of the experimental population will not be recognized as such while in the area of overlap. That is,

> experimental status will only be recognized outside the areas of overlap.

50 C.F.R. § 17.80. The rule reflects legislative history indicating the "wholly separate" requirement was included to address the issue of "how to treat introduced populations that overlap, in whole or in part, natural populations of the same species [and to] protect natural populations and to avoid potentially complicated problems of law enforcement." H.R. Rep. 97-567 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2833.

In short, the wholly separate requirement is violated only when an experimental population and a non-experimental population of the same species overlap, and only in such areas of overlap. Hence, the critical issue when determining whether the wholly separate requirements has been violated is whether the experimental and non-experimental populations are overlapping so as to be indistinguishable from one another, in whole or part. See McKittrick, 142 F.3d at 1175 ("when experimental and nonexperimental populations overlap . . . section 10(j) populations lose their experimental status").

The application of the "wholly separate" requirement must be adjusted to the needs, biology, and habitat of each reintroduced population. As the Ninth Circuit court of appeals has recognized, "each experimental population has its own set of special rules so that the Secretary has more managerial discretion. This flexibility allows the Secretary to better conserve and recover endangered species." McKittrick, 142 F.3d at 1174. Such flexibility vests the Service with discretion to identify experimental populations in various ways. As Congress explained:

> [Experimental population] regulations may identify a population on the basis of location, migration pattern, or any other criteria that would provide notice as to which populations of endangered or threatened species are experimental.

H.R. Rep. 97-835 (1982), reprinted in 1982 U.S.C.C.A.N. 2860, 2875.

From the beginning, the Service anticipated that endangered wolves from northwestern Montana would disperse and intermingle with the central Idaho NEP. To address this possibility, the Service determined that the NEP should be identified by location, and established an "experimental population area" with definite and permanent boundaries. Thus, "[a]ny 'new' arrivals from [the endangered NW Montana population] would be classified as part of the experimental population." 59 Fed. Reg. at 60,271. Conversely, "[w]olves dispersing into areas in Idaho or Montana outside of the experimental area would receive all the protections of an endangered species under the Act." Id.

The establishment of a boundary that when crossed alters the status of the individual specimens crossing such boundary fulfills the purposes of the "wholly separate" requirement, which is to protect natural populations. Wyoming Farm Bureau Federation, 199 F.3d at 1235-36. As the Tenth Circuit noted, it is not unusual that specimens of listed species "can and do lose Endangered Species Act protection simply by moving about the landscape." Id. at 1235. While such changes in status may pose risk to individual animals, they help ensure conservation of the species by providing regulatory certainty because "the legal protection afforded any particular wolf is clearly known, depending entirely on where the wolf is, not where it might once have been." Id. Thus, the court held that the Service's

establishment of set geographic boundaries for the central Idaho and Greater Yellowstone NEPs was a reasonable "interpretation of the 'geographic separation' provision" because it "reflects the goals of the Endangered Species Act 'to protect natural populations' and 'to avoid potentially complicated problems of law enforcement.'" Id. at 1235-36.

Given the Service's establishment of firm and permanent boundaries demarking geographically the separation between the NEPS and naturally-occurring populations, it is impossible for NEPs to overlap natural populations, and the Court need inquire no further. By identifying the NEPs on the basis of location, the rules distinguish the NEPs from other populations and provide clear notice of which wolves are endangered and which wolves are designated as NEPs. The objectives of section 10(j) are fulfilled and the Service's reasonable interpretation of the "wholly separate" requirement should not be disturbed.

2. Even if the Court is not persuaded that the issue of geographic separation is resolved as a matter of law by the Service's establishment of a firm boundary between the NEPs and naturally-occurring wolf populations, dismissal of the current action is not justified because there is nothing in the current administrative record or Court record demonstrating that wolf "populations" are overlapping.

Critically, the "wholly separate" requirement is violated only when "populations" overlap, and the term "population," as used in the ESA, is a term of art defined both for the ESA generally and for gray wolves specifically in ways that foreclose any determination of population overlap based on the facts identified in the Court's show cause order.

The term "population," while not defined by Congress, has been defined generally by regulation to mean a potentially self-sustaining "group of fish or wildlife . . . in common spatial arrangement that interbreed when mature." 50 C.F.R. § 17.3. In addition, the Service has defined the term "population," as applied to the unique characteristics of gray wolves, to mean "at least two breeding pairs of gray wolves that each successfully raise at least two young to December 31 of their birth year for 2 consecutive years." 59 Fed. Reg. 60,266, 60,271 (Nov. 22, 1994).

Because the "wholly separate" requirement is violated only if "populations" overlap, federal courts have repeatedly held that individual dispersers or migrants from an endangered population intermingling with an experimental population do not violate the "wholly separate" provision. See Forest Guardians v. United States Fish and Wildlife Service, 611 F.3d 692, 706 (10th Cir. 2010) (upholding Service's determination that lone dispersers of Aplomada falcons "did not constitute a population or even part of a population since they are not in 'common spatial arrangement' sufficient to interbreed with other members" of the source population).

In McKittrick, 142 F.3d 1170, the Ninth Circuit, citing the Service' definition of gray wolf population to require two breeding pairs of gray wolves to raise two young for two years, held that "lone wolves, or 'dispersers,' do not constitute a population." Id. at 1175. Citing the need "to defer to FWS's reasonable interpretation of section 10(j)," the court held that "FWS has interpreted the 'wholly separate geographically' requirement only to apply to

populations; this interpretation is reasonable and we decline to disturb it." Id.

Likewise, in Wyoming Farm Bureau Federation, 199 F.3d 1224, the court of appeals held that individual dispersing wolves "do not constitute a population or even part of a population, since they are not in a common spatial arrangement sufficient to interbreed" with each other. Id. at 1234. The fact that lone dispersers may interbreed with members of the destination population is irrelevant: unless a "lone wolf will encounter another solitary wolf of the opposite sex and reproduce for two years running, the populations left behind by the lone wolves do not expand simply because they travel away." Id.

These holdings reflect the biology of the gray wolf. Wolves disperse long distances to find a new population of wolves to join. Biologically, they are recruited into the new population and cease to be part of the source population. See AR 5332 (Jimenez et. al 2005) (discussing recruitment), AR 5426 (Mech & Boitani 2003) (distant-dispersers chance finding new population to join). See Wyoming Farm Bureau Federation, 199 F.3d at 1237 (NEP rules "address biological reality . . . *i.e.*, wolves can and do roam for hundreds of miles and cannot be precluded from intermingling with the released experimental population").

Today, we know that the number of dispersers between populations is sufficient to maintain genetic diversity. But, so long as dispersers remain lone wolves, it does not matter whether dispersals are meager or plentiful. Lone dispersers simply do not constitute a population since they are not interbreeding with each other, but are interbreeding with specimens of population into which they are dispersing. The boundary between the NEP and

endangered populations remains intact unless it is shown that at least two breeding pairs of gray wolves from one population area enter the other population area and successfully raise at least two young for 2 consecutive years. Wyoming Farm Bureau Federation, 199 F.3d at 1234; 59 Fed. Reg. 60,266, 60,271 (Nov. 22, 1994) (defining wolf population). Examples of group emigration by wolves are rare. AR 5434 (Mech & Boitani 2003). On the record before the Court, it cannot be concluded that such an event has occurred. And, even if it has, it is likely that such an event is localized along the border between the NEPs and endangered populations, making it possible to identify an area of overlap that would still enable the Service to conclude that the vast majority of the NEPs remains wholly separate from the endangered population.

In sum, any holding by this Court suggesting that the NEP status cannot be recognized due to the existence of genetic connectivity provided by individual dispersing wolves would "handicap [the] ability [of the Service] to effectuate species recovery." Wyoming Farm Bureau Federation, 199 F.3d at 1237. It is critical that courts defer to "the Department's flexibility and discretion to define and manage an experimental population pursuant to section 10(j)." Id. Without such flexibility, the overall goal of species recovery would suffer, since the Service would be unable to impose conditions that make reintroduction acceptable and successful, including the condition in the 1994 gray wolf reintroduction rule requiring that the essential elements of the NEP rules remain in effect until wolf recovery occurs.

CONCLUSION

For the reasons stated herein, there is no cause for this case to be dismissed as moot. The NEP rules, including the 2008 amendments allowing the removal of wolves upon a showing that wolf predation is a major cause of unacceptable impacts to ungulate populations, remain enforceable under the terms of ESA section 10(j).

DATED this 22ND day of February, 2011.

STEVEN W. STRACK
Deputy Attorney General
Office of the Attorney General

And

JAMES D. JOHNSON, ESQ.
WILLIAMS LAW FIRM, P.C.

/s/ James D. Johnson
James D. Johnson, Esq.
Attorneys for Defendant-Intervenor State of Idaho

CERTIFICATE OF COMPLIANCE

I certify that the foregoing support (or response) brief complies with the 6500 word limit of L.R. 7.1(d)(2)(a), in that it consists of 2,118 words as calculated by Microsoft Word 2003, excluding the parts of the brief exempted by the rule; and with L.R. 10(1)(a), in that it is double spaced and in a 14-pt font except for quoted material and footnotes.

/s/ James D. Johnson
James D. Johnson, Esq.
Attorneys for Defendant-Intervenor State of Idaho