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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

STATE OF WYOMING,)	Case No. cv-09-118-ABJ (Lead Case)
)	cv-09-138-ABJ
Petitioner,)	(Consolidated Cases)
and)	
)	
WYOMING WOLF COALITION,)	
)	
Petitioner-Intervenor)	
v.)	
)	
UNITED STATES DEPARTMENT OF)	
THE INTERIOR, et al.,)	
)	
Respondents.)	

_____)
)
BOARD OF COUNTY COMMISSIONERS)
of the COUNTY OF PARK, STATE OF)
WYOMING,)
)
Petitioner,)
)
v.)
)
UNITED STATES DEPARTMENT OF)
THE INTERIOR, et al.,)
)
Respondents.)
_____)

FEDERAL RESPONDENTS' RESPONSE BRIEF

TABLE OF CONTENTS

	<u>PAGE</u>
INTRODUCTION	1
STATEMENT OF THE ISSUES.....	1
BACKGROUND	1
I. THE ENDANGERED SPECIES ACT.....	1
II. FACTUAL AND REGULATORY BACKGROUND.....	3
A. The NRM Wolf Population.....	3
B. Regulatory Actions Relating To The NRM Wolf Population	4
1. Gray Wolf Listing And Development Of The NRM Recovery Goals.....	4
2. Past Regulatory Actions.....	5
3. Recent Regulatory Actions	9
SUMMARY OF ARGUMENT	10
STANDARD OF REVIEW	11
ARGUMENT.....	12
I. FWS RATIONALLY CONCLUDED THAT WYOMING’S REGULATORY SCHEME IS NOT ADEQUATE TO MAINTAIN A RECOVERED WOLF POPULATION IN THE STATE.....	12
A. FWS Appropriately Assessed Wyoming’s Regulatory Scheme.....	13
B. Maintenance Of The Wyoming Wolf Population Above Minimum Recovery Levels.....	17
1. FWS Reasonably Concluded That Wyoming’s Regulatory Scheme Will Not Maintain A Wolf Population Above Minimum Recovery Levels.....	17

2.	Petitioners’ Objections To FWS’s Analysis Lack Merit	23
C.	Demographic And Genetic Connectivity	28
1.	FWS Rationally Concluded That Wyoming’s Regulatory Scheme Is Not Likely To Maintain Genetic Or Demographic Connectivity	28
2.	Petitioners’ Arguments Regarding The Scientific Issues Lack Merit	31
D.	FWS Provided A Reasoned Explanation For Its Decision, And FWS’s Decision Is Entitled To Deference	34
II.	PETITIONERS’ REMAINING CHALLENGES TO FWS’S 2009 RULE ARE UNAVAILING	36
A.	FWS’s Guidance Does Not Render The 2009 Rule Arbitrary And Capricious	36
B.	FWS Appropriately Considered Wyoming’s Chapter 21 Regulations	39
C.	FWS Did Not Rely On Improper Factors In Issuing The 2009 Rule.....	41
III.	REMEDY.....	42
	CONCLUSION.....	43

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Baltimore Gas & Elec. Co. v. Natural Res. Council</i> , 462 U.S. 87 (1983).....	34
<i>Biodiversity Legal Found. v. Babbitt</i> , 943 F. Supp. 23 (D.D.C. 1996).....	40
<i>Building Indus. Ass’n of Superior California v. Babbitt</i> , 979 F.Supp. 893 (D.D.C. 1997)	27
<i>Center for Auto Safety v. Federal Highway Admin.</i> , 956 F.2d 309 (D.C. Cir. 1992).....	38
<i>Citizens to Preserve Overton Park v. Volpe</i> , 401 U.S. 402 (1971).....	12
<i>Cliffs Synfuel Corp. v. Norton</i> , 291 F.3d 1250, 1257 (10 th Cir. 2002).....	11, 12
<i>Colorado Env’tl Coal. v. Dombeck</i> , 185 F.3d 1162, 1176 (10 th Cir. 1999)	32
<i>Colorado Wild, Heartwood v. U.S. Forest Serv.</i> , 435 F.3d 1204, 1213-14 (10 th Cir. 2006)	12
<i>Defenders of Wildlife v. Hall</i> , 565 F.Supp.2d 1160 (D. Mont. 2008).....	7, 8
<i>Ecology Ctr. v. U.S. Forest Serv.</i> , 451 F.3d 1183, 1188-89 (10 th Cir. 2006)	27
<i>Ethyl Corp. v. EPA</i> , 541 F.2d 1, 37-38 (D.C. Cir. 1976).....	32
<i>Environmental Def. Fund v. U.S. Nuclear Regulatory Comm’n</i> , 902 F.2d 785, 789 (10 th Cir. 1990).....	34
<i>Federal Communications Comm’n v. Fox Television Stations</i> , 129 S.Ct. 1800 (2009).....	34, 35
<i>Federal Power Comm’n v. Idaho Power Co.</i> , 344 U.S. 17, 20 (1952)	43
<i>Federation of Fly Fishers v. Daley</i> , 131 F.Supp.2d 1158, 1161 (N.D. Cal. 2000).....	28
<i>Fund for Animals v. Babbitt</i> , 903 F.Supp. 96, 110 n.4 (D.D.C. 1995)	42
<i>High Country Citizens’ Alliance v. Norton</i> , 448 F.Supp.2d 1235, 1246 (D. Colo. 2006)	27

Lee v. U.S. Air Force, 354 F.3d 1229, 1242 (10th Cir. 2004) 27

Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1070, 1073-75 (9th Cir. 1996)..... 37

Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 378 (1989) 12, 27

National Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658-59 (2007) 35, 36

National Tank Truck Carriers v. EPA, 907 F.2d 177, 185 (D.C. Cir. 1990) 43

Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 66-67 (2004)..... 43

Pennaco Energy, Inc. v. United States Dep’t. of Interior, 377 F.3d 1147, 1159
(10th Cir. 2004) 12

Silverton Snowmobile Club v. U.S. Forest Serv., 433 F.3d 772, 782 (10th Cir. 2006) 12

South Prairie Constr. Co. v. Local No. 627, 425 U.S. 800, 803-804 (1976)..... 43

Southwest Ctr. for Biological Diversity v. Babbitt, 215 F.3d 58, 60 (D.C. Cir. 2000)..... 2

Tennessee Valley Auth. v. Hill, 437 U.S. 153, 180 (1978)..... 1

United States v. W.R. Grace & Co., 429 F.3d 1224, 1245 (9th Cir. 2005)..... 31, 32

Utah Env’tl Congress v. Bosworth, 443 F.3d 732, 739 (10th Cir. 2006) 12

Utah Shared Access Alliance v. U.S. Forest Serv., 288 F.3d 1205, 1213 (10th Cir. 2002)..... 12

Valley Cmty. Pres. Comm’n v. Mineta, 373 F.3d 1078, 1084 (10th Cir. 2004) 12

Western Org. of Resource Councils v. Bureau of Land Management, 591 F.Supp.2d
1206, 1216 (D. Wyo. 2008)..... 24

Wyoming v. Livingston, 443 F.3d 1211, 1214 (10th Cir. 2006)..... 20

Wyoming v. U.S. Dep’t of the Interior, 360 F.Supp.2d 1214, 1218-20 (D. Wyo. 2005),
aff’d, 442 F.3d 1262 (10th Cir. 2006)..... 4, 5, 36

Wyoming Farm Bureau Fed’n v. Babbitt, 199 F.3d 1224, 1231 (10th Cir. 2000)..... 11

<u>STATUTES</u>	<u>PAGE</u>
5 U.S.C. § 706.....	11, 43
16 U.S.C. § 1532(6).....	2
16 U.S.C. § 1532(20).....	2
16 U.S.C. § 1533.....	10
16 U.S.C. § 1533(a).....	2
16 U.S.C. § 1533(a)(1)(D).....	28, 40
16 U.S.C. § 1533(c).....	2
16 U.S.C. § 1533(i).....	41
WYO. STAT. ANN. § 23-1-101.....	6
WYO. STAT. ANN. § 23-1-101(a)(viii)(B).....	13
WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I).....	13, 14, 15, 21, 28, 40
WYO. STAT. ANN. § 23-1-101(b).....	14, 15
WYO. STAT. ANN. § 23-1-115.....	6
WYO. STAT. ANN. § 23-3-115(a).....	20
WYO. STAT. ANN. § 23-1-304.....	6
WYO. STAT. ANN. § 23-1-304(a).....	15, 21, 28
WYO. STAT. ANN. § 23-1-304(e), (j).....	15
WYO. STAT. ANN. § 23-1-304(g).....	15
WYO. STAT. ANN. § 23-1-304(m).....	15
WYO. STAT. ANN. § 23-1-304(n).....	15, 16

<u>REGULATIONS</u>	<u>PAGE</u>
50 C.F.R. § 17.84(i), (n).....	10
50 C.F.R. § 424.11(d)	2
39 Fed. Reg. 1171 (Jan. 4, 1974)	4
43 Fed. Reg. 9607 (Mar. 9, 1978).....	4
54 Fed. Reg. 34270 (July 1, 1994).....	27
71 Fed. Reg. 6634 (Feb. 8, 2006)	5
71 Fed. Reg. 43410 (Aug. 1, 2006).....	6, 7, 13
72 Fed. Reg. 6106 (Feb. 8, 2007)	6, 9, 35
72 Fed. Reg. 36939 (July 6, 2007).....	7
73 Fed. Reg. 10514 (Feb. 27, 2008)	7, 14
73 Fed. Reg. 63926 (Oct. 28, 2008).....	9
74 Fed. Reg. 15123 (Apr. 2, 2009)	passim

GLOSSARY

2009 Rule	Final Rule To Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and To Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15123 (Apr. 2, 2009)
APA	Administrative Procedure Act
DPS	Distinct Population Segment
ESA	Endangered Species Act
FWS	United States Fish and Wildlife Service
GYA	Greater Yellowstone Area
National Parks	Lands within Wyoming and within Yellowstone National Park, Grand Teton National Park, and John D. Rockefeller, Jr. Memorial Parkway.
NRM	Northern Rocky Mountain
WGFC	Wyoming Game and Fish Commission
WGFD	Wyoming Game and Fish Department
YNP	Yellowstone National Park

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INTRODUCTION

These consolidated cases seek review of the United States Fish and Wildlife Service's ("FWS") decision to identify a Northern Rocky Mountain ("NRM") distinct population segment ("DPS") of the gray wolf and to retain Endangered Species Act ("ESA") protections for the wolves in the significant portion of the DPS's range in Wyoming. *See* Final Rule, 74 Fed. Reg. 15123 (Apr. 2, 2009) ("2009 Rule").

In order to consider removing gray wolves in Wyoming from the ESA's protections, the State of Wyoming must establish regulatory mechanisms that assure the maintenance of a recovered wolf population in the State. After thoroughly reviewing Wyoming's laws, regulations, and management plan, as well as the best available scientific data, FWS rationally determined that the appropriate conditions presently do not exist to remove the ESA's protections for wolves in Wyoming. As demonstrated below, FWS's analysis and explanation is reasoned and supported by the record, and the 2009 Rule fully complies with the ESA. Therefore, FWS's 2009 Rule should be upheld, and Petitioners' challenges should be dismissed.

STATEMENT OF THE ISSUES

- I. Whether FWS rationally determined that gray wolves in Wyoming remain endangered due to inadequate laws, regulations, and a management plan governing wolf protection and management in the State of Wyoming.

BACKGROUND

I. THE ENDANGERED SPECIES ACT

Enacted in 1973, the ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Under the ESA, the Secretary of the Department of the Interior is charged with determining whether a species should be listed as threatened or endangered based upon five

prescribed factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. 16 U.S.C. § 1533(a)(1). Any one of the five listing factors is sufficient to support a listing determination if that particular factor causes the species to be “in danger of extinction” or “likely to become an endangered species within the foreseeable future” throughout all or a significant portion of its range. 16 U.S.C. § 1532(6) (defining “endangered species”); *id.* § 1532(20) (defining “threatened species”).

The ESA directs FWS to monitor the status of listed species and “from time to time revise each list ... to reflect recent determinations, designations, and revisions made in accordance with” the listing provisions of § 4. 16 U.S.C. § 1533(c)(1). The same five factors that determine whether a species is endangered or threatened also determine whether threats to a species have been diminished or removed to the point that reclassification or delisting is appropriate. *Id.* § 1533(c)(2); 50 C.F.R. § 424.11(d). FWS must base listing determinations on “the best scientific and commercial data available” and those efforts, if any, being taken by any state or foreign nation to protect the species. 16 U.S.C. § 1533(b)(1)(A). The best available data requirement “merely prohibits the Secretary from disregarding available scientific evidence that is in some way better than the evidence he relies on. Even if the available scientific and commercial data were quite inconclusive, he may – indeed must – still rely on it at that stage.” *Southwest Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000) (quotations omitted).

II. FACTUAL AND REGULATORY BACKGROUND¹

A. The NRM Wolf Population.

The NRM gray wolf DPS is a three part metapopulation composed of core areas of suitable habitat in northwestern Montana, central Idaho, and the Greater Yellowstone Area (“GYA”). 74 Fed. Reg. at 15137. The DPS encompasses a 378,690 mi² area and contains approximately 65,725 mi² of suitable wolf habitat. *Id.* at 15157, 15133. Most suitable habitat is occupied with resident packs (two or more wolves with a territory). *Id.* at 15137; AR09_38165 (Oakleaf et al. 2006). Wolves disperse to join other packs or attempt to form their own packs in unoccupied habitat, and wolf dispersal normally peaks in late winter prior to the start of the breeding season (February-March). 74 Fed. Reg. at 15138; AR09_5503; AR09_5468; AR09_36305 (Boitani 2003); AR09_37648 (Jimenez 2008d). The average dispersal distance for wolves in the NRM is 60 miles, but some have traveled over 400 miles. 74 Fed. Reg. at 15137.

NRM pack size averages about six to ten wolves, and wolf populations are composed of packs that are defined as breeding pairs,² packs that are not breeding pairs, and individual wolves, a complex population structure that gives wolf populations their resiliency to threats such as human-caused mortality. *Id.* at 15123, 15131; AR09_37045 (Fuller et al. 2003). The most isolated subpopulation in the NRM is the GYA. The GYA encompasses 24,600 mi² and includes Yellowstone National Park (“YNP”), Grand Teton National Park, wilderness areas, and adjacent parts of Idaho and Montana. AR09_41843-44 (USFWS 1994). The wilderness portions of the GYA primarily are used seasonally by wolves due to high elevation, deep snow, and low

¹ Respondents generally refer to arguments as having been raised by “Petitioners,” even though an argument only is raised by Petitioner-Intervenor. The combined brief filed by the State of Wyoming and Park County (Doc. 26) is cited as “Wyo. Br. at ____,” and the brief filed by the Wolf Coalition (Doc. 27) is cited as “Coalition Br. at ____.”

² A “breeding pair” is the metric FWS uses to describe successfully reproducing wolf packs that have at least an adult male and an adult female that raised at least two pups until December 31. 74 Fed. Reg. at 15132.

year-round wild ungulate populations. *See* 74 Fed. Reg. at 15137. The territories of persistent breeding pairs in GYA and central Idaho are occasionally within 60 miles of each other. *Id.* Adequate levels of genetic exchange have occurred between the GYA and the other NRM subpopulations with Federal protections in place. *Id.* at 15138.

The NRM population grew at an average annual rate of 22% per year from 1995 to 2008, AR09_40937-38 (USFWS et al. 2009), but grew more slowly in 2008, indicating that the DPS could be approaching the carrying capacity of the suitable habitat, 74 Fed. Reg. at 15138. While listed, the two major causes of mortality in the NRM were agency control of problem wolves and illegal killing, each causing an average mortality rate of 10% annually. *Id.* By the end of 2008, the NRM wolf population was estimated to contain about 1,645 wolves in 217 packs, with 95 of these packs classified as breeding pairs. AR09_40937-38 (USFWS et al. 2009).

B. Regulatory Actions Relating to the NRM Wolf Population.

1. Gray Wolf Listing and Development of the NRM Recovery Goals.

Gray wolves in the NRM were listed as endangered on the first list of species protected after the passage of the ESA in 1973. *See* 39 Fed. Reg. 1171 (Jan. 4, 1974). A 1978 rule reclassified the gray wolf as threatened in Minnesota and endangered throughout the remaining 47 coterminous states and Mexico. *See* 43 Fed. Reg. 9607 (Mar. 9, 1978). For over two decades, FWS has taken numerous actions to restore a NRM wolf population, and FWS repeatedly has analyzed and refined the recovery goals for this population. *See Wyoming v. U.S. Dep't of the Interior*, 360 F.Supp.2d 1214, 1218-20 (D. Wyo. 2005) (discussing the listing, reintroduction of gray wolves, and the development of FWS's recovery goals).

Briefly, FWS identified a minimum recovery goal of "10 breeding pairs of wolves in 3 separate recovery areas for 3 consecutive years" with some connectivity between the three populations. 74 Fed. Reg. at 15131. In subsequent years, the focus shifted to maintaining

recovery goals by State (*i.e.*, Montana, Idaho, and Wyoming) rather than by recovery areas. *Id.* at 15132 (explaining the basis for the shift). “To ensure that the NRM wolf population always exceeds the recovery goal of 30 breeding pairs and 300 wolves, wolves in each State shall be managed for at least 15 breeding pairs and at least 150 wolves in mid-winter,” the low point of the wolf’s annual population cycle. *Id.* at 15132. FWS repeatedly has analyzed and considered the recovery criteria for the NRM population, and FWS reaffirmed these findings in the 2009 Rule. *See id.* at 15130-39 (fully explaining the development and repeated review (including peer review) of the recovery criteria since 1980). Petitioners do not contest the biological foundation for FWS’s recovery criteria.

2. Past Regulatory Actions.

The NRM wolf population achieved its numerical, distributional, and temporal recovery goals at the end of 2002. 74 Fed. Reg. at 15124. Early efforts to facilitate delisting led to Wyoming’s promulgation of a 2003 law and management plan and to FWS’s January 13, 2004 letter finding this regulatory regime to be inadequate. *Id.*; AR09_41519 (Williams 2004). Wyoming filed suit challenging the 2004 letter. *See Wyoming*, 360 F.Supp.2d 1214, *aff’d*, 442 F.3d 1262 (10th Cir. 2006). This Court’s opinion thoroughly discussed the factual and regulatory background leading to FWS’s issuance of the 2004 letter; accordingly, this background is not repeated here. *Id.* at 1218-1225.

On July 19, 2005, FWS received a petition from the State of Wyoming and the Wyoming Game and Fish Commission (“WGFC”) to revise the listing status for the gray wolf. *See* AR09_36687 (Freudenthal 2005). While the petition was being considered, FWS published a notice announcing its intention to conduct rulemaking to establish a NRM DPS. 71 Fed. Reg. 6634 (Feb. 8, 2006). There, FWS explained that it was carefully considering Wyoming’s

delisting petition and that it believed Wyoming's 2003 law and wolf management plan were inadequate to assure the maintenance of a recovered population in the State.

On August 1, 2006, FWS issued a 12-month finding concluding that Wyoming's petitioned action (removing the DPS from the ESA's protections) was not warranted. 71 Fed. Reg. 43410 (Aug. 1, 2006). FWS determined that "Wyoming's current regulatory framework [the 2003 law and plan] is not adequate to maintain Wyoming's numerical and distributional share of the NRM wolf population." *Id.* at 43416. FWS explained that "[a]ttempting to manage a wolf population that is constantly maintained at minimum levels would likely result in a wolf population falling below recovery levels due to factors beyond [the Wyoming Game and Fish Department's ("WGFD")] control." *Id.* at 43428. FWS also explained that, although "most [of the 2003 peer] reviewers believed the coordinated implementation of all three State plans would be adequate," there were critical changes and new factors that were not reviewed by the peer reviewers, such as the rapid decline of the YNP wolf population in 2005. *Id.* at 43415.³

On February 8, 2007, FWS issued a proposed rule to delist wolves in Montana, Idaho, and Wyoming, as well as in parts of Washington, Oregon, and Utah, but FWS noted that the ESA's protections would be retained in significant portions of the DPS's range in Wyoming if Wyoming failed to develop adequate regulatory mechanisms. 72 Fed. Reg. 6106. In 2007, the Wyoming legislature passed a new statute ("HB213"), codified at WYO. STAT. ANN. §§ 23-1-101, 23-1-304, 23-1-115, that provides the framework for Wyoming's current wolf management. 74 Fed. Reg. at 15170. Following the change in State law, Wyoming adopted a revised wolf management plan. *See* AR09_41736 (Wyoming 2007); AR09_36612 (Cleveland 2007).

³ Petitioners' reliance on the 2003 peer reviews (Wyo. Br. at 6, 32; Coalition at 11) does not take these factors into account. Nor is Petitioners' assertion (Wyo. Br. at 9) that FWS "voiced only one specific criticism of the predator classification" accurate, as FWS identified numerous inadequacies present in Wyoming's regulatory scheme. *See* 71 Fed. Reg. at 43430.

On July 6, 2007, FWS extended the comment period in order to consider a 2007 revised Wyoming wolf management plan. 72 Fed. Reg. 36939 (July 6, 2007). Following this review, FWS determined that the expanded trophy game area, which included 70% of the State's suitable wolf habitat, was barely large enough to support Wyoming's share of the minimum number of breeding pairs necessary for a recovered wolf population. 74 Fed. Reg. at 15183. On December 12, 2007, FWS approved Wyoming's plan. AR09_37234 (Hall 2007). FWS determined that the wolf management plan addressed the three primary concerns identified in FWS's 2004 letter, AR09_41519 (Williams 2004), for instance, by changing the predatory animal area designation, committing Wyoming to maintain 15 packs, and agreeing that a pack equated to a breeding pair. AR09_37234 (Hall 2007). On February 27, 2008, FWS issued a final rule recognizing the NRM DPS and removing all of the DPS, including Wyoming, from the List of Endangered and Threatened Wildlife. 73 Fed. Reg. 10514 (Feb. 27, 2008) (2008 Rule).⁴

Several environmental groups challenged FWS's 2008 Rule on April 28, 2008. *Defenders of Wildlife v. Hall*, 08-cv-56-DWM (D. Mont.). After the lawsuit was filed, FWS became aware of Chapter 21 regulations promulgated by the WGFC on March 13, 2008. See AR09_35337; AR09_7590. The March 13 regulations (AR09_35181) defined a "chronic wolf predation area" as any area where there were two or more livestock deprecations over any time frame. See AR09_39063 (Talbot 2008). The regulations also provided that, once an area was deemed a chronic depredation area, lethal take permits must be issued without verification of predation. AR09_35401; AR09_35138, 35182, 35400. Since the entire trophy game area had at least two deprecations of livestock, the entire area qualified as a chronic wolf depredation area

⁴ The State of Wyoming filed suit challenging FWS's 12-month finding (71 Fed. Reg. 43410). See AR09_25841-42. Due to FWS's new rule and the intervening modifications to Wyoming's laws, this Court dismissed Wyoming's lawsuit. AR09_25850-51.

that allowed the WGFD to issue lethal take permits so long as seven packs were present outside of the National Parks. 74 Fed. Reg. at 15171; AR09_7590, 35233, 35337, 35345, 35356.

FWS biologists determined that these regulations were inconsistent with Wyoming's previously approved management commitments and "considered not defending [its] decision about the adequacy of Wyoming's regulatory mechanism" in the pending Montana lawsuit. AR09_35233, 35337. FWS, however, began discussions with Wyoming, 74 Fed. Reg. at 15171, and the Wyoming Attorney General's Office issued an opinion interpreting the March 18 regulations, AR09_37849 (Martin 2008). The opinion sought to clarify the definition of a "chronic wolf predation area" and when the WGFD must initiate control actions and issue lethal take permits. *Id.* Thereafter, Wyoming assured FWS that it would amend the regulations at the earliest possibility, and FWS proceeded to defend its approval of Wyoming's regulatory mechanisms. 74 Fed. Reg. at 15171; AR09_35233, 35337.⁵

On July 18, 2008, the Montana court enjoined the rule. *See Defenders of Wildlife v. Hall*, 565 F.Supp.2d 1160 (D. Mont. 2008). The court preliminarily determined that FWS's 2008 Rule was arbitrary and capricious for several reasons, including the purported lack of genetic exchange between NRM subpopulations and the inadequacies in Wyoming's laws and management plan. *Id.* at 1168-70, 1172-75. On August 11, 2008, FWS met with Wyoming representatives, notified them of many shortcomings in Wyoming's regulatory regime, and requested that revisions be made; Wyoming declined to resolve those problems. AR09_35234. At FWS's request, the 2008 Rule was subsequently remanded to the agency.

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⁵ Despite its assurances, Wyoming amended its regulations only after the Montana court issued a preliminary injunction and identified deficiencies with Wyoming's regulatory scheme. 74 Fed. Reg. at 15171.

3. Recent Regulatory Actions.

Following the adverse preliminary injunction ruling, Wyoming issued emergency regulations and a draft revised wolf management plan on October 27, 2008. 74 Fed. Reg. at 15156; AR09_36916 (emergency Chapter 21 regulations). On October 28, 2008, FWS reopened the comment period on the proposed rule and sought information, data, and comments on the 2007 proposed rule (72 Fed. Reg. 6106 (Feb. 8, 2007)), the adequacy of Wyoming's regulatory mechanisms, the portions of Wyoming that constituted a significant portion of the DPS's range, and other issues. 73 Fed. Reg. 63926 (Oct. 28, 2008). FWS reiterated that removing ESA protections in Wyoming was dependent on State law and the existence of a wolf management plan that adequately conserved Wyoming's portion of a recovered wolf population. 74 Fed. Reg. at 15123. On November 18, 2008, Wyoming adopted the 2008 Plan. AR09_41780 (2008 Plan).

FWS received numerous comments on its proposed action and thoroughly reexamined Wyoming's laws (WYO. STAT. ANN. §§ 11-6-302, *et seq.*, WYO. STAT. ANN. §§ 23-1-101, *et seq.*), its management plan and regulations, and the best scientific and commercial data available. *See* 74 Fed. Reg. at 15183; AR09_35232, 35337, 35341, 35345, 35356, AR09_35232. On January 14, 2009, the Secretary of the Department of the Interior and FWS announced that Wyoming's regulatory framework was not adequate and that FWS was identifying the DPS and removing wolves, except for those in Wyoming, from the ESA's protections. AR09_1737. FWS determined that "Wyoming has a wolf management strategy that is mandated by the legislature whereby the wolf population would be deliberately managed down to the absolute bare minimum levels necessary for recovery," AR09_35234, and that this regulatory framework was insufficient to maintain a recovered wolf population in the State, *see, e.g.*, 74 Fed. Reg. at 15170-72.

On January 15, 2009, FWS notified Wyoming's Governor that Wyoming no longer had an FWS-approved wolf management plan. AR09_37220 (Gould 2009). The rule was subsequently withdrawn from the Federal Register to provide the Obama Administration an opportunity for review and evaluation. *See* AR09_1669-71. Secretary of the Interior Ken Salazar affirmed the NRM rule on March 6, 2009. AR09_28978-80. On April 2, 2009, the NRM rule was published in the Federal Register, with an effective date of May 4, 2009. 74 Fed. Reg. 15123. Under the 2009 Rule, wolves in Wyoming are protected under the ESA and regulated as a non-essential, experimental population pursuant to 50 C.F.R. § 17.84(i), (n). 74 Fed. Reg. at 15123.

SUMMARY OF ARGUMENT

The States, including Wyoming, long have recognized the critical role of State regulatory mechanisms to removing the ESA's protections for wolves, AR04_01; AR06_14413, and FWS long has considered Wyoming to be critical to the establishment and maintenance of a recovered NRM wolf population, 74 Fed. Reg. at 15181. In the 2009 Rule, FWS determined that Wyoming constitutes a significant portion of the NRM DPS's range and that, prior to removing the ESA's protections, FWS must determine whether wolves in Wyoming are threatened or endangered under the ESA. 74 Fed. Reg. at 15179-81 (explaining FWS's analytical framework); *id.* at 15181-83 (explaining why Wyoming constitutes a significant portion of the DPS's range).⁶ This inquiry required FWS to assess the five statutory listing factors, including the adequacy of existing regulatory mechanisms, to determine the status of wolves in the DPS, and in Wyoming, should the ESA's protections be removed. 16 U.S.C. § 1533(a), (b).

⁶ Petitioners do not dispute these aspect of the 2009 Rule. In fact, Wyoming itself has advocated that the entire State be encompassed within any listing decision. *See* AR09_36722-25 (Freudenthal 2005).

Wyoming law identifies a limited area covering less than 12% of the State (the “trophy game area”) in which gray wolves can be managed by the WGFD. The trophy game area can be annually diminished in size, but not expanded beyond the statutorily-prescribed boundaries. Within that area, wolves are subject to mandatory and aggressive control as long as seven breeding pairs are located primarily outside of YNP, Grand Teton National Park, and John D. Rockefeller Memorial Parkway (collectively, “National Parks”). By law, aggressive management and control in the trophy game area cannot be relaxed until less than seven breeding pairs exist outside of the National Parks. In over 88% of Wyoming (the “predatory animal area”), State law allows for the unregulated, unlimited killing of gray wolves.

Collectively, Wyoming law limits wolf occupancy to less than 12% percent of the State, mandates the aggressive control of wolves to bare minimum levels in that area, and provides little to no flexibility to adjust management or protection of wolves in response to declines in YNP, increased mortality in the predatory animal area, disease, defense of property take, illegal killing, new scientific information, or other factors. FWS rationally concluded that this regulatory scheme is not likely to successfully maintain a recovered wolf population should the ESA’s protections be removed. FWS’s findings fall squarely within its area of scientific expertise, its findings are entitled to deference, and the 2009 Rule should be upheld.

STANDARD OF REVIEW

Judicial review of ESA claims are governed by the Administrative Procedure Act (“APA”), 5 U.S.C. § 706. *Wyoming Farm Bureau Fed’n v. Babbitt*, 199 F.3d 1224, 1231 (10th Cir. 2000). Section 706 of the APA authorizes courts to set aside agency action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706. Under this standard, a court’s inquiry must be thorough, and the Court’s duty is “to ascertain whether the agency examined the relevant data and articulated a rational connection between the

facts found and the decision made.” *Cliffs Synfuel Corp. v. Norton*, 291 F.3d 1250, 1257 (10th Cir. 2002) (internal quotation marks omitted); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989). “It is not [the court’s] duty, however, to substitute [its] judgment for that of the agency’s on matters within its expertise.” *Colorado Wild, Heartwood v. U.S. Forest Serv.*, 435 F.3d 1204, 1213-14 (10th Cir. 2006) (citing *Marsh*, 490 U.S. at 378). Nor is it a court’s role to weigh conflicting evidence or evaluate credibility, see *Pennaco Energy, Inc. v. United States Dep’t. of Interior*, 377 F.3d 1147, 1159 (10th Cir. 2004), or otherwise decide the propriety of competing methodologies, see *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 782 (10th Cir. 2006).

Accordingly, the applicable APA standard of review is narrow and highly deferential to the agency. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971); *Valley Cmty. Pres. Comm’n v. Mineta*, 373 F.3d 1078, 1084 (10th Cir. 2004) (APA review is “highly deferential”). The deference given to an agency is especially strong where, as here, “the challenged decisions involve technical or scientific matters within the agency’s area of expertise.” *Utah Env’tl Congress v. Bosworth*, 443 F.3d 732, 739 (10th Cir. 2006); *Utah Shared Access Alliance v. U.S. Forest Serv.*, 288 F.3d 1205, 1213 (10th Cir. 2002).

ARGUMENT

I. FWS RATIONALLY CONCLUDED THAT WYOMING’S REGULATORY SCHEME IS NOT ADEQUATE TO MAINTAIN A RECOVERED WOLF POPULATION IN THE STATE.

FWS’s position on the adequacy of Wyoming’s regulatory scheme, as set forth in the 2009 Rule, is rational and based upon the best scientific and commercial data available. FWS did not rely on one single factor in finding that Wyoming’s current laws, regulations, and management plan were inadequate; to the contrary, numerous factors when considered together led FWS to conclude that Wyoming’s proposed regulation of gray wolves is not likely to

maintain a recovered wolf population in Wyoming or adequately provide for demographic and genetic connectivity with the Idaho and Montana populations. The majority of Petitioners' arguments to the contrary are based on prior rulemakings, past agency statements, and FWS's guidance about the future. Respondents will address these arguments, *infra*, but will first detail the basis and rationale for the 2009 Rule, most of which Petitioners ignore in their briefs.

A. FWS Appropriately Assessed Wyoming's Regulatory Scheme.

FWS's evaluation of the adequacy of Wyoming's regulatory framework required identifying the applicable management framework that would govern wolf management and protection in Wyoming should the ESA's protections be removed. In accord, FWS thoroughly reviewed Wyoming's laws, regulations, and management plan. *See* 74 Fed. Reg. at 15170-72. The central component of Wyoming's regulatory framework is the designation of wolves as a predatory animal in over 88% of the State, WYO. STAT. ANN. § 23-1-101(a)(viii)(B), and as a trophy game animal in the remaining portions of northwestern Wyoming, *id.* § 23-1-101(a)(xii)(B)(I), (b) (often referred to as a "dual status" approach). *See* 74 Fed. Reg. at 15170.

Within the predatory animal area, wolves may be taken by anyone, anywhere, at any time, without limit, and by almost any means (including: shoot-on-sight; baiting; bounties and wolf-killing contests; locating and killing pups in dens; trapping; snaring; aerial gunning; and use of mechanized vehicles to locate or chase wolves down). 71 Fed. Reg. at 43428. Unfortunately, wolves are very susceptible to this type of unregulated mortality, AR06_15565-66 ("Wolves are so susceptible to human-caused mortality that it needs to be regulated if wolf packs are to persist"), and FWS utilized its scientific expertise and relied on actual data to conclude that wolves will be unable to persist within the predatory animal area in Wyoming, *see* 74 Fed. Reg. at 15170 ("most of the wolves in the predatory animal area were killed within a few weeks of losing the Act's protection (17 of at least 28)" in 2008); AR09_35327; AR09_3412; *compare*

AR09_5235 (map of wolf packs prior to 2008 delisting); *with* AR09_5236 (map of wolf packs after 2008 delisting).

Accordingly, gray wolf regulation in Wyoming depends entirely on the size, permanence, and management regime within the trophy game area. In accordance with statutory directives, Wyoming's trophy game animal designation allows for the regulation of the methods of take, hunting seasons, types of allowed take, and numbers of wolves that could be killed. 74 Fed. Reg. at 15170; AR09_35342. The trophy game area established to obtain delisting (WYO. STAT. ANN. § 23-1-101(b)) contains just over 12,000 mi² in northwestern Wyoming and includes the National Parks, adjacent Forest Service-designated wilderness areas, and adjacent public and private lands. 74 Fed. Reg. at 15170; AR08_11175 (map of land ownership in this area). This trophy game area encompasses 12% of the State and roughly 70% of the wolf's suitable habitat. 74 Fed. Reg. at 15170.⁷ The State has no management responsibility in the National Parks (approximately one-third of the trophy game area); therefore, this initial trophy game area provides for some State management and regulation in roughly 8% of the State. *See* AR09_41963 (1994 EIS) (National Parks are approximately 3,953 mi²); 73 Fed. Reg. at 10549 (trophy game area is approximately 12,000 mi²).

However, the size of the trophy game area established to obtain delisting (WYO. STAT. ANN. § 23-1-101(b)) is immediately reduced were delisting to occur. *See* WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I) ("From and after the date the gray wolves are removed from" ESA protections, the trophy game area shall include a smaller area that largely follows Forest Service boundaries); AR09_35154; AR09_7385 (map depicting in blue the boundary of the trophy game

⁷ The Wolf Coalition's assertions (Coalition Br. at 7, 18, 32) that the trophy game area includes the wolf's entire suitable habitat in Wyoming, and that the predatory animal area contains no suitable habitat, are not supported by the record. *See* AR09_29051 (map depicting trophy area and suitable wolf habitat in Wyoming); AR09_4829 (same).

area described in WYO. STAT. ANN. § 23-1-101(b), and depicting in black the trophy game area applicable upon delisted, as described in WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I)). This smaller trophy game area can be further diminished “if the commission determines the diminution does not impede the delisting of gray wolves and will facilitate Wyoming’s management of wolves.” WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I).

In the trophy game area, Wyoming law mandates the aggressive control of wolves so long as seven breeding pairs exist primarily outside of the National Parks, and State law does not allow for corrective actions to be attempted until breeding pairs decrease below that level. Several statutory and regulatory provisions confirm this regulatory regime. First, the overall intent and structure of Wyoming law provides for the aggressive control of wolves, rather than the protection and conservation of wolves. *See* WYO. STAT. ANN. § 23-1-304(e), (j) (WGFD is directed to manage wolves “as necessary to ensure the long-term health and viability of any big game animal herd”); WYO. STAT. ANN. § 23-1-304(g) (WGFD is “authorized ... to use aggressive management techniques including the use of aerial hunting and hazing ... to take wolves to protect private property”). Second, the WGFC is tasked with annually setting the size of the trophy game area, and it must set the boundaries “only as necessary to reasonably ensure at least seven (7) breeding pairs of gray wolves” are located primarily outside of the National Parks. WYO. STAT. ANN. § 23-1-304(a).

Third, State law “requir[es] lethal control” of wolves, WYO. STAT. ANN. § 23-1-304(m), and the law mandates the liberal issuance of permits to kill wolves “as long as there are seven (7) breeding pairs within the state and outside of [the National Parks],” regardless of the year-end status of wolves in Wyoming. WYO. STAT. ANN. § 23-1-304(n); 74 Fed. Reg. at 15171; AR09_35186. Wyoming has broadly defined the circumstances when lethal take permits shall be issued, for instance, requiring permits to be issued when wolves “harass” livestock.

AR09_36919 (Ch. 21 regulations, § 7(a)). As FWS noted, harassment cannot be confirmed and effectively leads “to unlimited permits for lethal take” when seven breeding pairs exist primarily outside of the National Parks. AR09_35340, 35342, 35344-46; AR08_6184 (Wyoming conceding in an analogous context that “harassed” is vague and needs to be defined). Finally, State law provides that control measures cannot be relaxed until the wolf population drops below seven breeding pairs, as lethal take permits “shall” be issued with seven breeding pairs and can be suspended or cancelled only if “*further* lethal control could cause relisting of wolves under the [ESA].” WYO. STAT. ANN. § 23-1-304(n) (emphasis added). Accordingly, “State law mandates aggressive management until the population outside the National Parks fall to 6 breeding pairs.” 74 Fed. Reg. at 15171.⁸

The effect of State law in mandating aggressive control until wolves fall below seven breeding pairs is further reflected by the WGFC’s March 13 regulations. 74 Fed. Reg. at 15171. On March 13, 2008, the WGFC issued regulations that had the effect of classifying the entire trophy game area as a “chronic wolf predation area,” paving the way for the issuance of lethal take permits until the wolf population fell below seven breeding pairs primarily outside of the National Parks. *Id.* at 15171; AR09_35339, 35401; AR09_7590; AR09_2655 (“Days before the delisting rule became effective the [WGFC] passed regulations that essentially mandated issuing unlimited lethal take permits throughout the trophy game area.”). Once the ESA protections were removed in Wyoming in 2008, the WGFD proceeded to liberally issue lethal take permits. 74 Fed. Reg. at 15171; AR09_35340; AR09_35356-35358, 35364-35380 (documenting

⁸ Consistent with the statutory scheme, Wyoming’s Chapter 21 regulations also provide for the aggressive control of wolves. For example, wolves are attracted to State-run feedgrounds, many of which are located in the trophy game area, and State regulations provide that wolves may be lethally removed where “conflict [an open-ended, broad term] occurs at any State operated feedground.” AR09_35186; AR09_36919 (Ch. 21 regulations). Thus, all wolves attracted to feedgrounds in the trophy game and predatory animal areas could be extirpated. *Id.*

Wyoming's liberal issuance of lethal take permits). Although corrective action was attempted with "substantially revised" regulations (Wyo. Br. at 12), FWS appropriately noted that the March 13 regulations demonstrate that "the framework established by State law allows Wyoming to reduce their wolf population outside the National Parks to 6 breeding pairs regardless of whether the year-end wolf population would be below 7 breeding pairs outside the National Parks or 15 breeding pairs or 150 wolves Statewide." 74 Fed. Reg. 15171; AR09_35340, 35342.

Collectively, these and other factors show that Wyoming has passed "a state law that significantly limits WGFDF options for professional wolf management" and provides that "the wolf population would be deliberately managed down to the absolute bare minimum levels necessary for recovery." AR09_35234; 74 Fed. Reg. at 15171-72. Petitioners do not dispute this intent or FWS's finding that Wyoming law provides for aggressive management to "only seven breeding pairs outside of National Parks." Wyo. Br. at 55, 57-58 (arguing there should be no requirement for Wyoming to maintain any buffer above seven breeding pairs and 70 wolves primarily outside of the National Parks). Accordingly, FWS reasonably considered whether Wyoming's regulatory scheme, *i.e.*, no wolf occupation in over 88% of Wyoming and aggressive management to six breeding pairs primarily outside of the National Parks before corrective action can be attempted, is adequate to maintain a recovered wolf population in Wyoming.

B. Maintenance Of The Wyoming Wolf Population Above Minimum Recovery Levels.

1. FWS Reasonably Concluded That Wyoming's Regulatory Scheme Will Not Maintain A Wolf Population Above Minimum Recovery Levels.

"Wolves are unlike coyotes in that wolf behavior and reproductive biology results in wolves being extirpated in the face of extensive human-caused mortality." 74 Fed. Reg. at 15170; AR09_36220 (Bangs et al. 2004). This is evidenced by the active eradication program

that resulted in the extirpation of wolves from the NRM region over 80 years ago. 74 Fed. Reg. at 15165. Because this threat “has the potential to significantly impact wolf populations if not adequately managed,” sources of mortality must be controlled to sustainable levels, and the wolf populations within each of the recovery States (Idaho, Montana, and Wyoming) must be maintained above minimum recovery levels. *Id.* at 15166, 15174.

FWS’s minimum recovery goal is a population that *never* falls below 10 breeding pairs and 100 wolves in each of the three recovery States. 74 Fed. Reg. at 15130-31; AR08_22754 (each State must ensure that its wolf population “never falls below 10 breeding pairs and 100 wolves”); AR08_11165; AR08_22295, 22297, 22299; AR08_22150; AR09_35458 (Wyoming Governor conceding that the State is required to maintain a population that never falls below minimum levels). “To ensure that the NRM wolf population always exceeds the recovery goal ..., wolves in each State shall be managed for at least 15 breeding pairs and at least 150 wolves in mid-winter.” 74 Fed. Reg. at 15132. FWS determined that the maintenance of at least 15 breeding pairs and 150 wolves in each State, combined with other steps (such as providing for connectivity with the other subpopulations), “will maintain the NRM DPS’s current metapopulation structure” and adequately describes a recovered wolf population. *Id.* at 15132, 15171.

In the 2009 Rule, FWS found that Wyoming’s regulatory framework does not assure the population is maintained above minimum recovery levels. First, the direction in Wyoming law to aggressively manage the wolf population to seven breeding pairs (or less) primarily outside of the National Parks will not maintain a wolf population of at least 15 breeding pairs and 150 wolves in the State. 74 Fed. Reg. at 15171. By focusing on breeding pairs outside of the National Parks, Wyoming law relies on YNP to contain at least eight breeding pairs to maintain at least 15 breeding pairs in the State. *Id.*; AR09_35458 (Wyoming Governor explaining the

State's reliance on YNP numbers). The data, however, prove that such reliance on YNP is not warranted – while nearly the entire suitable habitat in YNP is densely occupied by wolf packs, YNP has consistently and recently failed to support eight breeding pairs. 74 Fed. Reg. at 15171 (explaining that YNP supported less than eight breeding pairs in 2005 and 2008); AR09_2608; AR06_15562-63; AR06_15608 (noting rapid downturn in YNP population and the problems with Wyoming's regulatory framework in such a situation). Thus, FWS reasonably determined that YNP will not consistently maintain at least eight breeding pairs and that Wyoming's aggressive management to seven breeding pairs outside the National Parks is not adequate. 74 Fed. Reg. at 15150, 15171.

Second, Wyoming's proposed regulation of wolves to minimum levels is unlikely to provide for the maintenance of a wolf population that never falls below 10 breeding pairs and 100 wolves in the State. 74 Fed. Reg. at 15171. As FWS explained, “[a]ttempts to maintain any wildlife population at bare minimum levels are unlikely to be successful,” as uncontrollable sources of mortality are likely to result in population declines and jeopardize efforts to maintain a population at bare minimum levels. *Id.* at 15172; AR09_36317 (Boyd and Pletscher 1999) (“Wolf recovery ... may be significantly impacted by stochastic environmental events and political pressure.”); SAR09_121 (Mills 2007, p. 250-51) (“Unfortunately, when a population becomes small, it becomes particularly susceptible to a host of stochastic threats that interact with and exacerbate problems caused by deterministic factors.”).

In Wyoming, the predatory animal area constitutes a source of additive mortality likely to further reduce the trophy game area population below intended management levels. Individual wolves and *entire wolf packs* can travel from the trophy game area into the predatory animal area. *See, e.g.*, AR09_35326-29 (memorandum documenting wolf and pack movement and travel into the predatory animal area); AR09_38016 (Mech & Boitani 2003) (documenting pack

movements of between 77 and 150 miles); AR08_15653 (noting the Teton pack travelled 65 miles south and out of the trophy game area); *Wyoming v. Livingston*, 443 F.3d 1211, 1214 (10th Cir. 2006) (noting Washakie wolf pack traveling “far outside their normal range” to near Meeteetse, Wyoming, at or within the predatory area). Further, wolves in the trophy game area are attracted to the predatory animal area by the numerous State-operated winter elk feedgrounds located there. *See* AR09_2684; AR09_2700 (map of feedgrounds); AR09_35338; AR09_35186; AR09_35327 (winter elk feedgrounds in southwestern Wyoming routinely draw dispersing wolves into valley bottoms within predator area); AR09_2694 (“resident wolf packs and dispersing wolves will routinely seek out congregating elk in winter. Therefore, as long as elk are artificially congregated in occupied wolf habitat, wolves will kill elk on feedgrounds”). Thus, wolves within into the trophy game area will be subjected to unregulated mortality in the predatory animal area, and FWS rationally determined that “death following dispersal into the predatory animal area” constitutes additional unregulated mortality that is likely to further reduce a wolf population held at minimum levels in the trophy game area. 74 Fed. Reg. at 15171.

Other sources of mortality and aspects of Wyoming’s regulatory scheme show that management at bare minimum levels is unlikely to maintain recovery. Wyoming’s defense of property law provides that property owners may, without the need to obtain State authorization, kill any wolf “doing damage to private property.” WYO. STAT. ANN. § 23-3-115(a). The trophy game area contains private property, AR09_11773, defense of property killings cannot be regulated under Wyoming law, and defense of property take consistently occurs in the NRM region, *see* 74 Fed. Reg. at 15165 (documenting past take under Federal defense of property regulations).⁹ Illegal killing of wolves also occurs and cannot be controlled. *Id.* at 15165 (21%

⁹ The Wolf Coalition’s assertion (Coalition Br. at 25) that the defense of property law does not apply within the trophy game area mistakes the purpose of the law, which is to allow for wolf take *outside* of the predatory animal area. *See* AR09_41784 (2008 Plan) (“Property owners

of the overall mortality to radio-collared wolves from 1984 to 2004 resulted from illegal take). Further, disease outbreaks cause significant and dramatic population declines (for instance, the dramatic decline in YNP wolf numbers in 2005). *See id.* at 15172, 15137 (disease likely contributed to a high wolf mortality rate in 2008); AR06_15608. Collectively, these and other periodic events and uncontrollable sources of wolf mortality, in conjunction with State management to bare minimum levels, are likely to push “the Wyoming wolf population below minimum recovery levels.” 74 Fed. Reg. at 15171; SAR09_121 (Mills 2007, p. 249) (“Obviously, smaller populations will be more vulnerable to extinction (all else being equal) than larger populations, an idea rooted in the classics of applied ecology.”).

Third, the problems with successfully maintaining a wolf population at minimum levels are magnified by Wyoming’s statutory reduction in the size of the trophy game area “after the date gray wolves” are no longer protected under the ESA, as well as the statutory directive to reduce the size of the trophy game area to “facilitate Wyoming’s management of wolves.” WYO. STAT. ANN. §§ 23-1-101(a)(xii)(B)(I), 23-1-304(a).¹⁰ Any reduction or diminishment of the trophy game area will further limit breeding pair occupancy in the trophy game area and will expose additional packs and wolves to increased mortality in the predatory animal area. *See* 74 Fed. Reg. at 15171; AR09_7448 (diminishing the trophy game area will further expose wolf packs in the trophy area to excessive levels of mortality in the predatory animal area); AR08_11769 (map illustrating multiple packs outside of Forest Service lands and, therefore, outside of the smaller post-delisting trophy game area); AR06-15931; AR06_16004 (same);

within the [trophy game area] will be allowed to take wolves” pursuant to the defense of property law).

¹⁰ Wyoming law also provides that the trophy game area can be diminished unless the diminution would “impede the delisting of the gray wolf.” WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I). If Wyoming’s regulatory scheme were accepted, this condition would lack effect because any diminution could not “impede the delisting.” 74 Fed. Reg. at 15170.

AR08_11175 (explaining that the “forest border trophy game” area “can’t work biologically”); AR08_22754 (explaining that diminishment of the trophy game area to just National Parks and wilderness would be inadequate and likely result in emergency relisting). “Because wolves are unlikely to survive where they are classified as predatory animals, potential expansion of the predatory animal area would further limit occupancy in Wyoming” and preclude the maintenance of a wolf population above minimum recovery levels. 74 Fed. Reg. 15182.

Fourth, Wyoming’s regulatory framework does not provide for the maintenance of a minimum number of wolves in the State, a critical component of FWS’s recovery criteria. *Id.* at 15132. FWS’s recovery criteria contain both a breeding pair and a number of wolves component; “wolf recovery and long-term wolf population viability is dependent on [the DPS’s] distribution as well as maintaining the minimum numbers of breeding pairs and wolves.” *Id.* A wolf population that encompasses wolf packs and individual wolves, in addition to breeding pairs, is critical to maintaining the resiliency of the population to threats, such as human-caused mortality. 74 Fed. Reg. at 15131; AR09_37045 (Fuller et al. 2003). This is particularly true here: “A large and well-distributed *population* within the GYA is especially important because it is the most isolated recovery segment within the NRM DPS.” 74 Fed. Reg. at 15132 (emphasis added).

By requiring aggressive management as long as seven breeding pairs live primarily outside of the National Parks, Wyoming’s trophy game area population could contain only 28 wolves, as a minimum of four wolves are needed for a breeding pair. *See* AR09_35346. Although each breeding pair currently represents 14 wolves in the NRM (under Federal protections), 74 Fed. Reg. at 15132, additional sources of mortality and pressure under State management (such as hunting and increased control actions) can influence and decrease pack size. AR08_22294 (“Once wolves are hunted, or pursued more aggressively, we may see pack

structure change (i.e., smaller groups traveling together).”). Accordingly, the statutory directive to reduce the wolf population to seven breeding pairs, unattached to any minimum number of wolves, provides insufficient assurances that a healthy and viable *wolf population* is maintained in Wyoming. *See* AR09_35346 (explaining problems with Wyoming’s failure to commit to maintaining a minimum number of wolves, in addition to breeding pairs).

In sum, FWS found that Wyoming’s regulatory scheme, if implemented, would immediately reduce the population’s size through the predatory area designation and would thereafter reduce the remaining population primarily outside of the National Parks to seven (or less) breeding pairs. *See* AR09_35329; AR06_15931 (maps of packs located outside trophy area and subject to immediate take if Wyoming’s regulatory scheme is adopted). The evidence in the record supports FWS’s recovery criteria, *see* 74 Fed. Reg. at 15131; AR09_36162-64 (Bangs 2002), and the evidence supports FWS’s finding that Wyoming’s regulatory scheme is not likely to maintain a population above minimum recovery levels, 74 Fed. Reg. at 15171; AR09_35338-39 (Wyoming’s aggressive wolf control measures “would automatically result in the wolf population being held at or below minimum levels”). FWS’s findings are reasoned, supported by the record, and are due deference.

2. Petitioners’ Objections To FWS’s Analysis Lack Merit.

Petitioners’ own briefing shows that FWS’s findings are reasoned and well supported in the record. Notably, Petitioners acknowledge that a regulatory scheme that provides for the maintenance of at least 15 breeding pairs and 150 wolves is adequate. *See* Wyo. Br. at 25 (agreeing that a regulatory scheme is adequate where wolves are managed “for at least 15 breeding pairs and 150 wolves”); *id.* at 34-35, 55-57 (same). Yet, Petitioners also agree that intended State management to seven breeding pairs primarily outside of the National Parks would not have provided at least 15 breeding pairs in the two recent years when the YNP

population dropped below eight breeding pairs. *See* Wyo. Br. at 54-55. Although Petitioners seek to justify these periodic decreases below recovery levels, *id.*, they elsewhere acknowledge, as they must, that FWS's 15 breeding pair and 150 wolf buffer "*provides assurance* that the delisted wolf population in the three states will not drop below the minimum recovery goals of 10 breeding pairs and 100 wolves in each state." Wyo. Br. at 56 (emphasis added); *see, e.g.*, AR06_15562 (identifying decrease in Wyoming of *nine breeding pairs* in one year).

In other words, Petitioners do not and cannot dispute FWS's findings that a population managed at bare minimum levels will never fall below the minimum recovery goal. 74 Fed. Reg. at 15171. Without demonstrating that FWS's recovery criteria are arbitrary and capricious, and by agreeing that Wyoming's regulatory framework would not have maintained 15 breeding pairs "twice in a four year period," Wyo. Br. at 55, Petitioners have all but conceded that FWS raised valid concerns with Wyoming's regulatory framework. In accord, FWS's findings should be upheld, as it did not offer "an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Western Org. of Resource Councils v. Bureau of Land Management*, 591 F.Supp.2d 1206, 1216 (D. Wyo. 2008).

Petitioners' remaining efforts to show that FWS's analysis is arbitrary and capricious also fail. For instance, Petitioners argue that, had Wyoming been managing wolves in the past four years, no emergency status reviews would have been triggered; this, they contend, allegedly reflects the soundness of Wyoming's plan. Wyo. Br. at 54-56; 74 Fed. Reg. at 15186 (FWS's emergency status review triggers). Wyoming ignores that, regardless, FWS found a different trigger would be met, *i.e.*, that State management is unlikely to assure the Wyoming wolf population *never* falls below 10 breeding pairs and 100 wolves in the State. 74 Fed. Reg. at 15171; AR09_35338-39. As such, Petitioners' efforts to justify a regulatory regime that even

they contend barely exceeds triggers for “emergency” action simply reinforces the concerns FWS identified in the 2009 Rule and does not support their claims.

Petitioners also argue that the trophy game area contains “most” of the wolf’s suitable habitat and, in conjunction with the YNP wolves, “can” support 15 breeding pairs and 150 wolves in the State. Wyo. Br. at 25, 35, 41-43; Coalition at 9-10, 29, 32. Petitioners miss the point. The issue is not whether habitat in Wyoming “can” support a higher number of wolves in the State, but rather whether Wyoming’s regulatory scheme, if implemented, is likely to maintain a population above minimum recovery levels. Simply identifying the size and the amount of suitable habitat, and the potential ability to maintain at least 15 breeding pairs and 150 wolves in the State, neither addresses nor undermines FWS’s findings that Wyoming’s regulatory scheme is inadequate. *See* 74 Fed. Reg. at 15170-72.¹¹

Likewise, Petitioners err in relying on statements from FWS staff acknowledging that a dual-status approach does not necessarily prevent Wyoming from maintaining a recovered wolf population. Wyo. Br. at 27-33; Coalition Br. at 12, 16, 20. Since 2002, FWS has repeatedly emphasized that the adequacy of any dual-status approach depends on the size, permanence, and management within the trophy game area. *See, e.g.*, AR09_35343 (noting trophy game area “is barely good enough *only if wolf mortality in the trophy area is very conservative*” (emphasis added)); AR08_22299; AR06_15608; AR09_41519; *see also* Wyo. Br. at 6-7, 27-28, 30-31 (even statements identified by Petitioners show that FWS’s experts repeatedly stated the trophy game area must be permanent, sufficiently large, and adequately managed). As in the past, these

¹¹ Petitioners’ argument that Wyoming’s regulatory mechanisms allow for the maintenance of at least 15 breeding pairs and 150 wolves is at odds with the Petitions for Review, which directly ask the Court to order FWS (should the petitions be denied) “to manage the gray wolf population in Wyoming so that there are no more than 15 breeding pair of wolves in Wyoming each calendar year.” Petition for Review, Docket No. 1 at 6 (filed June 2, 2009). There is obviously no legal basis for Wyoming’s request, but it does highlight the inherent conflict in Wyoming’s position taken in this case.

factors remain important, and FWS rationally explained that the current predatory animal area, in conjunction with the size, potential diminishment of, and aggressive control within the trophy game area, is insufficient to maintain a biologically recovered wolf population. 74 Fed. Reg. at 15170-72. Thus, Petitioners simply disregard the context of FWS's past statements, and Petitioners' efforts to translate general statements that a dual-status approach can work into an endorsement of Wyoming's specific regulatory scheme do not have merit.

Nor does Petitioners' reliance on peer review statements made in the context of prior rulemakings demonstrate that Wyoming's current regulatory scheme is adequate to maintain a recovered wolf population. Wyo. Br. at 13-14, 33; Coalition Br. at 12. Contrary to Petitioners' claims (Wyo. Br. at 13; Coalition Br. at 12), many of the peer reviewers "disagreed with" and did not "endorse" Wyoming's plan, and those peer reviewers also raised biological concerns with Wyoming's management approach that are expressed in the 2009 Rule. *See* AR08_1160 (Hebblewhite) ("I see several problems with the Wyoming wolf management plan," including the failure to account for decreases in YNP population levels); AR08_645 (Cluff) (criticizing Wyoming's plan and explaining that "a management plan has to manage for a target above the minimum number acceptable because of contingencies beyond harvest mortality and what the State can effectively have control over"); AR08_648 (Meier) ("The proposed 'predatory animal' [designation] ... is likely to result in a seesaw of management as wolf numbers exceed, then fall below the management threshold The analysis makes a convincing case that the existing Wyoming management plan could result in the need for wolves to again be federally listed as they fell below recovery thresholds in the years after delisting"); AR08_654 (Adams) (FWS's findings that fluctuating between predatory animal and trophy game status are problematic were "a solid description of concerns with the Wyoming plan"); AR08_665 (Peek) ("I consider the

biological rationale for asking Wyoming to revise its wolf management plan, scattered across the draft, to be defensible and understandable”).

Further, the peer reviewers did not review Wyoming’s current law, its consistency with Wyoming’s regulations and plan, or, critically, FWS’s detailed scientific analysis in the 2009 Rule. *See* 74 Fed. Reg. 15138. Thus, the peer reviews cannot undermine or render FWS’s analysis in the 2009 Rule arbitrary and capricious. Moreover, the mere existence of dissenting opinions in the record – either the past opinions of peer reviewers or FWS staff – does not show that FWS’s specific and detailed analysis in the 2009 Rule arbitrary and capricious. The 2009 Rule reflects the scientific judgment and expertise of FWS and its expert staff, and Petitioners identify no statement by Mr. Bangs or other agency experts that disagree with or dispute the scientific conclusions *in the 2009 Rule*. In these circumstances, FWS has the discretion to “rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.” *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989); *Ecology Ctr. v. U.S. Forest Serv.*, 451 F.3d 1183, 1188-89 (10th Cir. 2006); *Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004) (same).¹²

Finally, Petitioners argue that FWS cannot consider the possibility that the trophy game area may be reduced in size in the future. *See* Wyo. Br. at 52-53. The ESA, however, requires FWS to independently assess “the inadequacy of existing regulatory mechanisms.” 16 U.S.C. §

¹² Petitioners’ contention (Wyo. Br. at 26-27) that the peer review policy (59 Fed. Reg. 34270 (July 1, 1994)) requires FWS to defer to the opinions expressed by peer reviewers also fails. The peer review policy does not create any substantive or procedural rights, *Building Indus. Ass’n of Superior California v. Babbitt*, 979 F.Supp. 893, 904-905 (D.D.C. 1997), and does not allow FWS to delegate decision-making responsibilities to outside parties, *High Country Citizens’ Alliance v. Norton*, 448 F.Supp.2d 1235, 1246 (D. Colo. 2006) (federal agency officials “may not subdelegate to outside entities-private or sovereign-absent affirmative evidence of authority to do so”). Indeed, Petitioners’ arguments are not even consistent with Wyoming’s position on this matter, as articulated in the record. *See* AR08_6182 (Wyoming stating that “the peer review requirement serves only to ‘second guess’ the states’ judgment and expertise” when employed in the context of reviewing the State’s decisions).

1533(a)(1)(D). Wyoming law is an existing regulatory mechanism and expressly provides that, once wolves are delisted, the trophy game area shall include a smaller area bounded by Forest Service lands, (*i.e.*, an area encompassing less than 12% of the State), and that the WGFC must annually set and diminish this smaller trophy game area as necessary to meet statutory objectives. WYO. STAT. ANN. §§ 23-1-101(a)(xii)(B)(I), 23-1-304(a). These statutory directives are an express and integral part of Wyoming's regulatory scheme and bear directly on how wolves are likely to be managed and protected under State law. 74 Fed. Reg. at 15170-72. In this way, Wyoming's law is not analogous to undeveloped "future actions" and other "speculative" measures, as Petitioners claim (Wyo. Br. at 53). *Federation of Fly Fishers v. Daley*, 131 F.Supp.2d 1158, 1161 (N.D. Cal. 2000). Thus, FWS did not err in considering Wyoming's law and how it provides for the management of gray wolves in the State.

C. Demographic And Genetic Connectivity.

1. FWS Reasonably Concluded That Wyoming's Regulatory Scheme Is Not Likely To Maintain Genetic Or Demographic Connectivity.

An integral component of FWS's recovery goal is the maintenance of an NRM metapopulation, or a population composed of partially isolated subpopulations. 74 Fed. Reg. at 15123. The metapopulation requirement provides for a population more resilient to area-specific disruptions than a single population in just one contiguous area. *Id.* at 15132-33; AR09_36976 (Fritts and Carbyn 1995); SAR09_121 (Mills 2007, p. 212-14). Maintaining a metapopulation also recognizes that either or both human-assisted or natural connectivity and genetic exchange between recovery units can occur and will assure that genetic diversity is maintained above levels that would threaten the NRM wolf population. 74 Fed. Reg. at 15131.

In the 2009 Rule, FWS concluded that demographic¹³ and genetic connectivity is not likely to be maintained under Wyoming's regulatory scheme, as the predatory animal area would effectively cut off all dispersal and interchange between central Idaho and Wyoming. 74 Fed. Reg. at 15170-71. The GYA is the most isolated population within the DPS. *Id.* at 15183; AR09_38165 (Oakleaf et al. 2006); AR09_41393 (vonHoldt et al. 2007). For the GYA population to be genetically and demographically viable, wolves "must be able to traverse large portions of it for extended periods of time, to survive long enough to find a mate in suitable habitat and reproduce." 74 Fed. Reg. at 15176. Although "exact migration corridors" between central Idaho and Wyoming are not known, the best available scientific data shows that wolves dispersing between central Idaho and Wyoming likely use Wyoming's predatory animal area. *Id.* at 15183.

Specifically, the available studies and modeling show two main dispersal corridors into Wyoming, one through the northwest corner of YNP, and the other near the southern Idaho border with Wyoming. *See* AR09_38170 (Oakleaf et al. 2006) (Figure 3); AR09_36327 (Boyd et al. 1995) (the "Rocky Mountain landscape provides a natural north-south travel and dispersal route for wolf movement between Jasper and Yellowstone national parks").¹⁴ FWS found that

¹³ "Demographic" factors generally relate to the age structure, sex ratio, reproduction, and other characteristics of a population. AR09_140 (Mills 2007, p. 251). Demographic connectivity, in addition to genetic connectivity, is important. *See, e.g.*, AR09_36305 (Boyd and Pletscher 1999) ("In social animals such as wolves, dispersal is an important mechanism for population regulation, genetic exchange, social organization, and colonization."); AR09_37657 (Jimenez et al. 2008d) ("Recruitment into the population occurs largely from immigration from neighboring populations").

¹⁴ Contrary to Petitioners' claim (Wyo. Br. at 38), FWS clearly did not "misrepresent" the Oakleaf et al. 2006 or Boyd et al. 1995 studies. Boyd et al. 1995 identifies characteristics of wolf dispersal, issues relevant to FWS's assessment of likely dispersal corridors in Wyoming. *See* AR09_36325; 74 Fed. Reg. at 15160, 15175, 15183 (discussing the study). Likewise, Oakleaf et al. 2006 identifies ten potential dispersal corridors, with the ninth corridor located squarely within the predatory animal area. *See* AR09_38170 (identifying ninth dispersal corridor near the

the migration route through YNP is unlikely to maintain connectivity with central Idaho, as wolves avoid resident packs and densely occupied areas like YNP. *See* AR09_35327; AR09_35347 (experts in YNP indicated “that there has been very little movement or use by wolves in the area within YNP that borders with Idaho”); AR09_36327 (Boyd et al 1995) (“In areas of established populations it is generally accepted that trespassing wolves are often harassed or killed by resident wolves.”).

Thus, FWS reasonably found that wolves dispersing into the GYA would likely disperse and temporarily live in the predatory animal area. *See* AR09_5235 (map of wolf packs in the predatory animal area); 74 Fed. Reg. at 15149, 15159; AR09_35327; AR09_11764 (explaining importance of the area south of YNP to the connectivity and the resiliency of the GYA population). These findings are supported by data and information indicating that peak dispersal occurs in late winter, AR09_5503; AR09_5468; AR09_36305 (Boitani 2003); AR09_37648, and that wolves typically disperse through valley bottoms and lower elevations where snow depths are the lowest and prey concentrations the highest (attributes of the predatory animal area), *see* 74 Fed. Reg. at 15137, 15176; AR09_35327; AR09_36327 (Boyd et al 1995); AR09_36313. Further, the State-operated elk feedgrounds in the predatory animal area attract and hold dispersing wolves, 74 Fed. Reg. at 15176, and actual data prove that wolves disperse through Wyoming’s predatory animal area, *see* AR09_35326; AR09_3098-3393 (three maps and a briefing paper describing evidence of wolves from Idaho traveling through the western part of Wyoming and within the predator area).

Accordingly, FWS had ample evidence supporting its findings that the Wyoming wolf population’s connectivity with central Idaho depends on the ability of wolves to traverse through

southern Idaho border); AR09_3099 (trophy game area boundary lies far north of the southern Idaho border).

and temporarily live in the predatory animal area. With no regulation of human-caused mortality in the predatory animal area, FWS rationally determined that dispersing wolves are unlikely to survive and successfully disperse between central Idaho and Wyoming. 74 Fed. Reg. at 15170; AR09_3101-02; AR09_35337 (the predatory animal area “forms an almost solid barrier that will prevent most, if not all, natural dispersal into the GYA from central Idaho.”); AR09_35342; AR09_5468; AR09_5495; AR08_22753 (“By having the Wyoming range as predatory animal we already greatly narrowed the ‘natural’ dispersal corridor to its biological minimum but then by hammering wolves on feedgrounds – it would stop any potential for immigration.”).

At bottom, FWS’s recovery criteria reflect the importance of maintaining a metapopulation structure in the NRM region, and these criteria are supported by the science. 74 Fed. Reg. at 15131-33; AR09_36305 (Boyd and Pletscher 1999); AR09_38173 (Oakleaf et al. 2006); AR09_36326-27 (Boyd et al. 1995) (“Biologists and managers must maintain refugia and habitat connectivity for wolf recovery to occur”). FWS reasonably determined that Wyoming’s regulatory scheme, namely the lack of regulation in the predatory animal area, is not likely to allow for the maintenance of a Wyoming population connected to the other NRM populations, thereby threatening the existing NRM metapopulation structure. FWS’s findings in this regard are supported by the record and are due deference.

2. Petitioners’ Arguments Regarding The Scientific Issues Lack Merit.

Petitioners’ argument that the demographic and genetic connectivity of the three NRM subpopulations will be maintained under State management is unavailing. *See* Wyo. Br. at 36-37. Other than citing wolf pack locations, Petitioners provide no record support for their unequivocal claim that “having a predator classification for wolves” in 88% of Wyoming “absolutely will not limit wolf movements between the three states.” Wyo. Br. at 37. These litigation statements do not demonstrate that FWS’s extensive analysis of the issue is arbitrary

and capricious or otherwise unlawful. *See United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1245 (9th Cir. 2005) (“[W]e will not delve further to second-guess the underlying data absent a showing of specific evidence that the [agency’s] conclusions were not warranted.”).

Nor do Petitioners’ criticisms of FWS’s analysis have merit. For example, Petitioners argue that FWS has “no idea where the existing wolf migration corridors’ are located.” Wyo. Br. at 38. FWS’s statement that it does not know “exact” dispersal corridors, 74 Fed. Reg. at 15183, hardly equates to the situation of having no information or data bearing on the issue. *See supra*, at 28-31. Further, Petitioners’ implication that FWS cannot utilize its expertise in the absence of conclusive data finds no support in the law. *See Ethyl Corp. v. EPA*, 541 F.2d 1, 37-38 (D.C. Cir. 1976) (“[W]e need not seek a single dispositive study that fully supports the [agency’s] determination. Science does not work that way; nor, for that matter, does adjudicatory fact-finding. Rather, the [agency’s] decision may be fully supportable if it is based, as it is, on the inconclusive but suggestive results of numerous studies.”); *Colorado Env’t Coal. v. Dombeck*, 185 F.3d 1162, 1176 (10th Cir. 1999) (“Our job is not to question the wisdom of the [agency’s] ultimate decision or its conclusion concerning the magnitude of [environmental] impacts.”).

Petitioners also seek to undermine the 2009 Rule by relying on FWS’s findings that the DPS will remain genetically viable in the future. For instance, Petitioners argue that the three NRM subpopulations are connected, the genetic variability of the DPS is high, and FWS concluded these attributes will be maintained in the future. *See, e.g.*, Coalition Br. at 25, 29, 37-38, 42-43. FWS did make these findings, but in the context of documenting current conditions in the NRM and in explaining that Federal protections in Wyoming, combined with State management in Idaho and Montana, will provide for connectivity and the maintenance of the genetic fitness of the NRM DPS. *See, e.g.*, 74 Fed. Reg. at 15161 (“*At present*, all three recovery areas appear sufficiently connected.” (emphasis added)); *id.* at 15177 (explaining that “[p]ost-

delisting” and *under Federal management*, the “GYA population will be managed for more than 300 wolves Maintenance at such levels, combined with expected levels of gene flow, indicates genetic diversity will not threaten this wolf population”). These findings certainly do not translate to the likely status of the DPS under Wyoming’s proposed management, as FWS explained at length in the rule. *Id.* at 15170-72, 15184 (“wolf populations in Wyoming continue to face high magnitude of threats that would materialize imminently in the absence of the Act’s protections because of a lack of effective regulatory mechanisms in the State.”).

Similarly, Petitioners’ argument (Wyo. Br. at 36-37) that “natural” connectivity is not required misunderstands FWS’s recovery criteria. FWS has long held that maintaining a NRM metapopulation (*i.e.*, three partially connected subpopulations) is required to achieve and maintain recovery. *See* 74 Fed. Reg. at 15130-32. Wyoming hardly disputes that the predatory animal area cuts off the potential for connectivity, whether natural or managed. *See supra*, at 28-31; *see* 74 Fed. Reg. at 15149, 15165 (explaining that the WGFD cannot devise a management strategy, regulate harvest, or otherwise ensure that the NRM recovery goal is met in over 88% of the State). Wyoming also is the only State that would not agree to monitor the genetic health of the population, encourage dispersal and effective migrants, and implement management practices that foster exchange and connectivity. 74 Fed. Reg. at 15135; AR09_37222 (Groen et al. 2008) (genetics memorandum of understanding (MOU)); AR09_35323 (Wyoming characterizing the genetics MOU as “meaningless”). Thus, while natural connectivity is not required, maintenance of a metapopulation is, and FWS rationally determined that Wyoming’s regulatory scheme provides inadequate assurances that the genetic and demographic health of the Wyoming population will be maintained should the ESA’s protections be removed.

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D. FWS Provided A Reasoned Explanation For Its Decision, and FWS's Decision Is Entitled to Deference.

Wyoming's regulatory framework must "safely support[] [Wyoming's] share of a recovered wolf population and allow[] for adequate genetic and demographic connectivity into the future and incorporate[] normal wildlife population fluctuations, such as those that appear to have occurred in YNP in 2008." 74 Fed. Reg. at 15150. As demonstrated above, FWS evaluated all relevant factors and reasonably concluded that Wyoming's regulatory mechanisms do not meet these standards and are not adequate under the ESA. *Id.* at 15170-72. Because FWS is operating within its area of scientific expertise, its determinations in regard to the adequacy of Wyoming's regulatory framework are entitled to a high degree of deference. *Baltimore Gas & Elec. Co. v. Natural Res. Council*, 462 U.S. 87, 103 (1983) (deference is highest when the agency is "making predictions, within its area of special expertise, at the frontiers of science"); *Environmental Def. Fund v. U.S. Nuclear Regulatory Comm'n*, 902 F.2d 785, 789 (10th Cir. 1990) (where an agency is making "a technical judgment within its area of special expertise . . . a reviewing court must generally be at its most deferential" (internal quotations omitted)).

Petitioners rely on *Federal Communications Comm'n v. Fox Television Stations*, 129 S.Ct. 1800 (2009), to argue that the 2009 Rule is subject to "heightened scrutiny" because it is allegedly inconsistent with FWS's approval of Wyoming's plan in 2008. Wyo. Br. at 22-23; Coalition Br. at 17. The Supreme Court, however, expressly held that an agency rule is *not* subject to any "heightened" review because it may conflict with past agency decisions. *Fox Television*, 129 S.Ct. at 1810 ("We find no basis in the [APA] or in our opinions for a requirement that all agency change be subject to more searching review."). Rather, the Court held that an agency must provide a "reasoned explanation" for its action and, where necessary, "display awareness that it is changing position." *Id.* at 1811. This reasoned explanation is provided "so that the reviewing court may understand the basis for the agency's action and so

may judge the consistency of that action with the agency's mandate." *Id.* at n.2 (quotations omitted). In contrast, the APA does not "demand explanation sufficient to enable [the court] to weigh (by its own light) the merits of the agency's change." *Id.*

FWS plainly issued a thorough and reasoned explanation for its finding that Wyoming's regulatory mechanisms are inadequate, as demonstrated above. FWS also provided this reasoned explanation in full "awareness" and consideration of its 2008 approval of Wyoming's plan. FWS explained that it had approved Wyoming's 2007 plan because the trophy game area included 70% of the State's suitable wolf habitat and was "presumed large enough to support Wyoming's share of a recovered wolf population." 74 Fed. Reg. at 15170. FWS explained, however, that subsequent events (such as Wyoming's issuance of the March 13, 2008 regulations and the Montana court's preliminary injunction order) led to the reassessment of Wyoming's laws, regulations, and management plan. *Id.* This reevaluation identified numerous shortcomings in Wyoming's regulatory regime, for instance, the effects of State law on the WGFD's ability to adaptively manage wolves to meet minimum recovery goals, as well as the effects of the predatory animal area on maintaining a wolf population above recovery levels and on maintaining connectivity with other NRM populations. *Id.*¹⁵ Contrary to Petitioners' claims, FWS cannot simply rest on prior analysis that it knows to be inadequate, and Petitioners' efforts to prevent FWS from re-evaluating past decisions should be rejected. *See National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658-59 (2007) ("[T]he only

¹⁵ For these reasons, Petitioners' claim (Wyo. Br. at 23-25) that Wyoming's current regulatory regime is consistent with past agency recommendations, such as those in FWS's 2007 proposed rule (72 Fed. Reg. 6106), is not correct. FWS determined that the trophy game area is not "large enough to adequately support the wolf population levels required for Wyoming" and that Wyoming's regulatory regime neither "acknowledges that the State would manage for 15 breeding pairs in mid-winter" nor provides assurances that the wolf population never falls below "a minimum of 10 breeding pairs and 100 wolves" in the State. 72 Fed. Reg. at 6131; *see* 74 Fed. Reg. at 15170-72.

‘inconsistency’ respondents can point to is the fact that the agencies changed their minds - something that, as long as the proper procedures were followed, they were fully entitled to do.”).

Nor is FWS precluded from further assessing the adequacy of Wyoming’s regulatory framework because the 2008 management plan was based, in part, on FWS’s comments. Wyo. Br. at 23. In providing comments on Wyoming’s management plan, FWS explained that the comments were “a very quick effort at modifying the original Wyoming Wolf Management Plan.” See AR08_11832. Subsequently, FWS evaluated Wyoming’s laws, regulations, and plan, and FWS determined that this regulatory scheme is inadequate due to deficiencies in State law that cannot be cured by regulations or a management plan. 74 Fed. Reg. at 15170-71. FWS is not barred from further assessing or reevaluating the adequacy of Wyoming’s regulatory framework because it provided comments to Wyoming during the administrative process. *Cf. Wyoming v. U.S. Dep’t of the Interior*, 360 F.Supp.2d 1214, 1230 (D. Wyo. 2005). Accordingly, Petitioners’ assertion that it was sufficient to accept preliminary comments by FWS, and that FWS failed to provide a reasoned explanation for its decision, do not withstand scrutiny.

II. PETITIONERS’ REMAINING CHALLENGES TO FWS’S 2009 RULE ARE UNAVAILING.

A. FWS’s Guidance Does Not Render The 2009 Rule Arbitrary And Capricious.

In their briefs, Petitioners have largely ignored FWS’s analysis and its explanation as to why Wyoming’s current regulatory framework is inadequate. Instead, Petitioners extensively focus on past agency statements, peer reviews of past rulemakings, and, as relevant here, FWS’s guidance to Wyoming on ways that it can address the deficiencies FWS identified in Wyoming’s current regulatory framework. See, e.g., Wyo. Br. at 2, 20-21, 26-48, 57-58; Coalition Br. at 24, 39-40. As explained below, Petitioners’ efforts to challenge FWS’s guidance as a means of invalidating the 2009 Rule do not have merit.

In the 2009 Rule, FWS first summarized and explained why Wyoming's current regulatory scheme is inadequate, and FWS then offered its view of what Wyoming could do (*i.e.*, "develop a statewide trophy game management designation") to address some of these deficiencies. 74 Fed. Reg. at 15149. FWS had good reasons for issuing this guidance, as the removal of ESA protections in Wyoming will require altering the prevailing regulatory framework, and that effort (if it is to occur) will benefit from FWS's issuance of guidance. *See Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1070, 1073-75 (9th Cir. 1996) (characterizing FWS's informal advice on complying with the ESA as a "desirable communication" that should not be "stifled"). Although FWS offered guidance to Wyoming, it was clear that further efforts and further analysis must occur prior to removing ESA protections in Wyoming. *See* 74 Fed. Reg. at 15172 ("Until Wyoming revises their statutes, management plan, and associated regulations, and is approved, wolves in Wyoming remain listed."); AR09_37220 (Gould 2009).

Contrary to Petitioners' claims, the fact that FWS's guidance is reflective of the deficiencies found in Wyoming's regulatory framework does not mean that the guidance constituted the basis for FWS's findings. *See* 74 Fed. Reg. at 15170-72 (nowhere in FWS's analysis of Wyoming's existing regulatory mechanisms did it conclude that the regulatory mechanisms are inadequate because Wyoming has not adopted a state-wide trophy game area). Accordingly, whether FWS's guidance has merit or should be adopted is immaterial to the issues before the Court, as FWS's guidance has not been adopted, FWS has not rejected a plan adopting this guidance, the guidance is not binding on either FWS or Wyoming, and, most importantly, the guidance did not constitute the basis for FWS's determination that Wyoming's *current* regulatory mechanisms are inadequate. *See* 74 Fed. Reg. at 15170-72; *supra* at 17-23, 28-31.

To the extent the guidance is relevant, the guidance is appropriately reflective of the deficiencies identified in Wyoming's existing regulatory regime. *See Center for Auto Safety v.*

Federal Highway Admin., 956 F.2d 309, 313 (D.C. Cir. 1992) (because a preamble statement “can have no *independent* legal effect, it is relevant only insofar as it suggests a reasonable interpretation of *existing* regulations”). For example, FWS determined that the lack of regulation or protections in the predatory animal area, in conjunction with its potential expansion, are not adequate to maintain a population above recovery levels in the trophy game area or provide for connectivity with the other NRM populations. 74 Fed. Reg. at 15170-72. FWS’s recommendation that Wyoming adopt a state-wide trophy game area bears on this issue, as a state-wide trophy game area would allow the WGFD to adaptively manage wolf populations throughout their range. *Id.* at 15149; AR09_7358; AR06_15931; AR08_11769; AR09_5235 (maps illustrating packs with all or part of their range outside the trophy game area).

Similarly, due to Wyoming’s reliance on YNP to maintain a specific number of breeding pairs, FWS recommended an additional “7 breeding pair and 70 wolf” standard applicable to areas under Wyoming’s jurisdiction. 74 Fed. Reg. at 15172. This additional standard, if adopted, would facilitate the maintenance of both minimum population levels and the full spectrum of biologically important components in wolf populations (*i.e.*, breeding pairs, packs, and individual wolves). *Id.* The guidance also appropriately reflects Wyoming’s unsupported reliance on YNP to maintain over eight breeding pairs. *See id.* at 15171. Contrary to Petitioners’ claims (Wyo. Br. at 33-35, 57), this guidance did not constitute some “higher” standard that FWS purportedly relied on to conclude that Wyoming’s current regulatory mechanisms are inadequate. *See* 74 Fed. Reg. at 15171 (“We have long maintained that Wyoming, Montana, and Idaho must each manage for at least 15 breeding pairs and at least 150 wolves in mid-winter to ensure the population never falls below the minimum recovery goal of 10 breeding pairs and 100 wolves per State. As demonstrated here, *Wyoming State law does not satisfy this standard.*” (emphasis added)).

Accordingly, Petitioners' efforts to challenge the merits of FWS's guidance, while at the same time disregarding the basis for FWS's determination that the current regulatory mechanisms are inadequate, are unavailing. FWS appropriately analyzed and explained why Wyoming's current regulatory scheme is inadequate in light of its effects on the biological status of wolves, and its analysis is sound. 74 Fed. Reg. at 15170-72.

B. FWS Appropriately Considered Wyoming's Chapter 21 Regulations.

Petitioners assert that Wyoming's Chapter 21 regulations and 2008 Plan cure any deficiencies in their regulatory framework and that FWS failed to "evaluate the Chapter 21 emergency rule on its merits." Wyo. Br. at 21, 24-25, 48. However, as Petitioners note (Wyo. Br. at 48-56), FWS did assess the merits of the Chapter 21 regulations, and FWS's analysis in this regard is reasoned and supported by the record.

First, FWS appropriately explained that the emergency regulations were temporary and contingent on future action, two factors that plainly relate to whether an existing regulatory mechanism is adequate. 74 Fed. Reg. at 15171-72. Second, and "[m]ost importantly, these regulatory improvements do not address the legislative shortcomings" FWS identified and evaluated in the 2009 Rule. *Id.* at 15172. For example, FWS explained that Wyoming's 2008 plan and chapter 21 regulations commit to maintaining connectivity, but that the predatory animal area and other aspects of State law preclude this commitment from becoming a reality. *See supra*, at 28-31, 33 (explaining the inability of the WGFD to maintain connectivity with neighboring populations under State law); AR09_35342 (statements that "the Commission will do everything it can to facilitate natural dispersal is factual but very misleading since they really can't do anything in the predator area"). Additionally, while the Chapter 21 regulations seek to identify a larger trophy game area, *see* AR09_36917 (identifying the trophy game area established to obtain delisting), State law dictates that the trophy game area shall be immediately

reduced in size “[f]rom and after the date gray wolves are removed from” the ESA’s protections, *see* WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I).¹⁶ Contrary to Petitioners’ claim (Wyo. Br. at 50), FWS appropriately identified the conflicts and inconsistencies between Wyoming law and the Chapter 21 regulations and the 2008 plan.

Further, as the Wyoming Governor noted, “the Wyoming Game and Fish Commission has only those powers granted by the Legislature.” AR08_22159. As such, FWS appropriately reviewed and considered “[t]he very specific and deliberate intent, tone, and wording of Wyoming law” to assess how wolves are likely to be managed and protected in the State. 74 Fed. Reg. at 15149. In other words, FWS cannot rationally presume that the WGFD and the WGFC will take action inconsistent with State law. *Id.*; AR08_22166 (Wyoming Governor conceding that “the provisions of HB 213 provide the outer boundaries for wolf management in Wyoming – nothing in a wolf rule legally could or practically would be adopted *to augment or reduce* the regulatory bundle of sticks that are clearly promised in HB 213” (emphasis added)).

Nor, as Petitioners contend, can FWS ignore State law or simply defer to Wyoming’s comments as to why State law is sufficiently protective of gray wolves. *See* Wyo. Br. at 50-51. “The plain language of the statute instructs the agency to consider ‘existing regulatory mechanisms,’ 16 U.S.C. § 1533(a)(1)(D), including mechanisms created by other agencies of government.” *Biodiversity Legal Found. v. Babbitt*, 943 F.Supp. 23, 26 (D.D.C. 1996). Further, the plain language of the ESA expressly affords FWS with the discretion to disagree and issue regulations inconsistent with the “comments or petition” of a State. *See* 16 U.S.C. § 1533(i).

¹⁶ *See also* WYO. STAT. ANN. § 23-1-304(n) (directing the issuance of lethal take permits “as long as there are seven [] breeding pairs” located primarily outside of the National Parks, and providing the suspension or cancellation of permits only if “further control could cause relisting”); *but see* AR09_36920 (Chapter 21 regulations, § 8(a), purporting to insert additional requirements into the ability to issue, suspend, or cancel lethal take permits); AR09_41804 (2008 Plan) (stating that the WGFD “could issue” lethal take permits if livestock depredation is experienced).

Thus, Congress expressly required FWS to independently assess Wyoming's regulatory mechanisms and did not mandate or prescribe that FWS must merely defer to a State on issues considered, evaluated, and reviewed under ESA § 4. *Id.* Thus, FWS appropriately reviewed Wyoming's law, as well as the consistency between the law and Wyoming's regulations and plan, and Petitioners' efforts to divest FWS of the discretion afforded to it in the ESA should be rejected.

C. FWS Did Not Rely On Improper Factors In Issuing The 2009 Rule.

Finally, Petitioners spend a great deal of time selectively citing agency statements to argue that "non-biological factors" influenced FWS's decision in the 2009 Rule. *Wyo. Br.* at 43-48. All of the referenced statements, however, were made in the context of past decisions, such as FWS's 2004 letter. *See id.* at 44-47 (arguing that the "foregoing evidence confirms that non-biological factors contributed to Director Williams' 2004 decision"). Although Petitioners assert that the 2009 Rule "necessarily must have the same basis" as FWS's 2004 letter, they disregard the stated basis for FWS's decision (74 Fed. Reg. at 15170-72) and identify no evidence in the extensive record that FWS actually relied on improper factors here. Thus, Wyoming's discourse on the factors that allegedly influenced FWS's 2004 letter is not relevant to FWS's findings in the 2009 Rule that Wyoming's current regulatory scheme is inadequate.

Even if the basis for FWS's 2004 letter is somehow relevant, Petitioners' claims would still fail. Petitioners pick out scattered statements by FWS personnel regarding the likely public reaction to Wyoming's management plan but do not point to anything in the 2004 letter indicating that these concerns drove the decision not to propose delisting at the time. *Wyo. Br.* at 44-47. Nor could they, as the 2004 letter is clear that FWS's reasons for not accepting Wyoming's plan had to do with the substance of Wyoming's approach. AR09_41519 (pointing out that "the unregulated harvest, inadequate monitoring plan, and unit boundaries proposed by

the state's management plan do not provide sufficient management controls to assure the Service that the wolf population will remain above recovery levels,” as well as the fact that the plan failed to clearly commit to managing for at least 15 packs and failed to adopt a definition of “pack” that was biologically sound). Thus, the 2004 letter is not based on “improper” factors that can somehow invalidate all subsequent FWS actions.

Finally, the “best scientific and commercial data available” mandate does not bar FWS from considering human tolerance and public attitudes, as Petitioners contend. *See* Wyo. Br. at 46-47; Coalition Br. at 12-13, 40-41. Public attitudes and human tolerance led to the excessive human-caused mortality that extirpated the species from the NRM region by the 1930s, showing that these factors have serious biological consequences for wolves. 74 Fed. Reg. at 15175; AR09_37982 (Mech 1995); AR09_37037 (Fritts et al. 2003). Further, “[t]he ESA's listing and delisting factors include considerations of manmade factors affecting the species' continued existence and overutilization,” and human factors are relevant and valid considerations under the ESA. *See Fund for Animals v. Babbitt*, 903 F.Supp. 96, 110 n.4 (D.D.C. 1995). Accordingly, FWS appropriately required “adequate regulatory mechanisms to be in place that will balance negative attitudes toward wolves in the places necessary for recovery,” and FWS rationally explained that these factors are not reflected in Wyoming's regulatory scheme. 74 Fed. Reg. at 15175; AR09_41822 (Wyoming 2008) (comparison of the Idaho, Montana, and Wyoming plans, with Wyoming's plan the only one that limits population and distribution of wolves in the State).

III. REMEDY

Based on the foregoing and the record, FWS's 2009 Rule complies with the ESA and the APA and should be upheld. However, should the Court grant Petitioners' motion in whole or in part, the appropriate remedy would be to “hold unlawful and set aside” the agency action. 5 U.S.C. § 706; *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) (the “function

of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration”); *South Prairie Constr. Co. v. Local No. 627*, 425 U.S. 800, 803-804 (1976). By contrast, Petitioners’ request that the Court dictate the results of future actions (*i.e.*, to order the delisting of wolves or how wolves are to be managed in Wyoming) is improper and would be contrary to law. *See National Tank Truck Carriers v. EPA*, 907 F.2d 177, 185 (D.C. Cir. 1990) (“We will not, indeed we cannot, dictate to the agency what course it must ultimately take ... that choice is the agency's and not ours.” (internal citations omitted)); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 66-67 (2004) (courts should not assume a supervisory role in agency action and inject themselves into day-to-day agency management).

CONCLUSION

For the reasons stated above, Federal Respondents respectfully request that the Petitions for Review be dismissed and that the Court enter judgment on behalf of Federal Respondents.

Respectfully submitted this 14th day of December, 2009.

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