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ATTORNEYS FOR WYOMING WOLF COALITION - Petitioner-Intervenors

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING,	)	
	)	CIVIL NO. 09-CV-118-J
Petitioner;	)	
	)	
WYOMING WOLF COALITION,	)	
	)	
Petitioner-Intervenors,	)	
	)	
vs.	)	<b>Wolf Coalition’s Opening</b>
	)	<b>Brief for Declaratory</b>
UNITED STATES DEPARTMENT	)	<b>Judgment and Injunctive</b>
OF THE INTERIOR; UNITED STATES	)	<b>Relief - Related to</b>
FISH & WILDLIFE SERVICE; KEN	)	<b>Respondents’ Refusal</b>
SALAZAR, in his official capacity	)	<b>to Delist the Gray Wolf</b>
as Secretary of the United States Department	)	<b>in Wyoming</b>
of the Interior; ROWAN GOULD, in his official	)	
capacity as Acting Director of the United States Fish	)	
and Wildlife Service, and STEPHEN GUERTIN,	)	
in his official capacity as the Regional Director of	)	
the Mountain-Prairie Region of the United States	)	
Fish and Wildlife Service,	)	
	)	
Respondents.	)	

BOARD OF COUNTY COMMISSIONERS OF )  
THE COUNTY OF PARK, STATE OF WYOMING, )

Petitioners, )

vs. )

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

Respondents. )

CIVIL NO. 09-CV-0138-J

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**WOLF COALITION’S OPENING BRIEF FOR DECLARATORY  
JUDGMENT AND INJUNCTIVE RELIEF – RELATED TO RESPONDENTS’ REFUSAL  
TO DELIST THE GRAY WOLF IN WYOMING**

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## INTRODUCTION

The best scientific and commercial data available demonstrate that Wyoming's Wolf Management Plan and underlying statutory scheme support the recovery goals established for the Gray Wolf (*Canis Lupis*) in Wyoming. The decision of the United States District Court for the District of Montana and the subsequent "flip flop" by the United States Fish and Wildlife Service (USFWS) represent politics at its worst, as well a complete and total rejection of the only valid "science" that has been generated on the subject. There is nothing in the updated and cumulative Administrative Record that undermines or otherwise warrants a departure from delisting the gray wolf population in Wyoming, and it is unlawful for the USFWS to "change its mind" based upon political influences rather than scientific evidence.

It is important for the Court to understand the historical and legal framework of the current dispute. In July, 2005, the State of Wyoming filed a Petition requesting the USFWS to delist the gray wolf population pursuant to the provisions of the Endangered Species Act, 16 U.S.C. §§ 1531 et seq. (ESA). The USFWS rejected Wyoming's Petition on August 1, 2006, and the State filed suit on October 10, 2006. The Wolf Coalition intervened in the 2006 lawsuit, and enjoyed full party status. That action was eventually resolved, with the Wyoming Legislature adopting certain amendments to the State's wolf statutes in 2007, and the State's Management Plan being revised accordingly.

On November 16, 2007, the USFWS approved the 2007 Wyoming Management Plan (attached as Exhibit A), finding that "if implemented, [the plan] would provide adequate regulatory protections to conserve Wyoming's portion of the recovered NRM wolf population into the foreseeable future." 2009 Final Rule at 15170 (attached as Exhibit B). On February 27, 2008, the Respondents issued a Final Rule (2008 Final Rule) removing the Northern Rocky Mountain (NRM) gray wolf Distinct Population Segment (DPS) from the



List of Endangered and Threatened Species.

On April 28, 2008, several environmental groups filed suit in Montana challenging the identification and delisting of the NRM DPS. In May 2008, the USFWS filed a brief and supporting affidavits in the Montana District Court wherein it robustly defended its decision to delist the gray wolf in Wyoming. On July 18, 2008, the Montana Judge issued a preliminary injunction enjoining the USFWS from implementing the 2008 Final Rule. The USFWS, in what appears to have been a pre-arranged capitulation, refused to defend its 2008 Final Rule, Wyoming's statutory provisions or the Wyoming Management Plan and instead, on September 22, 2008, requested the Montana Court to vacate and remand the Rule.

In an effort to address the Montana Court's concerns, Wyoming made additional changes to the 2007 Plan and issued a revised document on November 18, 2008. Those changes provide even greater protections to the gray wolf population.

On April 2, 2009, the USFWS issued a new Final Rule to Identify a Separate Northern Rocky Mountain Population of Gray Wolves as a Distinct Population Segment and to Revise the List of Endangered and Threatened Wildlife (2009 Final Rule), which is the subject of this current lawsuit. The 2009 Final Rule is a complete reversal of the USFWS's previous findings and the 2008 Rule with respect to Wyoming:

[W]e, the U.S. Fish and Wildlife Service (Service), identify a distinct population segment (DPS) of the gray wolf (*Canis Lupis*) in the Northern Rocky Mountains (NRM) of the United States and revise the List of Endangered and Threatened Wildlife by removing gray wolves within NRM DPS boundaries, *except in Wyoming*.

2009 Final Rule at 15123 (emphasis added). The USFWS's 2009 Final Rule rejected not only Wyoming's 2007 Plan, but the revisions that were made and adopted by Wyoming in November, 2008.

The State filed the current lawsuit on June 2, 2009 and on July 8, 2009, this Court

granted leave for the Wolf Coalition to intervene. The USFWS refused to delist the gray wolf in Wyoming despite acknowledging that Wyoming has continuously exceeded its recovery goals:

*Our current estimate for 2008 indicates the NRM DPS contains approximately 1,639 wolves (491 in Montana; 846 in Idaho; 302 in Wyoming) in 95 breeding pairs (34 in Montana; 39 in Idaho; 22 in Wyoming). These numbers are about 5 times higher than the minimum population recovery goal and 3 times higher than the minimum breeding pair recovery goal. The end of 2008 will mark the ninth consecutive year the population has exceeded our numeric and distributional recovery goals.*

*Id.* (emphasis added).

The Administrative Record in this matter overwhelmingly and undisputably proves that Wyoming has not only met, but exceeded its recovery goals, and has met every other delisting criteria that has been established. In 2008, the USFWS approved Wyoming's 2007 Wolf Management Plan, delisted the wolf in Wyoming and subsequently argued vigorously in support of the Plan. Yet in 2009, the USFWS - in what is an obviously politically inspired U-turn - changed the rules of the game and carved out Wyoming from the delisting decision. There simply is no science, old or new, supporting the USFWS's change of heart. The Wyoming Plan now, just as it did in 2008, passes scientific scrutiny. The wolves remain at or above recovery levels, Wyoming's Plan protects them in the long term, and delisting is warranted.

By refusing to delist the wolf in Wyoming, the Respondents have damaged the interests of the Wolf Coalition members and have violated the ESA. The Wolf Coalition members have standing in the current action, pursuant to 16 U.S.C. §§ 1540(g)(1)(A) and (C), to challenge the Respondents' failure to comply with the ESA.

## STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), § 1361 (action to compel an officer of the United States to perform his duty), § 2201 (declaratory relief), §2202 (injunctive relief), and § 1346 (United States as a defendant). This Court also has jurisdiction pursuant to 16 U.S.C. § 1540(g) (citizen-suit provision of the ESA). Judicial review is sought pursuant to the Administrative Procedures Act (APA), and 5 U.S.C. §§ 701-706 (APA right of review). “Section 701 of the APA provides that agency action is subject to judicial review except where there is a statutory prohibition on review or where agency action is committed to agency discretion as a matter of law.” *Olenhouse v. Commodity Credit Corporation*, 42 F.2d 1560, 1572 (10<sup>th</sup> Cir., 1994).

### I. Description of the Wolf Coalition

The Wolf Coalition is made up of associations, private entities, and political subdivisions of the State of Wyoming that represent the livestock industry; Conservation Districts; County Commissioners; predatory animal boards; the outfitting and guiding industry; and sportsmen groups. The Wolf Coalition members have a direct, individualized and substantial interest in the subject matter of the above-captioned matter, including in the recovery and management of the gray wolf population in the Yellowstone Recovery Area (YRA) and throughout the State. The Wolf Coalition members have suffered injury, and will continue to suffer injury, as a result of the Federal Respondents’ unlawful decision refusing to delist the gray wolf in Wyoming.

### II. Final Agency Action

“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of relevant a statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. To meet the statutory requirements for judicial review

under the APA, the challenged agency action must be “final.” *Colorado Farm Bureau Federation v. United States Forest Service*, 220 F.3d 1171, 1173 (10<sup>th</sup> Cir. 2000). An agency action is “final” if the impact of the action is direct and immediate, the action marks the consummation of the agency’s decision-making process, and the action is one by which rights or obligations have been determined or from which legal consequences will flow. *Bennett v. Spear*, 520 U.S. 154, 178, 117 S.Ct. 1154, 1168, 137 L.Ed.2d 281 (1997); *see also Gordon v. Norton*, 322 F.3d 1213, 1220 (10<sup>th</sup> Cir. 2003).

The Respondents’ 2009 Final Rule represents “final agency action” subject to judicial review.

#### **STATEMENT OF THE ISSUES**

The Wolf Coalition hereby adopts by reference the State of Wyoming’s Statement of Issues.

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

This action is brought pursuant to the Tenth Circuit’s Decision in *Olenhouse v. Commodity Credit Corporation*, *supra* at 42 F.3d 1560. The Wolf Coalition hereby adopts by reference the State of Wyoming’s Statement of the Case.

#### **BACKGROUND AND STATEMENT OF FACTS**

##### **I. History of Canadian Gray Wolf Introduction and Recovery Goals**

The USFWS has chosen to ignore the history that has led the parties to this point in time. Because that history provides the critical factual and legal frame-work within which the current dispute must be judged, however, it is important that we revisit what has already transpired.

In 1987, the USFWS published its Northern Rocky Mountain Wolf Recovery Plan (Recovery Plan), in order to outline steps for the “recovery” of the non-native Canadian gray

wolf population in the Northern Rocky Mountains of the United States. Recovery Plan at iv; 2004AR at 899.<sup>1</sup> “The three recovery areas identified for the Northern Rocky Mountain wolf include northwest Montana, central Idaho, and the Greater Yellowstone Area” (GYA), which was defined as Yellowstone National Park (YNP), designated wilderness areas (Absaroka-Beartooth, north Absaroka, Washakie, Teton), and adjacent public lands. *Id.* at 22; 2004AR at 900, 924

In an attempt to gain critical public support, the USFWS identified three management zones in order to minimize wolf-human/livestock conflicts and to protect other wildlife species (elk, moose, wild sheep), while allowing for wolf “recovery” within the geographic confines of the YRA.

“Zone I” contained “key habitat components in sufficient abundance and distribution on an annual basis to sustain ten breeding pairs of wolves. It should generally be an area greater than 3,000 contiguous square miles with less than 10% private land (excepting railroad grant lands) and less than 20% subject to livestock grazing.” *Id.* at 31; 2004AR at 933. “Zone II” was established as a “buffer” zone between Zone I and Zone III: “It should contain some key habitat components but probably not in sufficient abundance and distribution on an annual basis to sustain a viable wolf population. Zone II boundaries may be changed according to demonstrated wolf population and habitat needs, provided the change does not bring wolves into conflict with existing livestock areas/allotments.” *Id.* Zone III was defined as “undesirable” for wolf presence: “this zone contains established

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<sup>1</sup> The Administrative Record is cumulative, and includes all of the materials compiled and produced by the USFWS in the previous lawsuits described above. For ease of reference, those documents from the Administrative Records will be designated using the year of production, such as “AR2009” and “AR2004” along with the page number. Citations to the various Final Rules will also be by use of the year (e.g., “2009 Final Rule”) followed by the appropriate page number

human activities such as domestic livestock use or other human activities or developments in sufficient degree to render wolf presence undesirable.” *Id.*

The USFWS defined wolf population viability and recovery as thirty breeding pairs of wolves (defined as an adult male and an adult female that raise at least 2 pups until December 31 of the year of their birth), comprising some +300 individuals in a metapopulation with some genetic exchanges between subpopulations, for three successive years. 2009 Final Rule at 15130-15131.

The USFWS designated the YNP as one of three recovery areas because it was under Federal jurisdiction, it had high-quality wolf habitat and good potential release sites, and it was far from the natural expansion of wolf packs from Montana. *See* 1994 Final Rule for the Establishment of a Nonessential Experimental Population of Gray Wolves at 60254, (attached as Exhibit C). In its February 8, 2006 Advanced Notice of Proposed Rulemaking (2006 ANPR), 71 Fed.Reg. 6634; AR2006 17735-17762, the USFWS identified the “suitable habitat” within the NRM:

Suitable wolf habitat in the [Northern Rocky Mountain] wolf DPS is typically characterized by public land, mountainous forested habitat, abundant year-round wild ungulate populations, lower road density, lower number of domestic livestock that were only present seasonally, few domestic sheep, low agricultural use, and low human populations.

*Id.* at 6642; AR2006 17744. The area in which wolves are designated as “trophy game animals” under the both the 2007 and 2008 Wyoming Plans meets this definition of “suitable habitat.” 2007 Plan at 3-5; 2008 Plan at 3-5, AR2009 035280-035282. The area in which the wolves are designated as “predators” is not. *Id.*

In 1995 and 1996 the USFWS released a total of thirty-one (31) western Canadian gray wolves into YNP. 2007 Plan at 9; 2008 Plan at 10, AR2009-035287. The wolves in all

of Wyoming were designated as a “nonessential experimental” population under Section 10j of the ESA, in order to allow greater management flexibility and in recognition of the fact that their survivability was not “essential” to conservation of the species as a whole. For nonessential experimental populations, only those wolves within national parks or preserves receive the fully protected, threatened status. *Id.*

## II. Gray Wolf Recovery

In 1987, the USFWS identified a recovery criterion for gray wolves of at least ten breeding pairs in each of the three recovery areas (Montana, Idaho and Wyoming). In 1994 and again in 2001-2002, the USFWS confirmed that 10 breeding pairs in each recovery area was sufficient. AR 2009-032146. The “goal of ten breeding pairs in three separate recovery areas for three consecutive years was ‘reasonably sound and would maintain a viable wolf population in the foreseeable future,’” but was “somewhat conservative . . . and should be considered a minimum.” *Id.*

This goal has been met and exceeded every year for almost a decade. In 2001 there were 563 wolves in 34 packs. AR2006 at 14909. In 2002, there were more than 663 wolves, including 43 breeding pairs. 2004AR 292-293. In 2003, estimates showed 761 wolves, including 51 breeding pairs. There were an estimated 835 wolves in 110 packs by the end of 2004. 90-Day Finding on Wyoming Petition to Delist, 70 Fed. Reg. at 61770, AR2006 17729. “In 2005 . . . 16 breeding pairs and approximately 252 wolves were known to occur in Wyoming.” Notice of 12-Month Finding, 71 Fed. Reg. at 43412, AR2006 17765. The population continued to grow in 2006 with estimates totaling about 1,229 wolves, in 158 packs, with at least 87 potential breeding pairs. Weekly Report 9/15 to 9/22/2006, AR2006 15318-15323. The current NRM wolf population far exceeds the recovery goals. The USFWS admitted in its 2009 Final Rule that its current wolf population estimates for 2008,

indicate[] the NRM DPS contains approximately 1,639 wolves (491 in Montana; 846 in Idaho; 302 in Wyoming) in 95 breeding pairs (34 in Montana, 39 in Idaho; 22 in Wyoming). These numbers are about 5 times higher than the minimum population recovery goal and 3 times higher than the minimum breeding pair recovery goal. The end of 2008 will mark the ninth consecutive year the population has exceeded our numeric and distributional recovery goals.

2009 Final Rule, Fed. Reg. at 15123.

### III. The Wyoming Statutory Framework and Wyoming Plan

The State has committed to managing at least fifteen (15) wolf packs in Wyoming as a whole and at least seven (7) wolf packs living outside of the area defined as the YNP, Grand Teton, and the Parkway (collectively referred to below as “the National Parks”). The National Parks encompass approximately 3,945 square miles (2,524,800 acres) in Wyoming. Wolves will always be classified as “trophy game animals” within the National Parks and within the contiguous wilderness areas (Absaroka-Beartooth, North Absaroka, Washakie, Teton, Jedediah Smith, Winegar Hole and potentially at the Gros Ventre). *See* 2007 Plan at 1, 5; 2008 Plan at 1,5, AR 2009 035278, 035282. These wilderness areas encompass an additional 3,193 square miles (2,043,520 acres).

It is important to compare these areas (and acreages) within Wyoming with the USFWS Recovery Plan. Again, the USFWS’s 1987 Recovery Plan (referenced and relied upon in the 2009 Final Rule) defined “Zone I” as those areas containing “key habitat components in sufficient abundance and distribution on an annual basis to sustain ten breeding pairs of wolves. It should generally be an area greater than 3,000 contiguous square miles with less than 10% private land (excepting railroad grant lands) and less than 20% subject to livestock grazing.” Recovery Plan at 31; 2004AR at 933. The USFWS’s “zone management” approach remains in effect to this day. The area protected by both the 2007



and 2008 Wyoming Plans far exceeds the “Zone I” recovery area identified in the 1987 Recovery Plan. Wyo.Stat. § 23-1-304 (as implemented and carried out by either the 2007 or 2008 Plans) clearly meets the land-mass requirements identified in the Recovery Plan for the Zone I and Zone II management areas.

Wyo.Stat. § 23-1-304 classifies the gray wolf population as “trophy game animals” in those areas that are “necessary to reasonably ensure that at least seven (7) breeding pairs of gray wolves” are located in Wyoming, primarily outside of the National Parks and Parkway. This trophy game area easily equates to Zone I and Zone II.

Zone III was defined as “undesirable” for wolf presence: “this zone contains established human activities such as domestic livestock use or other human activities or developments in sufficient degree to render wolf presence undesirable.” Recovery Plan, 2004AR at 933. The area in which wolves will be classified as “predators” in Wyoming generally equates to “Zone III” as defined in the Recovery Plan (i.e., the area where the Respondents concluded wolf presence is undesirable).

By adopting Wyo.Stat. § 23-1-304, Wyoming has complied with, and will carry out, the goals of the Recovery Plan and the requirements of the ESA. The 2007 and the 2008 Plans ensure that the gray wolf population within the GYA protects a recovered wolf population.

#### **IV. Scientific/Biological Peer Review and USFWS Testimony in Support of the Wyoming Plan**

The importance of scientific peer review to evaluating the management plans being prepared by the States was articulated by Ed Bangs, the USFWS Recovery Coordinator, as early as 2003:

*I think we should make it clear that independent scientific peer review will be the ultimate judge of whether WY’s plan will conserve wolves or not. It isn’t*

us independently giving the thumbs up or down. We are making the decision whether they [sic] paln [sic] has a chance to pass the peer review process and if we proceed with the process. (Emphasis added).

2006AR 12173.

A. 2003 Wyoming Plan

The USFWS retained an independent panel of “12 of the top recognized wolf researchers, wolf management and livestock depredation experts in North America. . . .” (2004AR at 428) to peer review the Wyoming Plan. Eleven (11) of the twelve experts provided written reviews, ten (10) of whom concluded that the Wyoming Plan would (collectively with the Idaho and Montana management plans), maintain a recovered gray wolf population. 2004AR at 431-481. The entire set of peer reviews is included in the Appendix 2004AR 428-490.

Despite the peer review endorsement of the 2003 Wyoming Plan, the USFWS determined that “delisting cannot be proposed at this time due to some significant concerns about portions of Wyoming’s state law and wolf management plan” 2004AR at 505-506, and concluded that Wyoming would not be allowed to designate the gray wolf as a “predator” in any part of the State. This was the first instance in which the USFWS elevated its predetermined outcome over science.

B. 2007 Wyoming Plan

The USFWS submitted its February 8, 2007 proposed delisting rule along with Wyoming’s 2007 management plan to peer review. 2009 Final Rule at 15138. Following this peer review, the USFWS approved the Wyoming’s 2007 Plan. After the matter was remanded back to the USFWS by the Montana Court, the USFWS again submitted its delisting rule for peer review. Importantly, the USFWS admits that there were *no additional comments* on the rule making. *Id.*

That there were no new comments on the delisting rule is telling. By providing no additional comments, the determination that Wyoming's Plan (whether it be the 2003, 2007, or 2008 Plan), will support a recovered wolf population stands unchallenged to this day. The peer review comments have always endorsed Wyoming's dual management proposal and related Plans, regardless of iteration, which endorsements remain the best scientific data available. The USFWS have consistently ignored those peer reviews and continue to refuse to delist the wolf population in Wyoming despite the fact that the scientific support weighs in Wyoming's favor.

Instead of relying upon peer reviews, the USFWS looks to public perception. Mr. Bangs has admitted that the USFWS uses something other than biology and science to dictate its decision-making process. For example, Mr. Bangs began referring to *public perception and public relations* as far back as 2003:

We believe that the *image* that under predatory animal status in Wyoming, wolves could be hunted and killed without a clear regulatory safety-net, at any time, without limit, and particularly-by any means-is unacceptable to most Americans. We believe those *perceptions* will cause unimaginable rhetoric, conflict, emotion and mistrust. . . .While the [USFWS] is mandated to focus on science and biology, public attitudes and comments will influence subsequent litigation. We urge you to reconsider the wisdom of 'predatory animal' status for wolves *anywhere* in Wyoming. . . State-wide trophy game status would remove a major negative *public relations perception* that will cloud the *real issues* that are being discussed during the delisting process.

2004AR at 347, 348 (Emphasis added)

On July 14, 2003, Paul Hoffman, the USFWS Deputy Assistant Secretary for Parks, reported as follows:

While the predatory animal classification may be controversial, FWS biologists believe it will not adversely affect the continued recovery of wolves

since, for the most part, the area where wolves would be classified as predatory animal lies outside suitable wolf habitat. 2006AR 12059.

In addition to peer review, the USFWS's hand-picked experts submitted affidavit testimony in the Montana Court proceedings reporting that Wyoming's 2007 Plan justified delisting the NRM wolf population. AR2009-032202. The testimony of USFWS wildlife biologist Mr. Bangs is especially germane. Mr. Bangs testified to the Montana Court that Wyoming has committed to maintaining at least 15 breeding pairs and 150 wolves in Wyoming even if there are no wolves in YNP. AR2009-032169. He testified that the absence of breeding pairs in Wyoming's predatory area "has no impact on Wyoming's ability to maintain its share" of the wolf population "because that area is largely highly unsuitable wolf habitat." *Id.* at 032169-032170. He testified that the predatory area "is not located between the core recovery areas so it can not effect the rate of natural dispersal between the three core recovery areas." *Id.* He testified that wolves in the predatory area of Wyoming "do not contribute to maintaining wolf recovery in the NRM DPS." *Id.* at 032172. He testified that in recent years, the USFWS has "killed a higher percentage of the wolf population each year because most suitable habitat - where conflicts are least likely - is already occupied by resident wolf packs." *Id.* at 032176. Yet the overall NRM wolf population increased by 24% annually. *Id.* He testified that in "Wyoming's predatory animal area removal of all wolves would not affect the number or overall distribution of breeding pairs or impact recovery in the NRM." *Id.* at 032185. Most importantly, he testified that the "2007 Wyoming wolf plan is a solid science-based conservation plan that will adequately conserve Wyoming's share of the GYA wolf population so that the NRM wolf population will never be threatened again." *Id.* at 032183.

The USFWS has ignored all of the foregoing scientific evidence and has refused to delist wolves in Wyoming.

### SUMMARY OF ARGUMENT

Based upon its ongoing public relations concerns, the USFWS has announced that Wyoming's predator status is incompatible with its wolf recovery goals. This is so even though the predator zone is contiguous with Zone III – where habitat is unsuitable for wolf propagation wolf presence is “undesirable.” This is so even though independent peer reviewers and USFWS own experts have concluded that Wyoming's predator status will not prevent protection of a recovered gray wolf population. Those experts have found that Wyoming's designated trophy game area is sufficient, and that a “predator” designation in the remainder of the State will have no impact on wolf viability.

In ignoring the peer reviewers and its own experts, the USFWS has rejected the only science available, and continues to elevate public perception and political considerations over the requirements of the ESA. The USFWS is required to make all listing/delisting decisions based *solely* upon the best scientific and commercial data available. In this case the scientific and commercial data available has unequivocally confirmed that the Wyoming, Montana, and Idaho Plans are adequate to protect the gray wolf population.

The USFWS's refusal to delist the wolf in Wyoming was arbitrary, capricious, an abuse of discretion and in violation of the ESA. The 2009 Final Rule is in violation of the ESA because it was contrary to the best scientific and commercial data available, and not supported by substantial evidence.

The Administrative Record confirms that Wyoming's Plan meets the ESA requirements and the wolf population should be delisted in Wyoming. Respondents' failure to delist the wolf in Wyoming constitutes “agency action unlawfully withheld and unreasonably delayed” in violation of the APA. 5 U.S.C. § 706.

## ARGUMENT

### I. Standard of Review and Deference

“In addition to requiring a reasoned basis for agency action, the ‘arbitrary and capricious’ standard requires an agency’s action to be supported by the facts in the record.” *Olenhouse*, 42 F.3d at 1575.

We consider an agency decision arbitrary and capricious if the agency . . . relied on factors which Congress had not intended it to consider, . . . offered 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. (Citations and internal quotation marks omitted).

*Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1167 (10<sup>th</sup> Cir. 1999).

It is a “bedrock principle” that “a court cannot blindly defer to the interpretations of an administrative agency simply because that agency has expertise in a field that bears some relation to the statute at issue.” *Navarro v. Pfizer Corporation*, 261 F.3d 90, 99 (1<sup>st</sup> Cir. 2001). “If the statute is clear and unambiguous that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress.” *Sundance Associates, Inc. v. Reno*, 139 F.3d 804, 807 (10<sup>th</sup> Cir. 1998) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 1817, 100 L.Ed.2d 313 (1988) (internal quotations omitted). “[A]n agency’s interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear.” *Id.* at 808 (citation omitted).

“Although the Court must defer to an agency’s expertise, it must do so only to the extent that the agency utilizes, rather than ignores, the analysis of its experts.” *Defenders of Wildlife v. Babbitt*, 958 F.Supp. 670, 685 (D. D.C. 1997). “The Court will reject conclusory assertions of agency ‘expertise’ where the agency spurns unrebutted expert opinions without

itself offering a credible alternative explanation.” *Northern Spotted Owl v. Hodel*, 716 F.Supp. 479, 483 (W.D. WA. 1988). Here the Respondents ignored the analysis of the expert biologists regarding the Wyoming Plan.

Section 706(1) of the APA requires a reviewing court to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706. “[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.” *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 124 S.Ct. 2373, 2379, 159 L.Ed.2d 137 (2004) (emphasis in original).

The United States Supreme Court recently articulated the standard of review for agency action undoing previous action:

[T]he agency must show that there are good reasons for the new policy. But it need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than that would suffice for a new policy created on a blank slate. Sometimes it must - when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy.

It would be arbitrary and capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.

*FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1811 (2009) (italics in original, underlining added).

The USFWS has clearly changed its policy regarding Wyoming's dual status for wolf management. The USFWS, however, has provided no valid justification for its latest position and, as such, its change in policy is *not* permissible under the ESA. Because the "facts" relied on for the change in policy are contradicted by the USFWS's previous decision, it was required to provide a "more detailed justification." *Id.*

Justice Kennedy, concurring with the majority in *Fox* elaborated on an agency's duty to provide a detailed justification or reasoned explanation when disregarding facts that supported the prior action:

Where there is a policy change the record may be much more developed because the agency based its prior policy on factual findings. In that instance, an agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so. An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.

*Fox* at 1824 (emphasis added).

The USFWS ignored its previous factual findings that supported the approval of Wyoming's Plan, including its finding that:

The absence of wolf breeding pairs in the 88% of Wyoming where the wolf is designated as a predatory animal has *no impact* on Wyoming's ability to maintain its share of the GYA metapopulation segment *because that area is largely highly unsuitable wolf habitat* (Oakleaf 2007) and it is not located between the core recovery areas *so it can not effect the rate of natural dispersal between the three core recovery areas*. The Trophy Game Area of northwestern Wyoming [roughly west of Cody and North of Pinedale] is only 12% of the State but contains over two-thirds of the suitable wolf habitat in Wyoming and *all 25* wolf breeding pairs that were in Wyoming in 2007.

AR2009-032170 (emphasis added).



The USFWS's conclusion as quoted above pierces the heart of the two critical issues driving its decision to reject delisting wolves in Wyoming: (1) whether the trophy game area (the inverse of the predatory area) is large enough, and (2) the manner in which the predatory area affects genetic connectivity.

The USFWS has already concluded that the predatory area contains unsuitable habitat and would, therefore, have no impact on Wyoming's ability to protect the wolves. The USFWS has already concluded that Wyoming's trophy game area is adequate to protect a recovered wolf population. The USFWS has already concluded that the predatory area cannot affect natural dispersal, i.e. genetic connectivity. The USFWS has already concluded that:

Even if removal of problem wolves in trophy game areas of Montana, Idaho, and Wyoming doubled from the current rate of 10% per year to 20% per year under State management it would still not significantly impact overall wolf distribution or numbers from current levels. *In Wyoming's predatory animal area removal of all wolves would not affect the number or overall distribution of breeding pairs or impact recovery in the NRM.*

AR2009-032185 (emphasis added).

The USFWS has produced no information, no study, no expert, and no data that contradicts the foregoing conclusions. Despite that paucity of evidence, the USFWS's has described its latest position as follows:

Wyoming's predatory animal area forms an almost solid barrier that will prevent most, if not all, natural dispersal in the GYA from central Idaho. In addition, the extremely high rate of mortality associated with snowmobiles, snow tracking, and a hostile local public will result in very high rates of wolf removal throughout the winter when wolves typically disperse and breed.

AR2009-005477. The problem is, however, that the USFWS has provided nothing to support the foregoing summary accusation – no “facts” to support its inexplicable about-face.

The USFWS has disregarded its previous factual findings, the testimony of its own experts, and its peer reviewers' advice in favor of making bald assertions regarding the adequacy of Wyoming's trophy game area and genetic connectivity. In those circumstances where it chooses to acknowledge its previous contrary findings, it provides no legitimate scientific-based information to support its sudden change of heart. The best that it can seem to muster is a half-hearted attempt at saying "we must have been wrong, but now we are right": We "failed to consider the impacts of the predatory animal area to genetic connectivity." 2009 Final Rule at 15170.

Despite the USFWS's attempt at revisionist history, however, we know that it did in fact consider the relationship between the predatory area and genetic connectivity, concluding that the predatory area would not affect natural dispersal. *See* AR2009-032170. The USFWS also concluded that the predatory area does not affect Wyoming's ability to protect a recovered wolf population. Considering those previous findings, the USFWS would have had to support its 2009 decision by "providing a more detailed justification than that would suffice for a new policy created on a blank slate." *Fox* at 1811. It has obviously failed to do so, a state of affairs brought about by the fact that no such scientific or biological justification exists.

II. **Respondents Final Rule is Not Based on Sound Science**

A. **The ESA Requires Delisting Decisions to Be Based Solely on the Best Commercial and Scientific Data Available**

The purpose of the Wyoming Plan was to provide the adequate "regulatory mechanisms" for protecting the gray wolf population at or above recovery levels. 16 U.S.C. § 1533(a). Congress has established the standard by which Respondents were required to evaluate whether the Wyoming Plan met that goal:

The Secretary *shall* make determinations required by subsection (a)(1) of this section *solely on the basis of the best scientific and commercial data available* to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State . . . to protect such species. . . .” (Emphasis added)

16 U.S.C. § 1533(b)(1)(A). Congress’ use of the mandatory “shall” imposed upon the Respondents an unequivocal duty to rely solely on the best scientific and commercial data available when evaluating the adequacy of the Wyoming Plan. *See Forest Guardians v. Babbitt*, 174 F.3d 1178, 1186 (10<sup>th</sup> Cir. 1999). This mandate cannot be rejected in lieu of public relations concerns.

The obvious purpose of the requirement that each agency ‘use the best scientific and commercial data available’ is to ensure that the ESA not be implemented haphazardly, on the basis of speculation and surmise. While this no doubt serves to advance the ESA’s overall goal of species preservation, we think it readily apparent that another objective . . . is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.

*Bennett*, 520 U.S. at 176, 117 S.Ct. at 1168.

The peer reviews, USFWS testimony and the USFWS’s previous conclusions represent the best scientific and commercial data available on whether the Wyoming Plan is a sufficient “regulatory mechanism” for protecting a recovered wolf population. Respondents have produced no contrary “science” or “biology” to support their refusal to delist the wolf population in Wyoming. The USFWS ignored the peer reviews, ignored their own experts, rejected the science and biology, and capitulated on perhaps one of the most important decisions they could have made in this ongoing saga.

The Administrative Record does not contain an adequate scientific or biological basis for rejecting Wyoming’s current Management Plan.

The failure of [an] agency, despite the views of its own experts, to articulate a rational reason for its decision under the [five ESA] statutory factors, establishes the arbitrary and capricious nature of the agency's decision-making. *See Public Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993) ('The requirement that agency action not be arbitrary and capricious includes a requirement that the agency adequately explain its result'); *Carlton v. Babbitt*, 900 F.Supp. 526, 533 (D. D.C. 1995) (FWS must adequately explain its listing decision under the ESA based upon statutorily prescribed factors); *Fund for Animals v. Babbitt*, 903 F.Supp. 96, 113 (FWS must articulate a rational reason for its decision).

*Defenders of Wildlife v. Babbitt*, 958 F.Supp. at 684. "Agency action is arbitrary and capricious where the agency has failed to articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Northern Spotted Owl*, 716 F.Supp. at 482 (citation and internal quotations omitted).

In *Northern Spotted Owl v. Hodel*, various environmental organizations brought suit against the USFWS challenging its decision not to list the northern spotted owl as endangered or threatened. Despite peer review conclusions to the contrary, the USFWS concluded that listing the owl as endangered was not warranted at that time. The Court found that the USFWS "failed to articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* at 482 (citation and internal quotations omitted). The Court continued that "[j]udicial deference to agency expertise is proper, but the Court will not do so blindly. The Court finds that the Service has not set forth the grounds for its decision against listing the owl." *Id.* The Court ultimately concluded that the decision not to list was arbitrary and capricious because the USFWS lacked any expert analysis to support its decision not to list the owl, and the expert opinions from the status review contradicted the USFWS' conclusions. *Id.*

In *Defenders of Wildlife v. Babbitt*, the plaintiffs challenged the USFWS' refusal to list the Canada lynx as an endangered or threatened species. The Court found that the USFWS acted arbitrarily and capriciously when it (1) rejected the views of its own experts that the lynx met four out of five criteria for listing under the ESA; and (2) based its decision on faulty factual premises that were contradicted by the undisputed facts. USFWS experts concluded that the lynx should be listed, but in its decision not to list, the USFWS only referred to the study in a cursory manner, ignoring the experts' analysis and evidence. The Court held that it was arbitrary and capricious for the USFWS to ignore its own experts.

The NRM gray wolf population exceeds recovery criteria. The only question to be evaluated is whether the three State Recovery Plans together provided the adequate regulatory mechanism to protect a recovered wolf population. The expert biologists found that they did. The ESA (specifically, 16 U.S.C. § 1533(b)) required the USFWS to approve Wyoming's 2007 Plan and to begin the delisting process.. The USFWS's refusal to do so by rejecting the 2007 Plan constitutes agency action unlawfully withheld and unreasonably delayed in violation of 5 U.S.C. § 706(1).

If the USFWS is allowed to stray from the "best scientific and commercial data available" standard, endangered species evaluation and management will sink into a quagmire of subjective and emotional control. If science is rejected, all future decisions related to species management and recovery will be formed by politics and emotions, with the "scientists" relying upon polling data rather than biology.

B. The Standard for Approval of Wyoming's Plan

In 2003, the USFWS identified three perceived shortcomings in Wyoming's management plan. *See* AR2009-032182. The USFWS concedes that Wyoming has addressed those concerns. "The 2007 legislation and revised Wyoming wolf management

plan specifically resolved all three issues. . . . The 2007 Wyoming wolf plan is a solid science-based conservation plan that will adequately conserve Wyoming's share of the GYA wolf population so that the NRM wolf population will never be threatened again." AR2009-032183.

To pass muster in 2007, each State's Plan had to include (1) a regulatory control of take; (2) a pack definition consistent with the USFWS "breeding pair" definition; (3) the ability to manage the wolf population; (4) the ability to monitor impacts; and (5) an agreement to manage for an adequate number of breeding pairs and wolves above the minimum recovery levels. AR2009-032149.

In reviewing Wyoming's 2007 Plan, the USFWS considered the "plan's content, its understanding of [Wyoming's] laws, wolf biology, peer review, the State's response to peer review, and the agency's own experience managing wolves over the last twenty years," and concluded that Wyoming's Plan was adequate to ensure a wolf population above recovery levels. *Id.* at 032149-032150. Wyoming complied with every request and barrier erected by the USFWS to achieve Plan approval in 2007.

The USFWS has again changed course and has either raised the bar by creating *new* hurdles, or is revisiting prior concerns that have already been adequately addressed and duly resolved. The latest pronouncement is that Wyoming's Plan fails to:

1. Designate and manage wolves as a trophy game species statewide;
2. Manage for at least 15 breeding pairs and at least 150 wolves in mid-winter in their State and at least 7 breeding pairs and at least 70 wolves in mid-winter outside the National Parks;
3. Authorize defense of property take in a manner that is similar to the current regulatory scheme;

4. Consider all source of mortality, including all hunting and defense of property mortality, in its total statewide allowable mortality levels; and
5. Manage the population to maintain high levels of genetic diversity and to continue ongoing genetic exchange.

2009 Final Rule at 15179. Wyoming, however, has already addressed each of these so-called deficiencies (a fact that should expose the USFWS's squishiness for what it is – politics pure and simple).

First, there is no biological or practical reason to designate the wolf as a trophy game species throughout the entire state. To repeat:

The absence of wolf breeding pairs in the 88% of Wyoming where the wolf is designated as a predatory animal has *no impact* on Wyoming's ability to maintain its share of the GYA metapopulation segment because that area is largely highly unsuitable wolf habitat (Oakleaf 2007) and it is not located between the core recovery areas so it can not effect the rate of natural dispersal between the three core recovery areas.

AR2009-032170 (emphasis added). Protecting wolves statewide was never part of the deal. Protecting wolves throughout the State was never evaluated as part of the Final Environmental Impact Statement (FEIS). Protecting wolves throughout the State has never been considered to be an obligation of Wyoming. Protecting wolves throughout the State has never been suggested by the wolf biologists who have considered this issue.

In short, to demand that Wyoming provide statewide protection for the Canadian gray wolf population at this late date – over twenty years after the Recovery Plan, almost fifteen years since the wolves were first introduced, and after a decade of protecting a wolf population that has exceeded all recovery goals, is patently offensive and insupportable. A fact that the Respondents recognized a year ago, and a fact that they cannot refute today.

Second, the USFWS has already confirmed Wyoming's commitment to managing for

the required numbers of breeding pairs and wolves. “Wyoming Game and Fish Department [WGFD] has also committed to maintain at least 15 breeding pairs and 150 wolves in Wyoming even if there were no wolves in YNP.” AR2009-032169. Further, “[t]o ensure that the NRM wolf population continues to exceed the recovery goal of 30 breeding pairs and 300 wolves, Montana, Idaho, and Wyoming have *each committed* to maintain at least 15 breeding pairs and 150 wolves per State in mid-winter.” *Id.* at 032147 (emphasis added).

Third, Wyoming’s defense of property laws only affect wolves that are in the predatory areas. As identified above, the USFWS has recognized that wolves removed in the predatory area do not impact Wyoming’s ability to maintain the required wolf population.

Fourth, Wyoming considered all sources of mortality and responded by making the trophy game area large enough to ensure that recovery goals are met. “The Trophy Game Area of northwestern Wyoming . . . is only 12% of the State but contains over two-thirds of the suitable wolf habitat in Wyoming and *all 25* wolf breeding pairs that were in Wyoming in 2007.” AR2009-032170 (emphasis added). Further, “[n]o breeding pairs live outside the trophy game area because there is limited suitable habitat and federal agency control previously removed most wolves in the area because of persistent chronic conflict with livestock.” *Id.* at 032173.

Lastly, Wyoming’s Plan does not negatively impact the already high levels of genetic connectivity observed in the gray wolf population. Wyoming’s predatory area “is not located between the core recovery areas so it can not effect the rate of natural dispersal between the three core recovery areas.” *Id.* at 032170. “[A]ll subpopulations within the NRM wolf populations have high standing levels of genetic variability. . . , thus, *inadequate genetic diversity is not a wolf conservation issue in the NRM at this time.*” 2009 Final Rule at 15177 (emphasis added).



Wyoming's statutes, Management Plan, and associated regulations that were on the books in 2007, when the USFWS saw fit to delist the gray wolf in Wyoming, appropriately address each concern raised by the USFWS. There is no scientific evidence whatsoever supporting any of these new "requirements." Ultimately, based upon the best scientific and commercial data available to it in 2008, which is the *same* data available today, the USFWS determined that "Wyoming's management plans and laws were adequate to ensure that each State's share of the NRM wolf population would be maintained above recovery levels following delisting, and therefore constituted 'adequate regulatory mechanisms' under the ESA." AR2009 at 032150.

Wyoming has already addressed - and debunked - the five roadblocks to Plan approval set forth in the 2009 Final Rule.

C. Respondents Violated the ESA and APA by Rejecting the Wyoming Plan

Pursuant to the ESA, a species may be delisted only if the best scientific and commercial data available indicate that it is no longer endangered or threatened. In making this determination, the USFWS must consider five categories of threats to the species. the USFWS has intentionally ignored the available scientific data when applying these five factors to Wyoming's Plan,

A. **The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range**

The USFWS has separately analyzed suitable habitat and unsuitable habitat. 2009 Final Rule at 15157. The USFWS reviewed the quality, quantity, and distribution of habitat relative to biological requirements of wolves, and concluded that threats to habitat are unlikely to affect the recovery of the wolf in the foreseeable future. The USFWS relied upon two studies, both showing that the suitable habitat in the NRM was in northwestern Montana, central Idaho, and the GYA.

The GYA incorporates YNP (3,125 square miles) and surrounding wilderness (6,250 square miles) which are in public ownership. These areas are not suitable for human development and “no foreseeable habitat-related threats would prevent them from supporting a wolf population that exceeds recovery levels.” 2009 Final Rule at 15159. The USFWS concluded that the GYA and central Idaho will continue to provide “optimal suitable habitat for a resident wolf population and will be a dependable source of dispersing wolves to help maintain genetic connectivity and a viable wolf population in the NRM.” *Id.*

Unsuitable habitat and small fragmented areas of suitable habitat outside of these core areas largely represent geographic locations where wolf breeding pairs would only persist in low numbers, if at all. Although such areas may historically have contained suitable habitat, wolf pack persistence in these areas are not important or necessary for maintaining a viable, self-sustaining, and evolving representative wolf population in the NRM into the foreseeable future. *Id.* at 15161-15162.

In sum, threats to habitat are not a factor in the recovery of the gray wolf:

We do not anticipate overall habitat changes in the NRM occurring at the magnitude that will threaten wolf recovery in the foreseeable future because 71 percent of the occupied habitat is in public ownership that is managed for multiple uses that are complementary with suitable wolf habitat, and maintenance of viable wolf populations. *Id.* at 15159.

The vast majority of suitable wolf habitat and the current wolf population is secure in mountainous forested Federal public land (National Parks, wilderness, roadless areas, and lands managed for multiple uses by the U.S. Forest Service and Bureau of Land Management) that will not be legally available or suitable for intensive levels of human development.

The rate of conflict (now approximately 23 percent mortality per year) is well within the wolf population’s biological mortality threshold (30 to 50 percent), especially given the large amount of secure habitat that will support a

recovered wolf population and will provide a reliable and constant source of dispersing wolves. *Id.* at 15161.

The USFWS service compared actual wolf pack distribution from 2006 with predicted suitable habitat and determined that “nearly all suitable habitat in Montana, Idaho and Wyoming is currently occupied and areas predicted to be unsuitable remain largely unoccupied.” *Id.* at 15158. The current NRM wolf population occupies nearly 100 percent of the recovery areas recommended in the 1987 recovery plan for central Idaho, the GYA, and northwestern Montana. *Id.* at 15159. The wolf population similarly occupies nearly 100 percent of the predicted suitable habitat. *Id.*

2008 marked the first year that the NRM wolf population did not grow by 20 percent. The USFWS attributes this to the wolf population reaching its carrying capacity. *Id.* 15160. “As demonstrated by the NRM DPS’s suspected carrying capacity, there is sufficient suitable habitat to maintain the NRM wolf population well above recovery levels but not significantly higher than current levels.” *Id.*

The USFWS found that over the last 20 years, wolf packs have been unable to “persist in areas intensively used for livestock production, primarily because of agency control of problem wolves and illegal killing.” 2009 Final Rule at 15157. The USFWS further concluded:

while some areas predicted to be unsuitable habitat in Montana, Idaho, and Wyoming have been temporarily occupied and used by wolves or even packs, we still consider them as largely unsuitable habitat. Generally, wolf packs in such areas have failed to persist long enough to be categorized as breeding pairs and successfully contribute toward recovery.

*Id.*

The USFWS has concluded that wolves dispersing to unsuitable habitat are unlikely to form breeding pairs or contribute to population recovery. *Id.* The USFWS actually prefers

that wolves stay within the suitable habitat areas:

Conflict between wolves and livestock has resulted in the average annual removal of 8 to 14 percent of the NRM wolf population. [] Such control *promotes occupancy of suitable habitat* in a manner that minimizes damage to private property and fosters public support to maintain recovered wolf populations in the NRM DPS without threatening the NRM population.

*Id.* 15160 (emphasis added).

With respect to the interplay between genetic connectivity and habitat, the USFWS observed that “[a]t present, all three recovery areas appear sufficiently connected.” Specifically to the GYA, the USFWS said that

[w]hile the GYA is the most isolated core recovery area within the NRM DPS [], radio telemetry data demonstrate that the GYA is not isolated as at least one wolf naturally disperses into the GYA each year and at least 4 radio-collared non-GYA wolves have bred and produced offspring in the GYA in the past 12 years (1996-2008).

*Id.* at 15161.

The trophy game area in Wyoming contains the vast majority of the suitable habitat for wolves. There is sufficient “suitable habitat” in Wyoming to protect a recovered wolf population. This is so, *even if* wolves are designated as “predators” in areas of the State constituting unsuitable habitat. Wyoming’s predatory area will not affect wolf recovery levels because “wolf pack persistence in [unsuitable habitat] areas are not important or necessary for maintaining a viable, self-sustaining, and evolving representative wolf population in the NRM into the foreseeable future.” *Id.* at 15161.

#### **B. Overutilization for Commercial, Recreational, Scientific, Or Educational Purposes**

The USFWS concluded that the gray wolf population within the NRM is not at risk from overutilization for scientific and educational purposes. The USFWS did conclude,

however, that the gray wolf was at risk from commercial and recreation use in Wyoming's designated predatory areas. This is a complete reversal from its 2008 Final Rule and the USFWS has failed as a matter of law to explain why it changed course.

The USFWS ignores its previous determination that the predatory area does not put the wolf population at risk:

The absence of wolf breeding pairs in the 88% of Wyoming where the wolf is designated as a predatory animal has no impact on Wyoming's ability to maintain its share of the GYA metapopulation segment because that area is largely highly unsuitable wolf habitat (Oakleaf 2007) and it is not located between the core recovery areas so it can not effect the rate of natural dispersal between the three core recovery areas.

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The USFWS has now flip-flopped despite previously finding that “[w]olf populations can maintain themselves *despite sustained* human-caused mortality rates of between 30 and 50 percent per year,” and despite concluding that “[w]hen populations are maintained below carrying capacity and natural mortality rates and self-regulation of the population remain low, human-caused mortality can replace up to 70 percent of natural mortality.” 2009 Final Rule at 15162 (emphasis added).

An agency cannot change its policy without a reasoned analysis. The USFWS has failed to provide a satisfactory explanation for why it now believes the predatory area places the gray wolf at risk. The reason for that failure is obvious – the USFWS has no legitimate reason for its decision.

### C. Disease or Predation

The USFWS has reported that the gray wolves in the NRM DPS, including the gray wolf population within Wyoming and the GYA, are not at risk for disease or predation. According to the USFWS, “no diseases or parasites, even in combination, are of such

magnitude that the population is likely to become in danger of extinction in the foreseeable future. Similarly, predation does not pose a significant threat to the NRM wolf population.” *Id.* at 15163.

“No wild animals routinely prey on gray wolves.” *Id.* at 15164. “Other wolves are the largest cause of natural predation among wolves.” *Id.*

The USFWS monitored wolf mortality in radio-collared wolves, over the period of 1984-2004. Of those wolves killed:

21 percent were killed by natural causes (including 7 percent wolf-to-wolf conflict), 15 percent died from human-caused mortality other than agency control (vehicles, capture-related, incidental trappings, accidents, and legal harvest of wolves that range into Canada), 28 percent were killed in control actions, 21 percent were illegally killed, and in 15 percent [sic] cause of death was unknown. *Nevertheless, wolf numbers have increased at [sic] rate of about 22 percent annually, until 2008 [reached carrying capacity], in the face of ongoing levels of human-caused mortality.*

*Id.* at 15165 (emphasis added).

Just as disease does not threaten the wolf population, the USFWS similarly determined that state defense of property laws would not significantly increase the overall rate of wolf removal, excluding Wyoming. *Id.* 15165. “[W]e do not expect private citizen take under State defense of property laws to significantly increase the overall rate of wolf removal, except in Wyoming.” *Id.* Again, the USFWS finds fault with Wyoming’s predatory status: “In Wyoming, State law mandates . . . unregulated take in the predatory areas.” *Id.* In approving Wyoming’s plan in 2007, the USFWS analyzed Wyoming’s defense of property laws but came to the opposite conclusion.

The USFWS has continued in its effort to avoid explaining how unregulated take in predatory areas will adversely impact the Wyoming’s nonessential experimental wolf

population. The science has not changed since 2007 and there are no new facts available to the agency.

**D. The Adequacy or Inadequacy of Existing Regulatory Mechanisms**

Under the Wyoming Plan, wolves will be classified as “trophy game animals” within the Recovery Plan’s “Zone I” area and much of the “Zone II” area, and as “predators” in the remainder of the State. The USFWS’s criticism of Wyoming’s Plan are habitat based and focus upon the State’s decision to use this “dual classification” management protocol.

Wyoming’s dual classification will protect a recovered wolf population for one simple and unassailable reason: that area in which the wolves will be designated as trophy game animals includes all of the “suitable habitat;” that area in which wolves will be identified as predators has been and always will be unsuitable habitat. According to the USFWS:

Despite liberal regulations regarding wolf removal, nearly all suitable areas for wolves are being occupied by resident packs (Service *et al.* 2008, Figure 1; Oakleaf *et al.* 2005, p. 559). The outer NRM wolf pack distribution has remained largely unchanged since the end of 2000 (Service *et al.* 2001-2009, Figure 1), indicating that wolf packs are simply filling in the areas with suitable habitat, *not successfully expanding their range into unsuitable habitat*. As we previously explained in the recovery section, we believe that the NRM wolf population is likely at or above long-term carrying capacity.

2009 Final Rule 15166 (emphasis added).

The USFWS further provides:

Fuller *et al.* (2003) reviewed all available wolf studies to determine whether a population increased, stabilized, or decreased based on its annual mortality rates. According to these field data, assuming the population is maintained below carrying capacity, human-caused mortality would have to remove somewhere between 34 percent and 50 percent of the wolf population annually before the population would decline (Fuller *et al.* 2003, pp. 184-185). In practice, until 2008, the wolf population grew an average rate of 24 percent

annually despite an annual mortality rate of 26 percent (ranging from 20 to 50 percent depending upon location and year)(Smith *et al* 2008, p.1).

*Id.*

According to the USFWS, the standard to be met by each State before removing ESA protections is the adequate management of sustainable mortality rates. *Id.* Wyoming meets this standard and its designated predatory area does not interfere with wolf recovery. There are more than enough wolves in the trophy game area to meet recovery goals and sustain mortality rates:

Even if removal of problem wolves in trophy game areas of Montana, Idaho, and Wyoming doubled from the current rate of 10% per year to 20% per year under State management it would still not significantly impact overall wolf distribution or numbers from current levels. *In Wyoming's predatory animal area removal of all wolves would not affect the number or overall distribution of breeding pairs or impact recovery in the NRM.*

AR2009-032185 (emphasis added).

The trophy game area totaled just over 31,000km<sup>2</sup> (12,000mi<sup>2</sup>)(12%of Wyoming) in northwestern Wyoming, including YNP, Grand Teton National Park, John D. Rockefeller Memorial Parkway, adjacent U.S. Forest Service-designated Wilderness Area, and adjacent public and private lands.

2009 Final Rule 15170.

The absence of wolf breeding pairs in the 88% of Wyoming where the wolf is designated as a predatory animal has *no impact* on Wyoming's ability to maintain its share of the GYA metapopulation segment *because that area is largely highly unsuitable wolf habitat* (Oakleaf 2007) and it is not located between the core recovery areas so it can not effect the rate of natural dispersal between the three core recovery areas. The Trophy Game Area of northwestern Wyoming [roughly west of Cody and North of Pinedale] is only 12% of the State but contains over two-thirds of the suitable wolf habitat in Wyoming and *all 25* wolf breeding pairs that were in Wyoming in 2007.



AR2009-032170 (emphasis added).

The USFWS further observed that “[n]o breeding pairs live outside the trophy game area because there is limited suitable habitat and federal agency control previously removed most wolves in the area because of persistent chronic conflict with livestock.” AR2009-032173.

The USFWS itself said it best when it argued to the Montana Court that the predatory area will not impact the recovery of the wolves:

Wolves designated as predatory animals by Wyoming statute can be liberally killed . . . However, wolves in this portion of Wyoming *do not* contribute to maintaining wolf recovery in NRM DPS. In the past most wolves in this area were removed annually by federal agency control after chronic livestock depredations before they could successfully breed and raise young.

*Id.* at 032172 (emphasis added).

The USFWS also argued that those wolves in the predatory area would have to be removed even if the wolves remained listed: “Hunting would disproportionately remove the boldest wolves in the most accessible open habitats, the very type of wolf in the typical location where most livestock depredations, agency control actions, and illegal killing occurred when the NRM gray wolf was listed.” *Id.* at 032171.

Internal email correspondence describing the agency’s decision to approve Wyoming’s Plan is especially telling. The USFWS’s lead biologist agrees that Wyoming’s predatory status is sound:

In predatory animal area in WY immediate additional take could occur but there are few wolves in those areas anyway and they all tend to get into chronic livestock problems and are removed by agency control anyway - *so biologically pred. status wouldn’t matter but some folks will be upset with that concept* - but all States, including MI. MN. WI. in Midwest, are doing that

basic type of legal framework too - will [sic] more liberal wolf take in areas of highest conflict. So unless court intervenes FWS is done March 28 - except for admin stuff & wrap up to vigorously [sic] defend its delisting decision.

AR2009-006302 (email correspondence from Ed Bangs dated March 24, 2008)(emphasis added).

We estimate there are only about 30 wolves outside the trophy game area in Wyoming. The predatory animal area doesn't have much suitable wolf habitat in it and wolves there are typically removed by agency lethal control because of chronic livestock depredations. So removal of those wolves by private citizens reduces future livestock depredations, the need for agency control actions, and reduces agency costs - and *doesn't impact the overall status of the WY portion of the NRM wolf population*. The FWS has long recognized and recommended that public harvest is an important, if not critical tool, to help manage the density and distribution of wildlife and help to conserve wildlife populations.

AR2009-006286 (email correspondence from Ed Bangs dated April 1, 2008)(emphasis added).

I told them dual status was maybe biologically ok but it is a major public relations problem and only could work in WY if the area where wolves was protected was large enough.

AR2009-90066 (email correspondence from Ed Bangs dated April 11, 2003).

The facts relied upon by the USFWS in making the above determinations remain pertinent to the discussion today. Nothing has changed. The USFWS has presented no new facts and has failed to explain why its finding in 2008 – that wolves in the predatory area “do not contribute to maintaining wolf recovery in NRM DPS” – is now invalid. An agency must provide a reasoned basis when it reverses itself. The USFWS has refused to even acknowledge its earlier position that the predatory area does not contribute to wolf recovery,

let alone provide a reasoned analysis as to why such findings do not mandate that the wolf be delisted in Wyoming.

Instead, the USFWS hides behind the Montana Court's decision as an excuse to once again launch a political attack on Wyoming for its dual status. The USFWS's decision in that regard, however, is poorly reasoned and even less scientific. The USFWS cannot dispute that the wolf is biologically recovered in Wyoming. The USFWS cannot legitimately dispute that Wyoming's trophy game area is more than adequate in size to protect the wolf population. The WGFC regulations regarding predatory status are sufficiently flexible to address all recovery issues and to allow the Wyoming agency to react as necessary to sustain Wyoming's commitment.

Sprinkled throughout the 2009 Final Rule are the USFWS' claims that these regulations are not "good enough" because somehow the WGFD is not "committed" or "obligated" to enforce the rules. This assertion is in direct conflict with the USFWS's previous finding:

State laws and wolf management plans in Montana, Idaho, and Wyoming commit them to each maintain at least 15 or more breeding pairs and at least 150 or more wolves. The States have committed to do so in a manner patterned after the USFWS nonessential experimental population rules first enacted in 1994 and modified in 2005 and 2008. In addition, lethal predator control activities, by agencies and/or individuals, will be modified or even halted if recovery might ever be jeopardized.

AR2009-032183.

Despite this determination, the USFWS now "worries" that Wyoming will not follow through with its obligations and might change its management strategy. This argument applies equally well to Idaho and Montana, as there is nothing in their statutory or regulatory

schemes to prohibit amendment. It is unfortunate that the USFWS has seen fit to sink to this level in an effort to justify its decision. The USFWS's assertion that Wyoming will renege on its wolf protection obligations is not only absurd but is easily refuted: if Wyoming refuses to carry out its Plan, the wolves can be redesignated as the "non-essential experimental" population that they are.

The *only* reason given by the USFWS for changing its mind on the adequacy of the size of the trophy game area is that it "failed to consider the impacts of the predatory animal area to genetic connectivity." 2009 Final Rule at 15170. This "reason" *assumes*, without explanation, that genetic connectivity has an impact or otherwise threatens the recovery of the gray wolf. This assumption is flat out wrong and is resoundingly, not to mention ubiquitously, refuted by the record and by the USFWS itself in the 2009 Final Rule.

The USFWS has determined that the genetic diversity of the gray wolf in the NRM DPS is high and that any threat to the wolf population due a lack of genetic diversity is unlikely.

*It is our current professional judgment that even in the highly unlikely event that no new genes enter YNP or the GYA in the next 100 years, that wolf population's currently high genetic diversity would be slightly reduced, but not to the point the GYA wolf population would be threatened.*

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*[A]ll subpopulations within the NRM wolf populations have high standing levels of genetic variability. . . , thus, inadequate genetic diversity is not a wolf conservation issue in the NRM at this time.*

*Id.* at 15177 (emphasis added).

Despite the robust genetic diversity enjoyed by the wolves, the USFWS is requiring Wyoming to "institute additional protections to facilitate natural genetic exchange in order

to constitute an adequate regulatory mechanism.” 2009 Final Rule at 15176. This requirement is directly contrary to the overwhelming weight of the evidence and the USFWS’s own findings.

The USFWS has failed to point to any instance where lack of genetic connectivity even remotely threatens the NRM gray wolf population. By its own admission, the threat to the gray wolf from inbreeding or lack of genetic connectivity is “highly unlikely.” The USFWS has failed to identify one example of a wolf species, anywhere in the world, that is threatened by the lack of genetic connectivity. *See* 2009 Final Rule at 15177. The weight of the evidence in the record exposes the USFWS’s 2009 Final Rule for what it is - a political agenda designed to do away with dual status simply because the USFWS is concerned that someone in the broader public audience (outside of Wyoming) does not like it. The USFWS is making a last ditch effort to avoid approving Wyoming’s biologically sound wolf Management Plan.

The USFWS determined that Wyoming’s Plan “is unlikely to conserve Wyoming’s share of a recovered wolf population” because Wyoming relies, in part, upon the national parks and other public lands to meet its goal of 15 breeding pairs statewide. *Id.* at 15171. This is in direct conflict with the USFWS’s earlier determination: “Wyoming Game and Fish Department [WGFD] has also committed to maintain at least 15 breeding pairs and 150 wolves in Wyoming even if there were no wolves in YNP.” AR2009-032169.

A similar theory was adopted by the Montana Court, but neither the USFWS nor that Court explained why Wyoming is not entitled to rely upon the “YNP area” to reach its recovery criteria. After all, most of YNP and several other public lands in the GYA are located within the boundaries of the State of Wyoming and are located within the trophy game area. More to the point, those public lands contain an abundance of wolves and

breeding pairs. The YNP recovery area also contains the vast majority of the suitable habitat in the State: “[t]he Trophy Game Area of northwestern Wyoming [roughly west of Cody and North of Pinedale] is only 12% of the State but contains over two-thirds of the suitable wolf habitat in Wyoming and all 25 *wolf breeding pairs* that were in Wyoming in 2007.” *Id.* at 032173 (emphasis added). This finding is significant considering that Wyoming is required to maintain 15 breeding pairs, with the public lands assumed to support 8.

The USFWS’s argument is also illogical based upon the history of this introduction program. The wolves were brought into Wyoming because of the unique nature of YNP and the surrounding federal lands. The entire purpose of the introduction effort was to “return” wolves to Yellowstone National Park. There is not one document, including the 1987 Recovery Plan, the FEIS, or the 1994 Final Rule, that disclosed what now appears to be the true agenda of the USFWS and the various political organizations that demanded that wolves be introduced into our State: that they would be spread throughout our borders regardless of their impact and regardless of whether the habitat is appropriate or not. In short, this argument simply goes too far. The 1987 Recovery Plan and every subsequent publication has repeated that Zone Management will control, with the stated intent of limiting wolf dispersal to within Zones I and II. In contrast, there never has been a “Wyoming Recovery Area,” and to make such a land grab now should be seen for what it is.

There is little suitable habitat in Wyoming outside of the already designated trophy game area and wolves cannot successfully breed in this unsuitable habitat:

wolves in [the designated predatory] portion of Wyoming do not contribute to maintaining wolf recovery in NRM DPS. In the past most wolves in this area were removed annually by federal agency control after chronic livestock depredations before they could successfully breed and raise young.

AR 2009-032172. Armed with this knowledge, it makes no practical, scientific, or biological sense to require Wyoming to manage unsuitable habitat as a trophy game area.

E. **Other Natural or Manmade Factors Affecting the Wolf's Continued Existence**

The USFWS identified four “other” factors with the potential to affect the recovery of the gray wolf in the NRM DPS: public attitudes, genetic considerations, climate change and social structures of packs.

1. Public Attitudes Toward the Gray Wolf

The USFWS attributes significant weight to public attitudes in the recovery of the gray wolf:

Public hostility toward wolves led to the excessive human-caused mortality that extirpated the species from the NRM DPS in the 1930s. Such attitudes toward wolves are deeply ingrained in some individuals and continue to affect human tolerance of wolves. The predatory animal designation in Wyoming underscores this point. Wyoming's 2003 State law and wolf management plan essentially confined wolves to Wyoming's National Parks and wilderness areas. In 2007, Wyoming mandated wolves be classified as predatory animals in at least 88 percent of the State and allowed this area to be expanded in the WGFC “determines the diminution does not impede the delisting of gray wolves and will facilitate Wyoming's management of wolves.” Such a management strategy is not required to manage wolf density and distribution and was not used by other States.

2009 Final Rule at 15175.

The above quotation is troubling for many reasons. First is the implication that Wyoming's predatory status is a reflexive or knee jerk response borne out of hostility towards wolves. In reality, the predatory status is one half of a dual status classification (predatory area v. trophy game area) created to strike an appropriate balance between

protecting livestock and wildlife interests on the one hand, and ensuring the protection of wolves on the other. What the above passage elucidates is the USFWS's dislike of the dual status classification - and not because of any scientific or biological reason, but for reasons of public perception. It bears repeating here that the USFWS previously determined that the predatory status would have *no impact* on the recovery of the wolves, that delisting decisions must be based *solely* on the best commercial and scientific data available (and not on some nebulous concept of "public perception"), and the USFWS has failed to cite to any new facts that would support its decision to vacate its prior determination.

The second problem with the above quotation is the reference to Wyoming's 2003 Management Plan to bolster the assertion that public attitudes in Wyoming will not support wolf recovery. The USFWS identified three concerns in Wyoming's 2003 Plan, Wyoming subsequently addressed those concerns, and the USFWS *approved* the revised Plan. Wyoming's 2003 Plan is not relevant. Wyoming's revised, and previously approved, 2007 Plan is what is at issue here.

Next, the USFWS points to Wyoming's predatory status in the 2007 Plan. The USFWS fails to mention, however, that Wyoming's 2007 predatory classification was *approved only after a complete and thorough peer review by the USFWS's own experts*.

Perhaps most troubling is the last sentence in the quotation: "Such management strategy is not required to manage wolf density and distribution and was not used by other States." There is no doubt that a dual status management strategy is not *required* to achieve a recovered wolf population. That, however, is not the question. The issue is whether Wyoming's 2007 Management Plan meet scientific muster. The biological data, the USFWS expert testimony, the peer reviews, and the USFWS's previous position are all in agreement and the answer is yes. The USFWS fails to provide a satisfactory explanation for why it is



now “changing its mind.”

## 2. Genetic Considerations

The USFWS has spent considerable time debunking the concerns raised by various environmental groups and the Montana Court related to genetic connectivity of the subpopulations of the gray wolves in the NRM DPS:

[F]rom a purely biological perspective, the NRM DPS is a 400-mile southwestern extension of a North American wolf population consisting of many tens of thousands of individuals, and *its recovery is not even remotely comparable to other situations where concerns about genetic diversity have been raised.*

2009 Final Rule at 15178 (emphasis added).

It is our current professional judgment that even in the highly unlikely event that *no new genes enter YNP or the GYA in the next 100 years, that wolf population’s currently high genetic diversity would be slightly reduced, but not to the point the GYA wolf population would be threatened.*

*Id.* at 15177 (emphasis added).

[A]ll subpopulations within the NRM wolf populations have high standing levels of genetic variability. . . , thus, *inadequate genetic diversity is not a wolf conservation issue in the NRM at this time.*

*Id.* at 15177 (emphasis added).

Based upon the foregoing, it is difficult to conceive of a rational basis for the USFWS’s determination that concerns over genetic connectivity somehow render Wyoming’s 2007 Plan unworkable. Yet, when the USFWS reevaluated Wyoming’s Plan it determined that Wyoming’s “current regulatory framework limits natural genetic connectivity” (*id.* at 15183), and that Wyoming’s plan must fail because of “the impacts of the predatory animal area to genetic connectivity.” *Id.* at 15170. The Service further notes

that “[w]hile natural connectivity is not and has never been required to achieve our recovery goal, we believe it should be encouraged so as to minimize the need for agency-managed genetic exchange.” *Id.* The USFWS admits that genetic connectivity is not required for recovery but relies on genetic connectivity as the lynchpin in denying Wyoming’s Plan.

Based upon the best commercial and scientific data available, the gray wolf is indisputably recovered, the USFWS’s hand picked peer reviewers approve of Wyoming’s Plan, the USFWS’s expert testimony supports the plan, and the USFWS approved the Plan. Now, in an effort to reverse course, the USFWS uses genetic connectivity as a strawman to attack Wyoming’s designated predatory area.

This is politics in action. It is clear that the USFWS has capitulated to certain groups who do not like the predatory status. The USFWS, however, has yet to come up with any sort of biological or scientific basis to support its decision. Perhaps recognizing that there is nothing biologically wrong with dual status, the USFWS is now attempting to create “science” from public attitudes. How the public *feels* about the presence of wolves is irrelevant to whether Wyoming’s Plan meets scientific muster.

The USFWS has made it clear that it will not approve and version of Wyoming’s Plan unless and until Wyoming designates the entire State as a trophy game area. This is so regardless of whether the best commercial and scientific data prescribe otherwise. The USFWS approved Wyoming’s 2007 Plan and is now revoking that approval without satisfactory explanation. All information relied upon by the USFWS in denying the Wyoming Plan, however, was available to it when it approved it. Politics aside, Wyoming’s Plan passes muster.

### 3. Montana District Court Proceedings and Decision

On April 28, 2008, several environmental groups filed a lawsuit in Montana challenging the identification and delisting of the NRM DPS. The District Court granted a preliminary injunction reinstating ESA protections to the gray wolf, determining that the USFWS acted arbitrarily and capriciously in three respects. The Decision is attached as Exhibit D. First, that Court opined that the USFWS failed to adequately consider the genetic connectivity of the wolf subpopulations. Decision at 16. Second, that Court found that Wyoming's Plan failed to commit to the necessary numbers of wolves and that the USFWS failed to provide any rationale for accepting Wyoming's Plan in 2007 when it had rejected the plan in 2003. Decision at 31. Lastly, that Court found fault with Wyoming's depredation control laws finding that the laws are more expansive than ESA §10(j) regulations.

The USFWS vigorously defended its decision to delist the gray wolf in Wyoming:

By the time of delisting, the NRM wolf population had exceeded the minimum numerical and distributional recovery goals established in its recovery plan for *seven consecutive years*, and the population had increased at a rate of about *24 percent annually* for a period of *eleven consecutive years*. Threats to the wolf's long-term viability, either alone or in combination with others, had been reduced or eliminated to the point that the NRM DPS no longer fits the definition of an endangered or threatened species. This success can be credited in large measure to the intensive recovery efforts of the Federal Government . . . but it would not have been possible without the close partnership [sic] Montana, Idaho and Wyoming.

AR 2009-032143 (internal citations omitted).

The USFWS told the Court that it undertook a "careful consideration" of the "gray wolf's progress in the NRM," various recovery plans, peer reviews, "a huge body of scientific research and the agency's own unparalleled experience in the successful management of gray wolves." AR 2009-032144. Based upon this careful consideration, the

USFWS declared that “State management provides adequate regulatory mechanisms to ensure that the NRM gray wolf will remain recovered.” *Id.*

The Montana Court was wrong in its entirety. The USFWS aggressively argues in the 2009 Final Rule that the Montana Court got it wrong on the genetic connectivity issue. The scientific data available supports that genetic connectivity is not a threat to the gray wolf in the NRM DPS. The Montana Court also got it wrong when it found that Wyoming’s Plan does not protect a recovered wolf population – both in finding that Wyoming’s Plan fails to commit to adequate numbers of wolves and in finding that Wyoming’s depredation control laws are inadequate. It is in these last two factors that the USFWS has abandoned Wyoming.

The USFWS readily admits that it is changing course due to the Montana decision. The USFWS claims to have re-analyzed Wyoming’s regulatory framework, specifically the dual predatory-trophy game status based on concerns expressed by the District Court. 2009:

We previously approved this approach [dual status] because the 12 percent of Wyoming where wolves would be managed as a trophy game species included 70 percent of the State’s suitable wolf habitat and was presumed large enough to support Wyoming’s share of a recovered wolf population. This approach failed to consider the impacts of the predatory animal area to genetic connectivity. As discussed fully in Factor E and the Conclusion of the 5-Factor Analysis sections below, we now believe Wyoming must institute additional protections to facilitate natural genetic exchange in order to constitute an adequate regulatory mechanism.

2009 Final Rule at 15170.

As addressed above, Wyoming’s predatory area is scientifically sound and does not impact Wyoming’s ability to protect a recovered wolf population. The USFWS is now trying to equivocate by claiming that the predatory area somehow negatively impacts genetic connectivity. Yet all the science points to the conclusion that genetic connectivity is not

threat to wolves. “[A]ll subpopulations within the NRM wolf populations have high standing levels of genetic variability. . . , thus, *inadequate genetic diversity is not a wolf conservation issue in the NRM at this time.*” *Id.* at 15177 (emphasis added).

### CONCLUSION

The Respondents unlawfully withdrew approval of Wyoming’s 2007 wolf Management Plan. The Wyoming Plan meets every aspect of the 1987 Recovery Plan, the Final Rule, and the subsequent changes that the USFWS has made to the recovery goals and requirements. The Wyoming Plan provides the regulatory mechanism necessary to protect a recovered gray wolf population. The expert biologists’ opinions support the Wyoming Plan. The Administrative Record supports approval of the Wyoming Plan. The Administrative Record does not support the Respondents’ decision to reject the Wyoming Plan.

The USFWS acknowledges that Wyoming has met the established recovery goals. At the same time, and with no rational or scientific basis, the USFWS has refused to delist the gray wolf population in Wyoming. Although the USFWS fully understands that the standard for delisting is the best scientific and commercial data available, it has chosen to pay only lip service to that requirement.

Respondents’ decision to reject the 2007 Plan with the 2008 amendments, and to refuse to delist here is arbitrary, capricious, an abuse of discretion, and not in accordance with the ESA. Respondents’ have acted in excess of their statutory jurisdiction and authority by ignoring the ESA, the testimony of its own experts, and the independent peer reviews. Respondents have unlawfully withheld and unreasonably delayed approval of the Plan.

The Wolf Coalition respectfully requests that the Court enter an Order remanding this matter back to the Respondents with instructions to approve the Wyoming Plan and to

immediately begin the delisting process. *See Moisa v. Barnhart*, 367 F.3d 882, 887 (9<sup>th</sup> Cir. 2004).

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of November, 2009

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

In accordance with Fed. R. App. P. 32(a)(7)(B), I certify that this brief contains 13,988 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This word count was obtained by using the word count function of the WordPerfect 12 word processing program. The word count includes all footnotes. This brief was written in 13 point Times New Roman font using the WordPerfect 12 word processing program.

/s/ Harriet M. Hageman  
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 9, 2009, a true and correct copy of the foregoing **WOLF COALITION'S OPENING BRIEF FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF – RELATED TO RESPONDENTS' REFUSAL TO DELIST THE GRAY WOLF IN WYOMING**, was served upon the following via the Electronic Case Filing system of the United States District Court for the District of Wyoming.

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