

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING )

Petitioner, )

WYOMING WOLF COALITION, )

Petitioner-Intervenors, )

vs. )

Civil No. 09-CV-118-J

UNITED STATES DEPARTMENT OF )

THE INTERIOR; UNITED STATES FISH )

& WILDLIFE SERVICE; KEN SALAZAR, )

in his official capacity as Secretary of the )

United States Department of the Interior; )

ROWAN GOULD, in his official capacity )

as Acting Director of the United States )

Fish and Wildlife Service; and STEPHEN )

GUERTIN, in his official capacity as the )

Regional Director of the Mountain-Prairie )

Region of the United States Fish and Wildlife )

Service, )

Respondents. )

**JOINT REPLY BRIEF**

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

BOARD OF COUNTY COMMISSIONERS )

of the COUNTY OF PARK, STATE OF )

WYOMING, )

Petitioners, )

vs. )

Civil No. 09-CV-138-J

UNITED STATES DEPARTMENT OF )

THE INTERIOR; UNITED STATES FISH )

& 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, )  
)  
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Respondents. )

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## **SUMMARY OF THE ARGUMENT**

In the Federal Register notice for the final delisting rule, the Service outlined numerous alleged deficiencies with the State's wolf management scheme and identified five changes the State must make to the management scheme in order to satisfy the requirements for delisting in the Endangered Species Act ("ESA"). In rejecting the State's wolf management scheme, the Service acted arbitrarily and capriciously and, as a result, the Service's decision to reject the State's wolf management scheme must be set aside.

With respect to the alleged deficiencies, the Service cursorily parsed the State's wolf management statutes in an effort to show that the State does not have the necessary legal authority to allow the Wyoming Game and Fish Commission ("Commission") and the Wyoming Game and Fish Department ("Department") to conserve the State's share of the recovered Northern Rocky Mountain Distinct Population Segment ("NRM DPS") wolf population after delisting. The Service's analysis of the State's wolf management statutes is arbitrary and capricious because the Service badly misconstrued the statutes and ignored the binding legal commitments in the Wyoming Wolf Management Plan ("Wyoming Plan") and in Chapter 21 of the Rules and Regulations of the Wyoming Game and Fish Commission ("Chapter 21 rule") to manage for at least 15 breeding pairs and at least 150 wolves in Wyoming after delisting.



The Service also rejected the Chapter 21 rule on the erroneous grounds that the rule was temporary and not consistent with the wolf management statutes. Although the State initially adopted the Chapter 21 rule as an emergency rule, the Service was on notice that the final Chapter 21 rule was being promulgated. In fact, the final Chapter 21 rule took effect three weeks before the final delisting rule was published in the Federal Register and nearly two full months before the delisting rule became effective. The Service was legally required to consider the merits of either the emergency version or the final version of the Chapter 21 Rule. The Service acted arbitrarily and capriciously by not considering the merits of the Chapter 21 rule in assessing the adequacy of the State's regulatory scheme.

The Service also had no legitimate basis for finding that the Chapter 21 rule is not consistent with the State's wolf management statutes. The ESA precludes the Service from considering such a state administrative law question in evaluating the adequacy of the State's wolf management scheme. Moreover, the alleged inconsistencies between the statutes and the rules are based upon the Service's flawed interpretation of the statutes and therefore lack merit as a matter of law.

With respect to the five changes demanded by the Service, the State's existing wolf management statutes, the Chapter 21 rule, and the Wyoming Plan already address four of the five changes. The fifth demanded change — that the State must classify

wolves as trophy game animals statewide — has no basis in law or fact. To satisfy the legal requirements for delisting, the State’s wolf management scheme need only be “adequate” to allow the State to maintain at least 15 breeding pairs and at least 150 wolves in Wyoming after delisting. There is no legitimate evidence in the administrative record to show that the current trophy game area in Wyoming will prevent the State from achieving the numeric management goals. Accordingly, classifying wolves as trophy game animals in northwestern Wyoming and as predators throughout the remainder of the State satisfies the legal requirements for delisting. Just as important, the evidence in the administrative record indisputably shows that there is no suitable wolf habitat throughout most of Wyoming, so there is no biological reason why wolves should be classified as trophy game animals east and south of the current outer boundary of the trophy game area in Wyoming.

### **ARGUMENT**

- I. The Service’s reasons for rejecting the State’s wolf management scheme are arbitrary and capricious.**
- A. The Service’s interpretation of numerous provisions in the State’s wolf management statutes is incorrect as a matter of law.**

Relying on its own cursory interpretation of several provisions in the State’s wolf management statutes, the Service argues that the State’s wolf management scheme is not adequate to conserve the State’s share of the recovered wolf population after delisting.

(Fed. Br. at 13-17). Under the guise of statutory interpretation, the Service conjures up several “worst case scenario” outcomes that may result if the State’s wolf management statutes are interpreted and applied in the manner proposed by the Service. (Id.). The Service then cites these speculative results as reasons why the State’s scheme is inadequate. (Id.). The Service’s analysis of the various State’s wolf management statutes ignores the unambiguous language and express legislative intent of the statutes and therefore cannot stand.

### **1. The Proper Interpretation of the State’s Wolf Management Statutes**

The Wyoming Supreme Court has not interpreted any of the State’s wolf management statutes at issue in this case.

When the highest court in a state has not interpreted a particular state statutory provision, ... a federal court must examine the state appellate court opinions and other authorities to predict how the highest court would interpret that particular provision. In doing so, a federal court must follow state rules of statutory construction.

*United States v. Ruiz*, — F.3d —, 2009 WL 5102787 (10<sup>th</sup> Cir. Dec. 29, 2009)(citation, internal quotation marks, and internal brackets omitted). Accordingly, this Court must apply state rules of statutory construction when interpreting the State’s wolf management statutes.

When interpreting statutory language, the reviewing court seeks to determine the legislature’s intent in enacting the statute and to give effect to that intent. *See Sublette*

*County Sch. Dist. No. 9 v. McBride*, 2008 WY 152, ¶ 17, 198 P.3d 1079, 1083 (Wyo. 2008). If the statute is clear and unambiguous, then the reviewing court must give effect to the plain meaning of the statutory language. *Hede v. Gilstrap*, 2005 WY 24, ¶ 6, 107 P.2d 158, 162 (Wyo. 2005).

Generally speaking, the Service's concerns regarding the State's wolf management statutes all center on the Service's belief that the statutes (as interpreted by the Service) will not allow the State to maintain its share of the recovered NRM DPS wolf population. However, the Wyoming Plan and Section 4(a) in the Chapter 21 rule unambiguously commit the State to maintain at least 15 breeding pairs and at least 150 wolves in Wyoming after delisting. (2009 AR: 35278, 35287; Attach. D. to Jt. Opening Br.).

The Wyoming Plan and the Chapter 21 rule represent the State's interpretation of the State's wolf management statutes with respect to the numeric management goals for wolves. If the state agency that administers a statute scheme has interpreted the statutes, then the reviewing court must defer to the state agency's interpretation unless the interpretation is clearly erroneous. *Pinther v. State Dep't of Admin. & Info.*, 866 P.2d 1300, 1304 (Wyo. 1994). Accordingly, this Court (and the Service) must defer to the State's interpretation of the State wolf management statutes because, as is shown below, the State's interpretation gives effect the legislative intent of the statutes.

a.) **WYO. STAT. ANN. §§ 23-1-101(b) and 23-1-101(a)(xii)(B)(I).**

According to the Service, WYO. STAT. ANN. § 23-1-101(b) authorizes the State to establish a larger trophy game area solely for the purpose of ensuring that the gray wolf is delisted and then, as soon as delisting occurs, WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I) automatically diminishes the trophy game area to a size that would not have been adequate to allow for delisting. (Fed. Br. at 14-15, 21, 39-40). The Service's interpretation of WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I) and WYO. STAT. ANN. § 23-1-101(b) is flawed as a matter of law.<sup>1</sup>

Section 23-1-101(a)(xii)(B)(I) provides:

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

(I) "Trophy game animal" shall include any gray wolf within those tracts of land within the following described area, subject to modification as authorized in this subdivision:

\* \* \* \* \*

This described area may be diminished by rule of the commission if the commission determines the diminution does not impede the

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<sup>1</sup> In addition, in the Federal Register notice for the final delisting rule, the Service did not cite this argument as a reason why the State's wolf management scheme is not adequate. *See generally* 74 Fed. Reg. 15123, 15170-172 (April 2, 2009). Because this novel (and incorrect) interpretation of the State's wolf management statutes appears for the first time in the Service's response brief, this Court must reject the argument as being a *post hoc* rationalization of litigation counsel. *See United States v. Jenks*, 22 F.3d 1513, 1520 (10<sup>th</sup> Cir. 1994).

delisting of gray wolves and will facilitate Wyoming's management of wolves[.]

(Emphasis added). Section 23-1-101(b) provides:

To the extent necessary to achieve federal government delisting of the gray wolf, the governor may direct the game and fish commission to adopt a boundary between the area in which the wolf is treated as a trophy game animal and the area where it is treated as a predator at any place between the area described in subdivision (a)(xii)(B)(I) of this section and the following described area:

\* \* \* \* \*

Any boundary change adopted pursuant to this subsection shall be certified and effective as provided in W.S. 23-1-109(f).

(Emphasis added). Although the pertinent text is not included in the foregoing excerpts, WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I) and WYO. STAT. ANN. § 23-1-101(b) each describe a specific geographic outer boundary for the trophy game area. The area encompassed by the boundary described in WYO. STAT. ANN. § 23-1-101(b) is much larger than the area encompassed by the boundary described in WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I).

The boundaries described in WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I) and in WYO. STAT. ANN. § 23-1-101(b) represent alternative means for establishing the outer boundary of the trophy game area in Wyoming. In WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I), the Wyoming Legislature: (1) made delisting a condition precedent for gray wolves to be classified as trophy game animals; and (2) described the outer

boundary of a potential trophy game area. The phrase “[f]rom and after the date gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming” merely ensures that the gray wolf will not be legally designated as a “trophy game animal” under Wyoming law until wolves are delisted in Wyoming as provided by WYO. STAT. ANN. § 23-1-108.

In WYO. STAT. ANN. § 23-1-101(b), the Wyoming Legislature authorized the Commission to adopt a rule to expand the boundary of the trophy game area beyond the boundary described in WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I) (and thereby expand the size of the trophy game area) if the Service required a larger trophy game area for delisting. The phrase “[t]o the extent necessary to achieve federal government delisting of the gray wolf” merely recognizes that the Service may require the trophy game area to be larger than the area described in WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I) in order for the Service to delist wolves in Wyoming.

The boundary described in WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I) applies only if the Commission has not established a different boundary by rule as authorized in WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I). In Section 3(j) of the Chapter 21 rule, the Commission established the outer boundary for the trophy game area at the maximum limit authorized in WYO. STAT. ANN. § 23-1-101(b) because the Service had determined that a trophy game area of that size is large enough to allow for delisting. *See* 72 Fed.

Reg. 6106, 6119, 6131 (Feb. 8, 2007). As a result, and contrary to what the Service has argued, the outer boundary described in WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I) will not take effect when wolves are delisted.

The Service's interpretation of WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I) and WYO. STAT. ANN. § 23-1-101(b) cannot be squared with the express legislative intent underlying the State's wolf management statutes. The Wyoming Legislature enacted the State's wolf management statutes, *inter alia*, "to provide appropriate state management and control of gray wolves in order ... to prevent future listing of the gray wolf as an experimental nonessential population, endangered species, or threatened species."<sup>2</sup> 2003 Wyo. Sess. Laws, ch. 115, §4(a). (*See* Attach. A to Jt. Opening Br.). Since the Service has determined that a trophy game area smaller than the current area is not acceptable (*see* 74 Fed. Reg. at 15170-171), the Service's proffered interpretation would result in the wolf being relisted. The Service's interpretation thus contravenes the intent of the statutes. As a matter of law, WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I) and WYO. STAT. ANN. § 23-1-101(b) cannot be interpreted in a manner contrary to the legislative intent

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<sup>2</sup> This statement of legislative intent appears in HB229, which was enacted in 2003. The majority of the language in the State's current wolf management statutes was enacted in HB213 in 2007. The statement of intent from HB229 is still valid because: (1) the language has not been repealed; and (2) in HB213, the Wyoming Legislature amended Section 4(c) of Chapter 115 of the 2003 Session laws, thereby confirming a legislative intent for Section 4 to have continuing legal effect with respect to the provisions in HB213. (*See* Attach. B to Jt. Opening Br.).



underlying the statutes. *See Sublette County Sch. Dist. No. 9*, 2008 WY 152, ¶ 17, 198 P.3d at 1083.

The Service's interpretation also runs afoul of the basic tenets of statutory construction. For example, the Service effectively is arguing that the State has established a statutory framework with the intent of perpetrating a "bait and switch" on the Service, with the Commission adopting a rule to establish a larger trophy game area solely to gain federal approval of the State's wolf management scheme and then having a trophy game area that would not have gained federal approval take effect immediately upon delisting by virtue of self-executing statutory language. Such an interpretation is absurd and effectively accuses the State of not acting in good faith. A statute cannot be interpreted in a manner that produces an absurd result. *See Hede*, 2005 WY 24, ¶ 6, 107 P.2d at 162. In addition, in interpreting a statute, it must be presumed that the legislature enacted the statute in good faith. *See People v. Texas Co.*, 275 P. 896, 899 (Colo. 1929).

In the Federal Register notice for the final delisting rule, the Service also expressed concerns about the diminution language in WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I). (Fed. Br. at 15, 21, 28). As explained in the Joint Opening Brief, the ESA prohibits the Service from speculating about the possibility that the trophy game boundary might be moved in the future in assessing the adequacy of the State's existing wolf management scheme. (Jt. Opening Br. at 52-53). The ESA requires the Service to

assess the adequacy of the State's "existing" regulatory mechanisms. *See* 16 U.S.C. § 1533(a)(1)(D). Thus, as a matter of law, the Service cannot rely on the possibility that the size of the trophy game area might change as a reason for rejecting the State's wolf management scheme.

In addition, Section 4(c) of the Chapter 21 rule provides that the Commission cannot diminish the size of the current trophy game area unless the best scientific data and information available shows that reducing the size of the area will not prevent the Department from maintaining at least 15 breeding pairs and at least 150 wolves in Wyoming. Section 4(c) thus ensures that, if the size of the trophy game area is decreased in the future, the smaller trophy game area will not preclude the State from maintaining at least 15 breeding pairs and at least 150 wolves in Wyoming

**b.) WYO. STAT. ANN. §§ 23-1-304(e), (g), and (j).**

Citing WYO. STAT. ANN. §§ 23-1-304(e), (g), and (j), the Service argues that "Wyoming law mandates 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." (Fed. Br. at 15). The unambiguous language in WYO. STAT. ANN. §§ 23-1-304(e), (g), and (j) belies this argument. Each of these statutory provisions includes language that requires the State to

manage the delisted wolf population in Wyoming in order to maintain at least 15 breeding pairs and at least 150 wolves.

In WYO. STAT. ANN. § 23-1-304(e), the Wyoming Legislature addressed the potential negative impacts of wolf predation on big game animals herds in Wyoming.

Pursuant to WYO. STAT. ANN. § 23-1-304(e):

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

(Emphasis added).

The phrase “[t]o the extent permitted by this title” limits the State’s discretionary authority in managing wolves after delisting. As noted above, the State’s wolf management statutes were enacted with the intent that the wolf population in Wyoming be managed so that wolves are not relisted in the future. *See* 2003 Wyo. Sess. Laws, ch. 115, §4(a). Viewed in light of this express statement of legislative intent, the phrase “[t]o the extent permitted by this title” in WYO. STAT. ANN. § 23-1-304 (e) means the Department must manage wolves in a manner that ensures the long term viability of the big game animal herds in Wyoming *and* will not cause the wolf population to be re-listed.

Since the Service has stated that the wolf population will be relisted if the population drops below 15 breeding pairs and 150 wolves for three consecutive years, WYO. STAT. ANN. § 23-1-304 (e) requires the Department to manage wolves in a manner that ensures the long term viability of the wild ungulate herds in Wyoming and will not cause the wolf population in Wyoming to drop below 15 breeding pairs and 150 wolves for three consecutive years.

The Wyoming Legislature addressed the potential negative impacts of wolf predation on big and trophy game animal populations in WYO. STAT. ANN. § 23-1-304(j), which provides as follows:

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

(Emphasis added).

As used in WYO. STAT. ANN. § 23-1-304(j), the passive verb phrase “is authorized” is a synonym of the verb “may” and thus gives the Department management discretion in addressing wolf predation on the big game and trophy game populations in Wyoming. *See, e.g., In re WJH*, 24 P.3d 1147, 1152 (Wyo. 2001)(the term “may” is permissive and discretionary). However, given the express statement of legislative intent in 2003 Wyo. Sess. Laws, ch. 115, §4(a), the Department cannot exercise this

management discretion in a manner that might cause the re-listing of the gray wolf. The Department thus must exercise the discretionary authority granted by WYO. STAT. ANN. § 23-1-304(j) in a manner that will not cause the wolf population in Wyoming to drop below 15 breeding pairs and 150 wolves for three consecutive years

In WYO. STAT. ANN. § 23-1-304(g), the Wyoming Legislature addressed the potential negative impacts of wolf predation on private property such as livestock and domestic animals. Pursuant to WYO. STAT. ANN. § 23-1-304(g):

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

(Emphasis added).

As noted above, the passive verb phrase “is authorized” is discretionary. In addition, the discretionary authority granted in WYO. STAT. ANN. § 23-1-304(g) is limited by the statement of legislative intent in 2003 Wyo. Sess. Laws, ch. 115, §4(a). Accordingly, WYO. STAT. ANN. § 23-1-304(g) gives the Department discretionary authority to decide how to address the negative impacts of wolf predation on private property such as livestock and domestic animals, but the Department cannot exercise this management discretion in a manner that might cause the re-listing of the gray wolf.

**c.) WYO. STAT. ANN. §§ 23-1-304(m) and (n).**

The Service argues that, read together, WYO. STAT. ANN. §§ 23-1-304(m) and (n) will result in the issuance of an unlimited number of lethal take permits by the Department when seven breeding pairs of wolves exist primarily outside of the National Parks and will prohibit the Department from relaxing control measures until the wolf population in Wyoming drops below seven breeding pairs. (Fed. Br. at 15-16). This argument ignores the unambiguous language in WYO. STAT. ANN. §§ 23-1-304(m) and (n).

Pursuant to WYO. STAT. ANN. § 23-1-304(m):

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

(Emphasis added). Pursuant to WYO. STAT. ANN. § 23-1-304(n):

The commission shall promulgate rules and regulations providing for issuance of annual permits to landowners or livestock owners for removing wolves which are harassing, injuring, maiming or killing livestock or other domesticated animals and for wolves occupying geographic areas where chronic wolf predation occurs. The permits shall be issued as long as there are seven (7) breeding pairs within the state and outside of Yellowstone National Park, Grand Teton

National Park and John D. Rockefeller, Jr. Memorial Parkway. The rules shall provide for suspending or cancelling permits if further lethal control could cause relisting of wolves under the endangered species act.

(Emphasis added).

As used in WYO. STAT. ANN. §§ 23-1-304(m) and (n), the passive future tense phrase “could cause relisting” indicates an intent that lethal control should not be used to manage the wolf population if the Department determines that additional lethal control might result in the population size to decrease below the levels the Service has established for relisting. The unambiguous language in WYO. STAT. ANN. §§ 23-1-304(m) and (n) thus makes the cessation of lethal control contingent upon possible relisting, and not upon the existence of less than seven breeding pairs in Wyoming outside of the National Parks.

Both WYO. STAT. ANN. §§ 23-1-304(m) and (n) require the Commission to adopt rules to ensure that the use of lethal control and the issuance of lethal take permits to private citizens will not result in the relisting of the gray wolf. Sections 7(d) and 9(d) in the Chapter 21 rule comply with the statutory directive in WYO. STAT. ANN. §§ 23-1-304(m). (*See* Attach. D to Jt. Opening Br.). Section 8(d) in the Chapter 21 rule complies with the statutory directive in WYO. STAT. ANN. §§ 23-1-304(n). (*Id.*).

**B. The Service's reasons for rejecting the Chapter 21 rule are arbitrary and capricious.**

The Service argues that, in the context of the adequate regulatory mechanisms analysis, the Service can evaluate whether the Chapter 21 rule is consistent with the State's wolf management statutes. (Fed. Br. at 40-41). The Service hints that the ESA grants such authority, but cites no specific provision in the ESA or any other legal authority in support of this argument.

The question of whether a state agency rule conflicts with a state statute is inherently a state law question. To answer such a question, both the rule and the statute must be interpreted using the rules of statutory interpretation and construction adopted by the highest court in the state. *See, cf., United States v. Ruiz*, — F.3d —, 2009 WL 5102787 (10<sup>th</sup> Cir. Dec. 29, 2009)(federal court must use state rules of statutory construction to interpret state law). The Service, as a federal agency charged with administering various federal natural resources statutes, lacks the requisite knowledge and expertise to properly evaluate whether a state rule conflicts with a state statute. Moreover, the ESA expressly prohibits the Service from considering non-biological information in evaluating the adequacy of existing regulatory mechanisms. *See* 16 U.S.C. § 1533(b). Therefore, to the extent that the Service had concerns about possible inconsistencies between the Chapter 21 rule and the State's wolf management statutes,



the Service should have asked the State to address the issue and then deferred to the State's legal analysis.

The Service's lack of legal authority to address the rule/statute conflict issue notwithstanding, the Service's analysis of the issue in the Federal Register notice for the final delisting rule does not pass muster under the Administrative Procedure Act ("APA"). In an administrative record review case, the APA requires that the agency examine the relevant data and articulate a satisfactory explanation for its decision. *Citizens' Comm. to Save Our Canyons v. United States Forest Serv.*, 297 F.3d 1012, 1035 (10<sup>th</sup> Cir. 2002). In this case, the Federal Register notice for the final delisting rule does not include any specific citations to either the Chapter 21 rule or the State's wolf management statutes or a proper legal analysis of the rule and the statutes at issue. Thus, even if the Service had the authority to address the rule/statute conflict issue, the Service's analysis of the issue does not articulate a satisfactory explanation and, as a result, is arbitrary and capricious.

The Service also argues that it properly rejected the Chapter 21 emergency rule because the rule was "temporary and contingent upon future action[.]" (Fed. Br. at 39). This argument ignores the two significant facts. First, in January 2009, the State notified the Service that the Commission had started the process of adopting a final Chapter 21 rule (which is the same in every respect as the Chapter 21 emergency rule). (2009 SAR:

1-2). The Service disregarded this information in its push to adopt the final delisting rule before the Obama administration took office.

In addition, the final Chapter 21 Rule took effect on March 12, 2009, a full three weeks before the final delisting rule was published in the Federal Register and nearly two full months before the delisting rule became effective. (74 Fed. Reg. at 15123; *see also* Attach. D to Jt. Opening Br.). The Service thus had ample opportunity to review the final Chapter 21 rule before the delisting rule was published and took effect. As a matter of equity, the Service cannot find fault with the temporary nature of the Chapter 21 emergency rule when the Service should have included the final Chapter 21 rule in its analysis but did not.

- C. The Service’s conclusion that the State’s wolf management scheme does not assure that the recovered NRM DPS wolf population will be maintained above minimum recovery levels after delisting lacks merit.**
  - 1. The Service’s finding that Yellowstone National Park will not consistently have at least eight breeding pairs of wolves annually is factually incorrect.**

The Service argues that the State’s wolf management scheme will not maintain a wolf population of at least 15 breeding pairs and at least 150 wolves in Wyoming because: (a) the management scheme relies on Yellowstone National Park (“Yellowstone”) to have at least eight breeding pairs each year; and (b) Yellowstone “has consistently and recently failed to support eight breeding pairs.” (Fed. Br. at 18-19).

As argued in the Joint Opening Brief, the Service's continued insistence that Yellowstone will not consistently support at least eight breeding pairs of wolves is factually incorrect. (*See* Jt. Opening Br. at 53-56). The lack of a factual basis for the Service's argument notwithstanding, the Chapter 21 rule addresses the Service's concern.

Pursuant to Section 4(b) of the Chapter 21 rule:

If the Commission determines that there are less than eight (8) breeding pairs located inside of the National Parks for two consecutive years, then the Department shall manage for a sufficient number of breeding pairs and wolves in the area of the WTGMA located outside of the National Parks to achieve the management objectives described in Section 4(a) [of the Chapter 21 rule].

Section 4(a) of the Chapter 21 rule states that “[t]he Commission shall manage for at least fifteen (15) breeding pairs (comprising of at least 150 gray wolves) within the WTGMA[.]” Thus, in the unlikely event that Yellowstone does not consistently support at least 8 breeding pairs, the Department will manage the wolf population in Wyoming as needed to ensure that the management goals of at least 15 breeding pairs and at least 150 wolves are met.

**2. The Service finding that the State's wolf management scheme does not assure that the delisted wolf population in Wyoming will never fall below 10 breeding pairs and 100 wolves is factually incorrect.**

The Service also argues that the State's wolf management scheme does not assure that the delisted wolf population in Wyoming will never drop below 10 breeding pairs and 100 wolves because: (a) wolves moving from the trophy game area to the predator

area will be subjected to unregulated take; and (b) WYO. STAT. ANN. § 23-3-115(a) allows unregulated take of wolves on private property in the trophy game area. (Fed. Br. at 19-21).

In making the predator area argument, the Service assumes that the Department will not consider wolves killed in the predator area in evaluating whether the State's management goals of at least 15 breeding pairs and at least 150 wolves are being met. Such is not the case. All wolves killed in Wyoming, regardless of the manner and location of the take, will be counted by the Department in evaluating whether the State's wolf management goals are being met. (2009 AR: 35289-291). The Department will document the distribution, reproduction, and mortality of wolves in all areas in Wyoming outside of the National Parks and the Wind River Indian Reservation. (2009 AR: 35289). The appropriate federal agencies will share wolf population information with the Department with respect to wolves living in the National Parks and the Wind River Indian Reservation. (Id.).

Moreover, although the Service contends that all wolves in the predator area are likely to be killed, the Service does not explain why or how such take will prohibit the State from maintaining at least 15 breeding pairs and at least 150 wolves in Wyoming. This failure to make a rational connection between the facts found and the decision made

is arbitrary and capricious and must be set aside. *See Citizens' Comm. to Save Our Canyons*, 297 F.3d at 1035 (outlining the APA requirements for agency decisions).

With respect to WYO. STAT. ANN. § 23-3-115, the Service has stated that its concerns with the statute will be remedied if the State “authorize[s] defense of property take in a manner that is similar to the current [federal] regulatory scheme.” *See* 74 Fed. Reg. at 15179. The State has complied with this demand in Sections 3(b) and 7(a) of the Chapter 21 rule. The definition of “doing damage to private property” in Section 3(b) of the Chapter 21 rule mirrors the definition of the phrase “[i]n the act of attacking” in 50 C.F.R. §17.84(n). Section 7(a) of the Chapter 21 rule effectively makes the definition of “doing damage to private property” applicable to WYO. STAT. ANN. § 23-3-115.

**3. The Service’s finding that the State’s wolf management scheme does not provide for the maintenance of a minimum number of wolves in Wyoming is factually incorrect.**

The Service argues that “the statutory directive to reduce the wolf population to seven breeding pairs, unattached to any minimum number of wolves, provides insufficient assurances” that the State can maintain at least 150 wolves in Wyoming after delisting. (Fed. Br. at 22-23). This argument is unavailing for two reasons.

First, in the Federal Register notice for the final delisting rule, the Service did not cite this argument as a reason why the State’s wolf management scheme is not adequate. *See generally* 74 Fed. Reg. at 15170-172. Accordingly, this Court must reject the

argument as being a *post hoc* rationalization of litigation counsel. *See Jenks*, 22 F.3d at 1520.

Second, and more importantly, this argument ignores the State's unambiguous commitments in the Wyoming Plan and the Chapter 21 rule with respect to the State's management goals for wolves in Wyoming. In the Wyoming Plan, the State expressly commits to manage for at least 15 breeding pairs and at least 150 wolves in Wyoming. (2009 AR: 35278, 35287). Section 4(a) of the Chapter 21 rule establishes the same management goals. (*See* Attach. D to Jt. Opening Br.). The binding legal commitments in the Wyoming Plan and Section 4(a) of the Chapter 21 provide adequate assurances that the State will maintain at least 15 breeding pairs and at least 150 wolves after delisting.

**D. The Service is not entitled to deference regarding the scientific and technical findings in the final delisting rule.**

According to the Service, this Court should give the Service "a high degree of deference" when reviewing the scientific and technical findings in the final delisting rule because the Service was operating within its area of special expertise when it evaluated the adequacy of the State's wolf management scheme. (Fed. Br. at 34).

Generally, a reviewing court defers to a federal agency decision when the decision "implicates scientific and technical judgments within the scope of agency expertise." *Wyoming v. United States*, 279 F.3d 1214, 1240 (10<sup>th</sup> Cir. 2002). However, the deference owed to the scientific and technical findings of an agency is not unlimited. *Nat'l Wildlife*

*Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 798 (9<sup>th</sup> Cir. 2005)(citation and quotation mark omitted).

For example, a reviewing court cannot defer to an agency decision if the agency ignores the analysis of its experts. *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F.Supp.2d 1115, 1127-28 (N.D. Cal. 2006). As explained in detail in the Joint Opening Brief, Ed Bangs, the Western Gray Wolf Recovery Coordinator for the Service, consistently has held the biological opinion that classifying wolves as predators throughout most of Wyoming will not prevent the State from maintaining its share of the recovered wolf population in the NRM DPS. (Jt. Opening Br. at 27-32). Mr. Bangs has reiterated this opinion as recently as March 2009. (2009 AR: 712). The Service has ignored Mr. Bangs' biological opinion and instead has demanded that the State classify wolves as trophy game animals throughout all of Wyoming. *See* 74 Fed. Reg. at 15179.

As another example, a reviewing court also owes no deference "to an agency decision that 'is without substantial basis in fact.'" *Sierra Club v. U.S.E.P.A.*, 346 F.3d 955, 961 (9<sup>th</sup> Cir. 2003)(quoting *Fed. Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972)). The Service has demanded that the State classify wolves as trophy game animals throughout Wyoming and, in making this demand, implicitly has determined that the State cannot maintain its share of the recovered wolf population without the statewide trophy game classification. Yet, the undisputed evidence in the

administrative record confirms that there is no suitable wolf habitat in Wyoming east of the Big Horn mountains and south of the Wyoming Range and the Wind River mountains. (*See* AR 2009: 38170; 73 Fed. Reg. 63926, 63931 (Oct. 28, 2008)). In addition, the Service has acknowledged that “pack establishment in areas of unsuitable habitat is extremely unlikely[.]” 74 Fed. Reg. at 15183. If wolf packs are “extremely unlikely” to live east of the Big Horn mountains and south of the Wyoming Range and the Wind River mountains, then there is no legitimate biological reason why the State must have a trophy game classification for wolves in those areas of the State. The evidence in the administrative record thus shows that the Service has no basis in fact for demanding that the State adopt a statewide trophy game classification for wolves.

Finally, no deference is owed when the agency has not considered some factor which is essential to making an informed decision. *Nat’l Wildlife Fed’n*, 422 F.3d at 798. In determining whether the NRM DPS wolf population should be delisted, the Service was required to evaluate the adequacy of the State’s wolf management scheme “solely on the basis of the best scientific and commercial data available.” *See* 16 U.S.C. § 1533(b). As explained in detail in the Joint Opening Brief, the Service did not comply with this “best science” mandate in promulgating the final delisting rule. (Jt. Opening Br. at 26-48).



Any one of the foregoing exceptions to the general rule of deference would preclude this Court from deferring to the Service in this case. Since all three exceptions, apply, this Court cannot defer to the scientific and technical findings of the Service in the Federal Register notice for the final delisting rule.

**E. The changes the Service has demanded regarding the State's wolf management scheme are not merely "guidance."**

In the final delisting rule, the Service identified five changes that must be made to the State's wolf management scheme in order for the scheme to be an adequate regulatory mechanism. 74 Fed. Reg. at 15179. The Service argues that these demanded changes are merely "guidance" and do not "constitute the basis for [the Service's] determination that Wyoming's *current* regulatory mechanisms are inadequate." (Fed. Br. at 37) (emphasis in Fed. Br.). The unambiguous language in the Federal Register notice for the final delisting rule tells a different story.

In the "Conclusion of the 5-Factor Analysis" section in the Federal Register notice for the final delisting rule, the Service explained that

... Wyoming's regulatory framework does not provide the adequate regulatory mechanisms to assure that Wyoming's share of a recovered NRM wolf population would be conserved if the protections of the [ESA] were removed. In order to constitute adequate regulatory mechanisms, Wyoming's regulatory framework needs to: Designate and manage wolves as a trophy game species statewide; manage for at least 15 breeding pairs and at least 150 wolves in mid-winter in their State and at least 7 breeding pairs and at least 70 wolves in mid-winter outside the National Parks;

authorize defense of property in a manner that is similar to the current regulatory scheme; consider all sources of mortality, including all hunting and defense of property mortality, in its total statewide allowable mortality levels; and manage the population to maintain high levels of genetic diversity and to continue ongoing genetic exchange.

74 Fed. Reg. at 15179 (emphasis added).

The foregoing text confirms that the Service will approve the State's wolf management scheme only if the State makes the five identified changes to the management scheme. If the five identified changes are necessary for the Service to approve the management scheme, then logic and common sense dictate that the Service rejected the State's wolf management scheme because the management scheme does not address the matters embodied in the demanded changes. Accordingly, the Service's argument that the demanded changes are merely guidance and not the basis for the delisting decision is disingenuous and factually incorrect.

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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 6,710 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This word count was obtained by using the word count function of the Microsoft Word 2007 word processing program. The word count includes all footnotes. This brief was written in 13 point Times New Roman font using the Microsoft Word 2007 word processing program.

/s/ Jay Jerde  
Jay Jerde  
Deputy Attorney General

**CERTIFICATE OF SERVICE**



# ATTACHMENT E

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

Docket No. 09-CV-118-J

WYO. STAT. ANN. § 23-1-101

**TITLE 23  
GAME AND FISH**

<b>Chapter</b>		<b>Section</b>
1. ADMINISTRATION		23-1-101
2. LICENSES; FEES		23-2-101
3. GENERAL REGULATORY PROVISIONS		23-3-101
6. ENFORCEMENT; PENALTIES		23-6-103

**CHAPTER 1  
ADMINISTRATION**

<b>ARTICLE 1. GENERAL PROVISIONS</b>	<b>Section</b>	
	23-1-504	Free and reduced price license revenue recoupment program.
<b>Section</b>		
23-1-101. Definitions of wildlife.		
23-1-109. State management of gray wolves.		
		<b>ARTICLE 7. LICENSES, STAMPS, PERMITS AND TAGS</b>
<b>ARTICLE 3. GENERAL POWERS AND DUTIES OF THE COMMISSION</b>	23-1-701	Selling agents; administration of oaths; licenses; permits and game tags.
23-1-302. Powers and duties.	23-1-703	Limitation of number of big or trophy game animal licenses; reservation of certain licenses; reservation of certain unused licenses.
23-1-304. Classification of gray wolves.		
		23-1-705
<b>ARTICLE 5. FINANCE</b>		Complimentary licenses; one-shot antelope hunt licenses; gunpowder and buckskin hunt licenses; gratuitous licenses.
23-1-501. Game and fish fund.		
23-1-502. Financial policy; budget; fiscal year; debts.		

**ARTICLE 1  
GENERAL PROVISIONS**

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

- (a) As used in this act:
- (i) "Big game animal" means antelope, bighorn sheep, deer, elk, moose or mountain goat;
  - (ii) "Exotic species" means any wild animals, including amphibians, reptiles, mollusks, crustaceans or birds not found in a wild, free or unconfined status in Wyoming;
  - (iii) "Furbearing animal" means badger, beaver, bobcat, marten, mink, muskrat or weasel;
  - (iv) "Game bird" means grouse, partridge, pheasant, ptarmigan, quail, wild turkey and migratory game birds;
  - (v) "Game fish" means bass, catfish, crappie, grayling, ling, northern pike, perch, salmon, sauger, sunfish, trout, walleye or whitefish;
  - (vi) "Migratory game bird" means all migratory game birds defined and protected under federal law;
  - (vii) "Predacious bird" means English sparrow and starling;
  - (viii) "Predatory animal" means:
    - (A) Coyote, jackrabbit, porcupine, raccoon, red fox, skunk or stray cat; and
    - (B) Until the date gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming as provided by W.S.

## § 23-1-101

## GAME &amp; FISH

23-1-108, "predatory animal" includes wolves. After that date, "predatory animal" shall include any gray wolf not within an area of the state in which the gray wolf is:

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

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

(ix) "Protected animal" means black-footed ferret, fisher, lynx, otter, pika or wolverine;

(x) "Protected bird" means migratory birds as defined and protected under federal law;

(xi) "Small game animal" means cottontail rabbit or snowshoe hare, and fox, grey and red squirrels;

(xii) "Trophy game animal" means:

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

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

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

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

(xiii) "Wildlife" means all wild mammals, birds, fish, amphibians, reptiles, crustaceans and mollusks, and wild bison designated by the Wyoming game and fish commission and the Wyoming livestock board within Wyoming.

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



GAME & FISH

§ 23-1-103

120. Any boundary change adopted pursuant to this subsection shall be certified and effective as provided in W.S. 23-1-109(f).

Laws 1939, ch. 65, § 2; Laws 1943, ch. 112, § 1; Laws 1957, ch. 45, §§ 1, 2; Laws 1957, ch. 178, §§ 2, 3; Laws 1959, ch. 89, § 1; Laws 1965, ch. 45, §§ 1, 2; Laws 1965, ch. 184, §§ 4, 5; Laws 1973, ch. 249, § 1; Laws 1979, ch. 63, § 2; Laws 1979, ch. 140, § 1; Laws 1989, ch. 23, § 2; Laws 2003, ch. 115, § 2, eff. March 4, 2003; Laws 2007, ch. 168, § 3, eff. July 1, 2007; Laws 2009, ch. 169, § 1, eff. March 11, 2009.  
Codifications: C.S. 1945, § 47-102; W.S. 1957, § 23-1; Rev. W.S. 1957, § 23.1-1.

Historical and Statutory Notes

Laws 2003, ch. 115, §§ 3 and 4 (as amended by Laws 2007, ch. 168, § 4) provided:

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

The enacting clause of § 1 and § 6 of Laws 2007, ch. 168 provided:

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

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

The Governor certified with the Secretary of State all acts for Laws 2007, ch. 168 to become effective have occurred on February 27, 2008. The gray wolf was removed from the endangered or threatened species listing by the U.S. Fish & Wildlife Service in 73 Fed. Reg. 10514. See *Defenders of Wildlife v. Hall*, 565 F.Supp.2d 1160, D.Mont., July 18, 2008 (NO. CV 08-56-M-DWM) for the reinstatement of the gray wolf to the endangered species list.

# ATTACHMENT F

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

Docket No. 09-CV-118-J

WYO. STAT. ANN. § 23-1-304

## § 23-1-304

## GAME &amp; FISH

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

(a) The commission shall by rule and regulation establish areas within the state where gray wolves are classified as trophy game animals and set seasons and bag limits within those areas. The areas designated, seasons and bag limits shall be set annually in a manner the commission determines, through rule and regulation, only as necessary to reasonably ensure at least seven (7) breeding pairs of gray wolves are located in this state and primarily outside of Yellowstone National Park, Grand Teton National Park and John D. Rockefeller, Jr. Memorial Parkway at the end of the current calendar year.

(b) Repealed by Laws 2007, ch. 168, § 5.

(c) For purposes of this section "breeding pair" means an adult male and an adult female gray wolf raising at least two (2) pups of the year until December 31. The number of breeding pairs shall be certified by the department prior to January 31 of each year.

(d) The department shall institute and maintain an active program of population monitoring statewide. Population monitoring shall include the use of global positioning systems and radio collaring of gray wolves, including use of aerial tracking, necessary to accurately determine the population and movement of gray wolves in the state. The commission is authorized to enter into memoranda of understanding with the United States fish and wildlife service or other federal agencies to fund the purchase of the necessary technology and to ensure accurate and adequate monitoring of wolf population levels and movements through global positioning systems and radio collar tracking. In all areas of the state, except where otherwise provided, any person who harvests a wolf shall notify the department where the harvest occurred within ten (10) days. Any information regarding the number or nature of wolves legally harvested within the state of Wyoming shall only be released in its aggregate form and no information of a private or confidential nature shall be released without the written consent of the person to whom the information may refer. Information identifying any person legally harvesting a wolf within this state is solely for the use of the department or appropriate law enforcement offices and is not a public record for purposes of W.S. 16-4-201 through 16-4-205.

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

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

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

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

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

## GAME &amp; FISH

§ 23-1-304

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

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

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

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

(p) Repealed by Laws 2008, ch. 44, § 2.

Laws 2003, ch. 115, § 1, eff. March 4, 2003; Laws 2007, ch. 168, §§ 3, 5, eff. July 1, 2007; Laws 2008, ch. 44, § 2, eff. March 5, 2008.

## Historical and Statutory Notes

Laws 2003, ch. 115, §§ 3 and 4 (as amended by Laws 2007, ch. 168, § 4) provided:

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

The enacting clause of § 1 and § 6 of Laws 2007, ch. 168 provided:

"Section 1. This act shall be effective only if W.S. 23-1-109 as created by this act is in effect in accordance with the provisions of that section. The legislative service office is authorized and

directed to publish the provisions of this act in the manner which most effectively displays the contingencies provided in this act.

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

Laws 2008, ch. 44, § 3 provided:

"Section 3. Any other act adopted by the Wyoming legislature during the same session in which this act is adopted shall be given precedence and shall prevail over the amendments in this act to the extent that such acts are in conflict with this act."

The Governor certified with the Secretary of State all acts for Laws 2007, ch. 168 to become effective have occurred on February 27, 2008. The gray wolf was removed from the endangered or threatened species listing by the U.S. Fish & Wildlife Service in 73 Fed. Reg. 10514. See *Defenders of Wildlife v. Hall*, 565 F.Supp.2d 1160; D.Mont., July 18, 2008 (NO. CV-08-56-M-DWM) for the reinstatement of the gray wolf to the endangered species list.

## United States Supreme Court

Environmental law, endangered species, transfer of permitting power, no-jeopardy requirement, see *National Ass'n of Home Builders v. Defenders of*

*Wildlife*, 2007, 127 S.Ct. 2518, 551 U.S. 644, 168 L.Ed.2d 467.