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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.)	Wolf Coalition’s Reply
)	Brief for Declaratory
UNITED STATES DEPARTMENT)	Judgment and Injunctive
OF THE INTERIOR; UNITED STATES)	Relief - Related to
FISH & WILDLIFE SERVICE; KEN)	Respondents’ Refusal
SALAZAR, in his official capacity)	to Delist the Gray Wolf
as Secretary of the United States Department)	in Wyoming
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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

HISTORICAL OVERVIEW 4

 1. **History of Canadian Gray Wolf Recovery** 8

 2. **Review of Wyoming Management Plans and Statutory Scheme** 19

 3. **Summary** 22

ARGUMENT 23

 1. **The Wyoming Plan Meets the ESA Requirements for Delisting** 23

 2. **Misrepresentations Regarding Recovery Area and Wyoming Plan** 25

 3. **The Federal Respondents’ Demands are Without Basis** 27

 4. **The Federal Respondents’ Arguments are Based on Speculation** 30

 5. **The Federal Respondents Should be Required to Approve the Wyoming Plan** 31

CONCLUSION 31

TABLE OF AUTHORITIES

CASES	PAGE NO.
<i>In re Excel Innovations, Inc.</i> , 502 F.3d 1086 (9 th Cir. 2007).	30-31

STATUTES AND CONSTITUTIONAL PROVISIONS	PAGE NO.
Administrative Procedures Act, 5 U.S.C. § 701-706	8
16 U.S.C. § 1533, <i>et seq.</i>	7
16 U.S.C. § 1533(a)(1)	24, 31
16 U.S.C § 34(j) (the “10(j) Rule”)	23
National Environmental Act, 42 U.S.C. §§ 4321 <i>et seq.</i>	7
Wyo.Stat. § 23-1-304	17

OTHER AUTHORITIES	PAGE NO.
1987 Northern Rocky Mountain Wolf Recovery Plan	2, 5, 8-9, 17, 25

Final Rule for the Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. 60252 (1994)	5, 11, 12
Final Environmental Impact Statement for The Reintroduction of Gray Wolves to Yellowstone National Park and Central Idaho	5, 11, 12-13, 18, 25
50 C.F.R. § 17.84	11-12, 23
Advanced Notice of Proposed Rulemaking, 71 Fed. Reg. 6634 (2006)	13
2007 Final Gray Wolf Management Plan	13, 17-18, 20, 21-22, 24
2008 Final Gray Wolf Management Plan	13, 17, 19, 20, 24
Final Rule to Identify the Northern Rocky Mountain Population Segment and To Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15123 (2009)	9, 14-15, 20, 22, 23, 24, 27, 29

INTRODUCTION

Perhaps the most striking aspect of the “Federal Respondents’ Response Brief” is their blatant effort to redefine politics as “science,” and public perception as “biology.” The Federal Respondents have spent forty-three (43) pages attempting to justify the unjustifiable. Their Response Brief is nothing short of a gargantuan effort to rewrite history and, where that is not possible, an even more concerted effort to simply ignore it.

The Federal Respondents have also finally conceded that the vast majority of the representations that they have made to date related to the Canadian gray wolf population (including, among others, management and control assurances, geographic restrictions, biological needs, stated recovery goals, the importance and purpose of the peer reviews, travel corridors, genetic connectivity, a promise to “delist,” and a commitment to turn over management to Wyoming) were made for one purpose, and one purpose only – to say and do whatever was necessary to fulfil their objective of forcing Wyoming and its citizens to protect wolves (and provide the necessary prey base) throughout the entire State regardless of whether “recovery” (however defined) is assured and secured in a smaller geographic area.

The Federal Respondents are now arguing that protecting the wolf population at fifty percent (50%) above the United States Fish and Wildlife Service's (USFWS) unilaterally-defined recovery goals should be considered as a "bare minimum," while at the same time encouraging this Court to conclude that such a "bare minimum" is not good enough. Their objective in that regard is exposed by their most recent demand (included in their Response Brief; unsupported in the Administrative Record) that Wyoming be required to provide a cushion upon a cushion, thereby admitting that their ultimate goal is to increase, and then increase again, the number of wolves that must be protected regardless of whether they are "recovered" from a biological standpoint. In doing so they have confirmed that wolf numbers mean nothing, recovery goals are irrelevant and subject to change, and public perception and politics are the new "scientific" gold standard by which listing and delisting decisions under the Endangered Species Act will be made.

The Federal Respondents are arguing that Wyoming – and this Court – should ignore their Northern Rocky Mountain Wolf Recovery Plan (Recovery Plan), their previous Final Environmental Impact Statement (FEIS), their previous Final Rules, their previous findings, the testimony of their own wolf "experts," and the

overwhelming body of biological and scientific evidence that confirms the fact that the Wyoming Wolf Management Plan (Wyoming Plan) and statutory scheme¹ are designed, and will be implemented, to protect and preserve a recovered wolf population.

The Federal Respondents make it clear that they would have liked Wyoming to take a different approach to protecting its share of the recovered Canadian gray wolf population. Wolf recovery, however, is not a popularity contest, and “likability” is not the criterion by which Wyoming’s Plan should – or can– be judged.

The Federal Respondents have nattered on about various tangential matters, none of which have any bearing on the only significant issue before this Court – whether Wyoming’s Plan passes biological/scientific muster by providing the necessary regulatory framework for protecting this particular non-essential experimental wolf population at or above recovery levels. Wyoming’s Plan clearly

¹ The State of Wyoming and Park County have filed a joint Reply Brief in which they have described the Wyoming Plan and statutory scheme in great detail, and have addressed each of the criticisms lodged by the Federal Respondents in their effort to justify their latest political decisions. The Wolf Coalition does not intend to repeat that same information, and will instead focus upon exposing the illegality of the Federal Respondents’ decisions based on the relevant historical and scientific context of the current dispute. The Wolf Coalition hereby adopts and incorporates the Wyoming/Park County Brief by reference.

does and, importantly, the Federal Respondents have utterly failed to support their arguments otherwise. Their efforts are clearly focused on confusion and deflection rather than on addressing the question at hand.

HISTORICAL OVERVIEW

The Federal Respondents' attempt to construct a firewall between wolf introduction and recovery on the one hand and Wyoming's Plan on the other must not be tolerated. How, why, when and under what rules the wolves were brought into this State were relevant at the time of introduction, and remain relevant today. Such relevance is underscored by the fact that, with limited exception, the basis for wolf introduction, and the manner in which they are to be managed long term, have not changed. Stated another way, the biology and "science" that supported their introduction remains current to this day, with the Federal Respondents providing **nothing** (no data, no studies, no biology, no science) to support their more recent demands that Wyoming designate wolves as "trophy game animals" throughout the State, and provide the related protections (and prey) in a geographic area that is approximately ten (10) times greater in size than what has long been recognized as being the "suitable" habitat.

The reason why Wyoming was targeted for wolf introduction is also critical. To put it bluntly, the wolves were brought here because Yellowstone National Park (“YNP” or “Park”) is encompassed within our borders. Without that great expanse known as YNP, we would not be in the current predicament, as no “Wyoming-only-excluding-the-National-Parks” introduction program would have been conceived or carried out. The wolves were introduced into Wyoming for the purpose of “returning” or “restoring” an allegedly more “natural” predator/prey relationship to the Park and surrounding federal lands (*see* Recovery Plan, FEIS and 1994 Final Rule (59 Fed. Reg. 60252)), with the remainder of the State being recognized for what it was – unsuitable for wolf habitation. The studies and analyses leading up to and since introduction confirm the Federal Respondents’ purpose in bringing wolves here. The Federal Respondents in fact deliberately limited their environmental impact analysis to the geographic area in Northwestern Wyoming. *See* FEIS at 3, Chapter III (included in Appendix). The Federal Respondents have provided **nothing** (no data, no studies, no biology, no science) to establish otherwise, and they have no power or authority to demand that Wyoming adopt a management plan to protect wolves throughout the State when no such eventuality was ever contemplated or

evaluated.

The Federal Defendants are seeking to convince this Court that their review and rejection of the Wyoming Plan may be done in a veritable historical and factual vacuum. They do so by now theorizing that “Wyoming” outside of YNP and the surrounding federal lands was the real target of the introduction and recovery efforts from the beginning. They do so by implying that they never intended for wolves to remain in YNP and the surrounding federal lands – hoping instead that they would spread outside of the federal enclaves onto private and State property. Recognizing the “optics” of making this argument head on, they instead assert that it is somehow improper and unreasonable for Wyoming to count the wolf packs within YNP – i.e., the defined “recovery area” – as wolves within Wyoming, and that this Court should rule accordingly. They do so while hoping that this Court will not recognize their classic game of “bait and switch,” in which the goal of “returning” wolves to YNP was used as the “bait” to convince Wyoming and the Wolf Coalition members that wolf impacts would be minimal. They do so by hoping that this Court will not notice that the “switch” involves sacrificing the Wolf Coalition members (i.e., livestock and Wyoming’s wildlife) to the now-stated goal of forcing wolf propagation throughout

the State. The Federal Respondents have provided **nothing** (no data, no studies, no biology, no science) to support their arguments that Wyoming must be prohibited from counting the YNP wolves as being “in Wyoming,” or that the State as a whole should now be identified as the “recovery area” for the Northern Rocky Mountain (NRM) wolf population.

The Federal Respondents’ evaluation and approval or rejection of the Wyoming Plan must be constrained by their own history, by their own studies, by the scope of their recovery program, and by biology/science. They have no legal authority to ignore these constraints, and their rationale for rejecting the Wyoming Plan must be seen for what it is – a last ditch effort to establish Wyoming as a wolf nursery where no reasonable and effective control mechanisms will be allowed regardless of the number of wolves in the State, regardless of the fact that the only truly suitable habitat is the area that Wyoming has designated as the “trophy game area,” and regardless of the viability of the Wyoming Plan to do exactly what it was designed to do – protect a recovered wolf population.

The Federal Respondents have violated the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (the ESA); the National Environmental Act, 42 U.S.C. §§ 4321 *et seq.*

(NEPA); and the Administrative Procedures Act, 5 U.S.C. §§ 701-706, by rejecting the Wyoming Plan. Their justifications for such violations are shallow, unsupported by the Record and history, and are contrary to law.

1. **History of Canadian Gray Wolf Recovery**

The Wyoming Wolf Coalition, along with the State of Wyoming and Park County, have provided this Court over the years with an extensive historical overview of the Federal Respondents' wolf introduction program, the recovery goals, the recovery efforts, the viability (and hardiness) of the gray wolf population, and the rationale and foundation for the Wyoming Plan.² While we do not intend to reiterate that history here, there are certain facts that bear repeating – those facts that most clearly contradict the Federal Respondents' rejection of the Wyoming Plan and their current arguments.

- The USFWS's Recovery Plan identified the steps for the "recovery" of the Canadian gray wolf population in the Northern Rocky Mountains of the United

² The Wolf Coalition adopts by reference as though fully set forth herein the previous filings made in this case.

States. Recovery Plan at iv; 2004AR at 899.³ That Recovery Plan remains in effect to this day. *See* discussion of the same throughout the “Final Rule to Identify the Northern Rocky Mountain Population Segment and To Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15123 (2009).

- The “Primary Objective” of the Recovery Plan was to “remove the Northern Rocky Mountain wolf from the endangered and threatened species list by securing and maintaining a minimum of ten breeding pairs of wolves in each of the three recovery areas for a minimum of three successive years.” *Id.* at 12; 2004AR at 914. (Emphasis added). The overriding goal of the Recovery Plan and all subsequent actions have been to remove the wolves from the endangered species list. The decision regarding delisting was never intended to be decoupled from the definition of “recovery.” In other words, so long as the wolves are “recovered” as defined by the USFWS they are to be delisted.

- “The three recovery areas identified for the Northern Rocky Mountain

³ The Administrative Record is cumulative, and includes all of the materials compiled and produced in the previous lawsuits. 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

wolf include northwest Montana, central Idaho, and the Greater Yellowstone Area.”
Id. at v; 2004AR at 900 (emphasis added). The Greater Yellowstone Area (GYA)
was defined as the Yellowstone National Park (YNP), designated wilderness areas
(Absaroka-Beartooth, north Absaroka, Washakie, Teton), and adjacent public lands.
Id. at 22; 2004AR at 900, 924. The GYA is a geographically-limited and defined
area. It does not = all of the land in Wyoming, it was never intended to, and the
Federal Respondents have pointed to no biological or other scientific evidence or
other documentation that supports their effort to claim otherwise.

- The USFWS adopted “Zone Management” for wolf recovery and long-term management:

A management concept by which management priority and concern is de-emphasized beyond a central core area. For this document there will be three management zones: Zone I will give strong emphasis to wolf recovery; Zone II will be a buffer zone; and Zone III will contain established human activities such as domestic livestock use or developments in sufficient degree as to render wolf presence undesirable. Maintenance and improvement of habitat for wolves are not management considerations in Zone III. (Emphasis added).

Id. at 59; 2004AR at 961.

- The USFWS identified three (3) management zones in Wyoming:
 - “Zone I” includes “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” is 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.” *Id.*

- Zone III is “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.” *Id.*

- On November 22, 1994, the USFWS published its Final Rule for the “Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana.” 59 Fed. Reg. 60252 (1994 Final Rule) (emphasis added). The 1994 Final Rule was evaluated in the FEIS whose title confirms the nature and scope of the recovery program: “The Reintroduction of Gray Wolves to Yellowstone National Park and Central Idaho.” *See* 1994 Final Rule at 60252 (emphasis added). The FWS also amended 50 C.F.R.

Part 17 and promulgated “Section 10(j) Rules” (50 C.F.R. § 17.84), to establish a nonessential experimental population of gray wolves in Yellowstone National Park. While the recovery area was limited to the GYA, the nonessential experimental designation applies to Wyoming as a whole to allow for the use of aggressive management and control techniques throughout the State.

- The USFWS introduced wolves into Yellowstone National Park because it is under Federal jurisdiction, has high-quality wolf habitat and good potential release sites, and is far from the natural expansion of wolf packs from Montana. *See* 1994 Final Rule at 60254. The FWS relied upon the fact that “[m]ost of the reintroduction area is remote and sparsely inhabited wild lands.” *Id.* at 60256. The Federal Respondents also viewed wolf restoration in the Park as being desirable pursuant to the dictates of the National Park Service (NPS) Policy, which is described in the FEIS as follows:

The NPS will strive to restore native species to parks whenever all the following criteria can be met: (1) Adequate habitat exists and a natural population can be self-perpetuating, (2) The species does not pose a serious threat to safety of park visitors, park resources, or persons or property outside park boundaries, (3) The species used in restoration most nearly approximates the extirpated subspecies or race, and (4) The species disappeared, or was substantially diminished, as a direct or indirect result of human-caused change to the species or the ecosystem.

(Emphasis added).

FEIS at 4 (included in Appendix). While the Federal Respondents have implied that the NPS has no obligation to participate in protecting and preserving a recovered wolf population, the foregoing shows otherwise.

- In its February 8, 2006 Advanced Notice of Proposed Rulemaking (2006 ANPR), 71 Fed.Reg. 6634; AR2006 17735-17762, the USFWS defined “suitable habitat”:

Suitable wolf habitat in the NRM 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” in Wyoming encompasses the vast majority of “suitable habitat” within the State. 2007 Wyoming Plan at 3-5; 2008 Wyoming Plan at 3-5, AR2009 035280-035282. The geographic area in which the wolves are designated as “predators” does not. *Id.*

- The wolf population in each State is “recovered” and no longer subject to being listed under the ESA so long as it exceeds thirty breeding pairs (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 15130-15132.

- The Federal Defendants have confirmed that there is a substantial “cushion” in the recovery goals in order to guarantee that the wolf population will always “substantially” (to use their word) exceed the “bare minimum” required to maintain a viable wolf population:

The numerical component of the recovery goal represents the minimum number of breeding pairs and individual wolves needed to achieve and maintain recovery. To ensure that the NRM wolf population always exceeds the recovery goal of 30 breeding pairs and 300 wolves, wolves in each State shall be managed for at least 15 breeding pairs and at least 150 wolves in mid-winter. This and other steps, including human-assisted migration management if required (discussed below),⁴ will maintain the NRM DPS current metapopulation structure. Further buffering our minimum recovery goal is the fact that Service data since 1986 indicate that, within the NRM DPS, each breeding pair has corresponded to 14 wolves in the overall NRM wolf population in mid-winter (including many wolves that travel outside these recognized breeding pairs). (Service *et al.* 2008, Table 4). Thus, managing for 15

⁴ The Federal Respondents reported “below” that “[t]here are currently absolutely no genetic or demographic problems in any of the core recovery segments, including the GYA.” 74 Fed.Reg. at 15135. They have also concluded that it is “highly unlikely” that there would develop a “theoretical future genetic inbreeding problem.”

breeding pairs per State will result in substantially more than 150 wolves in each state (>600 in the NRM). Additionally, because the recovery goal components are measured in mid-winter when the wolf population is near its annual low point, the average annual wolf population will be much higher than these minimal goals.

We further improved, provided additional safety margins, and assured that the minimum recovery criteria would always be exceeded in our 2009 post-delisting monitoring plan. Three scenarios lead us to initiate a status review and analysis of threats to determine if relisting is warranted including: (1) If the wolf population for any one State falls below the minimum NRM wolf population recovery level of 10 breeding pairs of wolves and 100 wolves in either Montana, Idaho, and Wyoming at the end of the year; (2) if the portion of the wolf population in Montana, Idaho, or Wyoming falls below 15 breeding pairs or 150 wolves at the end of the year in any one of those States for 3 consecutive years; or (3) if a change in State law or management objectives would significantly increase the threat to the wolf population. Overall, we believe the NRM wolf population will be managed for over 1,000 wolves including over 300 wolves and 30 breeding pairs in the GYA (in 2008 there were 35 breeding pairs and 449 wolves in the GYA). This far exceeds post-delisting management targets of at least 45 breeding pairs and more than 450 wolves in the NRM.

2009 Rule, 74 Fed.Reg. at 15132-15133.

- Maintaining a recovered wolf population is not only assured by the Wyoming Plan, but is “hard wired” into the USFWS’s recovery goals. In other words, the USFWS’s monitoring program (as quoted above), coupled with the Wyoming Plan, make it literally impossible for the wolf population to fall below the

recovery levels.

- The FWS's "bare minimum" arguments are not only silly, they are an insult to this Court's intelligence. They also expose the dark underbelly of the Federal Respondents' approach to evaluating the Wyoming Plan, and confirm that biology and "science" have been replaced with the Federal Respondents' heavy handed version of "my way or the highway."

- The current NRM wolf population, including that portion in Wyoming, 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 at 15123.

- The State of Wyoming will protect 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 National Park, and the Parkway.

- 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. *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).
- The area protected by the Wyoming Plan far exceeds the Zone I recovery area. 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.
- The area in which wolves will be classified as “predators” in Wyoming generally equates to Zone III, which is “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 Federal Respondents’ half-hearted attempt to challenge this fact (Response Brief at 14, fn 7), is refuted by the maps that they have referenced. Those maps (AR2009 at 029051 and 004829 (attached)), only serve to emphasize the fact that the vast majority of Wyoming is “unsuitable” for wolf habitat.

Fortunately, the Wyoming Plan provides sufficient flexibility to expand as necessary in the event that any of the limited “suitable” habitat that is arguably outside of the trophy game area is actually needed for maintaining the 15 breeding pairs/150 wolves that Wyoming is tasked with protecting.

- Wolf recovery was never intended to result in the creation of “travel corridors” for genetic connectivity between the wolves in Idaho, Montana and Wyoming:

Wolf recovery will not result in wolf travel corridors or linkage zones being established. ... [O]nce established in each of the recovery areas, enough wolves from each area would disperse that some would successfully travel through or live in areas other than those in Yellowstone National Park and central Idaho. The size and proximity of three areas where wolves will be managed for recover are large enough, close enough, and have enough public land between them that additional areas (travel corridors) are not required in the foreseeable future to maintain a viable wolf population after the three sub-populations become established.

FEIS at 9 (included in Appendix).

- There is no valid biological or other scientific analysis in the Administrative Record that supports the Federal Respondents’ demand that Wyoming classify wolves as “trophy game animals” – and to provide the attendant protections – throughout the State.

2. **Review of Wyoming Management Plans and Statutory Scheme**

- The USFWS stated that the independent scientific peer review “will be the ultimate judge of whether WY’s plan will conserve wolves or not..” 2006AR 12173.

- The USFWS’s independent panel of “12 of the top recognized wolf researchers, wolf management and livestock depredation experts in North America. . . .” (2004AR at 428) peer reviewed the Wyoming Plan (as it existed in 2003) and found that it passed biological/scientific muster for delisting the wolves. The peer reviews may be found at 2004AR at 428-490. Those experts did not find that Wyoming’s 2003 Plan was perfect. Perfection, however, was not the standard by which Wyoming’s Plan was to be judged. In fact, those same experts voiced concerns regarding certain aspects of the Idaho and Montana Wolf Management Plans, while at the same time concluding that such Plans were sufficient to protect and maintain a recovered wolf population. *See Id.*

- Despite the fact that the peer reviewers approved the 2003 Plan, Wyoming continued to make changes to address the USFWS’s demands. Those changes culminated in the 2007 statutory changes and the 2008 Plan. The 2003 Plan

met the ESA requirements for delisting wolves. The 2008 Plan provides additional protections.

- The USFWS approved the 2007 Wyoming Plan after it (along with the delisting Rule) was submitted for a second round of peer reviews. 2009 Final Rule at 15138. Yet a third round of peer reviews were requested after the Montana District Court issued a preliminary injunction. The peer reviewers submitted no *additional comments* on the rule making. *Id.* 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, and remains the best scientific data available for evaluation and approval.

- The Federal Respondents have repeatedly admitted that Wyoming's predator classification will not affect maintenance of a recovered wolf population. 2004AR at 347, 348; 2006AR 12059 (FWS biologists believe that the predatory animal classification will not adversely affect continued recovery of wolves).

- USFWS wildlife biologist Ed Bangs has testified under oath as follows:
 - Wyoming has committed to maintaining at least 15 breeding pairs and 150 wolves even if there are no wolves in YNP.

- The absence of breeding pairs in the 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.”
- 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.”
- Wolves in the predatory area of Wyoming “do not contribute to maintaining wolf recovery in the NRM DPS.”
- 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.”
- The overall NRM wolf population increased by 24% annually despite the USFWS’s control efforts.
- 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.”
- 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."

(Emphasis added). AR2009-032169-032170, 03272, 032176, 032185, 032183.

3. **Summary**

- The regulatory stopgaps contained in the Wyoming Plan make it impossible for the wolf population to fall below the "numerical component of the recovery goal" of 30 breeding pairs and 300 wolves. *See* 2009 Final Rule at 15132.

- The ongoing monitoring that is provided for in the Wyoming Plan and the USFWS "post-delisting monitoring plan" make it impossible for wolf numbers to fall below what has been defined as a "recovered wolf population." *Id.*

- Wyoming's regulatory mechanisms are, by their very nature, designed to guarantee that the wolf population remains recovered.

- Wyoming's regulatory mechanisms will be implemented to guarantee that the wolf population remains recovered.

- Wyoming's regulatory mechanisms have built in redundancies to guarantee that the wolf population remains recovered.

ARGUMENT

The USFWS has refused to delist the wolf population Wyoming, stating that such wolves will “continue to be regulated as a non-essential, experimental population per 50 CFR 17.84(i) and (n).” 2009 Rule at 15123. By definition, Wyoming’s wolf population is not “essential to the continued existence of an endangered species or threatened species.” 16 U.S.C § 1539(j) (the “10(j) Rule”). This designation further undermines the Federal Respondents’ rejection of the Wyoming Plan – if such wolves are not “essential” to the “continued existence” of the species, it is difficult to explain how approval of the Wyoming Plan could create the catastrophe that has been described. It also complicates the Federal Respondents arguments related to genetic connectivity when, by definition, such a population must be “wholly separate geographically from nonexperimental populations of the same species.” *Id.*

1. **The Wyoming Plan Meets the ESA Requirements for Delisting**

The Federal Respondents have changed course so many times that medical collars for the treatment of whiplash may be the new fashion statement. They have approved the basis for the Wyoming Plan (2003); rejected the Plan for political,

public relations, and litigation risk management purposes (2004); approved it (2007); approved it again (2008); defended it (2008); abandoned it (2008); and rejected it (2009).

The Wyoming Plan and wolf management statutes meet each of the delisting criteria found in 16 U.S.C. § 1533(a)(1) of the ESA. The “best scientific and commercial data available” support the implementation of the Wyoming Plan and delisting the gray wolf population here.

The peer reviewers have confirmed the biological foundation for the Wyoming Plan, and have reiterated their position that the Wyoming Plan will protect and preserve a recovered wolf population. Period.

The USFWS’s own “wolf expert” Mr. Bangs, has confirmed the biological foundation for the Wyoming Plan, and has repeatedly stated that it will protect and preserve a recovered wolf population. Period.

The Federal Respondents’ latest attack on Wyoming’s management protocol must be seen for what it is – a post-hoc rationalization that bears no relationship to wolf recovery, protection or preservation.

2. **Misrepresentations Regarding Recovery Area and Wyoming Plan**

The Federal Respondents' non-scientific agenda is exposed by the following:

(1) their claim that "Wyoming" constitutes a significant portion of the NRM DPS's range (Response Brief at 10); (2) their claim that "[t]he central component of Wyoming's regulatory framework is the designation of wolves as a predatory animal in over 88% of the State . . . and as a trophy game animal in the remaining portions of northwestern Wyoming." (*Id.* at 13); and (3) their complaints regarding the number of wolves that may be killed in the predator area. *Id.*

First, "Wyoming" does not constitute a "significant portion" of the NRM DPS's range – the Yellowstone Recovery Area does. *See* Recovery Plan, FEIS, all Final Rules, AR2009-029051 and AR2009-004829.

Second, the "central component" of Wyoming's regulatory framework is protection and preservation of a recovered wolf population. To distort that purpose is to distort the biological basis for the Plan itself and to ignore Wyoming's commitment to protecting wolf viability. It also ignores the fact that Wyoming has committed to spending millions of dollars to protect and preserve a recovered wolf population. Wyoming has no incentive – none – to allow the wolf population to fall

below 15 breeding pairs and 150 wolves in mid-winter (numbers that provide a cushion of at least 50% over and above recovery levels). Wyoming has every incentive to ensure that the wolves stay above the minimum requirements

The Federal Respondents' obsession with the 88% vs. 12% is also irrelevant. The question is not what percentage of Wyoming may be overrun with wolves. The question is whether the Wyoming Plan protects and preserves a wolf population of at least 15 breeding pairs and 150 wolves in mid-winter.

Third, the Federal Respondents' "kill" arguments are emotional, irrelevant and speculative. The question is not whether and, if so, how many wolves may be killed in the predator area. The question is whether the Plan protects 15 breeding pairs and 150 wolves in mid-winter. It does.

Finally, the Federal Respondents can support their most dire of predictions only if they also pretend that wolves will no longer be tracked, monitored, counted, or evaluated once delisting occurs. To read the Federal Respondents' Response Brief would be to conclude that, at the same time that "aggressive" control techniques are immediately implemented, Wyoming will make no effort to ensure that the recovery protections are maintained. That "assumption" finds no support in the Wyoming Plan

or statutory scheme.

3. **The Federal Respondents' Demands are Without Basis**

The Federal Respondents have made the following demands that they claim Wyoming must meet in order to obtain Plan approval:

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 and the Federal Respondents know it. Their only hope is to generate enough of a smoke screen that this Court cannot figure it out.

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). Because there is no biological or scientific basis for Wyoming to protect wolves throughout the State, the Federal Respondents cannot reject the Wyoming Plan for failing to do so. Wyoming's Plan is geographically confined because the suitable habitat is geographically confined. The two are symbiotic.

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, 032147.

Wyoming's defense of property laws only affect wolves that are in the predatory areas. The USFWS agrees that wolves removed in the predatory area do

not impact Wyoming's ability to maintain the required wolf population.

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.

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). Providing for connectivity between YNP and Idaho does not require the wolves to

travel through such places as Baggs, Saratoga, Torrington, or Rock Springs. That reality confirms that the Federal Respondents are attempting to use “genetic connectivity” as a surrogate for “all of Wyoming.” Such an approach makes no sense from the standpoint of wolf recovery when the USFWS has found that approximately 88% of Wyoming is not “suitable” for wolf habitat.

Wyoming’s statutes, Management Plan, and associated regulations address each concern raised by the USFWS. There is no biological or other scientific evidence supporting their 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.

4. **The Federal Respondents’ Arguments are Based on Speculation**

The Federal Respondents speculate that if Wyoming does not protect and preserve a recovered wolf population there will not be the required number of wolves in Wyoming. That argument is circular and ignores reality. “Speculative injury

cannot be the basis for a finding of irreparable harm.” *In re Excel Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir. 2007).

5. **The Federal Respondents Should be Required to Approve the Wyoming Plan**

16 U.S.C. § 1533(a)(1)(D) of the ESA provides that in a listing or delisting decision, the Secretary is to ascertain the adequacy of “existing regulatory mechanisms.” The Wyoming Plan and statutory scheme meets the statutory definition of a “regulatory mechanism.” In developing and adopting the Plan and statutory scheme, the State of Wyoming has committed to protecting and preserving a recovered wolf population. There are no other issues to consider. The best scientific and commercial data available supports approval and implementation of the Wyoming Plan.

CONCLUSION

The State of Wyoming is faced with the difficult task of balancing its mandate to protect and preserve a recovered gray wolf population with its duty of protecting and preserving the prey upon which the wolves feed. Wyoming must consider the impact that wolves have on private property rights, particularly livestock. Wyoming must consider the impact that wolves have on other wildlife, particularly the elk and

moose populations. After balancing the various public interests, the State of Wyoming developed and adopted a Management Plan that was properly tailored and based on sound science.

The Federal Respondents' rejection of the Wyoming Plan and statutory scheme is arbitrary, capricious, and otherwise not in accordance with law. It should not be allowed to stand.

RESPECTFULLY SUBMITTED this 15th day of January, 2010.

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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 6703 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 14 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 January 15, 2010, a true and correct copy of the foregoing **WOLF COALITION'S REPLY 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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