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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

|   |   |                                  |
|---|---|----------------------------------|
| DEFENDERS OF WILDLIFE, <i>et al.</i>  | ) |                                  |
| ,   | ) |                                  |
| Plaintiffs,   | ) | Case No. CV-08-14-M-DWM          |
|   | ) |                                  |
| vs.   | ) |                                  |
|   | ) |                                  |
| ROWAN GOULD, Acting U.S. Fish<br>and Wildlife Service Director; <i>et al.</i> | ) |                                  |
| Defendants,   | ) |                                  |
|   | ) | <b>DEFENDANT-INTERVENORS</b>     |
| and   | ) | <b>SAFARI CLUB INTERNATIONAL</b> |
|   | ) | <b>AND SAFARI CLUB</b>           |
| SAFARI CLUB INTERNATIONAL,  | ) | <b>INTERNATIONAL</b>             |
| <i>et al.</i>   | ) | <b>FOUNDATION'S BRIEF IN</b>     |
| Defendant-Intervenors   | ) | <b>RESPONSE TO SHOW CAUSE</b>    |
|   | ) | <b>ORDER</b>                     |

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Safari Club International and Safari Club International Foundation (“Safari Club”) submit this brief in response to this Court’s Show Cause Order, dated January 28, 2011. In this brief, Safari Club explains 1) why the determination as to whether any portion of the wolves that are the subject of this litigation meets the statutory requirements for 10(j) status should be left to agency expertise; 2) that any change in the status of the experimental populations of wolves would require compliance with full rulemaking procedures; and 3) how any revocation of the 10(j) status of these wolves would undermine Congress’ intent to encourage states, tribes and individuals to accept introductions of experimental populations to assist in the conservation of threatened and/or endangered species.

### **INTRODUCTION**

In late 1994, through the promulgation of a federal regulation, the Secretary of the U.S. Department of the Interior (“Secretary”) designated populations of nonessential experimental wolves in portions of Montana and Idaho and all of Wyoming. 59 Fed. Reg. 60252 and 59 Fed. Reg. 60266 (November 22, 1994). The Secretary determined that these experimental populations were geographically separate from nonexperimental populations of wolves. 59 Fed. Reg. at 60256, 59 Fed. Reg. at 60271. In promulgating the rules that designated the experimental populations, the Secretary complied with the requirements of the Administrative Procedures Act (“APA”) by issuing proposed versions of the rule, and by giving

the public the opportunity to comment on those proposals. 59 Fed. Reg. at 60254.

In designating the experimental populations, the U.S. Fish and Wildlife Service (“FWS” or “Service”) relied on the best scientific evidence available and submitted the proposed experimental population introduction and designation for peer review. *Id.* at 60259. Almost two decades have passed and the experimental populations still retain their experimental status designation.

The Court has now directed the parties to show cause why this case should not be dismissed as moot due to the absence of a population meeting the statutory requirements for 10(j) status. The Court now asks the FWS (and the other parties to this action) to show cause whether the wolves that are at issue in this litigation still qualify for experimental designations. The determination as to whether these wolves meet the “wholly separate geographically” statutory requirement for an experimental population, identified in Endangered Species Act, (“ESA”), 16 U.S.C. §1539(j), is a scientific one. Neither the attorneys representing the parties, nor the Court can make this decision, as it requires the expertise of those who study wolf behavior and genetics, including biologists employed by the Service and the states of Montana, Idaho and Wyoming, as well as an appropriately selected panel of peer reviewers.

If the outcome of the agency’s decision requires the FWS to repeal its regulatory designation of the experimental populations of wolves that are the

subject of this litigation, then the public must participate in the decision-making.

Because the ESA requires that an experimental population designation be made by regulation, any repeal of that designation must follow the same APA process.

If the agency determines that there is an overlap between the experimental populations and wolves outside the artificially designated experimental population boundaries, that overlap exists because of the recovery of the wolves of the Northern Rocky Mountain Distinct Population Segment (“NRM DPS”). Wolf recovery in the NRM DPS is the result of the efforts of the FWS and the states of Montana, Idaho and Wyoming. It would be unconscionable to force the Service to reward that recovery with a removal of the experimental population designation, during the period of time that the FWS and states are striving to comply with technical and procedural aspects of the ESA delisting process. Congress amended the ESA, by adding the experimental population provision, to encourage states, tribes and individuals to accept introductions of populations of otherwise federally listed species. If recovery of an experimental population results in that population exceeding its originally drawn boundaries that measurable success should be rewarded in relaxed rather than stricter ESA prohibitions.

### **ARGUMENT**

#### **The Determination As to Whether a Population is Experimental is a Scientific One and Must Be Left to Agency Expertise**

Congress gave the FWS the discretionary authority to designate experimental populations.

(1) For purposes of this subsection, the term “experimental population” means any population (including any offspring arising solely therefrom) ***authorized by the Secretary for release*** under paragraph (2), but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species.

(2)(A) ***The Secretary may authorize the release*** (and the related transportation) of any population (including eggs, propagules, or individuals) of an endangered species or a threatened species outside the current range of such species ***if the Secretary determines that such release will further the conservation of such species.***

16 U.S.C. §1539(j) (emphasis added). The Secretary determines whether to introduce and designate an experimental population outside its current range. The Ninth and Tenth Circuits have each acknowledged that it is the Secretary who determines whether the experimental population is “wholly separate geographically.” When considering whether this very same experimental population of wolves qualified for experimental status due to overlap with individual dispersing wolves, the Ninth Circuit explained:

We must defer to FWS's reasonable interpretation of section 10(j), *see Rainsong [Co. v. FERC]*, 106 F.3d [269]at 272 [9<sup>th</sup> Cir. 1997)], particularly where the interpretation involves agency expertise, *see Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9<sup>th</sup> Cir.1993). FWS has interpreted the “wholly separate geographically” requirement only to apply to populations; this interpretation is reasonable and we decline to disturb it.

*U.S. v. McKittrick*, 142 F.3d 1170 at 1175 (9<sup>th</sup> Cir. 1998), *cert. denied*, 525 U.S. 1072 (1999). Similarly, the Tenth Circuit, in *Wyoming Farm Bureau Federation v. Babbitt*, 199 F.3d 1224 (10<sup>th</sup> Cir. 2000) deferred to agency expertise on the question of whether this same population of wolves is “wholly separate geographically” from resident wolves. “Instead, as the statutory language and legislative history make clear, Congress deliberately left the resolution of this type management/conservation issue to the Department.” *Id.* at 1234.

In the instant matter, the Court appears to ask the Service whether the genetic connectivity that formed the basis of the agency’s April 2, 2009 decision to classify as delisted the Montana and Idaho portions of the NRM DPS is equivalent to a determination that the experimental populations of wolves in the NRM DPS are no longer wholly separate geographically from endangered members of the gray wolf species. Regardless of the arguments that these briefs may offer, this Court cannot make that decision for the FWS. Only the agency can make that decision and it has not yet done so.

**Revocation of the Wolves’ Experimental Status Must Be Carried Out in Accordance with the APA**

Congress directed the Secretary to designate experimental populations by regulation.

Before authorizing the release of any population under subparagraph (A), *the Secretary shall by regulation identify the population* and determine, on the basis of the best available information, whether or

not such population is essential to the continued existence of an endangered species or a threatened species.

16 U.S.C. §1539(j) (emphasis added). Since an experimental population can only be designated by regulation, that designation can only be revoked or repealed by regulation. *Portland General Electric Company v. Bonneville Power Administration*, 501 F.3d 1009, 1036 (9<sup>th</sup> Cir. 2007), *cert. denied* 553 U.S. 1093 (2008) (Court rejected settlement agreement that violated existing regulations). Rulemaking, such as the promulgation of regulations to designate experimental populations, requires formal published notice and an opportunity for public comment. 5 U.S.C. §§ 553 (b) and (c). Rule making procedures are required for promulgation as well as the repeal or revocation of rules.

5 U.S.C. §551(5). To repeal or revoke a regulation, the agency must comply with the same notice publication and comment opportunity requirements of the APA. Until these procedures are followed, the experimental designation must remain intact.

**Imposition of Endangered Status Would Subvert the Intent of Congress and Would Sabotage Wolf Recovery**

The genetic connectivity that is at the heart of this Court's inquiry is the result of the recovery efforts and success of Idaho, Montana, Wyoming and the FWS. A ruling that would require the Service to modify the status of the

experimental wolves to “endangered” would serve as a punishment rather than a reward for those recovery achievements. To force the FWS to classify these experimental wolves as endangered would subvert the very purpose behind the drafters’ decision to add the experimental population option to ESA listing status. The idea behind the introduction of experimental populations was to encourage states, tribes and individuals to accept introductions of populations of otherwise federally protected species. The experimental status enabled the FWS to draft rules that would reduce or eliminate prohibitions against the take of members of these populations that would operate to discourage the introduction of these populations:

Congress added section 10(j) to the Endangered Species Act in 1982 to address the Fish and Wildlife Service's and other affected agencies' frustration over political opposition to reintroduction efforts perceived to conflict with human activity. Although the Secretary already had authority to conserve a species by introducing it in areas outside its current range, Congress hoped the provisions of section 10(j) would mitigate industry's fears experimental populations would halt development projects, and, with the clarification of the legal responsibilities incumbent with the experimental populations, actually encourage private parties to host such populations on their lands. H.R.Rep. No. 97-567, at 8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2808, 2817; *see also* 16 U.S.C. § 1539(j).

*Wyoming Farm Bureau*, 199 F.3d at 1231-2. The act of forcing the Service to revoke experimental status because of population expansion due to recovery would have ramifications that go far beyond the outcome of this case or even the fate of the NRM DPS of wolves. States, tribes and individuals who witness Montana,

Idaho and Wyoming's loss of experimental population-based authority over wolves will not in the future subject themselves to similar treatment when they are presented with the opportunity to assist in the recovery of other extirpated populations of federally listed species. If the conservation purposes of the ESA are to have any meaning, then success at recovery must be rewarded and not punished.

### **CONCLUSION**

The question of whether the genetic connectivity achieved among the populations of wolves in the NRM DPS affects the status of the experimental wolves within that DPS must be based on the best available science and must be made by the agency with the requisite expertise. Any change in the status of the experimental wolf population must be carried out through formal APA rulemaking procedures. Any change in status that would undermine the purpose of the experimental population provisions or that would discourage states, tribes and individuals from participating in species recovery should be avoided.

WHEREFORE, Safari Club respectfully submits that this case is not moot, since the status of the experimental wolves of the NRM DPS should not change.

DATED this 22nd day of February 2011.

Respectfully submitted,

/s/ Anna M. Seidman

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## CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), I hereby certify that the foregoing brief contains 1872 words, in compliance with the Court's 2500 word limit, as counted using the word processing word count function.

Dated February 22, 2011.

/s/ Anna M. Seidman  
Anna M. Seidman

**CERTIFICATE OF SERVICE**

I certify that on February 22, 2011, I electronically filed the foregoing with the Clerk of the U.S. District Court of Montana using the CM/ECF system, which will send a Notice of Electronic filing to the counsel of record.

/s/ Anna M. Seidman  
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