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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

DEFENDERS OF WILDLIFE, et al., )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 H. DALE HALL, et al., )  
 )  
 Defendants, )  
 )  
 and )  
 )  
 SAFARI CLUB INTERNATIONAL, )  
 et al., )  
 )  
 Defendant-Intervenors, )  
 )

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**CV 08-14-M-DWM**

**DEFENDANT-INTERVENOR  
STATE OF WYOMING'S  
BRIEF IN RESPONSE TO THE  
ORDER TO SHOW CAUSE  
ISSUED ON JANUARY 28, 2011**

On January 28, 2011, this Court issued an “Order to Show Cause” (OSC) in the above-captioned case, and the Defendant-Intervenor State of Wyoming hereby submits its brief in response to the OSC. The State of Wyoming will address the questions raised in the OSC as they relate to the experimental wolf population in the Yellowstone recovery area.

This Court has ordered each party to “file a brief showing 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.” (OSC, at 8) In raising the mootness issue *sua sponte*, the OSC poses two questions: (1) Does the wolf population in the Yellowstone recovery area still satisfy the requirements for being an experimental population as defined by [16 U.S.C. § 1539\(1\)](#)?; and, if not, (2) Is federal agency action required to remove the experimental population designation?

As explained in detail below, the wolf population in the Yellowstone recovery area continues to be an experimental population regardless of any movement or interbreeding between wolves in the Yellowstone recovery area and any other wolf population in the region. Even if the wolf population in the Yellowstone recovery area no longer satisfied the legal criteria necessary to be an experimental population, federal agency action is required to remove the experimental population status.

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## I. Legal Standard for Mootness

“A claim is moot if it has lost its character as a present, live controversy.” *Am. Rivers v. Nat’l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997). In determining whether a case is moot, “[t]he basic question is whether there exists a present controversy as to which effective relief can be granted.’ ” *Tate v. Univ. Med. Ctr. of S. Nev.*, 606 F.3d 631, 634 (9th Cir. 2010)(citation omitted). “If an event occurs that prevents the court from granting effective relief, the claim is moot and must be dismissed.” *Am. Rivers*, 126 F.3d at 1123.

## II. Background

The OSC arises from this Court’s interpretation of the term “experimental population” in the Endangered Species Act (ESA). Congress has defined the term “experimental population” as “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.” 16 U.S.C. § 1539(j)(1).

The OSC suggests the reintroduced wolf population in the Yellowstone recovery area may no longer be an experimental population due to geographic or genetic connectivity with other wolf populations in the region. (OSC, at 7) To support this view, the OSC relies on information gleaned from three separate sources:

(1) statements made by counsel for the Federal Defendants in *Defenders of Wildlife v. Salazar*, U.S.D.C. (Mont.) Number CV-09-77-M-DWM; (2) a statement of undisputed facts submitted by the Federal Defendants in the *Defenders of Wildlife v. Salazar* case;<sup>1</sup> and (3) three excerpts from the Federal Register notice for the delisting rule that was challenged in the *Defenders of Wildlife v. Salazar* case. (OSC, at 5-7)

### III. Argument

#### A. The wolf population in the Yellowstone recovery area continues to be an experimental population.

The concerns about the effect of geographic connectivity between wolf populations apparently arise from the phrase “wholly separate geographically” in [16 U.S.C. § 1539\(j\)\(1\)](#). The OSC infers that movement of individual wolves between an experimental population and a non-experimental population may mean the experimental population is no longer “wholly separate geographically.” (OSC, at 5-7) Such is not the case.

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<sup>1</sup> The OSC characterizes the argument of counsel and the statement of undisputed facts in *Defenders of Wildlife v. Salazar* as “evidence.” (OSC at 4) However, in the summary judgment context, oral argument by counsel is not evidence. *Smith v. Mack Trucks, Inc.*, 505 F.2d 1248, 1249 (9th Cir. 1974). In addition, “a court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it.” *M/V Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983).

The ESA dictates that an experimental *population* must be “wholly separate geographically” from a non-experimental *population* in order to maintain the experimental population status. Individual wolves do not constitute a population. See *United States v. McKittrick*, 142 F.3d 1170, 1175 (9th Cir. 1998)(citing 50 C.F.R. § 17.3); *Wyo. Farm Bureau Fed’n v. Babbitt*, 199 F.3d 1224, 1234-35 (10th Cir. 2000). Therefore, an experimental population remains “wholly separate geographically” from a non-experimental population even if individual wolves are dispersing between the populations. See *McKittrick*, 142 F.3d at 1175; *Wyo. Farm Bureau Fed’n*, 199 F.3d at 1234-35.

The information cited in the OSC indicates that individual wolves have dispersed into the Yellowstone recovery area at a rate of at least one wolf per year.<sup>2</sup> (OSC, at 7) Regardless of whether the dispersing wolves were experimental or non-experimental before they entered the Yellowstone recovery area, the wolf population in the Yellowstone recovery area remains “wholly separate geographically” from the other wolf populations in the region because the dispersing wolves are not “populations.”

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<sup>2</sup> The information in the Federal Register excerpts simply states that wolves from outside of the Yellowstone recovery area have dispersed into the area. (OSC, at 6-7) If these wolves are dispersing from the experimental population in the central Idaho recovery area into the Yellowstone recovery area then, by definition, the “wholly separate geographically” requirement is not implicated.

The concerns about the effect of genetic connectivity between wolf populations apparently arise from the phrase “including any offspring arising solely therefrom” in [16 U.S.C. § 1539\(j\)\(1\)](#). The OSC suggests that interbreeding between experimental wolves in the Yellowstone recovery area and wolves that have dispersed into the recovery area jeopardizes the experimental status of the Yellowstone recovery area population because the resulting offspring do not arise solely from the experimental population. (OSC, at 5) As a matter of law, the experimental population in the Yellowstone recovery area retains the experimental status even if such interbreeding occurs.

The 10(j) regulations define the population status of an individual wolf based upon the geographic location of the wolf. Any wolves found in the wild within the boundaries of the Yellowstone recovery area after the initial reintroductions are “considered nonessential experimental animals.” [50 C.F.R. §§ 17.84\(i\)\(7\)\(ii\), \(n\)\(9\)\(ii\)](#) (Oct. 1, 2009). This location-based approach to defining the population status of wolves represents a reasonable exercise of the Secretary’s management authority under Section 10(j) of the ESA. *Wyo. Farm Bureau Fed’n*, 199 F.3d at 1235-37 & n.5. Therefore, this Court must accord *Chevron* deference to this aspect of the 10(j) regulations. See *Providence Yakima Med. Ctr. v. Sebelius*, 611 F.3d 1181, 1189-90 (9th Cir. 2010)(explaining the requirements for *Chevron* deference).

The 10(j) regulations dictate that a wolf from a non-experimental population becomes an experimental wolf when the wolf moves into the Yellowstone recovery area. Conversely, a wolf dispersing from the Yellowstone recovery area becomes endangered when the wolf moves out of the recovery area and into an area where wolves are designated as endangered. Since a wolf that disperses into the Yellowstone recovery area becomes an experimental wolf for as long as the wolf remains in the recovery area, any interbreeding between that wolf and an existing wolf from the Yellowstone recovery area population necessarily would result in offspring that “arise solely” from the experimental population because both parents would be a part of the experimental population. See *Wyo. Farm Bureau Fed’n*, 199 F.3d at 1236 (“the Secretary intentionally identified the experimental population as all wolves found within the experimental areas, including imported wolves and any lone dispersers and their offspring”). As a matter of law, therefore, interbreeding between a wolf from the experimental population in the Yellowstone recovery area and a wolf from any other wolf population in the region has no effect on the experimental status of the wolf population in the Yellowstone recovery area.

This Court apparently interprets the phrase “including any offspring arising solely therefrom” to mean that an experimental population must consist only of offspring directly descended from the original reintroduced wolf population. (OSC,

at 3-4) Neither 16 U.S.C. § 1539(j) nor the ESA read as a whole supports such a narrow interpretation. See *Wyo. Farm Bureau Fed'n*, 199 F.3d at 1236. In fact, such a narrow interpretation of 16 U.S.C. § 1539(j)(1) “could actually undermine the [Secretary’s] ability to address biological reality (*i.e.*, wolves can and do roam for hundreds of miles and cannot be precluded from intermingling with the released experimental population), and thus handicap its ability to effectuate species recovery.” *Wyo. Farm Bureau Fed'n*, 199 F.3d at 1237.

The concerns about the impact of geographic and genetic connectivity on the experimental status of the wolf population in the Yellowstone recovery area are unfounded. Even though some movement and interbreeding between populations apparently has occurred, the wolf population in the Yellowstone recovery area continues to satisfy the legal criteria necessary to be an experimental population. Accordingly, this case is not moot.

**B. The Secretary must properly rescind or revoke the regulation designating a wolf population as “experimental” before the population will lose the “experimental” status.**

Even if the wolf population in the Yellowstone recovery area no longer satisfied the legal criteria necessary to be an experimental population, federal agency action is required to remove the experimental designation for the wolf population in the Yellowstone recovery area. The ESA authorizes the Secretary to release an

experimental population of a threatened or endangered species outside of the current range of the species. 16 U.S.C. § 1539(j)(2)(A). To designate an experimental population, the Secretary must adopt a regulation to identify the population and to specify whether the population is essential to the continued existence of the species. 16 U.S.C. § 1539(j)(2)(B). The regulation to designate an experimental population must be promulgated in accordance with 5 U.S.C. § 553. See 50 C.F.R § 17.81(a).

In 1994, the Secretary adopted a regulation to designate a non-essential, experimental gray wolf population for reintroduction into Yellowstone National Park.<sup>3</sup> 59 Fed. Reg. 60252-266 (Nov. 22, 1994). “[P]roperly enacted regulations have the force of law and are binding on the government until properly repealed.” *Flores v. Bowen*, 790 F.2d 740, 742 (9th Cir. 1986). The Secretary has not repealed or rescinded this regulation, so the regulation remains in full force and effect and will continue to be in effect until repealed or rescinded in accordance with 5 U.S.C. § 553.

### III. Conclusion

For the foregoing reasons, this case involves a present, live controversy and therefore is not moot.

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<sup>3</sup> Although initially published as one regulation in 50 C.F.R. § 17.84(i)(1), the regulation to designate this non-essential, experimental gray wolf population now appears both in 50 C.F.R. §§ 17.84(i)(1) and 17.84(n)(1).

DATED this 22<sup>nd</sup> day of February, 2011.

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### **CERTIFICATE OF COMPLIANCE**

Pursuant to Local Rule 7.1(d)(2), I hereby certify that the foregoing brief contains 2,029 words, in compliance with the 2,500 word limit established by the Order to Show Cause issued on January 28, 2011.

Dated this 22<sup>nd</sup> day of February, 2011.

/s/ Jeffrey M. Hindoien  
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