05-8026, 05-8027, 05-8035
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING, WYOMING WOOL GROWERS, et al.,
and the COUNTY OF PARK
Plaintiff/Appellants
v.
UNITED STATES DEPARTMENT OF THE INTERIOR, et al.
Defendant/Appellees,

and

GREATER YELLOWSTONE COALITION, et al.
Defendant-Intervenors/Appellees

GREATER YELLOWSTONE COALITION, et al. ANSWER BRIEF

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ORAL ARGUMENT IS REQUESTED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Intervenors Appellees Greater Yellowstone Coalition, National Wildlife Federation and Predator Conservation Alliance are non-profit public benefit corporations, do not have shareholders, and do not have parent or subsidiary corporations.

DATED this 8th day of August, 2005.

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TUHOLSKE LAW OFFICE, PC
Jack R. Tuholske

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STATEMENT OF JURISDICTION

Appellants pled this case as a federal question, ESA citizen suit and violation of the United States Constitution in the district court for the district of Wyoming ("District Court"). These claims generally provide for federal court jurisdiction. However, in this case the District Court held that it did not have jurisdiction pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, because there was no final agency action ripe for judicial review. The District Court dismissed this case on March 18, 2005. This Court has appellate jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the district court correctly hold that it lacked subject matter jurisdiction to review Appellants' Section 706 claims and ESA claims regarding the U.S. Fish and Wildlife Services' (FWS) interim letter declining to propose delisting the wolf because the letter is not "final agency action," a jurisdictional prerequisite to judicial review of agency action pursuant to 5 U.S.C. § 704?
2. Did the district court correctly hold that it lacked subject matter jurisdiction to review Appellants' Section 706(1) claims because FWS had no mandatory discrete, required duty to propose wolf delisting or to control predating wolves as desired by the Defendants?
3. Was the district court correct in holding that it lacked subject matter jurisdiction

to review Appellants' Section 706(2) claims because the "best science available" mandate can only attach to a non-discretionary, mandatory duty which FWS was not under because the January 13, 2004 letter was not part of a petition to delist or a status review?

STATEMENT OF THE CASE

Wyoming seeks appellate review of the District Court's dismissal of Wyoming's First Amended Complaint for lack of subject matter jurisdiction. In April, 2004, Wyoming filed suit challenging FWS's interim statement rejecting the wolf management plan developed by the State of Wyoming ("Wyoming Plan"), as part of the on-going process under the ESA for taking wolves off the federal list of endangered species in the northern Rockies. A coalition of private groups and county governments (the Wolf Coalition) filed suit on the same claims and also raised deficiencies under the National Environmental Policy Act (NEPA). Five conservation organizations intervened on the side of FWS (collectively referred to as "GYC"). The District Court consolidated the cases by order dated November 22, 2004, and ordered briefing on the Wyoming Plan and jurisdictional issues. The District Court heard oral argument on February 4, 2005. On March 18, 2005 the District Court dismissed the case without prejudice. Wyoming filed its notice of appeal on March 25, 2005.

STATEMENT OF THE FACTS

A. The Extirpation of the Gray Wolf from the Northern Rockies.

Wolves occupy an essential ecological niche; they are a top carnivore, serving to regulate ungulate populations such as elk, deer, and moose, which unchecked, are prone to starvation and disease. Though widespread, adaptable and resilient, wolves also have demanding habitat requirements: as social carnivores at the top of the ecological pyramid, wolves need comparatively large spaces in which to find sufficient vulnerable ungulates and alternative prey for food. (App. V. 9 at 2359). In pre-Columbian times, wolves thrived in virtually every corner of North America, colonizing every possible clime except high alpine mountain tops. The gray wolf can live nearly anywhere there is adequate ungulate prey and moderate human-caused mortality (App. V. 6 at 1465-1466), and "is the most widely distributed large carnivore in the northern hemisphere." (App. V. 6 at 1463).

With European settlement came development, livestock grazing, agricultural cultivation, and European attitudes towards wolves, resulting in increasingly lethal efforts to control and eradicate wolves. 68 Fed. Reg. 15804, 15805 (April 1, 2003), (App. V. 9 at 2272). The few wolves that tangled with livestock "created fear and hatred against all wolves." (App. V. 9 at 2353). These fears translated into a pervasive practice of predator control and "widespread persecution" which decimated numbers to extirpation: "poisons, trapping, and shooting…resulted in

extirpation of this once widespread species from more than 95 percent of its range." (App. V. 9 at 2272). Wolves were extirpated from Wyoming and the West by the 1930's, the victims of both government control programs and individual "wolfers." The gray wolf had formerly occupied most of the United States, but "because of widespread habitat destruction and human persecution, the species now occupies only a small part of its original range in these regions." 43 Fed. Reg. 9607, 9607 (March 9, 1978).

The role of humans killing wolves in the name of predator control cannot be understated. For example, settlers slaughtered "a minimum of 136 wolves, including about 80 pups" between 1914 and 1926 in the Yellowstone Region alone. *Wolf Recovery Plan* at 1, App. V. 9 at 2353. Succumbing to this extensive persecution, "gray wolf populations were eliminated from Montana, Idaho, and Wyoming, as well as adjacent southwestern Canada, by the 1930s." 70 Fed. Reg. 1286, 1286 and 1294 (January 6, 2005).

The District Court's finding that the predator status for wolves was at the heart of its extirpation from the Northern Rockies is well supported by the record: "[I]t is generally accepted that the cause of the wolf's demise in the coterminous United States was a direct result of human depredation." *State of Wyoming v. U.S. Dept of Interior*, 360 F. Supp. 2d 1214, 1218 (D. Wyo. 2005), also contained in the Appendix at V. 5 1192.

B. Wolves and the ESA.

Wolves were among the first species protected when the Endangered Species Act became law in 1973 and were listed almost solely because of their "excessive persecution." *See* 38 Fed. Reg. 14,678 (June 4, 1973); (App. V. 6 at 1648, 1503). Once listed, it became a federal offense to kill or harm a wolf, effectively ending their predator status which had been at the root of their demise. Wolves were initially listed a single species/population throughout the U.S.

The ESA mandates FWS to develop a recovery plan for each listed species. 16 U.S.C. § 1533 (f). In 1987, FWS adopted a wolf recovery plan for the northern Rockies, identifying a recovery goal of three wolf populations with ten breeding pairs each for the region. In addition to a small wolf population in northwestern Montana, the plan identified Yellowstone National Park and the extensive Wilderness Areas in central Idaho as likely sites for wolf recovery. The plan recognized that natural recolonization of Yellowstone National Park from northwestern Montana or Canada was highly unlikely and recommended a reintroduction program if wolves did not naturally move into Yellowstone within five years. (App. V. 9 at 2348-2349).

To provide FWS more flexibility to manage reintroduced wolves, and to make it easier for FWS to remove problem wolves, FWS proposed that reintroduction be accomplished under the ESA's "non-essential experimental

population" provision. In November 1994, after preparing an extensive Environmental Impact Statement in accordance with the National Environmental Policy Act (NEPA), FWS authorized the release of a non-essential experimental population of gray wolves into Yellowstone National Park and central Idaho. *See* U.S.C. § 4332(C)(i). The regulations developed for the Yellowstone and central Idaho populations allowed managers to kill wolves that attacked livestock. *See* 50 C.F.R. § 17.84(i)(3),(7), and (8). (App. V. 2 at 433). Despite the flexible "non-essential experimental" designation, some of these same plaintiffs sued unsuccessfully to block the re-introduction.[1]

In 1995 and 1996, FWS released 14 and then 17 wolves into Yellowstone National Park and like numbers into Idaho. (App. V. 9 at 2281). While FWS originally planned to release additional wolves, the great success of the reintroduction program made this unnecessary. Over the last decade, populations of reintroduced wolves have grown rapidly even while livestock depredations and other problems have been less severe than predicted. In 2003 FWS determined that

[1] *See Wyoming Farm Bureau Fed'n v. Babbitt, 987 F. Supp. 1349 (D. Wyo. 1997), rev'd and remanded by 199 F.3d 1224 (10th Cir. 2000)*. This case centered around three challenges to final rules governing the reintroduction of a nonessential experimental population of gray wolves into Yellowstone National Park and central Idaho. The district court struck down the challenged rules as violative of Sections 4(f) and 10(j) of the ESA. Reversing the district court, the Tenth Circuit noted the FWS was entitled to discretion in interpreting these provisions. The fact that there was some overlap of experimental and nonexperimental populations of wolves did not make reintroduction of wolves under 10 (j) illegal.

recovery objectives had been met. 68 Fed. Reg. 15804 (April 1, 2003) and App. V. 9 at 2283-2284. Indeed the re-introduction of gray wolves has been cited as one of the great wildlife management success stories of this century. Even Plaintiffs agree that the reintroduction has been an "unprecedented and overwhelming success." (App. V. 3 at 658).

C. Efforts to Begin Delisting Wolves.

1. The delisting process under the ESA.

The ESA prescribes a precise statutory scheme by which a species is delisted from the Act. Any person - which includes individuals, government entities and private organizations - may petition to remove a listed species. Within 90 days of the filing of such a petition, the Secretary of the Interior is required to make a finding (the 90-Day Finding) as to whether the delisting action is warranted. 16 U.S.C. § 1533(b)(3)(A). Following a positive 90-Day Finding, FWS then determines whether the petition warrants a proposed rule, and undertakes a review of the species. If the petition is warranted, then the Secretary must publish a proposed rule to delist the species within 12 months, subject to notice and comment requirements of the APA rulemaking process. 16 U.S.C. § 1533 (b)(3)(B). If FWS determines that, based on input from comments and further

evaluation, the statutory criteria for delisting are met,[1] then FWS publishes a final rule delisting the species. 16 U.S.C. § 1533 (b)(4) - (6). Only upon publication of the final rule (or a formal rejection of the rule), is the administrative process complete.

The ESA also defines which decisions in the listing process are subject to judicial review. A decision to reject a petition at the 90-Day Finding is subject to judicial review, as are decisions that end the delisting process by concluding that a petition is not warranted. 16 U.S.C. § 1533 (B)(3)(C)(ii). The final rule to delist or not delist is subject to judicial review. There is no provision in the ESA for judicial review of acceptance or rejection of state management plans that may be prepared in anticipation of the delisting process.

The ESA also established a separate procedure for conducting a periodic review of all species that are listed. 16 U.S.C. § 1533 (c). Specifically, the ESA requires the Secretary of the Interior to "conduct, at least once every five years, a review of all [listed] species" to determine whether any species should be delisted, up-listed from threatened to endangered status, or down-listed from endangered to threatened status. 16 U.S.C. § 1533 (c)(2)(A), (B). The status review is an interim

[1]FWS evaluates five factors used in making a listing or delisting determination. 16 U.S.C. § 1533(a)(1). Thus, once the population is determined to be recovered, FWS must be assured of the absence of any listing factor which could set back a newly recovered species. 68 Fed. Reg. at 15881. The listing process then can be initiated; its consummation is the publication, or rejection, of a final delisting rule.

mechanism to periodically evaluate species' status. The status review process, standing alone, does not lead to the listing or delisting of any species.

2. Delisting for wolves.

FWS has, over the years, received several delisting petitions for the gray wolf, and in response has published findings that the "petitions did not present substantial information that delisting...was warranted." 70 Fed. Reg. at 1288 and App. V. 9 at 2477. None of those have been challenged in court. However, neither Plaintiffs State of Wyoming nor Wyoming Wool Growers Association filed a petition to delist, prior to initiating this suit.

FWS announced their intent to begin the process to delist the Western Distinct Population Segment ("DPS") of gray wolves in an advance notice of proposed rulemaking. 68 Fed. Reg. 15879, 15879 (April l, 2003). Public comment would not be invited until FWS published a proposed rule. The advanced notice provided that the delisting determination would involve an "evaluation of the future threats to the gray wolf in the Western DPS, especially those...that would occur after removal [] of protections of the Act" and "based upon the wolf management plans and assurances of the States." 68 Fed. Reg. at 15881. State management plans were to weigh heavily in the delisting process as "indicators of attitudes and goals [] especially important in assessing the future of a species that

was officially persecuted by government agencies as recently as 40 years ago and still [] reviled by some members of the public." *Id*.

FWS conditioned delisting on "Idaho, Montana, and Wyoming each respectively developing and promulgating a wolf management plan that would assure further success and advance the goals of the revised plan." 68 Fed. Reg. at 15881; (App. V. 2 at 434). As articulated by FWS to Wyoming, delisting could not be proposed until each state has in place "approved state wolf management plans, funding to implement these plans, and State law that will allow the implementation of those plans." (App. V. 6 at 1484). FWS also noted that Idaho and Montana had already implemented appropriate state laws, and that a delisting proposal for the region would hinge on Wyoming's efforts.

3. Development of the Wyoming Plan.

The development of a state management plan for Wyoming was a prerequisite to FWS initiating the wolf delisting process. Bear in mind that at any time Wyoming could itself petition FWS to delist wolves based upon its own plan. FWS was committed to helping Wyoming develop a management plan that would continue to maintain wolf populations above recovery levels and allow for eventual delisting. (App. V. 6 at 1483) (FWS intends to proceed with the delisting process as rapidly as possible); (App. V. 6 at 1479) (State and Tribal management is in the

best interest of local, State and Tribal residents, and…FWS is striving to ensure that wolf delisting occurs as efficiently as possible.").

While the wolf was already classified as a predator under state law, such classification was superseded by federal management under the ESA. Wyoming from the outset attempted to maintain predator status after delisting, and created a dual classification system that would maintain the "predator" classification in 90% of its range and “trophy-game” status in National Parks (where hunting in not even allowed) and federal Wilderness areas.

In December of 2001, Wyoming Game and Fish Department requested financial assistance from FWS, and began drafting a plan to comply with the dual-status directive from the state legislature. (App. V. 6 at 1454). Wyoming had been eager to reassume management from the federal government, earlier pledging with the states of Montana and Idaho that the success "of a wolf management program is predicated upon a unified, regional approach to managing a regional wolf population and that such a regional approach will entail coordination and collaboration among the signatories and the respective fish and wildlife agencies." (App. V. 6 at 1450).

During the summer of 2002, Wyoming requested answers on the delisting process. Acting Regional Director Morgenweck informed Wyoming that FWS would propose to delist a recovered species only when they could "be assured that

State management of wolves by Montana, Idaho, and Wyoming will prevent human-caused mortality from reducing the wolf population so it becomes threatened or endangered again." (App. V. 6 at 1474). To the question, "Does Wyoming need to change the [predator] status of wolves," FWS responded simply: "Yes." (App. V. 6 at 1475). And, FWS emphasized that Wyoming must protect the wolf under trophy game status in an area larger than Yellowstone National Park if they were going to provide the "roughly one-third contribution to the overall recovery objective." (App. V. 6 at 1485).

Wyoming chose to forge ahead with a management plan based on predator status. Wyoming asked FWS again in September of 2002 for its perspective on their proposed dual-status law. FWS Director Williams responded that Wyoming's law would not provide adequate regulatory mechanisms to "provide the assurance necessary to meet the Endangered Species Act requirements for delisting." (App. V. 6 at 1476). Again, FWS mentioned that Wyoming law must "provide the legal authority to protect wolves from unregulated, human-caused mortality." *Id.* FWS advised that the dual-status classification providing for regulated hunting only within the National Parks and wilderness would likely not provide an area large enough to maintain the wolf population. (App. V. 6 at 1477). Director Williams emphasized the need to regulate human-caused mortality to maintain populations: "[E]lk typically migrate long distances outside of Yellowstone National Park and

wolf packs will occasionally follow them. Wolves will need legal protection from unregulated human mortalities under State law in an area at least as extensive as they currently occupy to maintain the population above recovery levels." (App. V. 6 at 1477). This could potentially act as a wolf “sink" where wolves are drawn into unoccupied areas in exploring new territory, and then shot. (App. V. 6 at 1592).

Upon review of the first draft plan in November, 2002, FWS concluded "[W]yoming law and wolf management as recommended by this draft management plan would not allow for delisting of wolves to be proposed." (App. V. 6 at 1502). To maintain a tri-state metapopulation, some wolf packs must be able to live outside of Yellowstone National Park. *Id.* FWS noted that the "biological facts appeared to be ignored by the document's management recommendations." *Id.* (emphasis added). FWS emphasized that Wyoming could not allow human persecution to go unchecked. (App. V. 6 at 1503). In light of the fact that "wolf populations disappeared because of unlimited human-caused mortality," FWS believed that maintaining predator status throughout most of the state could cause wolves to become threatened or endangered again. (App. V. 6 at 1517). *See also* 70 Fed. Reg. at 1294; (App. V. 7 at 1792); (App. V. 6 at 1803); (App. V. 9 at 2484).

Despite these clear pronouncements, Wyoming still expressed confusion as to what was expected from them to satisfy the "adequate regulatory mechanisms"

requirement. The state recruited its Congressional delegation to elicit "clear guidance" on what is an adequate regulatory mechanism, implying that the Legislature would make the needed adjustments. (App. V. 7 at 1794). FWS responded on February 14, 2003 that "management authority was needed "to provide protections for wolves beyond National Parks and National Forest Wilderness Areas." (App. V. 6 at 1691). This letter was followed by a companion letter to Governor of Wyoming Dave Freudenthal on February 21, 2003. FWS responded that "regulated State harvest programs, such as used by Wyoming Game and Fish to manage other large predators, such as mountain lions and black bears, can easily control wolf populations and yet satisfy requirements for delisting the wolf." (App. V. 6 at 1703).

Wyoming politicians continued to exert pressure on the state to maintain the predator status. For example, Fremont County Commissioners notified FWS that they passed a resolution to prohibit wolves within county lines, as "a threat to public health, safety, and livelihood [.]"(App. V. 6 at 1700 and V. 7 at 1725). Despite FWS's repeated concerns about predator status as an impediment to delisting, in Spring 2003 the Wyoming State Legislature classified the wolf as a "predator" in over 90% of its range outside of national parks and parkways. Kunkel Peer Review. (App. V. 7 at 1909); Final Wyoming Plan at p. 18, (App. V. 6 at 1663). Some of these areas harbor vehement anti-wolf sentiment. "All wolf packs

in Wyoming outside of Yellowstone National Park, and at least 3 packs in the Park, would have at least part of their home range designated in predatory animal status until the trigger was tripped to a larger trophy game designation." (App. V. 7 at 1813). The law delineated certain limited areas (National Parks and Wilderness) where wolves would be "trophy game" animals, and thus managed according to a regulated hunt like black bears. However, once a wolf drifted past this "predator" boundary, it would no longer be afforded any protection and would be subject to unregulated kill. See Wyo. Stat. Ann. § 23-3-10l (a)(v)(iii) and (xi)(B)(l & II). Under predator classification, wolves would be subject to take "without a license in any manner and at any time," except in the limited trophy game areas. Wyo. Stat. Ann. § 23-3-103. This scheme is referred to as "dual-status classification," where a wolf could be a trophy game animal one day and a predator the next, depending on its location.

FWS reiterated its concern with "predator" classification as well as the ambiguity of Wyo. Stat. Ann. § 23-1-304(b) calling for the Game and Fish Commission to manage for "at least seven (7) packs of gray wolves located in this state and primarily outside of Yellowstone National Park, Grand Teton National Park and John D. Rockefeller, Jr. Memorial Parkway or at least fifteen (15) packs within this state, including Yellowstone National Park, Grand Teton National Park and John D. Rockefeller, Jr. Memorial Parkway as of the end of the preceding

calendar quarter." FWS expressed concern that the law was ambiguous, and recommended that the law clearly manage for maintaining a total of 15 packs, with at least eight outside the Park. (App. V. 7 at 1742). The state of Wyoming admitted that the law was "susceptible to more than one reading," and requested a legal opinion from the Attorney General on the meaning of their state law. (App. V. 7 at 1749, 1738, 1743). On May 2, Wyoming responded to FWS's concerns by adamantly defending their policy to manage for a total of 15 packs, regardless of "whether inside or outside of the national parks and parkway." (App. V. 7 at 1738).

The District Court noted many of these communications between Wyoming and FWS, as well as Wyoming's repeated insistence, through legislative action, to maintain the predator classification. (App. V. 5 at 1202-05).

FWS again provided comments in July of 2003, on the Final Draft Plan, advising that it may be adequate to begin the delisting process if certain modifications were made. (App. V. 7 at 1791). Edward Bangs, Wolf Recovery Coordinator, wrote, "we urge Wyoming to re-consider having wolves listed as predatory animals anywhere in Wyoming...that designation may spoil our mutual desire to successfully delist the wolf population and maintain a recovered population." (App. V. 7 at 1792). He suggested retreating from the dual-classification boundary line scheme, which would result in "endless flip-flopping, and widespread public confusion." (App. V. 7 at 1794). *See also* (App. V. 7 at

1792 "wolves became extirpated almost solely because of unregulated excessive human-caused mortality."). The "predator" issue alone could derail the listing process, as it infers that "wolves should be eliminated and not maintained as a recovered population." *Id*. Mr. Bangs provided additional reasons on the inadequacy of a dual-status classification: "all wolf packs in Wyoming outside of Yellowstone National Park, and at least 3 packs in the park, would have at least part of their home range designated in predatory animal status until the trigger was tripped to a larger trophy game designation." (App. V. 7 at 1812). Bangs also noted that no other state has taken such an extreme approach by classifying wolves as predatory animals subject to unregulated take. (App. V. 7 at 1796).

4. The peer-review process.

FWS also initiated a peer review of the Wyoming Plan to gain additional feedback. Though Plaintiffs rely heavily on the peer-review process, *see e.g. Wyoming Brf.* at 23-24, both ignore the plethora of evidence that shows the peer reviewers were not enamored of the predator label. Four out of the eleven peer reviews expressed anxiety over any "predator" classification. *See* (App. V. 7 at 1895, 1910, 1925, 1927). For example, Bill Paul, Wolf Control and Depredation Expert for the U.S. Department of Agriculture commented:

> "I have some concern about how the Department can simultaneously manage for the required 7 packs outside the National Parks and Parkway while also potentially allowing a public harvest quota on some of these same packs in

> the trophy game animal area. While 'thinning' of some of these packs may not affect their continued existence, it could have an effect on their status as a 'breeding pack.'" (App. V. 7 at 1895).

Mark McNay, biologist for the Alaska Department of Fish and Game, recognizing the history of persecution, noted the "primary challenge for all three states will be maintaining human tolerance of wolves in rural areas[.]" (App. V. 7 at 1907). "The Wyoming plan clearly asserts that the State of Wyoming will only commit to 7 packs, but to maintain management authority the plan should provide some contingency that insures 10 breeding pairs are maintained within state boundaries regardless of population fluctuations in YNP." (App. V. 7 at 1905). Mr. McNay also notes "Management at minimum population size and pack numbers raises concerns about connectivity and genetic diversity of the recovered wolf population." (App. V. 7 at 1906).

Dr. Kyran Kunkel of Montana State University found the moving boundary line was the "crux of the plan," yet "confusing and difficult to enforce." (App. V. 7 at 1910). He also noted:

> "[M]anagement as directed by the Wyoming Plan may not achieve their objective of 15 packs especially initially given that all wolf packs outside national parks and wilderness areas in the northwest portion of the state will initially be classed as predators. This problem is indicated in the statement of p. 18 that '90%' of the home range area of wolf packs outside the national Parks and Parkway in Wyoming are outside of these designated trophy game wilderness areas."

(App. V. 7 at 1909). (emphasis added).

Other reviewers expressed their concerns as well. Dr. Daniel Pletscher of the University of Montana recommended "game status over a broader area." (App. V. 7 at 1915). Dr. Pletscher also noted the management nightmare of a constantly shifting boundary: "[M]anaging for 7 wolf packs outside of the Parks will be more difficult than managing for at least 7 wolf packs. Wolf Packs are dynamic everywhere, but especially where they are highly controversial. Boundaries where wolves are managed as a game animal may have to be shifted quite often. This will be painfully controversial each time it occurs." (App. V. 7 at 1915). And Adrian Wydeven, lead wolf biologist for the Wisconsin Department of Natural Resources found that the Wyoming Plan "seems like an **extreme form** of wolf management." (App. V. 7 at 1925). (emphasis added). Furthermore: "The plan discusses 'trophy' and 'predatory animal' status throughout the text, but does not clearly define the terms and how wolves in these 2 categories would be managed.., it appears the predatory status would allow anyone to shoot wolves anytime anywhere in the state outside the small area of trophy status in the northwest corner of the state." *Id.* (emphasis added). James Hammill, President of Iron Range Consulting and Services, found:

> "Wyoming's plan exposes wolves in Wyoming to **risk of catastrophic loss** outside of National Parks and Parkway." (App. V. 7 at 1927). (emphasis added). *Id.*

Hammill also recognized that wolf populations in each of the three states in the Western DPS are not insulated from management across the border: "source populations to maintain Wyoming's wolves could only come from Montana…unforeseen drops in wolf numbers there could 'cut off' Wyoming from source animals."

The peer reviewers expressed concerns beyond the predator classification. Mr. McNay commented that the Wyoming plan does not discuss other mortality factors such as disease related problems. (App. V. 7 at 1907). *See also* App. V. 7 at 1906; ("Management at minimum population size and pack numbers may also raise concerns about connectivity and genetic diversity of the recovered wolf population."); App. V. 7 at 1921; (Wyoming Plan seems to limit the potential for wolves to colonize other areas of suitable wolf habitat further to the south.").

In addition to the peer reviews, FWS relied upon their agency experts who had been actively monitoring and managing wolves since reintroduction in 1996, and scientific literature. Studies in 2002 by wildlife biologists had shown that for the population to effectively function as a metapopulation with genetic exchange between members, "dispersal corridors to the Yellowstone ecosystem be established and conserved." (App. V. 6 at 1457, 1496). FWS also adopted the findings of Drs. Woodroffe and Ginsberg published in the widely accepted journal

Science, attaching these findings in correspondence with the Wyoming Department of Fish and Game:

> "[P]opulation size is a poor predictor of extinction in large carnivores inhabiting protected areas. Conflict with people on reserve borders is the major cause of mortality in such populations, so that border areas represent population sinks. The species most likely to disappear from small reserves are those that range widely--and are therefore most exposed to threats on reserve borders--irrespective of population size. Conservation efforts that combat only stochastic processes are therefore unlikely to avert extinction." (App. V. 6 at 1462).

D. Events Leading to this Lawsuit.

Director Steve Williams notified Wyoming of the peer review comments on November 26, 2003 and invited feedback. (App. V. 6 at 1831). The states returned their comments on December 10, 2003, completing the peer review process. Wolf Recovery Coordinator Edward Bangs also provided his "scientific and biological perspective and recommendations" on the adequacy of the state wolf management plans to maintain a recovered wolf population in a January 7, 2004 memo to Director Williams. (App. V. 9 at 2502). Recommendations were based on FWS's "knowledge of the state plans and laws, how they were developed, the peer reviews, and the states' response to the peer reviews." *Id.* Mr. Bangs called on his experiences and knowledge from "managing and studying wolves in Alaska from 1976 through 1988 and in Montana, Idaho and Wyoming from 1988 through 2004" in concluding that Wyoming's plan does not provide enough "clarity or assurances

to allow FWS to proceed with a delisting proposal." (App. V. 9 at 2504).

Mr. Bangs reiterated the peer reviewers' concerns over the ability of the dual-status classification to prevent relisting, "repeatedly expressed to Wyoming" throughout the drafting of their law and wolf plan. (App. V. 9 at 2503). Mr. Bangs predicts that predator status "will almost certainly mean few if any wolf packs will be present throughout most of Wyoming." (App. V. 9 at 2504). In addition to changing predator status, Mr. Bangs identifies two other issues that must be resolved: first, Wyoming should commit to managing for at least 15 packs in Wyoming and maintain at least 7 of those packs outside the National Parks; and secondly, the definition of a pack must include a breeding pair. (App. V. at 2504-2505).

On January 13, 2004, Director Williams wrote a letter (hereafter, the Letter) wherein he notified Wyoming that delisting could not be proposed at this time due to deficiencies in Wyoming's Wolf Plan. Williams explained, as had been stated numerous times before, that "the 'predatory animal' status for wolves must be changed," recommending 'trophy game' designation statewide. (App. V. 7 at 1954). The other two recommendations articulated in the Letter are to "clearly commit to managing for at least 15 wolf packs in Wyoming" and "the definition of a pack must be consistent among the three states and should be biologically based." (App. V. 7 at 1955). He concluded with assurances that "the Service will assist

[Wyoming] in developing the three changes," and a continued commitment to reward Wyoming with more authority over wolf management while the delisting process gets rolling. *Id.* The Williams' Letter ultimately became the basis for triggering the instant lawsuits, the alleged "final agency action" rejecting Wyoming's Plan.

E. The District Court's Decision.

The State of Wyoming and Plaintiff-Intervenors filed suit in May, 2004, alleging: (1) that FWS violated the ESA and the APA 5 U.S.C. § 551 et seq. in declining to propose delisting by ignoring the best scientific and commercial data available, and by relying instead upon "litigation risk management" and political concerns; (2) FWS violated its own mandates by failing to manage and control depredating wolves in Wyoming; (3) that FWS violated the Commerce Clause, the Tenth Amendment, and the Guarantee clause of the United States Constitution. Shortly thereafter the Greater Yellowstone Coalition, National Wildlife Federation, Predator Conservation Alliance, Wyoming Outdoor Council and Jackson Hole Conservation Alliance were permitted to intervene as Defendants.[1]

The Wolf Coalition sued in September, 2004, alleging: (1) that FWS violated the ESA and APA when they declined to accept the Wyoming Plan by

[1] Of the original Defendant-Intervenors in the Wyoming case, only the Greater Yellowstone Coalition, the National Wildlife Federation and the Predator Conservation Alliance are appellees in this matter.

failing to consider the best scientific and commercial data available; (2) that FWS violated the ESA, APA and NEPA by failing to manage and control gray wolves in Wyoming; (3) that FWS violated NEPA by not preparing a Supplemental Environmental Impact Statement addressing wolf impacts outside of the Greater Yellowstone Area.

The District Court consolidated the two cases and bifurcated the action into two parts on November 18, 2004. The first round of briefing addressed only Plaintiffs' APA and Constitutional claims as well as jurisdictional issues. The second round of briefing, if necessary, would address the merits of the failure to manage wolf depredations to livestock and wildlife claims.

On March 23, 2005 the District Court held that the Letter did not constitute final agency action and APA jurisdiction could not attach. Because the Letter was not part of a status review or petition to delist, no rights or obligations flowed from it. The District Court stated:

> "…the letter and the decision contained therein do not rest on a statutory or regulatory foundation. The letter is not the full determination of a status review. Nor is the letter an action taken pursuant to a petition to delist. Without such a basis, this Court cannot attach condition or legal significance to the letter or the opinion it contains." (App. V. 5 at 1224).

The Court correctly held that the Letter was only part of a multi-faceted, ongoing process providing FWS with discretion to delist and was not part of a mandatory, periodic status review. Because the Letter did not originate as part of

the official decision-making process, both § 706 claims had no legal ground to stand on and were properly dismissed.

The District Court stressed that Wyoming was aware of, but declined to follow legally prescribed regulatory channels for wolf delisting – petitioning and periodic status review. The District Court rebuked Wyoming's attempt to circumvent the petition process while simultaneously attempting to invoke the protective rules contained therein stating:

> "The Court is at a loss to explain the actions of the State of Wyoming. The statutory mechanisms, namely the petition process, are in place for the State to create a reviewable record. This action, if it had been taken, would have forced the Federal Defendants to make choices under hard deadlines set by Congress…. The statutory requirements are not mere bureaucratic hoops to jump through, but rather are the stated will of Congress, and the people, and as such should be adhered to with great care." (App. V. 5 at 1258).

SUMMARY OF ARGUMENT

The APA requires, as a jurisdictional prerequisite, final agency action. 5 U.S.C. § 704. The finality requirement insures the matter is ripe, and prevents the Court from premature entanglement in the agency's affairs. The Supreme Court in *Bennett v. Spear,* 520 U.S. 154 (1997), defined final action as "the consummation of the agency's decision-making process" and a decision from which "rights and obligations flow." Defendants' claim that "rejection" of the Wyoming Plan as expressed in the Letter is final agency action fails under both *Bennett* and the plain language of the APA.

Section 4 of the ESA sets forth the decision-making process for delisting species. The process requires filing a petition, formal review of the petition including public notice and comment, and final approval or rejection of the petition. 16 U.S.C. § 1533 (b). That final decision is subject to judicial review. The Letter is not the consummation of the delisting process for wolves. It is an interim directive to Wyoming, similar to numerous previous statements, that Wyoming's insistence on predator classification, and its definition of wolf pack size, which the state stubbornly clings to, is biologically unsound and hence, FWS will not make a discretionary proposal to delist under these circumstances.

The District Court properly found that the Letter was not the consummation of the delisting process, and that Wyoming's argument ignores the plain language of the Congressionally-crafted delisting scheme. Wyoming did file a petition to delist on July 14, 2005, subsequent to the District Court's decision.

Plaintiffs also posit their claims as a vague "failure to act" violative of APA 5 U.S.C. § 706(1), chiding FWS for failing to use the best science in its "rejection" of the Wyoming Plan. This claim is also jurisdictionally defective. The Supreme Court in *Norton v. Southern Utah Wilderness Alliance*, 124 S.Ct 2373 (2004), has defined a "failure to act" claim as a failure to take a discrete act, such as issue a rule, order, act upon a petition and so forth, based upon a clear legal duty and a genuine failure to act upon that duty. Plaintiffs undercut their own claim by first

arguing that the rejection of the Wyoming Plan is final agency action, and then arguing FWS has failed to act. FWS cannot have acted both arbitrarily, and yet failed to act at all. While listing decisions under the ESA absolutely must be based on sound science, challenges under that standard are not challenges to a "failure to act." The District Court properly found that the best available science standard is a yardstick to measure the sufficiency of the agency's actions, not a discrete duty that can be compelled under § 706 (1).

If this Court finds the Letter as final agency action, this Court must side with FWS under the deferential standard of review required under the APA. FWS' interim rejection of the Wyoming Plan is based on years of experience with wolf management. It is not arbitrary to refuse to sanction Wyoming's return to predator status for wolves, when the record provides ample evidence that predator status was a primary cause of its extirpation. It was not arbitrary for the agency's expert scientists to insist on a definition of pack size in the recovery areas that comports with their understanding of the species' biological needs. Furthermore, that there may be some evidence in the record supporting Wyoming's Plan is not grounds for rejecting FWS' position; such a ruling would impermissibly require this Court to substitute its judgment for that of FWS. Finally, sporadic references to political or legal issues in the record do not mean that the agency's actions were based on political, instead of wildlife management concerns. If anything, Wyoming's

stubborn refusal to alter predator status classification for wolves is the real political, as opposed to biological, decision present in this case. Finally, the District Court properly rejected Defendants' claims to compel FWS to control problem wolves as Defendants would like. The regulations at 50 C.F.R. 17.84 confer broad discretion to FWS to manage the experimental population of re-introduced wolves, including taking control actions when appropriate. Again, FWS cannot have both failed to act (as alleged by both Defendants) and acted arbitrarily (as alleged by Wyoming) in its discretionary management of problem wolves.

STANDARD OF REVIEW

The District Court dismissed Wyoming's claims under Sections 706(1) and 706(2) of the APA for lack of jurisdiction.

"[T]he essential function of judicial review [of agency action] is a determination of (1) whether the agency acted within the scope of its authority, (2) whether the agency complied with prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious or an abuse of discretion. *CF & I Steel Corp. v. Economic Dev. Admin.*, 624 F.2d 136, 139 (10th Cir. 1980); *American Petroleum Inst. V. EPA*, 540 F.2d 1023, 1029 (10th Cir. 1976) (citing *Overton Park*, 401 U.S. at 415-417). Legal principles applicable in the first two determinations are straightforward. Determination of whether the agency acted within the scope of

its authority requires a delineation of the scope of the agency's authority and discretion, and consideration of whether on the facts, the agency's action can reasonably be said to be within that range. *Overton Park*, 401 U.S. at 415-16. Determination of whether the agency complied with prescribed procedures requires a plenary review of the record and consideration of applicable law." *Id*. at 416-17. *Olenhouse v. Commodity Credit Corp*., 42 F.3d 1560, 1574 (10th Cir., 1994).

This Court reviews the District Court's APA jurisdictional decision *de novo*. *New Mexico Cattle Growers Ass'n v. United States Fish & Wildlife Serv.*, 248 F.3d 1277, 1281 (10th Cir. 2001). However, "Where a trial court's ruling on jurisdiction is based in part on the resolution of factual disputes, a reviewing court must accept the district court's findings unless they are clearly erroneous**."** *Holt v. United States*, 46 F.3d 1000, 1003 (10th Circ. 1995).

It is well established that judicial review of final agency actions under the APA is premised under the deferential arbitrary and capricious standard. *Holy Cross Wilderness Fund v. Madigan*, 960 F. 2d 1515, 1524 (10th Cir. 1990). That standard of review is narrow. "In making the factual inquiry concerning whether an agency decision was 'arbitrary or capricious,' the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' This inquiry must be 'searching and careful,' but 'the ultimate standard of review is a narrow one.'" Moreover, as

the United States Supreme Court has stated, when scientific matters are at issue under an APA challenge, the agency's discretion is broad: "[W]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 377 (1989).

ARGUMENT

I. The District Court was correct in holding that it lacked subject matter jurisdiction to review Appellants' Section 706 claims and ESA claims because the Federal Defendants took no "final agency action", which is a jurisdictional prerequisite to judicial review of agency action pursuant to 5 U.S.C. § 704.

Judicial review under the APA must be premised upon a "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704. "Agency action" is defined as "agency rule, order, license, sanction [or] relief or the equivalent or denial thereof, or failure to act[.]" 5 U.S.C. § 551(13). Final agency action must satisfy two conditions: (1) the action must mark the "consummation" of the agency's decision-making process and not be tentative or interlocutory and; (2) rights and obligations or legal consequences must flow from the action. *Bennet v. Spear,* 520 U.S. 154, 177-178 (1997).

A. The Letter Was Not the Consummation of FWS's Decision-making Process for Delisting Wolves.

Bennett provides APA jurisdiction only for actions that constitute the

consummation of the agency's decision-making process. Here that decision-making process is the delisting of wolves pursuant to 16 U.S.C. § 1533. The Letter is not the consummation of the delisting process, because that process had yet to begin. The Letter is distinct from the ESA's mandatory petition mechanisms for delisting, and merely represents FWS' attempt to develop appropriate circumstances for a future delisting proposal. Wyoming's insistence that the District Court erred in concluding that the "rejection" of Wyoming's plan was not the ultimate action prior to delisting misses the mark. Assuming FWS had approved of Wyoming's plan, the next step still would not be delisting. Before delisting could occur, FWS would need to include Wyoming's plan in a discretionary FWS delisting proposal. Wyoming could also petition for delisting. Any petition is subject to public review, comment and final rule-making.

Section 4 of the ESA defines "final agency actions" by setting forth discrete, mandatory agency actions constituting the delisting process. Listing decisions are, of course, frequently subject to judicial review. *See e.g. Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 678 (D.D.C. 1997). Wyoming and the Wolf Coalition refuse to acknowledge that Section 4 provisions provide the ***only*** mechanisms for delisting a species and that the Letter merely communicated FWS' unwillingness to make a ***discretionary*** proposal to begin the formal process, thereby subjecting FWS decision-making to judicial review.

Wyoming can hardly argue unfamiliarity with the ESA's delisting petition process because Wyoming submitted a petition to delist the Preble's Meadow Jumping Mouse on December 17, 2003 and petitioned to delist wolves on July 14, 2005[1]. 69 Fed. Reg. at 16944. Wyoming admitted deliberately avoiding the statutorily-prescribed delisting process at oral argument when attempting to invoke the futility exception to the exhaustion of remedies doctrine. (App. V. 5 at 1221). The District Court clearly and correctly held that Wyoming's situation falls outside any relief this exception could offer. The District Court noted that Wyoming's attempt to circumvent the bright lines of timing and behavior subject to judicial review via the petition process would create a defacto petition process ignoring the ESA's legislative mandates. *Id*. As the District Court noted, the Letter did not rest on any statutory or regulatory foundation and was not part of a status review or petition to delist – it was not part of a distinct decision-making process. (App. V. 5 at 1223). The District Court properly rejected Defendants' "form over function" argument as failing to recognize the "significance of the petition process." (App. V. 5 at 1221).

Because Wyoming cannot argue that it availed itself of the petition process and that the Letter is the final agency action on a petition to delist, Wyoming posits

[1] Federal Appellees have attached Wyoming's petition to delist as an addendum to their response brief.

the final agency action as flowing from a decision on the status review. But, a status review is separate from a delisting petition. By its nature, a status review is a process distinct from the listing process. *Compare* 16 U.S.C. 1533 § (c)(2)(A)-(B) *with* 16 U.S.C. § 1533 (b)(3)(A). Any determination from the status review must "be made in accordance with the provisions of subsections (a) and (b) of this section." Thus a status review can lead to the initiation of a delisting process, but is not the culmination, or in the words of the statute, a "determination" under the delisting process.

The District Court correctly held that the Letter "rejecting" the Wyoming plan was not the end result of a status review. App. V. 5 at 1222-3. Wyoming cites FWS' statement that, "a status review of the [gray wolf's] listing status has determined that the species could be delisted once a state wolf management plan has been approved by the [FWS] Service for Montana, Idaho, and Wyoming" in support of their position that "rejecting" the Wyoming's plan was the culmination of a status review and therefore final agency action. (App. V. 9 at 2475-2501). However, the quoted language clearly indicates that a status review has already been completed where it says, "a status review of the [gray wolf's] listing status ***has determined***…" *Id*. The status review referenced was completed in 2003, and as the District Court noted, led to the gray wolf being eventually downlisted from endangered to threatened. (App. V. 9 at 2271). However, FWS's final decision to

downlist wolves was made as a result of a Final Rule promulgated under Section 4 of the ESA. The final rule to downlist was overturned. *Defenders of Wildlife v. U.S. Department of the Interior*, 354 F. Supp. 2d 1156 (D. Or. 2005). However, in this case, the status review itself was not challenged; Plaintiffs sued over a Final Rule establishing new Distinct Population Segments and downlisting wolves. *Id.* at 1158-9. In sharp contrast, here there is no Final Rule to challenge, because no final action has resulted from the status review with respect to removing wolves from the ESA.

Not only is the Letter not the end of the status review, it has all the trappings of an interlocutory statement made in the context of an-on going process rather than a final decision made pursuant to Section 4 of the ESA. The Letter encourages development of a sufficient plan meeting adequate regulatory mechanisms necessary for delisting. The letter cannot be viewed in isolation, but rather as a continuous series of communications between Wyoming and FWS about what steps Wyoming must take if FWS is to petition for delisting of wolves. In that context, the Letter is merely one of many statements where FWS told Wyoming that it must remove the predator label before FWS would move the Petition process forward. (App. V. 6 at 1475, 1476, 1502, 1517; V. 7 at 1791-1797; V. 9 at 2506).

Finally, Wyoming contests the District Court's view of the Letter as

interlocutory stating, “Nothing about the sentence ‘If requested, the [Federal defendants] will assist the [Wyoming] Department [of Game & Fish] in implementing the three changes noted above’, is interlocutory in nature.” *Wyoming Brf.* at 21. Two sentences later Wyoming admits that, “the Federal Defendants apparently are willing to help Wyoming make the demanded changes.” *Id*. Wyoming belies its own claim, agreeing that FWS viewed the Letter as interim, and envisioned further opportunity for cooperation.

Wyoming also argues that FWS’ statements regarding “predatory” animal status, managing for at least 15 packs and minimum pack size are not interlocutory or tentative statements. The agency’s use of the word “must” regarding certain minimum protections Wyoming must provide in order to proceed with delisting hardly constitutes “final agency action.” Simply informing Wyoming of its wolf management responsibilities in a letter does not constitute “final agency action” within the APA, or under Section 4 of the ESA.

B. No Rights or Obligations Flow from the Letter

Under *Bennett* final agency action must not only be the consummation of the decision-making process, it must be one from which “rights and obligations have been determined,” or from which “legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). In addition, when "an agency merely expresses its view of what the law requires of a party, even if that view is adverse to the party,"

courts may not review that claim. *AT&T v. EEOC*, 270 F.3d. 973, 975 (D.C. Cir. 2001). The Letter fails to satisfy this prong under *Bennett* and *AT&T*.

Wyoming characterizes the Letter as an order "demanding" three changes, and "imposing obligations" on Wyoming. *Wyoming Brf*. at 29. However, FWS cannot force Wyoming to do anything. The "demanded" changes are voluntary; Wyoming is free to ignore them. Wyoming's failure to adopt FWS' requirements for a future FWS delisting proposal carries no consequence other than continued ESA preemption, a maintenance of the status quo. Wyoming always maintains the option of itself petitioning for delisting based on its Plan, which it has just done.

The District Court correctly held that FWS' actions herein, taken through Congress' power under the Commerce Clause, was a valid exercise of federal authority. (App. V. 5 at 1223). Wyoming's reliance on *State v. Snyder*, 212 P. 771 (Wyo. 1923), recognizing that the power of the legislature is the power of the sovereign, misses the mark. Simply put, if Wyoming does not change its laws or the Wyoming Plan, nothing happens except a continuation of the status quo. Maintaining federal preemption of wolf management through continued listing under the ESA is not a legal consequence for Wyoming that flows from the Letter. It derives from the ESA itself.

Wyoming's alleged second consequence ("…the rejection of the Wyoming Plan also means the Federal Defendants will not propose a rule to delist the gray

wolf until Wyoming makes the demanded changes to the Wyoming Plan") and third consequence ("…the Federal Defendants have adopted new guidelines for managing wolves in Idaho and Montana that are less restrictive than the guidelines being used to manage wolves in Wyoming."), see *Wyoming Brf.* at 30, are also not cognizable. These consequences simply flow from the regulatory scheme established in the ESA. *New York v. United States*, 505 U.S. 55, (1992); *Reno v. Condon,* 528 U.S. 14 (2000).

Both a continuation of FWS' wolf management and the offer to turn over wolf management to Wyoming, upon compliance with federal standards, represent federal preemption and regulatory incentive principles laid out in *New York* and *Reno*. In addition, continued status quo federal wolf management in Wyoming, while Montana and Idaho's management regimes change, result from Montana and Idaho submitting acceptable state management plans and are not the result of the Letter. Montana and Idaho effectuated wolf management changes Wyoming chose not to undertake. *See* 70 Fed. Reg. at 1288 and App. V. 9 at 2477. Continued federal preemptive wolf management, as discussed above, is a legally valid exercise of ESA authority and not a legal consequence as defined in *Pennaco Energy, Inc. v. United States Dep't of Interior*, 377 F.3d 1147 (10th Cir. 2004).

In *Pennaco*, unlike the case at bar, legal consequences flowed from a final agency action taken at the consummation of a "distinct decision-making process".

Id. at 1155. In *Pennaco* the court stated:

> "We conclude the IBLA's decision marked the consummation of a ***distinct decision-making process***. Although the IBLA did not make a final determination as to what NEPA required, the IBLA's decision was a definitive statement of its position that the environmental analyses already prepared by the BLM were not adequate. The IBLA's conclusion on that point was neither tentative nor interlocutory in nature." *Id.*

Pennaco is distinguishable by the fact that FWS was not involved in a distinct decision-making process when FWS declined to accept the Wyoming Plan.

In sum, the Letter expresses FWS' interpretation of what the ESA requires in order for Wyoming to assume wolf management. Informing Wyoming of FWS' interpretation of the law is not the kind of legal consequence conceivable in *Bennet's* finality framework. The court in *AT&T* expressly held: "Such a[n] [actual or concrete] injury typically is not caused when an agency merely expresses its view of what the law requires of a party, even if that view is adverse to the party." *AT&T*, 270 F. 3d at 975. FWS must inform various parties of its interpretation of the law to carry out its statutorily defined duties. The delisting petition mechanism provides the proper forum for judicial resolution of conflicting views of the law. To hold otherwise would subject countless agency communications to premature and unnecessary judicial scrutiny.

C. The Letter was not "Agency Action" within the Meaning of the APA.

Wyoming also fails to read *Bennett* in conjunction with the statutory

definition of agency action. "Agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act". 5 U.S.C § 551(13). Wyoming asserts that the District Court added another term to the definition of finality, namely that the agency's decision be the end result of a process defined by statute or regulation in order to be subject to judicial review. *Wyoming Brf.* at 23. However, the District Court merely applied *Bennett* and the APA definition of agency action, and found that the Letter failed both tests. The District Court correctly held that the Letter is not an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or a failure to act under 5 U.S.C. § 551 (13).

Wyoming is correct that an agency cannot avoid judicial review by expressing a final decision in a letter, rather than a more formal document. *Natural Res. Defense Council, Inc. v. Envtl. Protection Agency*, 22 F.3d at 1132-1132 (D.C. Cir. 1994). However, the final decision must still meet the statutory definition of final action under the APA. Wyoming argues that under *Public Serv. Co. of Colo. v. United States Envtl. Protection Agency*, 225 F.3d 1144 (10th Cir. 2000), agency action is "final" for APA purposes if the action has a "direct and immediate impact" on the complaining party. Wyoming again relies on authority not applicable to their situation. In *Public Serv. Co. of Colo*, the question before the court was whether two EPA letters constituted "final action" within the meaning of

the statute governing review of the Administrator's actions on behalf of the EPA. In *Public Serv. Co. of Colo*, unlike the case at bar, the actions in question were "agency action" by way of APA definition rendering the "direct and immediate impact" inquiry relevant. In the instant case, the Letter is not "agency action" as defined in 5 U.S.C. § 551(13) and is therefore not analogous to *Public Serv. Co. of Colo*. The District Court correctly held that the Letter was neither "final" nor "agency action," and was both tentative and interlocutory. (App. V. 5 at 1218).

The Letter here is akin to one issued by EPA in *City of San Diego v. Whitman*, 242 F.3d 1097 (2002). EPA sent the City of San Diego a letter indicating that it would apply certain provisions of the Ocean Pollution Reduction Act of 1994, 33 U.S.C. §§ 1311(j), to the City's as-yet-unfiled application for renewal of a modified National Pollutant Discharge Elimination System permit. The City alleged that the letter was final agency action and was illegal under the governing statute, much as the Plaintiffs allege the Williams Letter represented an illegal determination under the ESA. *City of San Diego*, 242 F.3d at 1098. EPA's letter outlined a view of the law and the permit process that San Diego believed to be illegal. Rather than proceed with the permit process (akin to the listing process here), the City sued over the issuance of the letter. In rejecting the suit for lack of final agency action, and hence lack of subject matter jurisdiction, the Court explained:

> "The EPA's letter does not satisfy the first of the *Bennett v. Spear* requirements for final agency action--that the action mark the 'consummation' of the agency's decisionmaking process. The EPA's decision-making process on the City's application for renewal of its section 301(h) modified permit will not even begin until the City files its application. If and when the City is aggrieved by the EPA's decision regarding its application, the City's recourse is to appeal to the Environmental Appeals Board, as a prerequisite to review by this court." *Id.* at 1101.

The same analogy applies here; the delisting process has not formally commenced, let alone concluded. The Letter is merely an interim expression of the agency's view as to what is required under the law. If Appellants disagree, they can petition the agency to delist, and if declined, vindicate their position in court.

Finally, Wyoming cites no authority for the proposition that the Wyoming plan is an order. "[O]rder" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing. 5 U.S.C. § 551(6). Although the Letter is a matter "other than rulemaking," it is not part of any final disposition. It is not an Order under the APA.

II. The District Court correctly held that it lacked subject matter jurisdiction to review Appellants' § 706(2) claims for lack of subject matter jurisdiction, but if this Court reaches Appellants' § 706 claims they must fail because the Federal Defendants did not act arbitrarily or capriciously in allegedly "rejecting" the Wyoming Plan.

A. FWS Relied Only on Scientific and Commercial Data in Evaluating the Wyoming Plan

If this Court finds that the Letter, thought not part of the listing process, is nonetheless final agency action under *Bennett*, then this Court should reject Wyoming's claim that the Letter was not based on the best available science and was therefore arbitrary and capricious. This Court's analysis of an agency decision under APA § 706(2) must be guided by the deferential standard enunciated by the Supreme Court in *Marsh v. Oregon Natural Resource Council*:

> "Because analysis of the relevant documents "requires a high level of technical expertise," we must defer to "the informed discretion of the responsible federal agencies." *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976). See also *Baltimore Gas & electric Co. v. Natural Resource Defense Council, Inc.*, 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination … a reviewing court must generally be at its most deferential.")

Marsh v. ONRC, 490 U.S. 360, 377 (1989).

The wildlife management issues presented herein are the kind of "scientific determination" requiring deferential review under § 706(2). While deference to FWS is not axiomatic, here the record is replete with evidence that FWS' refusal to propose delisting because of the Wyoming Plan's predator status was based upon relevant factors, supported by FWS's expertise, and ultimately a reasonable conclusion.

The record demonstrates European settlement brought development,

agriculture, livestock grazing and "widespread persecution" decimating wolf numbers to extirpation: "poisons, trapping, and shooting…resulted in extirpation of this once widespread species from more than 95 percent of its range." (App. V. 9 at 2271). In short, "humans kill wolves." (App. V. 1 at 1465). The record also demonstrates that wolves are resilient. Under ESA protection, where predator status was legally forbidden, wolves have made "dramatic recovery progress…" (App. V. 5 at 1196-1197). The best available scientific information about wolves, therefore, shows that (1) wolves were extirpated because they were considered predators, and (2) once "predator" status was removed wolves recovered dramatically. It was not arbitrary or capricious for FWS to insist that Wyoming eliminate predator status as a delisting prerequisite.

Wyoming makes much of comments by a single FWS employee about the political and legal ramifications of delisting to argue that FWS was not acting on scientific factors. *Wyoming Brf.* at 32-33. The occasional concern expressed by a staff scientist about the politics of wolf delisting hardly means that FWS did not use its scientific expertise as a basis for rejecting predator status. FWS consistently told Wyoming that "predator status" was unacceptable biologically to maintain a recovered wolf population in Wyoming. FWS' awareness that "predator" status would be unpalatable to many Americans in no way contravenes the ESA nor does it "prove" that FWS ignored science.

The record overflows with biological evidence that "predator" status simply will not work biologically and does not comply with the ESA. For instance, from the outset, FWS emphasized the need to regulate human-caused mortality, which is extremely difficult under a predator classification because of largely unregulated killing, to maintain populations: "[E]lk typically migrate long distances outside of Yellowstone National Park and wolf packs will occasionally follow them. Wolves will need legal protection from unregulated human mortalities [(a biological reality)] under State law in an area at least as extensive as they currently occupy to maintain the population above recovery levels." (App. V. 6 at 1477). And, allowing unregulated killing through predator status could potentially act as a wolf "sink" where wolves are drawn into the unoccupied areas in exploring new territory, and then shot. (App. V. 6 at 1492).

FWS further stated that "biological facts appeared to be ignored by the document's management recommendations" and reminded Wyoming that they could not allow human persecution to go unchecked. (App. V. 6 at 1502-1503). Wyoming was advised that dual-classification could be approved if a trophy-game status area was permanently expanded over an area large enough to protect wolves using areas outside the National Parks. (App. V. 7 at 1791, 1794).

Wyoming's assertion that a year-round, fair-chase hunting season is somehow a defacto "predator" status, citing a statement by Mr. Bangs, is taken

completely out of context. *Wyoming Brf.* at 33. The full text of the letter, *See* App. V. 7 at 1791-1797, reveals that Mr. Bangs was telling Wyoming that, "predator" status would limit wolf population, the same way hunting would, but not in the controlled, sustainable manner trophy game status hunting would. (App. V. 7 at 1796-1797). Obviously the immediate biological effect would be death, but the long term effect of "predator" status would be unregulated killing and likely re-listing as the letter makes eminently clear. The same is true for Mr. Bangs' comment, that "predator" status "was a public relations problem, but biologically was fine." (App. V. 3 at 754). Mr. Bangs' immediately preceding words are, "…predator status would mean no wolves in those areas and was a public relations problem, but biologically was fine." *Id*. Mr. Bangs again notes that "predator" status means wolf extirpation. Mr. Bangs' comment that "predator" status "in and of itself" would not preclude Wyoming from maintaining its share of a recovered wolf population is also twisted out of context by Wyoming. That comment is part of a discussion wherein Mr. Bangs reinforces that "predator" status application is unsound without a much larger trophy game management area. (App. V. 9 at 2506).

Finally, should the Court review the Letter, then the basis for its review would be that espoused in the Letter, and not in other documents. FWS has consistently maintained that "predator" status is biologically unsound. Any

statements made by a staff scientist could therefore only be properly complained of if they were somehow adopted in the Letter, which they were not.

In sum, the record clearly shows that FWS' was motivated by sound science and not political concerns. FWS has consistently maintained that wolf recovery hinges on preventing unregulated human-caused mortalities.

B. FWS' Decision is not Contrary to the Evidence Before it.

Wyoming and Wolf Coalition claim that FWS' decision was contrary to the evidence before it, asserting that the peer reviewers endorsed the Wyoming Plan. The overall peer review outcome was hardly resounding. Four scientists expressed strong reservations such as, Wyoming's plan "seems like an extreme form of wolf management." (App. V. 7 at 1925); "Wyoming's plan exposes wolves in Wyoming to risk of catastrophic loss outside of National Parks and Parkway." *Id*. at 1927; "thinning" likely to occur under a dual-status classification may affect the viability of "breeding packs." *Id*. at 1895 ; and disease factors unaddressed by the plan could have a profound impact on Wyoming wolves, and could lead to **irreversible declines** in wolf packs and "non compliance with the mandate for 10 breeding pairs in each state." *Id*. at 1907 (emphasis added).

Wyoming also states that (1) "The scope of the peer review process defines the relevant question to be answered regarding the adequacy of the three state plans;" and (2) "The purpose of the peer review process defines what is the best

scientific evidence in this administrative record." *Wyoming Brf. at* 36. Wyoming cites no authority for either proposition; certainly nothing in the text of the ESA or regulations suggests these statements are true. At the same time, FWS has developed its own body of professional scientific research that must also be considered the "best scientific evidence" in the record.

The purpose of the peer review is to provide additional non-binding guidance to FWS's considerable agency experience managing listed species. While some peer reviewers supported Wyoming's Plan, their opinions do not demonstrate FWS' decision is contrary to the evidence before it. As discussed above, FWS has substantial evidence from its own experience, professional judgment, and comments from some peer reviewers to support not accepting Wyoming's Plan. For example, the Wolf Recovery Team published weekly reports tracking movement, denning, mating, and feeding patterns. FWS also compiled independent scientific data from university researchers as well as articles published in respected journals, all of which were provided to Wyoming. (App. V. 6 at 1492).

III. The District Court correctly held that it lacked subject matter jurisdiction to review Appellants' Section 706(1) claims because the Federal Defendants did not withhold or delay a discrete, required action.

A. FWS Has not Withheld a Discrete, Mandatory Action Under the "Best Science" Mandate.

Wyoming also appeals the District Court's holding that the ESA's best available science mandate does not allow a "failure to act" claim under APA § 706 (1) in the case at bar. A claim under § 706(1) can proceed only where a Plaintiff asserts an agency failed to take a discrete action that it is required to take. *Norton v. Southern Utah Wilderness Alliance,* 124 S. Ct 2373 (2004) (hereafter *SUWA*). Before a court can act under § 706(1), the offending agency must have a non-discretionary duty to act, and then must completely fail to carry out that duty. *Id*. Wyoming's statement, "The Federal Defendants' failure to comply with the 'best science' mandate when reviewing the adequacy of the Wyoming Plan amounts to agency action unlawfully withheld" is a fundamental misread of § 706(1) jurisprudence. *Wyoming Brf.* at 49.

The "best science" mandate found in 16 U.S.C. § 1533 (a) does not contain the type of discrete, non-discretionary duty required by *SUWA.* Rather, it applies in the context of listing decisions. One could allege that a listing decision was arbitrary because it did not use the best available science. However, that is fundamentally different from alleging that the best science mandate is an independent duty that could be compelled under § 706 (1).

A § 706 (1) claim presupposes no final agency action upon which to bring the more common "arbitrary and capricious" challenge under APA § 706 (2). Thus

the core of a § 706 (1) claim is an administrative agency's failure to take a discrete act that it is required to take. However, the Wolf Coalition alleges that Defendants 'rejection of the Wolf Plan is both a failure to act in violation of § 706(1), and arbitrary final agency action under § 706(2). (Wolf Coalition Complaint ¶¶ 195-198, App. V. 1 at 252). Both averments are pled within the same cause of action (Count I, Violation of the ESA), so they are not pled as alternative theories. Wyoming advances the same proposition in Count I of its complaint, asserting that the "decision to reject the Wyoming Plan is final agency action," and that by rejecting the Wyoming Plan and refusing to propose delisting, the agency is unlawfully withholding action. (Wyoming Complaint ¶¶ 121-122, App. V. 1 at 51-52). The federal government cannot simultaneously act, and fail to act; the Plaintiffs' fundamental misunderstanding of 706(1) underscores why their claim here fails as a matter of law.

Wyoming really disputes the type of action taken by FWS – issuing an interim letter in which FWS disagrees with the Wyoming Plan. Courts dismiss such § 706(1) claims as "dressed up" § 706(2) claims because the plaintiff fails to demonstrate a genuine failure to act, but simply disagrees with the type of action taken. *See e.g. Nevada v. Watkins*, 939 F.2d 710, 714 n.11 (9th Cir. 1991).

Wyoming's § 706(1) claim is more appropriate in a "missed deadline" or "agency action unreasonably withheld" scenario such as that in *Forest*

Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1988). The *Babbitt* Court stated:

> "In our opinion, when an agency is required to act -- either by organic statute or by the APA -- within an expeditious, prompt, or reasonable time, § 706 leaves in the courts the discretion to decide whether agency delay is unreasonable. However, when Congress by organic statute sets a specific deadline for agency action, neither the agency nor any court has discretion. The agency must act by the deadline. If it withholds such timely action, a reviewing court must compel the action unlawfully withheld." *Forest Guardians*, 174 F.3d at 1190.

Babbitt, read concurrently with the APA definition of "agency action," which includes a "failure to act," illustrates § 706(1)'s proper application to compel a discrete agency action withheld beyond a statutory or regulatory deadline. *Babbitt* also allows a court to compel a discrete agency action withheld beyond a reasonable time for which no concrete date is statutorily or regulatorily prescribed.

Wyoming's claim cannot fairly proceed as a genuine failure to act claim, because no agency action has been withheld. Wyoming simply disagrees with FWS' opinion regarding what is the "best science" and indulges in a "dressed up" failure to act claim expressly disallowed in *Nevada v. Watkins*.

Furthermore, assuming arguendo, that FWS has taken final agency action, which they have not, the discrete agency action limitation discussed in *SUWA*, precludes "broad programmatic" attacks on agency actions. *SUWA*, 124 S. Ct. at 2380. FWS has and must continue to have discretion to evaluate and synthesize its own in-house opinions with peer reviewers' opinions. Similar to *SUWA* (wherein petitioners unsuccessfully urged the Court to compel BLM to enter a general order

for compliance with a statutory mandate), FWS' responsibility to use best available science, when involved in official decision-making, "is mandatory as to the object to be achieved, but it leaves [FWS] a great deal of discretion in deciding how to achieve it." *SUWA*, 124 S. Ct. at 2380.

SUWA makes clear that § 706(1) only addresses *whether* an agency has undertaken a discrete mandate, not how the agency executed that mandate. Challenges to agency actions allegedly carried out deficiently are not properly plead as § 706(1) claims as the Court in *SUWA* noted, "General deficiencies in compliance, unlike the failure to issue a ruling that was discussed in *Safeway Stores v.Brown*, 138 F.2d 278, 280 (Emerg. Ct. App 1943), lack the specificity requisite for agency action." *Id*.

The District Court noted that if Wyoming had petitioned for delisting, application of "best science" guidepost would be appropriate:

> "The Court is at a loss to explain the actions of the State of Wyoming. The statutory mechanisms, namely the petition process, are in place for the State to create a reviewable record. This action, if it had been taken, would also trigger [sic] the "best science available" mandate…" (App. V. 5 at 1258).

The District Court properly understood that the best science available mandate is properly applied to review a specific listing or delisting decision made pursuant to Section 4, not as a separate duty that can be compelled under 706 (1).

IV. Failure to Manage Wolf Depredations are not cognizable under §§ 706(1), or 706(2).

Plaintiffs also challenged FWS's failure to control wolf populations in a manner that comports with FWS's regulatory authority to manage experimental, non-essential populations of species re-introduced under the ESA. Plaintiffs are upset that FWS has not controlled (i.e. killed) wolves that stray unto private lands and kill livestock or wild game. The Wolf Coalition and Wyoming's "failure to manage" claim must fail as a matter of law whether plead as a § 706(1) or § 706(2) claim. The District Court properly dismissed Wolf Coalition's alleged failure to manage wolf depredation claim under § 706(1) for the same reasons it dismissed the best available science claims discussed above. Further, the Wolf Coalition's § 706(2) claim is improperly plead and must also be dismissed.

A. The Plaintiffs § 706(1) Claim for Failure to Control Fails Because ESA Regulations Impose No Mandatory Duty for FWS to Kill Wolves that Predate on Livestock or Wildlife.

Wyoming alleges a violation of 50 C.F.R. § 17.84(i)(3)(vii). Yet , the regulation begins:

(vii) The Service or agencies designated by the Service **may** take wolves that are determined to be "problem" wolves.

And is followed by:

All chronic problem wolves (wolves that depredate on domestic animals after being moved once for previous domestic animal depredations) will be removed from the wild (killed or placed in captivity). The following three criteria

will be used in determining the status of problem wolves within the nonessential experimental population area:

(A) There must be evidence of wounded livestock or partial remains of a livestock carcass that clearly shows that the injury or death was caused by wolves. Such evidence is essential since wolves may feed on carrion which they found and did not kill. There must be reason to believe that additional livestock losses would occur if no control action is taken.

(B) There must be no evidence of artificial or intentional feeding of wolves. Improperly disposed of livestock carcasses in the area of depredation will be considered attractants. Livestock carrion or carcasses on public land, not being used as bait under an agency authorized control action, must be removed or otherwise disposed so that it will not attract wolves.

(C) On public lands, animal husbandry practices previously identified in existing approved allotment plans and annual operating plans for allotments must have been followed.

SUWA, Town of Castle Rock v. Gonzales, 125 S. Ct. 2796 (2005) and *Trapper Mining, Inc. v. Wyodak Res. Dev. Corp.*, 923 F.2d 774, 779 (10th Cir.1991) easily dispose of Wolf coalition's § 706(1) claims.

Under *SUWA*, an agency must (1) be charged with a clear legal duty requiring discrete specific actions, and (2) must fail to discharge that duty, before jurisdiction under § 706(1) attaches. The above-quoted regulations do not meet the *SUWA* test because they are prefaced with the statement "[S]ervice or agencies designated by the Service **may** take wolves that are determined to be "problem" wolves." 50 C.F.R. § 17.84(i)(3)(vii) (emphasis added).

In addition, "[A] court reviewing an agency's construction of a statute first

makes its own inquiry into the intent of Congress on the precise issue. If that intent is ambiguous or nonexistent, then the court should defer to the agency's interpretation as long as it is reasonable." *Trapper Mining, Inc. v. Wyodak Res. Dev. Corp.*, 923 F.2d 774, 779 (10th Cir. 1991). Here the permissive language of the regulation is clear. If it is ambiguous, the FWS' interpretation of it is certainly reasonable in the context of agency expertise and wolf predation issues.

Finally, the Supreme Court in *Castle Rock*, clearly committed enforcement actions to agency discretion: "[T]his Court rejected out of hand the possibility that "the mandatory language of the ordinance . . . afforded the police *no* discretion." *Castle Rock*, 125 S. Ct. at 2806. The *Castle Rock* Court referenced a "shall" enforce provision and left enforcement to agency discretion based on logistical, timing and monetary considerations.

Wyoming urges that the phrase "will be" is mandatory language under the *Trapper* holding. The statute at issue in Trapper is distinguishable from 50 C.F.R. § 17.84. In *Trapper*, the statute (1) did not confer enforcement authority and (2) the phrase "will be" appeared in a provision controlled by, "shall" which obviously leaves no room for agency discretion. In the instant case the opposite is true. The regulation at 50 C.F.R. § 17.84 (1) confers enforcement authority and (2) the phrase "will be" is preceded by the word "may," clearly indicating discretion to enforce as is common in most discretionary enforcement scenarios. *Castle Rock*

stands for the clear proposition that enforcement duties, even enforcement duties couched in mandatory sounding "shall" language are committed to agency discretion. The regulation does not contain the kind of imperative needed for a § 706(1) claim.

The District Court correctly cited the controlling regulations from 50 C.F.R. §§ 17.84(i)(3)(v), (vii), (ix) and (xi) all of which contain *discretionary* authority to remove wolves by relocating, placing in captivity, or killing. App. V. 5 at 1232. Sub-part (v) states: "The Service, or agencies authorized by the Service, *may* promptly remove (place in captivity or kill) any wolf…" Sub-part (ix) states: "Service or other Federal, State, or tribal personnel *may* receive written authorization from the Service to take animals under special circumstances…" Sub- part (xi) states: "Any employee or agent of the Service…*may* take a wolf from the wild…" Clearly, no mandatory duty exists and in the absence of such a duty, no failure to discharge such a duty can logically present itself.

Even assuming Wyoming's reading of 50 C.F.R. § 17.84(vii) is correct, no particular allegations have been made regarding a particular chronic problem wolf. To avail themselves of any potential relief, the Wolf Coalition and Wyoming must provide specific factual allegations, to compare with § 17.84(vii) provisions that define chronic problem wolves. Simply stating that FWS has violated the ESA by "failing and refusing to properly manage and control the wolves", *see Wolf Coal.*

Brf. at 47, does not state a claim for which relief can be granted. Plaintiffs sweeping statements here, compared with this Court's holding in *Gordon v. Norton*, 322 F.3d 1213 (10th Cir. 2003) reveal the weakness in Wyoming's argument. That court also noted that if § 17.84(vii) did impose substantive requirements on FWS, review of such a claim required "factual development, i.e. what constitutes a chronic problem wolf and satisfactory removal of a wolf." *Id*. at 1220. Allowing Wyoming's sweeping and generalized claim failing to meet the particular criteria set out for chronic problem wolves is not supported by the record. Additionally, Wyoming and the Wolf Coalition's claim falls into the broad programmatic attack condemned in *SUWA*.

The Wolf Coalition does not claim that FWS has failed to carry out any discrete mandatory duty found in 50 C.F.R. § 17.84, they charge only that FWS failed and refused to manage properly and have not taken adequate steps to control depredations as Wyoming would like. It is apparent that enforcement measures under 50 C.F.R. 17.84(vii) are committed to agency discretion. In short, FWS did not fail to perform a mandatory, discrete agency action and as such the APA requires that Wolf Coalition's claim must fail for lack of subject matter jurisdiction.

B. The Wolf Coalition's § 706(2) Claims Fail Because No Final Agency Action has Occurred.

The Wolf Coalition also contends that their "failure to properly manage" claim can be resolved under § 706(2) even if no discrete, non-discretionary duty exists to begin with. Appellants misapprehend the proper application of § 706(2) to federal agency action. The Wolf Coalition itself argues that "Whether [FWS'] refusal to manage the wolves is arbitrary, capricious, and an abuse of discretion, etc., however, is a different story." *Wolf Coal. Brf.* at 50.

Section 706(2) allows a court to set aside agency action found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. To be susceptible to APA jurisdiction, a challenge must be made against some particular APA defined "agency action" in a § 706(2) claim. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891.(1990).

The Wolf Coalition, cites *SUWA* for their proposition, see *Wolf Coal*. *Brf.* at 50, that a § 706(2) claim can proceed even if "there is no § 706(1)-enforceable mandatory duty to act." *See Wolf Coal. Brf.* at 50.

While *SUWA* recognizes that 706 (2) claims are cognizable, *SUWA* clearly contemplates federal agencies taking agency actions that are then subject to judicial review. Here the Wolf Coalition has not identified a specific action that is arbitrary. The Wolf Coalition's argument is that FWS refuses to manage wolves, not that FWS acted arbitrarily, or illegally, by taking control actions.

V. If this Court finds that jurisdiction to hear Appellants' § 706

claims is proper this case must be remanded to the District Court.

Wyoming cites *Katt v. Dykhouse*, 983 F.2d 690 (6th Cir. 1992), urging that this Court should address the § 706 substantive claims at issue. The general rule as stated in *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) is that federal appellate courts do not consider issues not addressed in the court below. In Singleton, the Court considered appropriate circumstances when a federal appellate court may consider issues not considered below, stating: "Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt… or where "injustice might otherwise result."

Following the accepted procedure which calls for resolution of claims at the district court level would hardly work an injustice. Both parties would be guaranteed an appeal should either party believe their cause was incorrectly decided. In addition, no outstanding circumstances are present in this case. In *Katt*, an inordinate amount of time had passed preventing discovery, prejudicing plaintiff's case. That court was concerned that a remand might lead to another appeal, again preventing discovery and further protracting the lawsuit's progression. This case bears no similarity.

Appellants demonstrate no exceptional circumstance or a likely miscarriage of justice occurring should the general rule be followed. If this Court reverses the

District Court's APA jurisdictional holding it should remand Appellants' APA claims to the district court.

CONCLUSION

Based on the foregoing, the judgment of the District Court should be affirmed.

DATED this ____ day of August, 2005.

_____
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STATEMENT OF RELATED CASES

Other than these consolidated actions, there are no related cases currently pending before this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Tenth Circuit Rule 32-1, I certify that the attached Answer Brief of Defendant-Intervenor Greater Yellowstone Coalition, et al. is proportionately spaced, 14-point Times New Roman font. It contains approximately 13,880 words.

Dated: August 8, 2005.

_____
Jack R. Tuholske

CERTIFICATE OF DIGITAL SUBMISSION

I undersigned certifies that (1) all required privacy redactions (below) have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and

(2) the digital submissions have been scanned for viruses with Symantec AntiVirus, Version 9.0.0.338. The last scan and update of our anti-virus software was August 8, 2005 at 12AM.

Dated: August 8, 2005.

_____
Jack R. Tuholske

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the ____ day of August, 2005, a true and correct copy of Defendant-Intervenors Greater Yellowstone Coalition, et al. Answer Brief was mailed, postage prepaid, to the following:

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