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
Plaintiffs/Appellants

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.
Defendants/Appellees,
and
GREATER YELLOWSTONE COALITION, et al.
Defendants-Intervenors/Appellees

Appeal from the United States District Court for the District of Wyoming
The Honorable Alan B. Johnson, District Court Judge
D.C. No.'s 04-CV-0123-J and 04-CV-0253-J (Consolidated)

BRIEF OF APPELLANTS WYOMING WOOL GROWERS, ET AL., (WOLF COALITION)

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ORAL ARGUMENT IS REQUESTED

IDENTITY OF WOLF COALITION MEMBERS

The Wolf Coalition is made up of the following entities:

1. Wyoming Wool Growers Association
2. Wyoming Stock Growers Association
3. Wyoming Farm Bureau Federation
4. Wyoming Association of Conservation Districts
5. Rocky Mountain Farmers Union
6. Wyoming County Commissioners Association
7. Board of County Commissioners of the County of Campbell
8. Board of County Commissioners of the County of Lincoln
9. Board of County Commissioners of the County of Sublette
10. Board of County Commissioners of the County of Washakie
11. Wyoming Association of County Predatory Animal Boards
12. Fremont County Predatory Animal Board
13. Teton County Predatory Animal Board
14. Converse County Predatory Animal Board
15. Wyoming Outfitters & Guides Association
16. Green River Valley Cattlemen's Association
17. Upper Green River Cattle Association
18. Wyoming Business Alliance
19. Cody Country Outfitters and Guides Association
20. Foundation for North American Wild Sheep
21. Jackson Hole Outfitters and Guides
22. Rock Springs District 4 Grazing Board
23. Sportsmen for Fish & Wildlife Wyoming
24. Sportsmen for Fish & Wildlife Park County
25. Sportsmen for Fish & Wildlife Teton County
26. Sportsmen for Fish & Wildlife Lincoln County
27. Sportsmen for Fish &Wildlife Utah

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STATEMENT REGARDING RELATED APPEALS

Tenth Circuit Rule 28.2(C)(1) Statement: Appeal No.'s 05-8026, 05-8027, and 05-8035 were consolidated for procedural purposes by Order filed on June 9, 2005. There are no other prior or related appeals.

JURISDICTIONAL STATEMENT

The District Court has jurisdiction of the Wolf Coalition's lawsuit based on 28 U.S.C. §§1331 (federal question), 1361 (action to compel a United States officer), 2201 (declaratory relief), 2202 (injunctive relief), and 1346 (United States as defendant); 16 U.S.C. §1540(g) (Endangered Species Act (ESA)); 5 U.S.C. §§701-706 (Administrative Procedures Act (APA)); and 42 U.S.C. §§4321-4370 (National Environmental Policy Act (NEPA)).

On March 23, 2005, the District Court entered its final Corrected Memorandum Opinion and Order (Corrected Memorandum) dismissing all of the Plaintiffs/Appellants' claims. The Wolf Coalition timely filed its Notice of Appeal on April 4, 2005. This Court has jurisdiction pursuant to 28 U.S..C § 1291.

STATEMENT OF ISSUES

I. Was the Federal Defendants' rejection of the Wyoming Gray Wolf Management Plan "final agency action" subject to judicial review?

Raised: Aplt.App.Vol. 3 at 668-669; Vol. 4 at 943-958

Ruling: Aplt.App.Vol. 5 at 1214-1226, 1259-1260

II. Did the Federal Defendants unlawfully reject the Wyoming Plan?

Raised: Aplt.App.Vol. 3 at 694-705; Vol. 4 at 958-961, 967-970, 983-987

Ruling: Aplt.App.Vol. 5 at 1214-1226

III. Did the District Court err in holding that it lacked jurisdiction over the Wolf

Coalition's "failure to manage" claims?

Raised: Aplt.App.Vol. Vol. 3 at 666; Vol. 4 at 961-977

Ruling: Aplt.App.Vol. 5 at 1231-1235, 1259-1260

IV. Did the District Court err in holding that it lacked jurisdiction over the Wolf Coalition's claims brought pursuant to NEPA?

Raised: Aplt.App.Vol. Vol. 3 at 666; Vol. 4 at 977-983

Ruling: Aplt.App.Vol. 5 at 1235-1243, 1259-1260

STATEMENT OF THE CASE

On September 21, 2004, the Wolf Coalition filed a Complaint for Declaratory Judgment and Injunctive Relief against the Department of Interior (DOI), the Fish & Wildlife Service (FWS), Gale Norton, Steven Williams, and Ralph Morgenweck (collectively "Federal Defendants"), challenging their rejection of the "Wyoming Gray Wolf Management Plan," (Wyoming Plan), their failure and refusal to properly manage and control wolves in Wyoming, and their refusal to prepare a supplemental environmental impact statement (SEIS) under NEPA. Aplt.App.Vol. 1 at 186-263 (Complaint).

The Wolf Coalition requested a declaration that the Federal Defendants violated the ESA, 16 U.S.C. § 1533(b), by rejecting the Wyoming Plan for reasons other than "solely on the basis of the best scientific and commercial data available." The Wolf Coalition also sought to enforce the Federal Defendants' obligations to

effectively manage and control wolves in Wyoming to address the killing of livestock, domestic animals and wildlife. Finally, the Wolf Coalition requested the Court to order the Federal Defendants to prepare an SEIS to analyze protection and propagation of wolves outside of the recovery area and to analyze the impact of their decision to forego managing the wolves as contemplated by the following: (1) "1987 Northern Rocky Mountain Wolf Recovery Plan" (Recovery Plan) (Aplt.App.Vol. 9 at 2344-2471); (2) "Reintroduction of Gray Wolves to Yellowstone National Park and Central Idaho Final Environmental Impact Statement" (FEIS) (portions included in *Id*. at 2508-2538) ; and (3) 1994 "Final Rule: Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana," 59 Fed.Reg. 60252, 50 C.F.R. Part 17 (Final Rule) (*Id*. at 2539-2553).

On November 22, 2004, the District Court entered its "Amended Order Consolidating Docket No. 04-CV-0253-J with Docket No. 04-CV-0123-J", joining the Wolf Coalition's lawsuit with the suit filed by Wyoming. Aplt.App.Vol. 2 at 426-451 In that Order, the Court bifurcated the Plaintiffs' "rejection of the Wyoming Plan" claims from their "failure to manage" claims and the Wolf Coalition's NEPA claims. *Id*. at 450. The Court also ruled that the parties were to address all jurisdictional issues in the first round of briefing. *Id*.

The District Court dismissed all claims on March 23, 2005. Aplt.App.Vol. 5

at 1192-1260.

STATEMENT OF FACTS

I. HISTORY OF GRAY WOLF INTRODUCTION AND RECOVERY GOALS

In 1987, the FWS published the Recovery Plan, the purpose of which was to outline steps for the recovery of the gray wolf (Canis lupus) populations in portions of the Northern Rocky Mountains. Aplt.App.Vol. 9 at 2349. The three recovery areas were northwest Montana, central Idaho, and the Greater Yellowstone Area (GYA). *Id*. at 2350. The GYA recovery area was defined as Yellowstone National Park (YNP), designated wilderness areas (Absaroka-Beartooth, north Absaroka, Washakie, Teton), and adjacent public lands. *Id*. at 2374.

In order to alleviate the public's concerns, the wolf recovery and management program was designed to minimize impacts on livestock, domestic animals and wildlife. *Id*. at 2361. The Federal Defendants adopted management and control techniques for the Yellowstone Recovery Area (YRA), including a zone management protocol. Three management zones were established to minimize wolf-human/livestock conflicts and to protect other wildlife, while allowing for wolf "recovery" within the YRA. The "Zone Management Concept" was defined:

> A management concept by which management priority and concern is de-emphasized beyond a central core area. For this document there will be three management zones: Zone I will give strong emphasis to wolf recovery; Zone II will be a buffer zone; and Zone III will contain established human activities such as domestic livestock use or

> developments in sufficient degree as to render wolf presence undesirable. Maintenance and improvement of habitat for wolves are not management considerations in Zone III.

Id. at 2411.

On November 22, 1994, the FWS published the Final Rule for wolf introduction. *Id*. at 2539-2553. The impacts of the Final Rule were evaluated in the May, 1994 FEIS. *Id*. at 2539. The FEIS and Final Rule incorporated the Recovery Plan, including zone management (which was integral to the preferred alternative). *Id*. at 2517.

The FWS adopted the FEIS recovery goals in the 2003 "Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Coterminous United States" 68 Fed. Reg. 15804 (2003 Final Rule to Reclassify):

> [W]e have adopted the definition of wolf population viability and recovery developed in the 1994 EIS (Service 1994a). That definition is 'Thirty breeding pairs of wolves (defined as an adult male and an adult female that raise at least 2 pups until December 31 of the year of their birth), comprising some +300 individuals in a metapopulation with some genetic exchanges between subpopulations, for three successive years.'

Aplt.App.Vol. 9 at 2284-2285.

The "Primary Analysis Area" analyzed in the FEIS was

> The area in which a wolf population is expected to have a measurable environmental impact. *This area is much smaller than the experimental population area for the Yellowstone and central Idaho areas*. (Emphasis added).

Id. at 2536. The District Court's "Figure 1," purports to show "The Yellowstone Management Area." Aplt.App.Vol. 5 at 1199. That Figure is more accurately entitled "Yellowstone Nonessential Experimental Population Area," which is how it is labeled in the Final Rule (50 C.F.R. § 17.84(7)(ii)). Aplt.App.Vol. 9 at 2553. This distinction is important – while the nonessential experimental population area includes the entire State, the management (recovery) area is confined to the YRA. It is improper to equate the "nonessential experimental population area" with the "Yellowstone Management Area."

The FEIS primary analysis area in Wyoming was limited to 8.9 million acres in and around YNP. *Id*. at 2510, 2525. The Federal Defendants did not analyze the environmental impact of wolf recovery or management in any geographic area outside of those lands. The geographic area to be impacted by wolves was a critical component of the preferred alternative:

> Wolves would primarily occur in mountainous portions of western Montana, northwestern Wyoming, and central and northern Idaho. The majority of wolf pack territories would occur on public lands in and around national parks, national wildlife refuges, and forest service lands around Yellowstone National Park. ...

Id. at 2521.

Effective wolf management formed the foundation for the Preferred Alternative:

> The overriding goal of the wolf control program is to minimize wolf depradations on livestock by using a wide variety of techniques. . . . Wolves that attack livestock (cattle, sheep, horses, and mule) could be . . .killed or placed in captivity when six or more packs were present in a recovery area. ... Chronic problem wolves (depradating once after relocation) would be removed from the wild.

Id. at 2519. The Federal Defendants agreed to manage and control wolves to protect historical public and private land uses. *Id*. at 2528.

> By establishing a nonessential experimental population, more liberal management practices may be implemented to address potential negative impacts or concerns regarding reintroduction.

Id. at 2540, 2542, 2529.

> Because reintroduced gray wolves will be classified as a nonessential experimental population, the Service's management practices can reduce local concerns about excessive government regulation of private lands, uncontrolled livestock depredations, excessive big game predation, and the lack of State government involvement in the program.

Id. at 2541. Wyoming decides how many wolves would be tolerated outside of the YRA: "The respective states and tribes would determine how many wolves would exist in each recovery area above the minimum number required for a viable wolf population." *Id*. at 2530.

On November 22, 1994, the FWS promulgated the Section 10(j) Rules (50 C.F.R. §17.84), to establish the nonessential experimental population of gray wolves. *Id*. at 2551-2553. That Rule requires the Federal Defendants to use aversive conditioning, non-lethal control, relocation, placing wolves in captivity, and killing

wolves to protect human life, livestock, domestic pets, and wildlife. They have not complied with that agreement.

II. WOLF RECOVERY

In 2003, the FWS reported that, as of December 31, 2002, the wolf population in the northern Rocky Mountain recovery area had achieved the numerical and distributional recovery goals for the Western Distinct Population Segment (WDPS) and is not in danger of extinction. Aplt.App.Vol. 9 at 2277-2278, 2295. The FWS reported that "[t]here have been at least 300 wolves in a minimum of 30 packs since the end of 2000, and at the end of 2001 there were 563 wolves in 34 packs in the Northern U.S. Rockies." *Id*. at 2277. By the end of 2003, there were at least 174 wolves in fourteen (14) packs living in YNP, and 76 to 88 wolves in eight (8) packs living in Wyoming outside of YNP. Aplt.App.Vol. 1 at 228, 315. The Federal Defendants underestimate the wolf population. *Id*.

As part of the "status review" (ESA, 16 U.S.C. § 1533(b)(1)) that formed the basis for the 2003 Final Rule to Reclassify, the FWS analyzed the five (5) required ESA factors (16 U.S.C. § 1533(a)) to determine the status of the wolves in the WDPS, including the wolves within Wyoming and the YRA. *Id*. at 15841-15857, 2308-2324. These are the exact same factors that the Federal Defendants would have evaluated in response to a 16 U.S.C. § 1533(b)(3) petition to delist.

A. The Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range

Focusing on the habitat available in the GYA (24,600 square miles), the FWS's status review established that there is no present or threatened destruction, modification, or curtailment of the WDPS wolf habitat or range. This area "of potential wolf habitat [is] secure, and no foreseeable habitat-related threats prevent [it] from supporting a wolf population that exceeds recovery levels." *Id*. at 2312. The FWS went on to state that "[t]he only areas large enough to support wolf packs, but lacking livestock grazing, are Yellowstone National Park and some adjacent USDA Forest Service Wilderness [lands]. . . ." *Id*.

B. Overutilization for Commercial, Recreational, Scientific, Or Educational Purposes

The FWS found as part of its status review that the wolves in the WDPS, including the wolves in the GYA, are not at risk of overutilization for commercial, recreational, scientific, or educational purposes. *Id*. at 2312-2312.

C. Disease or Predation

The FWS's status review revealed that the wolves in the WDPS, including the wolf population within the YRA, are not at risk for disease or predation: "in the studies of wolves in Montana, Idaho and Wyoming to date, disease and parasites have not appeared to be a significant factor affecting wolf population dynamics." *Id*. at 2315.

D. The Adequacy or Inadequacy of Existing Regulatory Mechanisms

The FWS found that there were adequate existing regulatory mechanisms in place to protect at or above recovery levels the wolves in the WDPS, including the wolf population in the YRA. *Id*. at 2322-2324. The FWS also reported that it was necessary to remove wolves from the endangered species list to stabilize the population:

> [a]t the end of 2002, nearly all of the most suitable wolf habitat in the northern Rocky Mountains of Montana, Idaho, and Wyoming was occupied by resident wolf packs. As the wolf population continues to expand, wolves will increasingly attempt to settle in areas intensively used for livestock production, a higher percentage of those wolves likely will become involved in conflicts with livestock, and a higher percentage will need to be removed. For the wolf population to become stabilized, human-caused mortality would have to remove 30 percent or more of the wolf population annually."

Id. at 2323.

E. Other Natural or Manmade Factors Affecting its Continued Existence

The FWS has also concluded that there are no other natural or manmade factors affecting the continued existence of the wolves in the WDPS, including the wolf population in the YRA. *Id*. at 2324.

III. WOLF RECOVERY

On May 14, 2003, Regional Director Morgenweck informed the Wyoming Game and Fish Department (WGFD) that,

> [t]he wolf population in the Western Distinct Population (DPS) is considered 'recovered' since there have been 30 or more breeding pairs well distributed throughout western Montana, central Idaho, and the Greater Yellowstone area for each of the last three years. At the end of 2002, 43 packs met the Recovery Plan definition of 'breeding pair', that is an adult male and female raising at least two pups until December 31. Of these confirmed packs, 11 were in northwest Montana, 23 in the Yellowstone area, and 9 in central Idaho.

Aplt.App.Vol. 7 at 1741. Morgenweck went on to state that,

> The Service is eager to transfer management to the state wildlife agencies. ... Delisting could be proposed in 2003, but only after all three states finalize appropriate state wolf management plans and regulations which will ensure a continued viable wolf population after the species is delisted.

Id. Morgenweck did not instruct the States that they were required to file a petition to delist before delisting could proceed. Such a requirement would have been absurd – the FWS had completed and published (within the previous six (6) weeks) its statutorily-required status review to determine whether the wolves were "endangered or threatened" under the ESA (*see* 16 U.S.C. § 1533(b)(1)) and concluded that the population was not in danger of extinction. Aplt.App.Vol. 9 at 2295. Based upon that status review, Morgenweck tied delisting with approval of Management Plans – not a separate and redundant petition to delist process.

IV. THE WYOMING PLAN

The WGFD developed the Wyoming Plan over an approximate eighteen-month-period beginning in early 2002. The WGFD worked with the FWS throughout

that time. The Federal Defendants never tied delisting with the filing of a petition to delist under the ESA (16 US.C. § 1533(b)(3)). They stated at every step that delisting was tied to approval of the management plans, identifying approval or rejection as the penultimate decision for delisting:

> The States of Montana, Idaho, and Wyoming are required to have in place approved State wolf management plans, funding to implement these plans, and State law that will allow the implementation of those plans. *These are the only requirements that the Act requires of the States for the Service to propose delisting*. The Service intends to have independent peer review of the State plans in addition to public review during the delisting process. It is possible that if peer review indicates that a State wolf management plan will not conserve the wolf population above a viable level, the State would be required to modify its plan to address those shortcomings. (Emphasis added).

Aplt.App.Vol. 6 at 1474.

On September 11, 2002, the WGFD informed the FWS that it intended to adopt a dual classification of wolves – as "trophy game animals" within the National Parks and the designated wilderness areas of the Bridger-Teton and Shoshone national forests (approximately 5.1 million acres), and as "predators" elsewhere. *Id*. at 1481. On December 19, 2002, the FWS informed the WGFD, that "[i]t appears that based on what we know now about the dual status proposal, this has the potential for working, provided the area where wolves are classified as trophy game animals is of sufficient size to preclude the relisting of the wolf once they are delisted. ... As described in your draft management plan, the size of that area is not large enough."

Id. at 1524. To address the FWS concerns, Wyoming expanded the trophy game area in its final Management Plan:

> The State of Wyoming will commit to maintaining 15 packs of wolves in the State including the National Parks and Parkway with 7 of these packs occupying areas outside the National Parks and Parkway. From the date gray wolves are delisted, they will be classified as trophy game animals in those tracts of land within the boundaries of Wyoming designated as YNP, GTNP, the Parkway, and contiguous wilderness areas (Absaroka-Beartooth, North Absaroka, Washakie, Teton, Jedediah Smith, Winegar Hole, and Gros Ventre) in accordance with W.S. 23-1-101(a)(xii)(B)(I)."

Id. at 1649.[1] Wolves will always be protected as "trophy game animals" within the National Parks, an area of approximately 3,945 square miles (2,524,800 acres), and within the contiguous wilderness areas (Absaroka-Beartooth, North Absaroka, Washakie, Teton, Jedediah Smith, Winegar Hole and potentially at the Gros Ventre), an additional 3,193 square miles (2,043,520 acres). *Id*. at 1646, 1694; Aplt.App.Vol. 1 at 41-42.

The area protected by the Wyoming Plan (7,000 square miles; 4,568,320 acres) is more than double the recovery area required by the Recovery Plan. Wyo.Stat. § 23-1-304 (as implemented by the Wyoming Plan) meets the land-mass requirements of the Recovery Plan and FEIS Zone I and Zone II management areas. The area in

[1] The Wyoming Plan is based upon Wyo.Stat. § 23-1-304 (Attachment E), which was adopted by the Wyoming Legislature in 2003 to provide the statutory framework for managing wolves.

which the Wyoming Plan and Wyo.Stat. § 23-1-304 classify wolves as predatory animals equates to the Recovery Plan's "Zone III" (that area identified as "undesirable" for wolf presence).

The Wyoming Plan zones are geographically flexible to ensure perpetual protection of a viable wolf population. If there are less than seven (7) wolf packs located in Wyoming primarily outside of the National Parks, Wyoming simply expands the "trophy game area." The geographic area in which that designation will be made is known as the "Northwest Wyoming Wolf Data Analysis Unit" ("Wolf DAU"). Aplt.App.Vol. 6 at 1646; Wyo.Stat. § 23-1-304.

V. FWS REVIEW OF THE WYOMING PLAN

On June 20, 2003, Ed Bangs, the FWS Recovery Coordinator, described the time-line and review process:

> After Montana, Idaho, and Wyoming have all completed their State wolf management plans, the Service may forward those plans for independent peer review. The Service, itself, *must first determine* that they are likely to maintain a delisted wolf population above levels that would cause a wolf population in the western DPS to become listed again under the Endangered Species Act. If we believe that those plans are adequate, *we will then forward them* to a group of scientists, which we select, for independent professional peer review. *If that peer review determines that in combination those State laws will conserve a recovered wolf population throughout the western DPS, then the Service will develop a delisting proposal*. (Underlining in original; italics added).

Aplt.App.Vol. 7 at 1784. By the time that the foregoing was sent, the FWS had already concluded that the Wyoming Plan was biologically sound. According to the

Bangs:

> Howdy all – I just did an interview with high country news radio about the 'Wy wolf controversy'. I said human-caused morality is the only issue and we need to see how the states will address that if the ESA wasn't around. I said predator status would mean no wolves in those areas and was a public relations problem, but biologically it was fine – if WY managed for a wolf population in the GYA.

Aplt.App.Vol. 3 at 754.

On July 2, 2003, Bangs submitted comments to the WGFD on the then-current Wyoming plan, reporting that the FWS had found that the Wyoming Plan was likely to protect a delisted population:

> The plan appears to contain enough area and adequate wolf management policies for Wyoming Game and Fish Department to reasonably conserve a recovered wolf population in Wyoming.

Aplt.App.Vol. 7 at 1793. Bangs also pointed out that,

> [t]he wolf management strategy outlined in this plan generally appears to be adequate. Given the level of controversy in Wyoming and the buffer that wolves in Yellowstone National Park provide for overall wolf management in Wyoming, we believe the plan walks that fine line between local tolerance and national interest.

Id. Bangs noted that,

> Wyoming should commit to maintaining 15 or more packs in Wyoming, so if wolf numbers in the Parks drop below 8 packs, Wyoming will have more than 7 packs outside the Parks. *The plan currently recognizes and provides for this*. (Emphasis added).

Id. Further,

> [t]he Service supports the flexibility in the definition of a wolf pack as

> recommended by the plan. ... At this point, it does not appear that the state definition of a pack under state law [assumed to mean 5 wolves traveling together in winter] is going to be a major conflict with any new [sic] potentially new definition for a recovered wolf population. ... *State law may be inconsistent with the final determination of the post-de-listing monitoring criteria but at this time it does not appear any differences are biologically significant enough to jeopardize delisting*. (Emphasis added).

Id. at 1794.

Although the Wyoming Plan was biologically sufficient to protect the wolves, Bangs voiced concerns about public perceptions:

> While the [FWS] is mandated to focus on science and biology, public attitudes and comments will influence subsequent litigation. We urge you to reconsider the wisdom of 'predatory animal' status for wolves anywhere in Wyoming. The Wyoming legislature could help avoid a huge and very public brawl that will be damaging, if not fatal, to the [FWS's] efforts to delist a recovered wolf population and would greatly improve the National public's attitude and trust of Wyoming's abilities to manage wolves, by authorizing wolf trophy game status statewide. ... *State-wide trophy game status would remove a major negative public relations perception that will cloud the real issues that are being discussed during the delisting process*. (Emphasis added).

Id. at 1796. Bangs never informed Wyoming that public relations concerns would trump the biological soundness of its Plan. In fact, Bangs concluded his comments by declaring that "[t]he biological recovery of wolves under the ESA has been completed. . . ." *Id*. at 1797.

The District Court implies at page 11 of the Corrected Memorandum that the Federal Defendants' concerns regarding Wyoming's dual classification was

biologically based. The foregoing establishes that the District Court's finding is inaccurate and contradicted by the Record.

VI. SCIENTIFIC/ BIOLOGICAL PEER REVIEW

On September 12, 2003, the FWS hired an independent panel of "12 of the top recognized wolf researchers, wolf management and livestock depredation experts in North America. . . " to review the States' Plans. Aplt.App.Vol. 7 at 1874. "All [peer reviewers] are recognized authorities in wolf management and/or research, and each has 15-35 years of experience with wolves, large predator/prey or livestock depredation issues." *Id*. at 1880. The FWS requested the peer reviewers to determine whether "(1) the state plans of Montana, Idaho, and Wyoming will achieve the stated objectives of each plan, and (2) if you believe that collectively they are adequate to maintain the wolf population at or above the recovery level into the foreseeable future." *Id*. at 1849-1853.

Ten (10) of eleven (11) wolf experts who provided peer reviews concluded that the Wyoming Plan would, collectively with the Idaho and Montana Management Plans, maintain the wolf population at or above recovery goal levels. Portions of the expert's conclusions are worth repeating:

> Yes, I found Wyoming's plan for 15 packs, 7 outside the parks, to be adequate to achieve the Service's plan for 10 breeding pairs. Habitat is adequate and prey resources appear more than adequate for the immediate future. ... I see every reason to suspect that 10 breeding pairs can be guaranteed given Wyoming's plans, apparent commitment to the

> process, and desire to assume responsibility.
>
> ***
>
> I suspect Idaho will have the most wolves and Montana the fewest, but I think that a fairly equitable distribution will be the goal of the states.

Id. at 1899, 1901.

> Wyoming's proposal for trophy game classification for wolves within the 7 wilderness areas, the potential for expansion of trophy classification beyond the wilderness areas, and a revolving 90 day review period for wolf classification by the Wyoming Game and Fish Commission provides ample flexibility to respond to unanticipated declines in wolf numbers outside of National Parks.

Id. at 1906.

> ... [T]he Wyoming plan has an apparent fail-safe mechanism that allows changing the area of predator designation and regulations when numbers of packs drop to 7 aside from the assumed 8 or more packs in the park. Thus regardless of how the wolf is classified outside the 15-pack area, or what the regulations are for the predator classification, guaranteeing a 15-pack minimum should suffice to meet the state's goal.

Id. at 1883.

> ... The Wyoming plan's dual classification of wolves as either a 'trophy game animal' or a 'predatory animal,' while contentious in terminology, is similar in some respects to the Minnesota Wolf Management Plan's Zone A and Zone B concept. ...

Id. at 1885.

The detailed peer reviews are included in the Appellants' Joint Appendix, Volume 7 at 1882-1932, and attachment F.

On January 13, 2004, the FWS informed Wyoming that, despite the scientific endorsement of the Wyoming Plan, "delisting cannot be proposed at this time due to

some significant concerns about portions of Wyoming's state law and wolf management plan." *Id*. at 1955. In summary:

* Wyoming State law and the Wyoming Plan identified the gray wolf as a "predatory animal" in those areas of the State outside of the Greater Yellowstone Recovery Area (i.e., the area generally designated as "Zone III" in the Recovery Plan);
* Wyoming must commit to managing for at least 15 wolf packs in Wyoming; and
* Wyoming's definition of a pack be consistent with Montana and Idaho and be biologically based.

Id. at 1955-1956. The FWS confirmed its position in a press release issued the same day in which the Director was quoted as saying, "'[d]elisting can move forward *as soon as* Wyoming makes the changes we've identified to both its state law and its wolf management plan, *but not until then* because these wolves are part of one distinct population segment.'" *Id*. at 1962-1963 (Emphasis added).

The peer reviews constitute the best scientific and commercial data available. The peer reviewers performed the *only* scientific and commercial analysis of the Wyoming Plan. The Federal Defendants have produced no data, studies, analyses, evaluations, materials, independent reviews, or statistical information, that in any way undermines, or contradicts the peer reviewers' endorsement of the Wyoming Plan individually, and their endorsement of the three State plans collectively.[2]

[2] On January 2, 2005, almost five weeks *after* the Wolf Coalition filed its Opening Brief in the District Court, the Federal Defendants produced a copy of a January 7, 2004 memorandum from Bangs to Morgenweck. Aplt.App.Vol. 9 at

VII. WOLF PREDATION AND DAMAGE

The Federal Defendants have failed to comply with their commitment to effectively manage and control wolves to prevent impacts on the livestock industry, on other wildlife species, and on historic public and private land use practices. Wolves have damaged Wyoming's agricultural interests, killing cattle, sheep and horses. Aplt.App.Vol. 1 at 231-234. Wolves have killed Wyoming's wildlife resources, including elk, moose, deer, bighorn sheep and antelope, causing a decrease in wildlife herds. *Id.* The wolf population has damaged the outfitting and sportsmen industries. *Id*. The damages caused to Wyoming's wildlife populations, livestock industry, the outfitting and sportsmen industries, and tourism industry translate into decreased revenues for Wyoming's Counties. *Id*. The Recovery Plan, the FEIS preferred alternative, and the Final Rule were designed to prevent those losses. *Id*.

The actual impact of the wolves in the form of livestock and wildlife kills has far exceeded the FEIS estimates. *Id*. To date, the Federal Defendants have refused to undertake an SEIS to take a "hard look" at the impacts of their wolf recovery and

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2502-2507. Recognizing that the Administrative Record did not support their rejection of the Wyoming Plan, the Federal Defendants produced it.

The January 7, 2004 memorandum is not the "best scientific and commercial data available" especially when compared with the peer reviews. It is an undocumented and unsupported opinion statement contradicted by Bangs' previous conclusions. It also endorses predator status in certain areas of Wyoming, while the Director rejected predator status outright.

management program. *Id*.

SUMMARY OF ARGUMENT

The Federal Defendants' rejection of the Wyoming Plan was "final agency action" subject to judicial review. The Federal Defendants' violated the ESA when they rejected the Wyoming Plan based upon factors other than the "best science available" standard. The District Court improperly dismissed the Wolf Coalition's "failure to manage" and NEPA claims, misapplied the APA, and wrongfully decided the merits of those claims. It was error for the District Court to dismiss the Wolf Coalition's claims.

ARGUMENT

I. STANDARD OF REVIEW

A. Administrative Procedure Act

"Judicial review of both formal and informal agency action is governed by §706 of the APA, which provides that a 'reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found' not to meet six separate standards." *Olenhouse v. Commodity Credit Corporation*, 42 F.3d 1560, 1573 (10th Cir. 1994). "Informal agency action must be set aside if it fails to meet statutory, procedural or constitutional requirements or if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id*. at 1573-1574 (citation omitted). "These standards require the reviewing court to engage in a 'substantial

inquiry.' *Id*. at 1574. "An agency's decision is entitled to a presumption of regularity, 'but that presumption is not to shield [the agency's] action from a thorough, probing, in-depth review.'" *Id*. at 1574 (citation omitted).

"[T]he reviewing court shall decide all questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. "[T]he essential function of judicial review 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." *Olenhouse*, 42 F.3d at 1574 (citations omitted).

The Tenth Circuit gives no deference to the District Court's decision. *Citizens Committee to Save Our Canyons v. United States Forest Service*, 297 F.3d 1012, 1021 (10th Cir. 2002). This Court's review of the administrative record pertaining to the challenged action is independent. *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1167, fn 5 (10th Cir. 1999). This Court is not bound by the District Court's recitation of the facts below. *Olenhouse*, 42 F.2d at 1569, fn 16.[3]

> In reviewing the agency's explanation, the reviewing court must determine whether the agency considered all relevant factors and

[3] The introductory paragraph of the Corrected Memorandum's "Factual and Procedural Background" is neither relevant nor supported by the Record and should be disregarded by this Court.

> whether there has been a clear error of judgment. (Citations omitted). Agency action will be set aside
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> > *if the agency relies on factors which Congress has not intended for it to consider*, entirely failed to consider an important aspect of the problem, *offered an explanation for its decision that runs counter to the evidence before the agency*, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. (Emphasis added).

Id. at 1574 (citations and internal quotations omitted).

> [I]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself. (Citation and internal quotations omitted). Thus, the grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record. (Citation omitted). The Agency must make plain its course of inquiry its analysis and its reasoning.

Id. at 1575. The "arbitrary or capricious" standard also requires that an agency's action be supported by the facts in the record. *Id*. Agency action is arbitrary if it is not supported by "substantial evidence." *Id*.

"An agency's interpretation of its own regulations may well be entitled to 'substantial deference'; but it nevertheless will be set aside if it is the product of a decisionmaking process deemed arbitrary or capricious, or if it lacks factual support." *Id*. at 1575-1576 *See also, Public Lands Council v. Babbitt*, 167 F.3d 1287, 1294 (10th Cir. 1999); *Navarro v. Pfizer Corporation*, 261 F.3d 90, 99 (1st Cir. 2001). "If the statute is clear and unambiguous that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

..." *Sundance Associates, Inc. v. Reno*, 139 F.3d 804, 807 (10th Cir. 1998) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 1817, 100 L.Ed.2d 313 (1988) (internal quotations omitted).

Although the Court must defer to an agency's expertise, it must do so only to the extent that the agency utilizes, rather than ignores, the analysis of its experts." *Defenders of Wildlife v. Babbitt*, 958 F.Supp. 670, 685 (D. D.C. 1997). The Court will reject conclusory assertions of agency 'expertise' where the agency spurns unrebutted expert opinions without itself offering a credible alternative explanation." *Northern Spotted Owl v. Hodel*, 716 F.Supp. 479, 483 (W.D. WA. 1988).

Section 706(1) of the APA requires a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706. "[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 124 S.Ct. 2373, 2379, 159 L.Ed.2d 137 (2004) (*SUWA*) (emphasis in original).

B. Fed.R.Civ.P. 12 Motion to Dismiss – Challenge to Jurisdiction

The Defendants' objection to the District Court's jurisdiction over the Wolf Coalition's "failure to manage" and NEPA claims must be likened to a motion to

dismiss under Fed.R.Civ.P. 12(b)(1) and (6).[4] "Generally, the complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Ramirez v. Department of Corrections*, 222 F.3d 1238, 1241 (10th Cir. 2000) (citations and internal quotations omitted). "We accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiffs.'" *Id*. (Citations omitted).

"'The Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim.'" *Cayman Exploration Corporation v. United Gas Pipe Line Company*, 873 F.2d 1357, 1359 (10th Cir. 1989) (Citations omitted). "[G]ranting a motion to dismiss is 'a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice.'" *Id*. (Citation omitted).

"'When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" *Swierkiewicz v.*

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[4] During the November 17, 2004 consolidation hearing, the Federal Defendants informed the Court that they had not yet produced any administrative record related to the "failure to manage" and NEPA claims. Aplt.App.Vol. 2 at 477-478. They also stated that such records would be "extensive." *Id*. The Defendants' jurisdictional challenges are legal in nature and are directed solely to the Court's jurisdiction over Plaintiffs' respective Complaints.

Sorema, 534 U.S. 506, 511, 122, S.Ct. 992, 152 L.Ed.2d 1 (2002) (citation omitted). "Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case." *Id*. at 512. "Given the Federal Rules' simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be provided consistent with the allegations.'" *Id*. at 513-514 (Citation omitted).

II. REJECTION OF THE WYOMING PLAN WAS "FINAL AGENCY ACTION"

The Wolf Coalition filed suit pursuant to the citizens suit provisions of the ESA (16 U.S.C. §1540(g)(1)(A) and (C)), challenging the Federal Defendants' January 13, 2004 decision to reject the Wyoming Plan. The Federal Defendants' rejection of the Wyoming Plan violated the ESA, specifically, 16 U.S.C. § 1533(b)(1)(A), which mandates:

> The Secretary shall make determinations required by subsection (a)(1) of this section *solely on the basis of the best scientific and commercial data available to [her]* after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation. . . to protect such species. (Emphasis added).

The Federal Defendants' decision to reject the Wyoming Plan was not based solely on best scientific and commercial data available, but was improperly motivated by public relations and political concerns, "litigation risk management" principles, and

speculation.

The peer reviews constitute the best scientific and commercial data available. The reviewers established that the Wyoming Plan provides the adequate regulatory mechanism to protect wolves at or above recovery levels. The Federal Defendants ignored those findings. The Federal Defendants' rejection of the Wyoming Plan constitutes agency action unlawfully withheld and unreasonably delayed under the APA. 5 U.S.C. § 706(1). The Federal Defendants' refusal to judge the Wyoming Plan on the science, and their rejection of the Wyoming Plan for improper reasons, was arbitrary, capricious, an abuse of discretion, and not in accordance with the ESA, was in excess of statutory jurisdiction, authority, and limitation and was done without observance of the proper procedure as required by the ESA. 5 U.S.C. § 706(2)(C) and (D).

The District Court did not address the substance of the Wolf Coalition's claims, finding that "[t]he Plaintiffs have failed to show that the January 13, 2004 letter constituted final agency action and the Court does not have jurisdiction over the Plaintiffs' and Plaintiff-Intervenors' claims purportedly arising under the APA." Aplt.App.Vol. 5 at 1226. The District Court's decision was in error.

"'Whether federal conduct constitutes final agency action within the meaning of the APA is a legal question.'" *Pennaco Energy, Inc. v. United States Department of Interior*, 377 F.3d 1147, 1155 (10th Cir. 2004) (citation omitted).

> As a general matter, two conditions must be satisfied for agency action to be 'final': First, the action must mark the consummation of the agency's decisionmaking process (citation omitted) – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' (Citation omitted).

Bennett v. Spear, 520 U.S. 154, 177-178, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). In *Bennett* the Court concluded that the FWS's biological opinion proposing the use of reservoir water had direct and appreciable legal consequences and, therefore, was final agency action subject to judicial review. Despite the fact that the Bureau of Reclamation, not the FWS, ultimately allocated the water, the Court found that the Biological Opinion and the Incidental Take Statement "alter the legal regime to which the action agency is subject, authorizing it to take the endangered species *if (but only if) it complies with the prescribed conditions.*" *Id*. at 178. (Emphasis added).

A. **Rejection of the Wyoming Plan was the Consummation of the Decisionmaking Process**

The Federal Defendants' rejection of the Wyoming Plan was "final agency action" subject to judicial review. It was the final decision in the status review process that was undertaken to determine whether the wolves could be delisted. The Federal Defendants concluded as a result of that status review that the gray wolf recovery goals had been met, that the wolves were not in danger of extinction, and delisting was appropriate. The State Management Plans were developed as the final step for the Federal Defendants to propose delisting. When the Federal Defendants

rejected the Wyoming Plan they also refused to delist the wolves.

On May 5, 2003, the Assistant Secretary reported that "[t]he Service has also announced its intention to delist wolves in the Western DPS *as soon as* Idaho, Montana, and Wyoming have developed management plans that ensure the long-term conservation of wolves as required by the Endangered Species Act." Aplt.App.Vol. 7 at 1739 (emphasis added). On May 14, 2003, the Regional Director summarized the delisting process: "Delisting could be proposed in 2003, but only after all three states finalize appropriate state wolf management plans and regulations which will ensure a continued viable wolf population after the species is delisted." *Id*. at 1741. On September 12, 2003, the FWS described the purpose for the individual State management plans:

> State management plans have been determined by the Service as the most appropriate means of maintaining a recovered wolf population and demonstrating adequacy of regulatory mechanisms because the primary responsibility for management of the species will rest with the states upon delisting (and subsequent removal of the protections of the ESA)."

Id. at 1850.

In July, 2003, Wyoming published its final Management Plan. The peer reviewers endorsed it.

On January 13, 2004, the FWS rejected the Wyoming Plan and refused to proceed with delisting:

> ... [D]elisting cannot be proposed at this time due to some significant

> concerns about portions of Wyoming's state law and wolf management plan. I have specifically outlined those concerns and *provided recommendations to correct them* in this letter.
>
> *If Wyoming adequately addresses each of the following concerns, the Service intends to proceed with the proposed delisting process* for the gray wolf in the Western Distinct Population Segment. (Emphasis added).

Id. at 1955.

The District Court decided that the January 13, 2004 letter was "interlocutory in nature, and not the culmination of a decision-making process – such as whether to delist the wolf." Aplt.App.Vol. 5 at 1218. That decision was based upon one sentence of the January 13th letter – "If requested, the Service will assist the [WGFD] in implementing the three changes noted above." *Id*. The District Court ignored the actual decision made by the FWS, instead finding that the January 13th decision was "interlocutory" rather than final because it "contemplates more cooperation between Wyoming and the Federal Defendants." *Id*. The letter itself demonstrates that it does nothing of the sort – it was merely another way for the FWS to make it clear that, if Wyoming refused to amend its Plan exactly as instructed, wolves would not be delisted. The FWS did not seek "cooperation," it sought capitulation.

The District Court's interpretation of the January 13, 2004 letter ignores the extensive procedural and factual history that preceded the Federal Defendants' decision to reject the Wyoming Plan. The District Court also ignores the FWS's

status review and the information that was developed as part thereof. The Federal Defendants have consistently declared that approval of the three States' Management Plans was the final step for wolf delisting. The Federal Defendants repeated that position earlier this year: "[O]nce Wyoming has an approved wolf management plan, we intend to propose removing the gray wolf in the Western DPS from the List of Endangered and Threatened Wildlife." "Final Rule – Endangered and Threatened Wildlife and Plants; Regulation for Nonessential Experimental Populations of the Western Distinct Population Segment of the Gray Wolf," 70 Fed.Reg. 1286 (2005 Final Rule), Aplt.App.Vol. 9 at 2475-2501. By linking approval of the Wyoming Plan with delisting of the wolves, the Federal Defendants identified rejection of that Plan as "final agency action" subject to judicial review – as the consummation of the decision-making process.

The history behind the Federal Defendants' decision to reject the Wyoming Plan establishes its finality. That history is critical to understanding the purpose of the Federal Defendants' rejection and the impact of that decision – a refusal to delist the wolves. The significance of that history cannot be tossed aside simply because the FWS offered to "cooperate" *if but only if* Wyoming changed its Plan.

Wyoming and the Federal Defendants cooperated throughout development of the Plan. It was only *at the end of that two-year cooperative process* that the Federal Defendants rejected Wyoming's Plan. Their rejection of the Wyoming Plan was

clearly the consummation of the decisionmaking process, a conclusion that is confirmed by the Federal Defendants' subsequent actions – they have refused to delist the wolves, despite the fact that the population exceeds the recovery goals and continues to expand geographically and numerically. If rejection or approval of the Wyoming Plan was not the final decision point, the Federal Defendants should have moved forward with delisting.

The District Court erred by elevating the Federal Defendants' offer of "cooperation" over the extensive history that had already taken place.

B. **Legal Consequences Flowed from Rejection of the Wyoming Plan**

The Federal Defendants have altered the legal regime to which Wyoming is subject, stating that they will proceed to delist "*if but only if*" Wyoming amends its Plan and Statutes to conform to the conditions included in the January 13th letter. The *Bennett* Court, using two other Supreme Court cases as examples, described the types of actions that would not be considered "final agency actions."

> In [*Franklin v. Massachusetts*, 505 U.S. 788, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992)], the agency action in question was the Secretary of Commerce's presentation to the President of a report tabulating the results of the decennial census; our holding that this did not constitute 'final agency action' was premised on the observation that the report carried 'no direct consequences' and served 'more like a tentative recommendation than a final and binding determination.' 505 U.S., at 798, 112 S.Ct., at 2774. And in [*Dalton v. Specter*, 511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497 (1994)], the agency action in question was submission to the President of base closure recommendations by the Secretary of Defense and the Defense Base Closure and Realignment

> Commission; our holding that this was not 'final agency action' followed from the fact that the recommendations were in no way binding on the President, who had absolute discretion to accept or reject them." 511 U.S., at 469-471, 114 S.Ct., at 1725. Unlike the reports in *Franklin* and *Dalton*, which were purely advisory and in no way affected the legal rights of the relevant actors, the Biological Opinion at issue here has direct and appreciable legal consequences.

Id.

The Federal Defendants' decision here differs in every fundamental respect from the types of "agency actions" involved in *Franklin* and *Dalton*. The Federal Defendants' January 13th letter is neither a "report tabulating results" that carried "no direct consequences," nor merely a recommendation to a higher authority who had "absolute discretion" to either accept or reject it. The January 13th letter was signed by the Director of the FWS. It was mandatory in its terms, carried real and immediate legal consequences, and provided Wyoming with two choices – either agree to all of the FWS's demands or seek judicial review. Once the Federal Defendants decided not to delist the wolves, Wyoming had no other choice.

This Court recently addressed the "final agency action" question in *Pennaco Energy, Inc.*, which involved a challenge to the Interior Board of Land Appeals' (IBLA) reversal of the Bureau of Land Management's (BLM) decision to auction three oil and gas leases. The IBLA concluded that the BLM had not satisfied the requirements of NEPA prior to issuing the leases, and remanded the matter for additional appropriate action. The Court found that the IBLA's decision and remand

was "final agency action" as it "marked the consummation of a final decision-making process." 377 F.3d at 1155.

> 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 naturel. ... The second requirement is also satisfied. *Definite legal consequences flowed from the IBLA's decision, namely that Pennaco's development of the leased tracts is delayed until the BLM has prepared additional unspecified NEPA documents*. (Emphasis added).

Id. at 1155-1156. In the current case, Director Williams' January 13, 2004 letter was a "definitive statement" of the FWS's position that the Wyoming Plan was inadequate. Definite legal consequences flowed from the FWS's decision, namely delisting will not be proposed until Wyoming modifies its Plan. Wyoming was also prohibited from assuming the additional management authority that was granted by the FWS to Montana and Idaho through the 2005 Final Rule. Aplt.App.Vol. 9 at 2476.

In *Pennaco Energy, Inc*., this Court equated delay with the "legal consequences" prong of the APA "final agency action" requirement. The delay resulting from the Federal Defendants' rejection of the Wyoming Plan has several components, the more obvious of which are as follows: (1) the goal of wolf recovery has been to transfer management to the States and the Federal Defendants' rejection of the Wyoming Plan has indefinitely delayed Wyoming from assuming that

authority; (2) the Federal Defendants' decision to delay (derail) the delisting process causes ever-increasing and substantial injury (most specifically to the Wolf Coalition members) in the form of increased livestock and wildlife kills as a natural consequence of an exploding wolf population – it does not protect the "status quo"; (3) rejection of the Wyoming Plan delays and hinders stabilization of the wolf population as described in the 2003 Final Rule to Reclassify (Aplt.App.Vol. 9 at 2323) and allows the population to expand unchecked, further destabilizing the population.

Delay, however, has not been the only legal consequence. On March 9, 2004, within two months after rejecting the Wyoming Plan, the FWS issued a Proposed Rule to allow those States with approved management plans (Montana and Idaho) more flexibility in wolf management. 69 Fed.Reg. 10956, 10957. The Federal Defendants issued the Final Rule on January 6, 2005, granting to Idaho and Montana additional management authority to control wolves. The FWS refuses to grant the same authority to Wyoming. Aplt.App.Vol. 9 at 2476, 2479.

That rejection of the Wyoming Plan is more than "merely a step in the decisionmaking process," is confirmed by the swiftness with which the FWS bestowed management authority on Montana and Idaho after approving their Management Plans. That decision shows that the delisting process was dependent upon one remaining § 1533(a)(1) factor (adequate regulatory mechanism) before

moving into the next phase of wolf recovery (delisting and transferring management and control to the States). That decision also demonstrates the "legal consequences" of the Federal Defendants' rejection of the Wyoming Plan. The Federal Defendants' grant of power to Montana and Idaho confirms the finality of their decision to reject the Wyoming Plan.

> By enacting a provision permitting judicial review of 'final agency action' for which there is no other adequate remedy in a court, Congress intended to cover a broad spectrum of administrative actions, and the Supreme Court has reaffirmed that intent by holding that the Administrative Procedure Act's generous review provisions must be given a hospitable interpretation. (Citations omitted). Judges reviewing administrative actions must interpret the 'finality' element in a flexible and pragmatic way. (Citation omitted). ... A court must decide whether the agency's position is definitive and whether it has a direct and immediate effect on the day-to-day business of the parties challenging the action. (Citation omitted). ...The Court must distinguish a tentative agency position from a situation where the agency views its deliberative process as sufficiently final to demand compliance with its announced position. (Citation omitted).

Sabella v. United States, 863 F.Supp.1, 3 (D. D.C. 1994).

The Federal Defendants before the District Court relied upon *Public Service Company of Colorado v. EPA*, 225 F.3d 1144 (10th Cir. 2000). That case is inapplicable. The Federal Defendants did not provide Wyoming with "tentative recommendations" – they issued an Order directing Wyoming to amend its Plan and Statutes. They then conditioned Wyoming's ability to assume primary management responsibility for the wolves on compliance with that Order. The Wolf Coalition is entitled to seek judicial review of the lawfulness of that decision.

C. **The Wolf Coalition Was Not Required to File a Petition to Delist**

The District Court rejected the Wolf Coalition's argument that the Federal Defendants were required to comply with the ESA's "best science available" mandate. That decision was based on the fact that none of the parties filed a petition to delist the wolves under 16 U.S.C. § 1533(b)(3)(A). The District Court's conclusion is wrong, and is contradicted by the plain language of the ESA and the Administrative Record.

There are two ways under the ESA in which the Secretary determines whether a particular species is "endangered" or "threatened". First, any "interested person" may petition to add or remove a species from the lists identified in Section (4)(c) of the ESA. 16 U.S.C. § 1533(b)(3)(A). Second, pursuant to Section (4)(c)(2), the Secretary is required, "at least once every five years" to conduct a status review of all species that are included on the list published pursuant to Section 4(c)(1). The purpose of the petition process and the status review process are the same – to determine whether a particular species is endangered or threatened.

A petition to delist/downlist the wolf requires the Secretary to conduct the "status review" that is described in Section 4(b)(3). The Secretary may also (and in fact has) review the status of the wolf on her own initiative without a petition to delist/downlist. Regardless of whether the status review is in response to a petition or pursuant to the five-year-or-less review requirement, that status review must be

conducted pursuant to the "best science available" standard of 16 U.S.C. § 1533(b). The five listing factors are set forth in 16 U.S.C. § 1533(a).

The Secretary has completed her status review of the wolves in Wyoming, Idaho and Montana. That status review is described in the 2003 Final Rule to Reclassify and the 2005 Final Rule.

In their 2005 Final Rule, the Federal Defendants acknowledged that the Wyoming Plan was part and parcel of their status review of the wolf population:

> The gray wolves in the WDPS have achieved their recovery population numbers. *A status review of the species' listing status has determined that the species could be delisted once a State wolf management plan has been approved by the Service for Montana, Idaho, and Wyoming*. State management plans have been determined by the Service to be the most appropriate means of maintaining a recovered wolf population and of providing adequate regulatory mechanisms post-delisting (i.e., addressing factor D, 'inadequacy of existing regulatory mechanisms of the five listing factors identified under section 4(a)(1) of the Act). . . . For a variety of reasons, the Service determined that Wyoming's current State law and its wolf management plan do not suffice as an adequate regulatory mechanism for the purpose of delisting (letter from Service Director Steven Williams to Montana, Idaho, and Wyoming, January 13, 2004). (Emphasis added).

Aplt.App.Vol. 9 at 2493. The Federal Defendants referenced the Director's January 13, 2004 letter as representing the decision to reject the Wyoming Plan.

The 2005 Final Rule was based upon the Federal Defendants' status review, which included the their evaluation of the three States' Management Plans. The Federal Defendants concluded that the Montana and Idaho Plans provided the

necessary regulatory mechanism for protecting the wolf population, and the Wyoming Plan did not. As a result of those decisions, the Federal Defendants granted to the States of Idaho and Montana additional management authority and flexibility. Without the benefit of the status review the Federal Defendants would have had no mechanism through which to transfer management to Montana and Idaho.

The District Court summarily and without basis concluded that rejection of the Wyoming Plan was not part of a status review. Aplt.App.Vol. 5 at 1223. The District Court not only misunderstood the process but ignored the Federal Defendants' admission that the States' Management Plans were evaluated as part of the status review.

The Federal Defendants analyzed the States' Management Plans as part of the status review to determine whether they provided the "adequate regulatory mechanism" for protecting a viable wolf population. It would be unnecessary and absurd to require the Wolf Coalition to file a petition to delist, and for the Federal Defendants to undertake a redundant status review, especially when as recently as January, 2005, they reported that the "preliminary monitoring in 2004 indicates that the wolf population continues to increase, again primarily in the [nonessential experimental area]." Aplt.App.Vol. 9 at 2478.[5]

[5] The District Court developed its own standard for evaluating the status of a species: "[t]he petition process strikes a delicate balance between judicial

D. **Conclusion**

The Federal Defendants' decision to reject the Wyoming Management Plan is "final agency action" subject to judicial review.

III. THE FEDERAL DEFENDANTS UNLAWFULLY REJECTED THE WYOMING PLAN

Finding that it lacked jurisdiction, the District Court did not apply the APA § 706(1) or 706(2) standards to the Federal Defendants' rejection of the Wyoming Plan. This Court reviews the District Court's decision de novo and should address the merits of the Wolf Coalition's claim that the Federal Defendants unlawfully rejected the Wyoming Plan. Pursuant to both 5 U.S.C. §§ 706(1) and (2) (which are discussed in reverse order), this Court should compel the Federal Defendants to approve the Wyoming Plan.

A. The Federal Defendants' Rejection of the Wyoming Plan was Arbitrary, Capricious, an Abuse of Discretion, Otherwise Not in Accordance with the ESA; in Excess of Statutory Jurisdiction, Authority, and Limitation; and Without Observance of the Procedures Required by Law

The Federal Defendants reviewed the status of the wolf population, found that

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review, agency expertise and the public's right to a healthy, sustainable eco-system which fosters biological diversity." Aplt.App.Vol. 5 at 1221. The petition process does no such thing. The petition process, like the status review process, is undertaken to determine whether, based upon the best available scientific and commercial data available, a particular species is endangered or threatened. The Court committed reversible error by misstating the purpose of the petition process, and improperly adopting a "biological diversity" standard, rather than the standard required by the ESA.

the recovery goals had been met, and concluded that none of the statutorily-defined listing factors prevented recovery and protection. At that point the Federal Defendants were required to evaluate the Wyoming Plan pursuant to the standard imposed by Congress – solely on the basis of the best scientific and commercial data available . 16 U.S.C. § 1533(b)(1)(A). Their obligation to judge the Wyoming Plan based upon that standard was mandatory and could not be avoided by public relations concerns. *See Forest Guardians v. Babbitt*, 174 F.3d 1178, 1186 (10th Cir. 1999).

> The obvious purpose of the requirement that each agency 'use the best scientific and commercial data available' is to ensure that the ESA not be implemented haphazardly, on the basis of speculation and surmise.

Bennett, 520 U.S. at 176, 117 S.Ct. at 1168.

The peer reviews are the best scientific and commercial data available regarding the viability of the Wyoming Plan. It was unlawful for the Defendants to ignore the peer reviews. *Heartwood, Inc. v. United States Forest Service*, 380 F.3d 428, 436 (8th Cir. 2004). "The Service may not base its listings on speculation or surmise or disregard superior data." *Building Industry Association of Superior California v. Norton*, 247 F.3d 1241, 1246-1247 (D.C. Cir. 2001).

The Federal Defendants' rejection of the Wyoming Plan violated the ESA. They rejected the science that was at their fingertips, and made a decision that was instead driven by fear of litigation and speculation regarding public relations concerns. Although Defendants had concluded that the Wyoming Plan struck a

"skillful" balance between "local tolerance and national interest," (Aplt.App.Vol. 7 at 1793), they rejected that Plan based solely upon how unidentified interests outside of Wyoming may view "predator" status in those areas of the State that Defendants had previously found were "undesirable" for wolf presence and propagation. In sum, there was no biological basis for the Defendants' decision.

The Federal Defendants internally reviewed the Wyoming Plan in its final form and concluded (before submitting it for peer review) that it would protect the wolf population. The January 13th letter includes no explanation for their change in position, but simply demanded that Wyoming commit to managing for at least 15 wolf packs and revise its definition of a "pack." The Wyoming Plan did commit to managing for at least 15 wolf packs in Wyoming, a fact that was acknowledged in the FWS' July 2, 2003 letter. *Id*. at 1791-1797. The FWS had also previously expressed its support for Wyoming's definition of "pack". *Id*. The peer reviews substantiated Wyoming's commitment to managing for 15 packs and its definition of "pack".

An agency has an obligation to explain a change in position. *Oregon Natural Resources Council v. Daley*, 6 F.Supp.2d 1139, 1157 (D. OR. 1998). It was arbitrary and capricious for the Defendants to reject the Wyoming Plan based upon provisions that had been previously approved. *See Smiley v. Citibank*, 517 U.S. 735, 741-742, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996) (it is arbitrary and capricious for an agency to suddenly, and without explanation, change its position).

The January 13, 2004 letter includes no data to support their conclusion that the Wyoming Plan did not provide an adequate regulatory mechanism to protect the wolf population. The Federal Defendants did not address any of the five ESA listing factors in the January 13th letter. The Administrative Record contains no scientific or biological support for rejecting the Wyoming Plan.

> The failure of [an] agency, despite the views of its own experts, to articulate a rational reason for its decision under the fifth, as well as the other four, statutory factors, establishes the arbitrary and capricious nature of the agency's decision-making. *See Public Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993) ('The requirement that agency action not be arbitrary and capricious includes a requirement that the agency adequately explain its result'); *Carlton v. Babbitt*, 900 F.Supp. 526, 533 (D. D.C. 1995) (FWS must adequately explain its listing decision under the ESA based upon statutorily prescribed factors); *Fund for Animals v. Babbitt*, 903 F.Supp. 96, 113 (FWS must articulate a rational reason for its decision).

Defenders of Wildlife v. Babbitt, 958 F.Supp. at 684. "Agency action is arbitrary and capricious where the agency has failed to articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Northern Spotted Owl*, 716 F.Supp. at 482 (citation and internal quotations omitted).

In *Northern Spotted Owl v. Hodel*, various environmental organizations sued the FWS over its decision not to list the northern spotted owl as endangered or threatened. The FWS had refused to list the northern spotted owl, despite the fact that a status review and peer review panel concluded that the situation supported listing. In holding that the FWS's action was arbitrary and capricious, the Court explained

that the FWS "failed to articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* at 482 (citation and internal quotations omitted). The Court continued that "[j]udicial deference to agency expertise is proper, but the Court will not do so blindly. The Court finds that the Service has not set forth the grounds for its decision against listing the owl." *Id*. The Court ultimately concluded that the decision not to list was arbitrary and capricious because the FWS' documents lacked any expert analysis to support its decision not to list the owl, and the expert opinions contradicted the FWS's decision. *Id*.

In *Defenders of Wildlife v. Babbitt*, the FWS acted arbitrarily and capriciously by ignoring the findings of its own experts. The Court granted summary judgment to the plaintiff, holding in relevant part that: 1) the FWS acted arbitrarily and capriciously when it rejected the views of its own experts that the lynx met four out of five criteria for listing under the ESA; and 2) the FWS acted arbitrarily and capriciously by basing its decision on faulty factual premises that directly contradicted undisputed facts.

The peer reviews are the only science that Defendants have. Congress requires that they control the decision at hand. The Wolf Coalition respectfully requests this Court to order the Federal Defendants to approve the Wyoming Plan.

B. The Federal Defendants Unlawfully Withheld and Unreasonably Delayed Approval of the Wyoming Plan

The District Court stated that, "[i]n order to invoke jurisdiction under § 706(1), the Plaintiffs must demonstrate that the agency failed to perform an act that was legally required." Aplt.App.Vol. 5 at 1227. The Court then held that "[t]he Federal Defendants were not compelled by statute or regulation to approve the Wyoming Plan, nor did the 'best science available' mandate attach to their decision making process." *Id*. at 1231. The District Court erred on both counts.

The District Court erred when it dismissed the Wolf Coalition's 5 U.S.C. § 706(1) claims by concluding that the Federal Defendants' evaluation of the Wyoming Plan was not done as part of an ESA status review and, as such, was not the type of agency action that is subject to the "best science available" standard. The scientific/biological analysis endorsed the States' Plans as providing the adequate regulatory mechanism to protect the wolves. At that point the Federal Defendants were required to approve the Wyoming Plan and proceed to delisting. Their refusal to do so constitutes agency action unlawfully withheld and unreasonably delayed.

The District Court concluded that "there is no categorical imperative that commands the Secretary to propose to that the gray wolf be delisted." *Id*. at 1229. The Court also found that 50 C.F.R. § 424.13 does not provide that the Secretary "must approve a state's management plan." *Id*. at 1230. The District Court missed

the point.

The Federal Defendants repeated time and again that the State Management Plans were the most appropriate means of maintaining a recovered wolf population and demonstrating the adequacy of regulatory mechanisms (i.e. addressing factor D). They reiterated that conclusion on January 6, 2005, when they granted to Montana and Idaho additional management authority. The Federal Defendants considered the Management Plans as the critical tool to protect a viable wolf population. They cannot argue that they had no discrete and non-discretionary duties in terms of how those Plans will be evaluated. The ESA supplies the standard of review.

The Wyoming Management Plan is the linchpin in the process. When the Federal Defendants rejected the "best science available" standard at that juncture, their ultimate decision violated the ESA. If the they are allowed to ignore the "best science available" standard when evaluating the Wyoming Plan, they will have successfully nullified the most objective component of the ESA. If they are not required to evaluate the Wyoming Plan based solely on the best science, they will have engaged in the type of political gerrymandering that 16 U.S.C. § 1533(b) was adopted to prevent.

The Federal Defendants' compliance with the ESA's "best science available" standard is mandatory. It is not interchangeable with public relations concerns or fear of litigation. When the Federal Defendants passed over the peer reviewers' findings,

and relied instead upon impermissible considerations, they violated their mandatory, non-discretionary responsibilities and unlawfully withheld and unreasonably delayed approval of the Wyoming Management Plan.

The Supreme Court's decision in *SUWA* does not support the District Court's conclusion. In *SUWA* the relevant land use plan was considered a "policy determination," not an "implementation decision." *SUWA*, 124 S.Ct. at 2383. In this case, the Federal Defendants' decision to reject the Wyoming Plan was an implementation decision – to carry out the recovery and management program – subject to review under § 706(1).

The Wolf Coalition seeks a Declaratory Judgment that the Federal Defendants violated the ESA (16 U.S.C. § 1533(b)(1)) when they based their decision on improper factors. The Wolf Coalition seeks a Mandatory Injunction from this Court compelling the Federal Defendants to evaluate the Wyoming Plan solely on the basis of the best scientific and commercial data available.

IV. THE DISTRICT COURT ERRED IN HOLDING THAT IT LACKED JURISDICTION OVER THE WOLF COALITION'S "FAILURE TO MANAGE" CLAIMS

Count I of the Wolf Coalition's Complaint describes the manner in which the Federal Defendants violated the ESA. First, the Federal Defendants violated the ESA by rejecting the Wyoming Plan. Second, the Federal Defendants violated the ESA by failing and refusing to properly manage and control the wolves. The Wolf

Coalition brought its "failure to manage claim" pursuant to both prongs of 5 U.S.C. § 706(1) *and* (2). The Wolf Coalition requested the Court to compel the Federal Defendants to properly manage and control the wolves (5 U.S.C. § 706(1)). The Wolf Coalition also brought suit challenging the Federal Defendants' failure and refusal to manage and control the wolf population as being arbitrary; capricious; an abuse of discretion; otherwise not in accordance with the ESA; in excess of statutory jurisdiction, authority and limitation; and without observance of procedures as required by law. 5 U.S.C. § 706(2)(A), (C), and (D). Aplt.App.Vol. 1 at 246-253, 258. The District Court did not address the Wolf Coalition's § 706(2) claims.

During the November 17, 2004, hearing on the Wolf Coalition's Motion to Consolidate its case with the State of Wyoming's case, the Federal Defendants reported that they had not produced an administrative record related to the failure to manage claims. Aplt.App.Vol. 2 at 477-478. The parties agreed that the Plaintiffs' "failure to manage" and "rejection of the Wyoming Plan" and Wyoming's Tenth Amendment claims should be bifurcated. *Id*. at459-488. The District Court agreed. *Id*. at 450. The Court also held that "all issues pertaining to this Court's jurisdiction regarding all claims and parties be fully briefed concurrently with the claims related to the Federal Defendants' rejection of the Wyoming Plan." *Id*. The Wolf Coalition's NEPA claims were part of the "failure to manage" claims in terms of briefing and resolution.

The only issue to be addressed in relation to the Wolf Coalition's failure to manage and NEPA claims is whether the Court has jurisdiction. The District Court, focusing exclusively on § 706(1) of the APA, dismissed the Plaintiffs' failure to manage claims, finding that they had "failed to demonstrate that the Federal Defendants have a mandatory duty to control wolf depredation." Aplt.App.Vol. 5 at 1232. The District Court improperly dismissed the Wolf Coalition's failure to manage claim.

The District Court was required to take as true the allegations set forth in the Wolf Coalition's Complaint. The Court did not do so, stepped well beyond the narrow jurisdictional issue, and decided the merits of the failure to manage claims. According to the District Court, "[t]he only arguably mandatory actions that FWS must take are related to 'chronic problem wolves.' *See* 50 C.F.R. § 17.84(i)(3)(vii)." *Id*. at 1233-1234. The District Court identified the circumstances under which the Federal Defendants are required to remove (kill or place in captivity) such wolves. *Id*. The District Court did not address whether the Wolf Coalition's Complaint described such circumstances (e.g., killing of livestock, domestic animals and wildlife by problem wolves). It clearly does. Aplt.App.Vol. 1 at 231-234, 245-246, 251-253, 258. The Court summarily dismissed the Wolf Coalition's failure to manage claims, deciding that the facts and the Wolf Coalition's claims were irrelevant. The District Court's decision to decide the merits of the Wolf Coalition's claims must be reversed.

Sections 706(1) and 706(2) are separate provisions of the APA for a reason. They are not interchangeable concepts. Even in those circumstances when an agency has no mandatory duty to act (enforceable by §706(1)), its actions are subject to judicial review under § 706(2). The Supreme Court in *SUWA* recognized the differences between the two statutory provisions, and the circumstances under which a § 706(2) claim may proceed even if there is no §706(1)-enforceable mandatory duty to act:

> The statutory directive that BLM manage 'in accordance with' land use plans, and the regulatory requirement that authorizations and actions 'conform to' those plans, prevent BLM from taking actions inconsistent with the provisions of a land use plan. Unless and until the plan is amended, such actions can be set aside as contrary to law pursuant to 5 U.S.C. § 706(2).

SUWA, 124 S.Ct. at 2382.

The foundation for the wolf reintroduction and recovery program included an effective management and control program. The Recovery Plan, FEIS, and Final Rule describe in detail the types of protections that would be afforded to the Wolf Coalition members to protect against wolf kills of livestock and wildlife. The Federal Defendants argue that those protections are not "mandatory" as that term has been defined in the context of a suit under § 706(1). Whether their refusal to manage the wolves is arbitrary, capricious, and an abuse of discretion, etc., however, is a different story. That story will be told in greater detail once the Federal Defendants are

required to produce those documents that describe the reintroduction, recovery, and management efforts and the related impacts on livestock and wildlife. The Wolf Coalition's failure to manage claims as brought pursuant to 5 U.S.C. § 706(2) raise questions of fact that cannot be resolved on a Rule 12 motion.

The Wolf Coalition must be allowed to pursue the 5 U.S.C. § 706(2) claims that the Federal Defendants have unlawfully failed and refused to manage and control wolves numerically, geographically, and when they prey on livestock and other wildlife. At this point the Court has no basis for stripping the Wolf Coalition of its right to show that the Federal Defendants' failure and refusal to properly manage the wolf population is having the exact impact on livestock producers and on other wildlife that they committed to preventing.

The District Court's decision dismissing the Wolf Coalition's failure to manage claims should be reversed.

V. THE FEDERAL DEFENDANTS ARE REQUIRED TO PREPARE A SUPPLEMENT ENVIRONMENTAL IMPACT STATEMENT

The District Court dismissed the Wolf Coalition's NEPA claim, finding that "[t]he Plaintiff-Intervenors[6] have failed to establish that there has been a final agency

[6] There are numerous places throughout the Corrected Memorandum where the District Court appears to refer to the Wolf Coalition is a "Plaintiff-Intervenor." The Wolf Coalition, however, was a party plaintiff. Park County is the only plaintiff-intervenor.

action in this case which would implicate NEPA." Aplt.App.Vol. 5 at 1237. The Court reiterated its conclusion that the January 13, 2004 letter was not final agency action and then proceeded to decide the merits of the issue by challenging the factual basis for Wolf Coalition's claims:

> The Plaintiff-Intervenors [sic] additional claim that the '[Federal] Defendants' demand that the State of Wyoming adopt a plan for the purpose of protecting the gray wolf population outside of the Yellowstone Recovery Area' *is not supported by the record*. The Plaintiff-Intervenors are attempting to manipulate the actions of the Federal Defendants into a NEPA claim. The only action taken by the Federal Defendants was to inform the State of Wyoming that the Wyoming Plan was insufficient, in their opinion, to sustain the recovered gray wolf population. (Emphasis added).

Id. at 1237-1238. Significantly, there was no record on which the Court could base the foregoing conclusion. The District Court's decision on the merits of the Wolf Coalition's NEPA claim must be reversed.

The District Court was required to accept as true the following facts as asserted in the Wolf Coalition's Complaint:

* the wolf reintroduction and recovery program (Recovery Plan, FEIS, and Final Rule) was designed to protect wolves within the YRA, with lands outside of those areas being "undesirable" for wolf presence.
* the Wyoming Plan protects the wolf population in an area larger than the YRA.
* the Federal Defendants rejected the Wyoming Plan to force Wyoming

to protect wolves outside of the YRA.

* the Federal Defendants' rejection of the Wyoming Plan and demand that Wyoming protect the wolves outside of the YRA, is a "major federal action," the environmental impact of which must be analyzed.

* the Federal Defendants have never analyzed the environmental impact of protecting wolves outside of the YRA.

Aplt.App.Vol. 1 at 216-255, 240-244, 253-258.

The foregoing is not a "manipulation" of the Federal Defendants' actions. Their decision to force Wyoming to protect wolves outside of the YRA triggered NEPA and the requirement that they supplement their environmental impact statement.

The Council on Environmental Quality (CEQ) rules and regulations dictate when a supplement EIS is necessary:

> (c) Agencies:
> (1) Shall prepare supplements to either draft or final environmental impact statements if:
> (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

40 C.F.R. § 1502.9(c)(1). By its nature, whether an SEIS is required is a question of fact that cannot be resolved pursuant to a jurisdictional challenge brought under

Fed.R.Civ.P. 12(b)(1). *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376-377, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989). "[I]n the context of reviewing a decision not to supplement an EIS, courts should not automatically defer to the agency's express reliance on an interest in finality *without carefully reviewing the record* and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance – or lack of significance – of the new information." *Id*. at 378 (emphasis added). There is no record yet available, which makes a "careful review" of agency action impossible.

> Courts review an agency decision regarding the need for a supplemental EIS under the 'arbitrary and capricious' standard of the APA. (Citation omitted). This is so because the decision whether to prepare a supplemental EIS 'is similar to the decision whether to prepare an EIS in the first instance,' *and is highly factual*. (Citations omitted) (emphasis added).

Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515, 1524 (10th Cir. 1992).

The District Court held that the Wolf Coalition's SEIS claim does not implicate the type of major federal actions contemplated by NEPA. Aplt.App.Vol. 5 at 1239. That conclusion is legally insupportable and can only be decided after a full explication of the facts.

The District Court also concluded that "what effect the protection of the wolves throughout the State of Wyoming will have on the 'quality of the human environment' is simply the wrong standard to apply." Aplt.App.Vol. 5 at 1240. The

District Court provides no support for that finding, nor is there any. The stated purpose of the EIS process – draft, final and supplemental – is to determine the impact of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). Wolf expansion will affect the environment in every area where it occurs. The nature of the protections afforded the wolves will also affect the environment. The Federal Defendants must be required to take a "hard look" at those impacts and include the public in the decision-making process.

The District Court also attempted to analogize the Federal Defendants' decision to expand the gray wolf recovery area with the off-road vehicle use at issue in *SUWA*. Again, whether an SEIS is required is fact specific. The Court in *SUWA* did not decide the issues before it in a factual vacuum under Rule 12. The *SUWA* decision was entered only after the defendants produced an administrative record and the parties developed the necessary factual background on which the court could rule.

In the instant case, the District Court dismissed the Wolf Coalition's NEPA claim without the benefit of any record or factual development. The District Court's decision does violence to the very regulatory provision that describes the circumstances under which an SEIS is required.

The CEQ regulations require the Federal Defendants to prepare an SEIS if there are "substantial changes" in the proposed action or there are "significant new circumstances or information . . . bearing on the proposed action *or its impacts*." 40

C.F.R. § 1502.9(c)(1) (emphasis added). The Federal Defendants' decision to protect wolves outside of the recovery area, their decision to force the geographic expansion of wolves throughout Wyoming, their decision to disregard zone management of wolves, and their refusal to use the management and control techniques that are mandated by the Recovery Plan, FEIS and Final Rule, represent "substantial changes" to the wolf recovery and management program. Such changes will "significantly affect the quality of the human environment." 42 U.S.C. § 4332.

The Federal Defendants' rejection of the Wyoming plan represents a substantial shift in wolf recovery policy. The Federal Defendants' rejection of the Wyoming Plan represents a major modification to wolf management.

The District Court held that shifting wolf management from the Federal Defendants to Wyoming is not "major federal action" under NEPA. Corrected Memorandum at 51. When that "shift" results in an environmental impact to the State, it is "major federal action" requiring analysis. The Federal Defendants undertook "major federal action" when they brought wolves into YNP and were required to analyze the environmental impact of that decision. That environmental impact analysis included a detailed look at, among other things, the geographic area of impact, the number and types of livestock and wildlife that would be killed, and the other impacts of protecting wolves within a specifically-defined geographic area.

The Federal Defendants have decided to "reintroduce" wolves into the

remainder of Wyoming, a decision that has a substantially broader impact than the original decision to protect wolves in the YRA. The Federal Defendants were required to perform an EIS to analyze their decision to reintroduce wolves into YNP. They are also required to conduct an EIS to analyze their decision to protect wolves throughout the remainder of the State.

CONCLUSION

The District Court committed reversible error by finding that the Federal Defendants' rejection of the Wyoming Plan was not "final agency action." The Federal Defendants violated the ESA when they rejected the Wyoming Plan. The District Court committed reversible error by dismissing the Wolf Coalition's "failure to manage" and NEPA claims.

STATEMENT REGARDING ORAL ARGUMENT

The Wolf Coalition respectfully requests oral argument. The issues raised and addressed above are of great importance to the interests and the future of the Wolf Coalition members and Wyoming. The Wolf Coalition also believes that oral argument would assistance the Court to understand and decide the issues before it.

Dated this 20th day of June, 2005.

WYOMING WOLF COALITION

__/s/_____

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CERTIFICATE OF COMPLIANCE - WORD LIMIT

As required by Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief is proportionately spaced, contains 13997 words, and complies with the type/volume specifications of Fed.R.App.P. 32(a)(7)(B). I relied upon my word processor, Wordperfect 11, to obtain the count.

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Harriet M. Hageman

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I hereby certify that (1) no privacy redactions are required. Every document submitted in Digital Form and scanned PDF format is an exact copy of the written document filed with the Clerk ans served on the parties on June . I further certify that the digital submissions have been scanned with the most recent virus scanning program (Norton Antivirus, System Works Professional 2004; most recent update 06/17/05) and, according to the program, are free of viruses.

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Harriet M. Hageman

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The undersigned hereby certifies that on the 21st day of June, 2005, a revised electronic copy of the APPELLANT WOLF COALITION'S OPENING BRIEF (without attachments) was served upon the Clerk of Court via e-mail and sent on a Compact Disk to the Parties as indicated below.

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