Nos. 05-8026, 05-8027, 05-8035

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING, et al.,

Appellants

v.

DEPARTMENT OF THE INTERIOR, et al.,

Appellees

Oral Argument Requested

On Appeal from the United States District Court for the District of Wyoming, No. 04-CV-0123; Hon. Alan B. Johnson

BRIEF OF FEDERAL APPELLEES

KELLY A. JOHNSON
Acting Assistant Attorney General
Environment & Natl. Resources Div.

KRISTEN L. GUSTAFSON
JIMMY A. RODRIGUEZ
M. ALICE THURSTON
DAVID C. SHILTON
Attorneys, U.S. Dept. of Justice
P.O. Box 23795
Washington, D.C. 20026
(202) 514-5580

Of counsel:

DAVID GAYER
MARGOT ZALLEN
Office of the Solicitor
U.S. Dept. of the Interior

TABLE OF CONTENTS

PAGE

PAGE

PAGE

TABLE OF AUTHORITIES

PAGE

CASES:

PAGE

STATUTES RULES AND REGULATIONS:

PAGE

PAGE

STATEMENT OF RELATED APPEALS: To counsel's knowledge, there are no prior or related appeals.

JURISDICTION

Federal Appellees concur with appellant State of Wyoming that this Court has appellate jurisdiction over the final judgment entered by the district court pursuant to 28 U.S.C. 1291.[1/] We do not concur that the district court had subject matter jurisdiction under either 5 U.S.C. §§ 706(1) or 706(2), for the reasons discussed infra at 26-38 & 53-58.

ISSUES PRESENTED

1. Whether the district court had jurisdiction to review a letter from the Director of United States Fish and Wildlife Service (FWS) finding that Wyoming's wolf management plan was not adequate to support a proposal to delist wolves, where the letter made no final determination regarding the appropriateness of delisting wolves and imposed no legal consequences, and where no party had petitioned for delisting.

2. Whether, if the letter was a reviewable final agency action, it was arbitrary and capricious for FWS to find that Wyoming's wolf management plan was insufficient because it designated wolves as "predators" subject to unregulated

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[1/] For the sake of simplicity, in this brief we generally refer to arguments as having been raised by "Wyoming," even where they are also raised by one or more of the additional appellants. Citations to Appellants' Joint Appendix will be to "APP _," and to the district court opinion found in an Attachment to Wyoming's Opening Brief as "Op. __."

killing over a large portion of their range in the State, and failed to clearly commit to protecting an adequate number of packs in the State.

3. Whether informing the State that aspects of its wolf management plan were inadequate to permit delisting violated the Tenth Amendment or the Guarantee Clause of the United States Constitution.

4. Whether FWS had non-discretionary duties to delist or manage wolves that could be enforced by a suit under 5 U.S.C. §706(1).

5. Whether FWS was required to supplement an Environmental Impact Statement that had been prepared for a 1994 Wolf Recovery Plan because wolves had increased their range since that time.

STATEMENT OF THE CASE

For many years, FWS has worked with the States of Wyoming, Montana, and Idaho and other interested parties to achieve the common goal of recovering the gray wolf in the western United States so that it may be removed from the list of threatened and endangered species. To this end, FWS, states, and private groups have participated in restoring the wolf in the northern Rocky Mountains. Now that the gray wolf has achieved the numerical and distributional recovery goals set forth in the 1994 Wolf Recovery Plan and Environmental Impact Statement, FWS has

turned its attention to ensuring that the proper conditions exist for the gray wolf population to remain at or above recovery levels upon delisting.

The Endangered Species Act ("ESA") requires that FWS, before delisting a species, be assured that "adequate regulatory mechanisms" are in place to ensure that the species will not be placed in danger of extinction throughout all or significant portion of its range in the foreseeable future. 16 U.S.C. 1533(a)(1)(D). Thus, Wyoming, Montana, and Idaho must first establish wildlife management plans that will ensure that the wolf population in the three states remains at or above recovery levels. After reviewing the three states' management plans, along with the statutory bases for the plans, the FWS Director sent a letter dated January 13, 2004, to the Wyoming Game and Fish Department (WGFD), stating that adequate protections did not presently exist for FWS to proceed with a proposal to delist the gray wolf in the area encompassed by these states. FWS was concerned that Wyoming's state law and wolf management plan (the "Wyoming Plan"), taken together, did not provide an adequate regulatory mechanism to ensure that the gray wolf population will remain recovered. FWS made clear that it wished to continue to work with Wyoming to resolve this issue and work toward delisting.

Wyoming challenged the January 13, 2004, letter, and attempted to obtain a judicial determination that the Wyoming Plan was in fact adequate to support

delisting. The district court dismissed the action, primarily on grounds that the January 13 letter was not "final agency action" reviewable under APA § 704; Wyoming and allied parties appeal.

STATUTORY BACKGROUND

The ESA defines an endangered species as a species that is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. 1532(6); 50 C.F.R. 424.02(e). A threatened species is a species that is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. 1532(20); 50 C.F.R. 424.02(m). A species includes any subspecies of fish, wildlife, or plants, and any distinct population segment (DPS) of any species of vertebrate fish or wildlife that interbreeds when mature. 16 U.S.C. 1532 (16).

The Secretary of the Department of the Interior ("Secretary") is charged with determining whether a species should be listed as threatened or endangered based upon five prescribed factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. 16 U.S.C.

1533(a)(1). Any one of the five listing factors is sufficient to support a listing determination if that particular factor causes the species to be "in danger of extinction" or "likely to become an endangered species in the foreseeable future" throughout all or a significant portion of its range. The same five factors must be considered to determine whether threats to the species have been diminished or removed to the point that downlisting (*e.g.* from "endangered" to "threatened") or removal from the list ("delisting") is appropriate.

Decisions about whether a species is endangered or threatened must be made "solely on the basis of the best scientific and commercial data available." 16 U.S.C.1533(b)(1)(A); 50 C.F.R. 424.11(b). When considering revision of a listing, in addition to scientific and commercial publications, the Secretary may consider administrative reports, maps or other graphic materials, information received from experts on the subject, and comments from interested parties. 50 C.F.R. 424.13.

Section 4(b) of the ESA, 16 U.S.C. 1533(b), provides that an "interested person" can petition to add or remove a species from the list of endangered and threatened species, and provides that certain determinations made as part of the petition process will be reviewable by a court. After a petition is filed, FWS is obligated to review it and make a finding as to whether the petition presents "substantial scientific or commercial information indicating that the petitioned

action may be warranted." 16 U.S.C. 1533(b)(3)(A). That finding must be made "[t]o the maximum extent practicable, within 90 days after receiving the petition." Id. Where a petition presents such information, FWS is required to review the status of the species and, within twelve months after receiving the petition, make one of the following findings: (1) the petitioned action is not warranted; (2) the petitioned action is warranted and the agency is proposing a rulemaking to implement the action; or (3) the petitioned action is warranted but precluded by other obligations. 16 U.S.C. 1533(b)(3)(B). The statute provides that: "(ii) Any negative finding described in subparagraph (A) [pertaining to the 90-day finding] and any finding described in subparagraph (B)(i) or (iii) [pertaining to a finding that the petitioned action is either not warranted or is warranted by precluded by other higher-priority actions] shall be subject to judicial review." 16 U.S.C. 1533(b)(3)(C)(ii).

A positive petition finding triggers rulemaking procedures that include publication of a proposed rule in the Federal Register, notice and comment, public hearings, peer review, and, ultimately, a final determination regarding the listing or delisting. Those final determinations are also subject to judicial review under the APA. See U.S.C. 1533(b)(6)(B)(ii); see generally 50 C.F.R. 424.14 (setting out procedures for petitions).

STATEMENT OF THE FACTS

A. Biology and Ecology of the Gray Wolf. – Gray wolves are social animals, usually living in packs of 2 to 12 wolves. APP 2272. Packs are primarily family groups which may consist of a breeding pair, pups from the current year, offspring from the previous year, and occasionally an unrelated wolf. Usually, only the top ranking male and female in a pack breed and produce pups. Litters are typically born from early April into May and can range from 1 to 11 pups, with 4 to 6 pups being average. Id.

The gray wolf historically occurred across much of North America; however with the arrival of European settlers, the species' numbers took a rapid downturn. Spurred by bounties offered by Federal, State, and local governments, people poisoned, trapped, and shot wolves until the species was extirpated from more than 95% of its range in the lower 48 states. When the ESA was passed in 1973, only several hundred wolves occurred in northeastern Minnesota and Michigan, with possibly a few wolves scattered in Montana and the American Southwest. Id. Actions of humans were the primary reason that the gray wolf became an endangered species. APP 2294.

B. Listing History and Recovery Planning. – The Northern Rocky Mountain wolf was listed as endangered on the first list of species protected after

passage of the ESA in 1973. APP 2273. A 1978 rule listed the gray wolf (*canis lupus)* as threatened in Minnesota and endangered throughout the remaining 47 conterminous states and in Mexico. Id. In 1987, FWS developed a recovery plan for the gray wolf in the northern Rocky Mountain states. APP 2344. In 1994, FWS completed an Environmental Impact Statement ("EIS") pursuant to the National Environmental Policy Act ("NEPA") on the Reintroduction of Gray Wolves to Yellowstone National Park and Central Idaho. This EIS proposed a recovery goal of 30 or more breeding pairs of 300 or more wolves in a metapopulation structure, with some exchange between populations. APP 2284. The EIS also proposed a definition of "breeding pair" as an adult male and an adult female that raise at least two pups until December 31 of the year of their birth. Id. In a 2003 Final Rule downlisting the status of the wolf to "threatened" (see infra at 9-10), FWS adopted the definitions of wolf population viability and recovery developed in the 1994 EIS. APP 2284-2285.

In November 1994, as part of an effort to reintroduce gray wolves in Central Idaho and Yellowstone National Park, FWS designated nonessential experimental populations of gray wolves under ESA §10(j), 16 U.S.C. 1539(j), in Wyoming, Idaho, and Montana. FWS promulgated special rules under §10(j) which were codified at 50 C.F.R. 17.84(i). These established two non-essential experimental

populations, one for central Idaho and the other for the Yellowstone area (which includes the entire State of Wyoming), and provided increased management flexibility to address potential human-wolf conflicts.[2/] In 1995 and 1996, FWS released wolves captured in Canada into the Central Idaho and Greater Yellowstone Experimental Population Areas. APP 2282; see generally Wyoming Farm Bureau Fed'n v. Babbitt, 199 F.3d 1224 (10th Cir. 2000) (upholding FWS decision to introduce wolves).

On April 1, 2003, FWS issued a Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States, 68 Fed. Reg. 15804, et seq., APP 2270. This Final Rule created three distinct population segments ("DPS") – an Eastern DPS, a Western DPS, and a Southwestern DPS – for the species in the conterminous United States. The Western DPS encompassed those states covered by the Northern Rocky Mountain Recovery Plan. The Final Rule reclassified the Western

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[2/] On January 6, 2005, FWS published a new rule relating to the management of non-essential experimental populations within the Western DPS. 70 Fed. Reg. 1286 (APP 2475). Under the new rule, landowners in states with a Service-approved wolf management plan (currently Montana and Idaho) may take additional steps to protect their livestock and dogs from attacks by wolves on their private property without prior written authorization. States with approved plans may ask to become "designated agents" of the FWS or enter into a memorandum of understanding to take over certain wolf management functions from the Service. The new 10(j) rule is codified at 50 C.F.R. 17.84(n).

DPS from endangered to threatened status based upon the gray wolf's recovery progress under the Recovery Plan and upon FWS' evaluation of the ESA's five-factor threats analysis. APP 2277-2278, 2290-2291, 2324.[3/]

While the gray wolf populations in Montana, Idaho, and Wyoming have achieved the numerical and distributional recovery objectives of the Recovery Plan, FWS may not consider delisting until the states of Montana, Idaho, and Wyoming promulgate management plans that assure that the wolf population will be conserved safely at or above recovery levels if the ESA's protections are removed. FWS recognized in the 2003 Final Rule that the primary determinant of the long-term status of gray wolf populations will be human attitudes. "These attitudes are based on the conflicts between human activities and wolves, concern with the perceived danger the species may pose to humans, its symbolic representation of wilderness, the economic effect of livestock losses, the emotions regarding threats to pets, the conviction that the species should never be a target of sport hunting or trapping, and the wolf traditions of Native American tribes." APP 2324.

[3/] The final rule was vacated by a district court in Defenders of Wildlife v. Secretary United States Department of the Interior, 354 F. Supp. 2d 1156 (D. Ore. 2005), appeal pending, No. 05-35691 (9th Cir.). The court in Defenders concluded that FWS's downlisting of entire DPSs, without analyzing threats to the gray wolf outside of its current range, was arbitrary and capricious. Id. at 1171-1173.

C. <u>The Wyoming Plan and Wyoming Law.</u> – FWS has assisted Idaho, Montana, and Wyoming in preparing their respective wolf management plans and has provided funding to the states to develop those plans. The Governors of the three states signed a Memorandum of Understanding in August 1997 stating that they would all develop wolf management plans so that the delisting process could be completed in a timely manner. APP 1450.

In September 2002, the Wyoming Department of Game and Fish (WDGF) requested that FWS provide its opinion on several proposed changes in the status of wolves under Wyoming law. APP 1481. The proposal reviewed by FWS set forth a "dual status" system that allowed the Department to manage a limited portion of the wolf population as a "trophy game animal," but treated wolves as unregulated "predatory animals" in remaining portions of the State.[4/] A letter dated September 26, 2002, from FWS Director Steve Williams criticized this approach:

> We believe the dual status for wolves in Wyoming would not provide the appropriate authorities to regulate human-caused mortality to maintain recovery levels. In addition, we believe the proposal to classify wolves as "trophy animals

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[4/] The Wyoming Game and Fish Commission is empowered to regulate the take of "trophy game animals," but cannot regulate the take of "predatory animals." See WYO. STAT. ANN. § 23-1-302 (a)(i) ("The commission is directed and empowered: *** To fix season and bag limits, open, shorten or close seasons on any species or sex of wildlife for any type of legal weapon, <u>except predatory animals</u> . . . .") (emphasis added).

> within the Yellowstone and Grand Teton National Parks, and the wilderness areas of the Bridger-Teton and Shoshone National Forests," would not provide for a secure or large enough area to maintain the wolf population to proceed with delisting.

APP 1478. FWS expressed concern that under the proposal "the State would not have authority to further regulate wolf management where they were designated a 'predatory animal,' and therefore we believe this proposal does not provide the assurances the Endangered Species Act requires for delisting." APP 1477-1478.

In November 2002, WDGF submitted a draft management plan to FWS which retained the dual classification approach . FWS again advised that this approach was problematic and would not satisfy the "adequate regulatory mechanism" requirement of the ESA.

> Wyoming law and wolf management as recommended by this draft management plan would not allow for delisting of wolves to be proposed. * * * The Wyoming plan recognizes []that maintenance of wolf packs outside of those currently in Yellowstone and Grand Teton National Parks will be necessary for the population to be maintained above recovery levels. Since excessive human persecution was almost the sole reason that wolves became listed, it is the only significant issue that must be addressed for them to be delisted, once recovery is achieved.

APP 1502-1503. FWS repeated the biological concerns with the dual status system that were expressed in its September 26, 2002 letter. Id.

In 2003, the Wyoming Legislature enacted a statute governing the management of gray wolves in Wyoming upon delisting. The statute, codified as WYO. STAT. ANN. § 23-1-304, creates a dual classification system by providing that wolves would be classified as "trophy game animals" in the National Parks and the federally designated wilderness areas contiguous to the National Parks and classified as "predatory animals" throughout the remainder of the State. § 23-1-101(b)(ii).

In addition, § 23-1-304 (c) defined the term "pack" as five or more gray wolves traveling together. The statute granted the Wyoming Game and Fish Commission[5/] the authority to reclassify the gray wolves outside the National Parks and wilderness areas from predatory animals to trophy game animals when there are fewer than 7 packs outside of the National Parks and fewer than 15 packs in the entire state, § 23-1-304 (b)(i). Another provision requires the Commission to maintain the wolf's predatory animal classification outside of the National Parks as long as there are "at least seven (7) packs of gray wolves * * * primarily outside of [the National Parks] * * * or at least fifteen (15) packs within this state, including [the National Parks] * * * ." § 23-1-304(b)(ii) (emphasis added).

[5/] The Commission supervises and sets policy for WDGF. See WYO. STAT. ANN. §§ 23-1-301-303; 23-1-401.

WDGF requested an opinion from the Wyoming Office of the Attorney General to clarify the circumstances under which the Commission would be required to classify the gray wolves as predatory animals under this legislation. APP 1744-1748. In response, the Office of the Attorney General acknowledged that "the plain language of the [statute] is in conflict and thus suffers from internal ambiguity." APP 1744. The opinion identified the following scenarios under which the stated goal of the state management plan could not be met under the terms of the statute (APP 1746):

> Scenario #1: 10 packs inside the Parks & 5 packs outside the Parks. Classify as a predatory animal because at least 15 packs in the state.
> *This scenario leaves less than 7 packs outside of the Parks.*
>
> Scenario #2: 3 packs inside the Parks & 10 packs outside the Parks. Classify as a predatory animal because at least 7 packs outside the Parks.
> *This scenario leaves less than 15 packs total in the state.*
>
> These scenarios defeat the clearly identified legislative goals of maintenance of fifteen (15) packs in the state and maintenance of seven (7) packs outside the Parks.

The opinion recognized the conflict this created with the guidance Wyoming had received from FWS that "<u>both</u> the goal of fifteen (15) packs within the state as a whole, <u>and</u> seven (7) packs outside of the Parks will be simultaneously required for delisting." APP 1746 (emphasis in original). Despite these findings, the

opinion concluded that the language of § 23-1-304, when read in light of the purpose stated by the Wyoming Legislature to "facilitate the removal of the gray wolf from its listing" (APP 1745), authorized WDGF "to prepare a management plan that will satisfy the requirements of the Service." APP 1747. The opinion acknowledged the existence of an "alternative interpretation" based on a more restrictive reading of the statutory language that would defeat the Department's ability to satisfy the requirements outlined by FWS. Id.

In June 2003, several months after the passage of § 23-1-304, WDGF submitted a revision of the draft plan to FWS. APP 1643-1685. FWS again conveyed comments to the Department. APP 1791-1796. In this July 2003 letter FWS expressed concern that the Final Draft plan might not be consistent with Wyoming law, APP 1791, and stated that the FWS would be hesitant to propose delisting "unless State law unambiguously authorizes implementation of a state wolf management plan that will conserve wolves above recovery levels." APP 1793. FWS also stated that switching back and forth between designating wolves as a "predatory animals" or "trophy game animals" depending on population levels in certain areas would be confusing and "creates an environment whereby the wolf population is much more likely to slip below acceptable levels and trigger re-listing." APP 1794. Finally, FWS urged "Wyoming to re-consider having wolves

listed as predatory animals anywhere in Wyoming [because] [t]hat designation may spoil our mutual desire to successfully delist the wolf population and maintain a recovered population." APP 1792.

The Wyoming Game and Fish Commission nevertheless approved the final Wyoming Plan in July of 2003. APP 1643. While the Wyoming Plan committed to maintaining a minimum of 15 packs within Wyoming and to maintaining at least seven of those packs outside of the National Parks (APP 1646), it adopted the dual classification strategy that FWS had found problematic. Wolves found within the National Parks and the wilderness areas contiguous to the National Parks would be classified as trophy game animals, while wolves outside of those areas would be classified as predatory animals subject to unregulated take. APP 1646. The Wyoming Plan provides that if the number of packs were to fall to or below seven outside of the National Parks, this would "trigger" the Commission to promulgate a rule to classify the gray wolf as a trophy game animal in a larger area known as the Northwest Wyoming Data Analysis Unit (DAU).[6] APP 1646. The Wyoming Plan calls for the application of the definition of a "pack" (i.e., 5 or more wolves traveling together) found in WYO. STAT. ANN. § 23-1-304(c). APP 1658.

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[6] The Wolf DAU includes the National Parks, wilderness areas contiguous to the Parks, and 2,642 square miles of land in Wyoming surrounding the Parks and wilderness areas. APP 1646.

In September 2003, FWS asked a group of twelve recognized wolf experts to conduct a peer review of the Wyoming Plan, as well as management plans submitted by Idaho and Montana. APP 1849. Several of the peer reviewers who returned comments expressed concerns regarding the Wyoming Plan, and in particular its classification of wolves outside of the National Parks and wilderness areas as predators. Kryan Kunkel, Ph.D., Montana State University, stated:

> Management as directed by the Wyoming Plan may not achieve their objective of 15 packs especially initially given that all wolf packs outside national parks and wilderness areas in the northwest portion of the state will initially be classed as predators. This problem is indicated in the statement on p. 18 that "90% of the home range area of wolf packs outside the National Parks and Parkway in Wyoming are outside of these designated trophy game wilderness areas." As indicated in the plan, initially, wolves would only be classified as trophy within the wilderness areas and as predators outside those areas, and thus right at the onset of enactment of the plan within 90% of areas occupied by wolves today, wolves would be classed as predatory and would be subject to unregulated take. We must assume conservatively that many of these wolves would be killed (and some packs eliminated) since unregulated take is sanctioned, and that could then immediately result in a drop in wolf packs below the 7 pack threshold (since as indicated above, 90% of area used by the 8 packs currently outside the national parks is outside the wilderness areas and thus they are all subject to unregulated take as predators) dictated in the plan.

APP 1910. Daniel H. Pletscher, Professor, University of Montana, raised a similar concern. APP 1916 (while "[m]anagement as a game species allows managers to

close seasons when populations are low and the objective is to increase numbers * * *, [m]anagement as a predatory animal allows little flexibility"). In discussing weaknesses in the Wyoming Plan, Adrian P. Wydeven, Mammalian Ecologist and Wolf Biologist, Wisconsin Department of Natural Resources, observed that predator status "seems like an extreme form of wolf management," and that "trophy management, with more liberal controls available for livestock producers would be more appropriate and would provide much more sound conservation of wolves." APP 1926. James Hammill, President, Iron Range Consulting & Services, Inc., noted that "Wyoming's Plan exposes wolves in Wyoming to risk of catastrophic loss outside of National Parks and Parkway." APP 1928.

D. <u>The January 13, 2004 Letter</u> – On January 13, 2004, FWS Director Williams identified deficiencies in several portions of the Wyoming Plan and provided recommendations to address those problems. APP 1956-1957. Director William's letter explained that because wolf populations in Montana, Idaho, and Wyoming comprise the Western DPS's metapopulation, the three state management plans must be considered together. APP 1956. Thus, all three state plans must ensure the long term survival of the gray wolf in the Western DPS. The letter went on to outline the following three concerns that the FWS believed must be addressed:

1. The "predatory animal" status for wolves must be changed. The unregulated harvest, inadequate monitoring plan, and unit boundaries proposed by the state's management plan do not provide sufficient management controls to assure the Service that the wolf population will remain above recovery levels. * * *

2. The Wyoming state law must clearly commit to managing for at least 15 wolf packs in Wyoming. We believe that wolf population management as trophy game would provide adequate controls to ensure that wolves remain above recovery goals with well distributed packs in suitable habitat.

3. The Wyoming definition of a pack must be consistent among the three states and should be biologically based. * * * If a pack size must be established by law, rather than a result of collaborative effort, the state law must define pack size as at least 6 wolves traveling together in the winter. At the current time, biological monitoring and analyses indicate that this pack size is expected to include at least one breeding pair.

APP 1955-1956. Williams noted that FWS would assist Wyoming in implementing the suggested modifications to the state management plan and Wyoming law. APP 1956.

E. <u>The District Court Decision</u>. -- On May 3, 2004, Wyoming filed suit in district court, alleging that FWS's January 13, 2004, letter violated the ESA and was arbitrary and capricious because it purportedly rejected the Wyoming Plan on the basis of factors that are not properly considered in the delisting of species.

Wyoming also alleged that FWS had failed to carry out purported mandatory duties to delist wolves and to manage predation by wolves, and had violated the Tenth Amendment and Guarantee Clauses of the Constitution. Members of the Board of County Commissioners of Park County intervened in support of Wyoming. On September 21, 2004, several allied groups known as "the wolf coalition" filed a separate action making similar claims to Wyoming's. The district court consolidated the two actions, and permitted a number of conservation groups to intervene as defendant-intervenors.

After briefing and argument, the district court entered judgment dismissing all claims. In a comprehensive opinion, the district court explained that the Administrative Procedure Act (APA) did not provide jurisdiction to review FWS's January 13, 2004, letter regarding the Wyoming Plan because there had been no "final agency action" within the meaning of 5 U.S.C. 704. The court pointed out that FWS's determinations regarding the adequacy of a particular state's plan for protecting a delisted species is only one part of the decisionmaking process regarding whether or not to delist a species. Op. 27. The January 13 letter was not the consummation of the decisionmaking process, and did not determine any rights or obligations or impose any legal consequences, and thus could not be reviewed as "final agency action." Op. 34-35. Further, reviewing this letter would be contrary

to the review process contemplated by the ESA, which permits parties to obtain a final and reviewable decision by petitioning for delisting.

The court also found that it lacked jurisdiction under 5 U.S.C. 706(1) to compel agency action unreasonably delayed or unlawfully withheld because Wyoming and the other plaintiffs had not established the existence of a discrete agency action that FWS was required by law to take. Op. 37-44. As for claims that FWS must supplement its 1995 EIS, the court noted that supplementation is necessary only if there remains major Federal action to occur, and here there was no relevant remaining action to which an obligation to supplement could attach. Op. 45, 51. Finally, the court found that claims that the January 13 letter amounted to a violation of the Guarantee Clause and the Tenth Amendment were without basis in law. Op. 62-66.

F. <u>Recent Developments That May Affect the Appeal</u>. – Two post-judgment developments may shed light on the issue of the Court's jurisdiction. On or about July 1, 2005, Wyoming petitioned pursuant to 43 C.F.R. 14.2 for FWS to amend the 10(j) rules regarding wolves in Wyoming, codified at 50 C.F.R. 17.84(i). On July 13, 2005, Wyoming forwarded a "Petition to Revise the Listed Status of the Gray Wolf (Canis Lupus) by Establishing the Northern Rocky Mountain Distinct Population Segment and to Concurrently Remove the Gray

Wolf in the Northern Rocky Mountain Distinct Population Segment From the List of Endangered and Threatened Species." See http://wyoming.gov/governor/documents/signeddelistpetition07.13.05.pdf. These petitions are discussed in the argument insofar as they may affect finality and ripeness.[7/]

STANDARD OF REVIEW

FWS agrees with Wyoming that the district court's dismissal of appellants' claims for lack of jurisdiction is reviewed de novo by this Court. See Colorado Farm Bureau Fed'n. v. U.S. Forest Service, 220 F.3d 1171, 1173 (10th Cir. 2000). The district court's denial of Wyoming's motion to supplement the administrative record is reviewed for abuse of discretion. Sierra Club v. Slater, 120 F.3d 623, 639 (6th Cir. 1997).

SUMMARY OF ARGUMENT

1. The January 13, 2004 letter from FWS was not a "final agency action" reviewable under the APA. The letter did not decline to delist the western population of gray wolves, but simply made clear that "delisting cannot be proposed at this time due to some significant concerns about portions of Wyoming's state law and wolf management plan." APP 1955. A letter expressing

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[7/] For the Court's convenience we have attached copies of the two petitions to this brief.

concerns about a particular state's management plan and outlining steps to resolve those concerns so as to permit FWS to propose delisting does not consummate the decisionmaking process. Nor does it impose any legal consequences or alter the legal regime to which any party is subject. The January 13 letter thus did not fulfill either of the two essential conditions for "final agency action."

2. If this Court nevertheless finds that the January 13 letter was a final agency action, it should remand for initial consideration by the district court of the merits issues regarding that letter. This case does not present any of the "unusual circumstances" that would justify reaching issues that the lower court has not considered.

3. If the Court does review the January 13 letter, it should uphold FWS's determination that the Wyoming Plan was not adequate to permit FWS to propose delisting at this time. FWS found several shortcomings in the Wyoming Plan, among them the "predatory animal" status for wolves which permits unregulated harvest in some areas, the failure to clearly commit to managing for at least 15 packs in the State, and the failure to adopt a definition of "pack" that was biologically sound. These concerns reflected a proper focus on the statutory requirement that adequate regulatory mechanisms be in place before delisting occurs. Based on its own expertise, as well as concerns raised by a number of peer

reviewers, FWS reasonably concluded that "predator" status and other problematic aspects of the Wyoming Plan prevented FWS from finding that adequate regulatory mechanisms were in place to protect wolves once delisted.

4. There is no constitutional barrier in the Tenth Amendment or the Guarantee Clause to FWS assuring itself that a state has adopted adequately protective regulatory mechanisms before it delists a species and returns it to state management. Nor is there any support for Wyoming's argument that a federal agency violates these constitutional provisions by allegedly relying on improper factors in determining that a state management plan is currently inadequate to warrant a proposal to delist a species.

5. The district court properly found that it lacked jurisdiction under 5 U.S.C. 706(1) to compel agency action unlawfully withheld or unreasonably delayed because Wyoming failed to demonstrate an essential prerequisite for such an action: a legal requirement that FWS take some discrete, non-discretionary action. Wyoming's attempts to use Section §706(1) to enforce broad mandates to use the best available scientific information and to manage wolves under FWS's highly discretionary regulatory provisions were properly rejected.

6. The Wolf Coalition's claim that FWS was obliged to prepare a supplemental EIS on the 1994 wolf reintroduction program was properly rejected

because there remained no federal agency action to complete on that reintroduction, and the January 13 letter did not constitute a proposal for a new major federal action.

I

THE JANUARY 13, 2004 LETTER WAS NOT A REVIEWABLE FINAL AGENCY ACTION

The APA authorizes judicial review only by persons "adversely affected or aggrieved by agency action," and even then, it limits nonstatutory judicial review to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. §§ 702, 704 (emphasis added). These requirements are jurisdictional in nature and absent these elements a reviewing court cannot reach the merits of a claim. Pennaco Energy Inc. v. Dep't of the Interior, 377 F.3d 1147, 1155 & n.4 (10th Cir. 2004). As stated by the Supreme Court:

> [T]wo conditions must be satisfied for agency action to be final: First, the action must mark the consummation of the agency's decisionmaking process * * * – 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 * * *.

Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (inner citations omitted); see also Public Service Co. of Colorado v. EPA, 225 F.3d 1144, 1147-49 (10th Cir. 2000).

The January 13, 2004 letter from FWS simply made clear that "delisting cannot be proposed at this time due to some significant concerns about portions of Wyoming's state law and wolf management plan." APP 1955. The decision not to propose delisting did not consummate the decisionmaking process or alter the legal regime to which any party was subject. Accordingly, it was not reviewable final agency action.

A. The January 13 Letter Fails the "Consummation of the Decisionmaking Process" Test. -- The ESA establishes a decisionmaking process for listing and delisting species. Interested parties can petition to list or delist, and FWS must expeditiously resolve whether to list or delist by considering the five factors set out at 16 U.S.C. 1533(a)(1). Determinations that a petitioned-for action is unwarranted are subject to judicial review. See 16 U.S.C. 1533(b)(3)(C)(ii) and discussion supra at 5-7. Congress has thus defined the decisionmaking process for delisting species, and prescribed which decisions flowing from that process are final and reviewable. This decisionmaking process will not be consummated until either FWS delists wolves or determines that delisting is not warranted. See City of San Diego v. Whitman, 242 F.3d 1097, 1101 (9th Cir. 2001) ("EPA's letter does not satisfy the first of the Bennett v. Spear requirements for final agency action -- that the action mark the 'consummation' of the agency's decisionmaking process,"

where the decision-making process set out in statute "will not even begin until the City files its application").

Prior to the district court's judgment, no party in this case had petitioned FWS to delist wolves, and none of the decisions that Congress made reviewable had issued. Appellants instead attempted to challenge a preliminary and partial determination by FWS not to propose delisting at this time because of problems with Wyoming's management plan. A determination to propose delisting would plainly not have been a final agency action. See Ash Creek Min. Co. v. Lujan, 934 F.2d 240, 243-244 (10th Cir. 1991) (agency's proposed land exchange was not final agency action). By the same token, a decision not to propose delisting is not final. See Gordon v. Norton, 322 F.3d 1213, 1221 (10th Cir. 2003) (FWS' failure to confirm livestock kills as wolf kills was not final agency action where such confirmation was only one factor in ultimate wolf control decision).

Wyoming seeks to extract the January 13 letter from its context, by claiming that it was a final determination on the adequacy of Wyoming's management plan. But there is no free-standing requirement for FWS to review the adequacy of state management plans. FWS reviews such plans only because the ESA requires a consideration of the adequacy of existing regulatory mechanisms as part of the broader determination whether to list or delist a species. See 16 U.S.C. 1533(a). A

determination like that in the January 13 letter is thus both partial and preliminary. It is partial because the adequacy of Wyoming's plan is only one of several factors that must be considered before wolves can be delisted. See supra at 4-5. It is preliminary and interlocutory because it states no settled view on whether delisting is in fact appropriate. Indeed, FWS can freely change its view even on the issue of the adequacy of existing regulatory mechanisms up until the time of a delisting decision, as FWS works with Wyoming to improve the adequacy of its plan. Interlocutory determinations like the January 13 letter are not directly reviewable; a challenger must wait until they are incorporated into a final agency decision and bring an action at that time. See 5 U.S.C. § 704 ("A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action"); see also Federal Trade Comm'n v. Standard Oil Co. of Cal., 449 U.S. 232, 245 (1980); Mobil Exploration and Producing, U.S., Inc. v. Department of the Interior, 180 F.3d 1192, 1198 (10th Cir. 1999).

There is no extraordinary burden imposed by postponing review until a final agency action on delisting. As noted supra at 22, Wyoming has recently petitioned for delisting the gray wolf in the Northern Rocky Mountain Area, and can obtain a final reviewable decision regarding the adequacy of its management plan in that

proceeding. The Wolf Coalition argues (Br. 39) that "[i]t would be unnecessary and absurd to require the Wolf Coalition to file a petition to delist," since FWS had conducted a "status review" which found that wolf populations had reached recovery levels. That status review supported a final decision to downlist the status of the Western DPS of wolves to threatened (see supra at 10), but FWS was clear that it would have been premature to propose delisting. APP 2304. In any event, nothing in the statute suggests that a party can evade the petition process simply by asserting that FWS already has relevant information on hand. FWS must be given the opportunity to exercise its judgment with respect to all the factors that go into the delisting determination, not just wolf numbers, in the context of the open and public process that the statute provides. As the district court observed (op. 30):

> The petition process strikes a delicate balance between judicial review, agency expertise and the public's right to a healthy, sustainable eco-system which fosters biological diversity. The petition process sets up mandatory bright lines of both timing and behavior that are readily open to judicial review. See 16 U.S.C. § 1533(b)(3)(C)(ii).

Accordingly, judicial review must await the consummation of the decisionmaking process that Congress provided.

Bennett v. Spear, far from supporting Wyoming (see Wyoming Br. 23-24), demonstrates why a preliminary determination regarding the adequacy of a

particular state plan to support delisting cannot be a final agency action. Bennett involved a challenge to a Biological Opinion issued by FWS on the operation of a reclamation project. As the Supreme Court explained, the ESA and implementing regulations create a decisionmaking process that culminates in the issuance of a Biological Opinion and Incidental Take Statement. See 520 U.S. at 158. The issuance of the Biological Opinion and Incidental Take Statement is the final action that FWS takes in the consultation process established under Section 7(b), 16 U.S.C. 1536(b), and thus marks the consummation of FWS's decisionmaking process. 520 U.S. at 178. Issuance of a Biological Opinion and Incidental Take Statement is thus like a FWS decision to delist a species, or a decision to deny a petition requesting delisting, which is the final action FWS takes pursuant to the process established in ESA Section 4(b), 16 U.S.C. 1533(b).

Wyoming's reliance on HRI, Inc. v. EPA, 198 F.3d 1224 (10th Cir. 2000), is also misplaced. In that case, the Environmental Protection Agency (EPA) asserted jurisdiction under the Safe Drinking Water Act over lands that were Indian country, as well as lands where the Indian country status was "in dispute." An EPA determination that a certain parcel fell into the "in dispute" category was final for purposes of the jurisdictional question, and had the legal consequence of forcing a mining company to apply for an EPA permit. 198 F.3d at 1236-1237.

This bears no relation to the situation here, as statements regarding the current adequacy of Wyoming's wildlife management plan do not create federal jurisdiction where none would otherwise exist. Moreover, unlike the situation here, there was no statutory review scheme at issue in HRI that the plaintiffs evaded by focusing their challenge on a preliminary determination.

In sum, the January 13 letter is not the consummation of the agency decisionmaking process, but represents a preliminary or interlocutory determination in that process. Permitting review of such determinations would bring about a chaotic situation where all manner of interlocutory determinations regarding the status of species could be challenged prior to a final decision on whether to list or delist.[8/]

[8/] The doctrine of exhaustion of administrative remedies provides an alternative grounds for reaching this same result. Generally, a litigant must pursue all available administrative remedies before seeking judicial review of an administrative action. Exhaustion doctrine serves to avoid premature interruption of the administrative process and allow the agency to exercise its discretion and apply its expertise. McKart v. United States, 395 U.S. 185, 193-94 (1969). Here, the ESA creates an administrative process whereby parties can petition to obtain a final agency determination regarding the listing or delisting of species. The exhaustion doctrine requires that a party pursue that available remedy, and allow FWS to complete the administrative process, before seeking judicial review regarding a particular issue that FWS considers during the administrative process. See United Tribe of Shawnee Indians v. United States, 253 F.3d 543, 550-551 (10th Cir. 2001).

B. The January 13 Letter Does Not Determine Rights or Impose Legal Consequences. – The second condition that must be satisfied for agency action to be final is that "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." Bennett, 520 U.S. at 177-78. Bennett found that a Biological Opinion met this condition because it imposed "direct and appreciable legal consequences" on the parties. Id. at 178. Specifically, "the Biological Opinion's Incidental Take Statement constitutes a permit authorizing the action agency to 'take' the endangered or threatened species so long as it respects the Service's 'terms and conditions.'" 520 U.S. at 170. A taking without this permit could have led to severe penalties. Id. "[T]he Biological Opinion and accompanying 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.

The January 13 letter, in contrast, did not "alter the legal regime" to which Wyoming was subject. The letter simply informed Wyoming that its management plan as currently constituted was not sufficiently protective to permit FWS to propose delisting of wolves. The letter invites Wyoming to continue to work with FWS to reach the goal of delisting. See APP 1955 ("the Fish and Wildlife Service is committed to pursuing a proposal to delist the species"). It did not impose any

new requirements or modify the existing legal regime, and unlike Bennett did not place Wyoming in the position of choosing between immediate compliance and exposure to civil or criminal penalties. The letter simply provided a recommended roadmap for addressing FWS' concerns regarding the adequacy of the Wyoming Plan.

Wyoming complains (Br. 29) that changes demanded by the January 13 letter would require Wyoming to alter its law and its management plan to obtain greater authority over wolves. The January 13 letter does not require Wyoming to do anything. It simply makes clear that several aspects of Wyoming's plan and underlying law, particular the designation of wolves as "predators" in most of the State, would not provide sufficient protection for wolves to permit FWS to propose delisting at this time. If Wyoming does not wish to continue to work toward a FWS delisting proposal it can instead keep its current law unchanged and petition for delisting (as it recently has). If FWS then determines pursuant to 16 U.S.C. 1533(b)(3)(B)(ii) that delisting is not warranted due to concerns about Wyoming's wolf management plan, Wyoming could challenge that decision and obtain a court ruling as to whether its plan is adequate. Plainly, the January 13 letter does not serve as an "order" requiring Wyoming to change its law.

Even if Wyoming could somehow obtain a court order holding that FWS must accept Wyoming's current plan, that would simply begin a rulemaking process on delisting, which would eventually result in a final decision on delisting that would be subject to judicial review on the basis of a comprehensive rulemaking record. This Court "has cautioned against finding finality where judicial '[i]ntervention leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary.'" Sierra Club v. Yeutter, 911 F.2d 1405, 1418 (10th Cir. 1990), quoting from Standard Oil Co., 449 U.S. at 242.

The January 13 letter did not alter the legal regime to which Wyoming was subject, but simply stated FWS' view of what the ESA requires and where Wyoming stood in terms of meeting those requirements. A letter that "'outlines the [agency's] views,'" but does not "order[] the state or any other party to take any particular action" does not fulfill the second part of the Bennett test. Public Service Co. of Colorado v. EPA, 225 F.3d 1144, 1148 (10th Cir. 2000); see also Chemical Weapons Working Group, Inc. v. U.S. Dept. of the Army, 111 F.3d 1485, 1495 (10th Cir. 1997) (Defense Secretary's certification to Congress that operational test of incinerator was complete was not final agency action); National Ass'n of Home Builders v. Norton, _ F.3d _, 2005 WL 1591058 (D.C. Cir. 2005)

(FWS' promulgation of a survey protocol providing instructions to avoid "takings" under the ESA was not final agency action because it did not change the legal obligations of any party); Independent Equipment Dealers Ass'n v. EPA, 372 F.3d 420, 427-28 (D.C. Cir. 2004) (court "lacked authority to review claims where an agency merely expresses its view of what the law requires of a party, even if that view is adverse to the party").

Appellants' reliance on Pennaco Energy Inc. v. U.S. Dep't of the Interior, 377 F.3d 1147 (10th Cir. 2004), is misplaced. Pennaco involved a challenge by oil companies to a decision of the Interior Board of Land Appeals (IBLA) finding that three oil and gas leases were invalid due to the agency's failure to comply with the National Environmental Policy Act (NEPA). The IBLA decision represented the Department's final adjudication of the adequacy of the environmental statement prepared pursuant to NEPA. See 43 C.F.R. 4.1(b)(3), 4.5 (delegating Secretary's authority to IBLA). As such, it represented the consummation of a separate agency decisionmaking process. Moreover, the IBLA's decision altered the legal regime to which the oil companies were subject by invalidating the leases that they had received from the Bureau of Land Management. Indeed, all parties in Pennaco agreed that the decision at issue was final agency action. Pennaco, 337 F.3d at 1555.

Finally, the fact that Montana and Idaho were granted additional authority over wolves in 2005 pursuant to Section 10(j) of the ESA (see supra at 9 n.2) did not somehow have the effect of making the January 13, 2004 letter final, as Wyoming suggests. Wyoming provides no authority supporting its remarkable suggestion that a non-final letter can retroactively be rendered final by some later agency action. At any rate, the rulemaking that granted additional authority to Montana and Idaho was a separate proceeding that did not even deal with delisting, and was not challenged by any party. Wyoming apparently believes that it is entitled to similar changes in the 10(j) rules as were made for Montana and Idaho. Its remedy is plain - it can petition FWS to make such changes, and indeed has recently done so (see supra at 22). But Wyoming cannot claim that the January 13 letter was somehow the equivalent of a final rule rejecting such desired changes. As the January 13 letter imposed no legal consequences on Wyoming, it fails to meet the second Bennett test for final agency action.

C. Alternatively, the Issues Raised by the January 13 Letter Are Not Ripe for Adjudication. – While the district court correctly dismissed for lack of a final agency action, this Court could affirm the judgment below on the alternative but related ground that the controversy is not ripe. The questions presented here – whether the regulatory mechanisms adopted by Wyoming are adequate to maintain

wolves at a recovery level – are mixed questions of law and fact that are best resolved on the basis of the full record that will be developed in the process recently initiated by Wyoming's petition to delist the wolf. In that proceeding, Wyoming's plan will be considered in the context of all threats affecting the wolf in the three-state area, and all existing regulatory mechanisms, state and federal, that will address those threats. FWS will consider all five factors under 16 U.S.C. 1533 (a)(1), not just regulatory issues. It will also consider the factual evidence which Wyoming believes is pertinent to its petition. The record for the January 13 letter does not relate to these broader issues, and reflects the fact that there was no formal agency process or agency fact finding. This Court has held similar informal determinations unripe when there was an opportunity for the agency to consider the issues in a more comprehensive proceeding. See Coalition For Sustainable Resources, Inc. v. U.S. Forest Service 259 F.3d 1244, 1251-1253 (10th Cir. 2001); Sierra Club v. Yeutter, 911 F.2d at 1418-1419. Accordingly, this Court could affirm the decision below on grounds that the controversy over whether Wyoming's management plan is adequate to support delisting is not ripe.

II

THIS COURT SHOULD DECLINE TO CONSIDER CLAIMS THAT WERE NOT RULED ON BY THE DISTRICT COURT

Having found that it lacked jurisdiction under the APA to consider the challenges to the January 13 letter, the district court properly declined to consider the merits of appellants' claims. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998) (addressing merits in face of finding of lack of jurisdiction would violate separation of powers); Gold v. Local 7 United Food and Commercial Workers Union, 159 F.3d 1307, 1309-1310 (10th Cir. 1998). Even if this Court disagrees with the district court's holding that the January 13 letter was not final agency action, the proper course would be to remand rather than determine the merits issues as appellants urge. In Singleton v. Wulff, 428 U.S. 106, 120 (1976), the Supreme Court stated the "general rule" that "a federal appellate court does not consider an issue not passed upon below," and found that it was "an unacceptable exercise of its appellate jurisdiction" for a court of appeals to reverse a district court's dismissal of case for lack of jurisdiction and then rule on the merits. Following this rule, this Court has exercised its discretion to rule on issues not ruled on below only in "unusual circumstances," such as where "proper resolution of the issue was beyond doubt and injustice would otherwise result." Lyons v. Jefferson Bank & Trust, 994 F.2d 716, 721 (10th Cir. 1993), citing Petrini v. Howard, 918 F.2d 1482, 1483 n. 4 (10th Cir. 1990); see also Tele-Communications, Inc. v. C.I.R. , 104 F.3d 1229, 1233 (10th Cir. 1997) ("Thus, an issue must be

presented to, considered and decided by the trial court before it can be raised on appeal").

No unusual circumstances are presented here, and there would be no injustice in allowing the district court to rule first on the challenges to the January 13 letter should this Court determine it is reviewable. This Court should follow its usual practice of remanding so that the district court can first consider the merits of Wyoming's challenge. See, e.g., Committee to Save the Rio Hondo v. Lucero, 102 F.3d 445, 452 (10th Cir. 1996) (remanding case to district court for consideration on merits after reversing district court's dismissal for lack of standing); United States v. Colorado Supreme Court, 87 F.3d 1161, 1167 (10th Cir. 1996) (same); Riggs v. City of Albuquerque, 916 F.2d 582, 587 (10th Cir. 1990) (same); see also In re R. Eric Peterson Construction Co., Inc., 951 F.2d 1175, 1181-82 (10th Cir. 1991).

Wyoming's reliance (Br. 31 n.3) on Katt v. Dykhouse, 983 F.2d 690, 695 (6th Cir. 1992), is misplaced. First, that was not an "APA case" as Wyoming maintains, but a First Amendment challenge to a state Insurance Commission's rule forbidding insurance agents from informing customers about the availability of commission rebates. See 983 F.2d at 691. The Sixth Circuit, after reversing the district court's dismissal based on res judicata, did not adjudicate the merits of the

plaintiff's case, but merely decided that an alternate ground for dismissal urged by the Insurance Commission (that plaintiffs' proposed speech was unprotected by the First Amendment because the speech would involve illegal activity) was without merit. Id. at 694. The Court remanded, making clear that "we express no opinion on the ultimate outcome of this litigation." Id. at 697. Wyoming here asks the Court to resolve the merits of this case, and even to "order the Federal Defendants to approve the Wyoming Plan as written." Br. 43. This is far different from the situation in Katt, and plainly improper.

III

THE CONCLUSIONS IN THE JANUARY 13 LETTER REGARDING THE WYOMING PLAN WERE NOT ARBITRARY, CAPRICIOUS OR CONTRARY TO THE ESA

Even if Wyoming's contentions regarding the January 13 letter were properly before this Court, they would have to be rejected. This letter reiterated FWS' longstanding concerns that Wyoming's proposed management of wolves as "predators" subject to unregulated killing in nearly all of the wolf's statewide range outside the National Parks, its failure to clearly commit to manage for seven packs outside the parks and for 15 packs total, and its failure to adopt an adequate definition of pack all indicated that Wyoming did not currently afford adequate protection to justify a proposal to delist wolves. Wyoming attacks these

conclusions by arguing that the January 13 letter was 1) tainted by factors that Congress did not intend to be considered in this context (Br. 31-34); 2) contrary to "the best scientific evidence regarding the adequacy of the Wyoming Plan" (Br. 35-38); and 3) based on arbitrary and unexplained changes in agency position (Br. 38-42). None of these charges is supported by the record.[9/]

Assuming that this Court finds that it can review the January 13 letter pursuant to the APA, it must be guided by the well-established deferential standards for review of an agency determination that falls within its sphere of expertise. See, e.g., Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989).

[9/] Contrary to Wyoming's argument (Br. 50-51), the district court did not abuse its discretion in determining that if Director William's January 13 letter was considered a "final agency action," then testimony by a different government official given two days after the letter was sent should not be made part of the administrative record. See 1/07/05 opinion denying motion to supplement record with testimony before a Committee of the Wyoming Legislature by Paul Hoffman, Deputy Assistant Secretary for Fish and Wildlife and Parks. Mr. Hoffman made clear that the January 13 letter, not his testimony, presented the agency's position regarding the problems inherent in the Wyoming Plan, and that FWS Director Williams was the official with authority to speak on that issue. APP 513-514. The district court plainly did not abuse its discretion by finding that the existing administrative record was adequate, and that there was no need to supplement the record with post-hoc testimony that did not purport to be the official FWS position. See Custer County Action Ass'n v. Garvey, 256 F.3d 1024, 1028 (10th Cir. 2001) ("[t]he circumstances which warrant consideration of extra-record materials are 'extremely limited'").

A. The Determinations in the January 13 letter were not based on improper factors. – Wyoming maintains (Br. 32) that the ESA requires that FWS "shall not consider any factors not related to the biological status of the species," when it is reviewing a state management plan. It contends (id.) that FWS violated this alleged mandate by considering "political concerns." Wyoming is wrong on both counts.

The ESA mandates that the Secretary's determinations regarding the listing, delisting, or reclassification of a species be made "solely on the basis of the best scientific and commercial data available to him [or 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, or any political subdivision of a State or foreign nation, to protect such species * * *." 16 U.S.C. § 1533(b)(1)(A). While the best available science requirement applies to determinations regarding whether to list, delist, or reclassify a species, FWS here was taking steps preliminary to issuing a possible proposed ruled. As the district court pointed out (Op. 33, 39), in its evaluations preliminary to issuing a proposed rule, FWS may consider a broad array of sources, not limited to scientific and commercial data. There is no evidence that Congress intended the best available science directive to apply to FWS correspondence regarding these preliminary matters.

Even assuming that the "best scientific and commercial data available" mandate applied to the preliminary determination at issue here, that requirement would not limit FWS to considering only the "biological status of the species," (Wyo. Br. 32), and plainly does not bar FWS from considering whether Wyoming's management regime would effectively regulate interactions between wolves, humans and their livestock. Congress specifically required the agency to consider "the inadequacy of existing regulatory mechanisms," before listing or delisting a species. 16 U.S.C. 1533(a)(1)(D). Consideration of the likely effectiveness of Wyoming's management plan is particularly vital in this case, where the record shows that excessive human-caused mortality was almost the sole reason that wolves were driven to the brink of extinction in the first place. APP 1503; 2294. The effectiveness of the Wyoming Plan depends directly on considerations such as FWS pointed to in its January 13 letter. See APP 1955 (pointing out that unregulated harvest of wolves permitted by Wyoming's proposed "predator" status, along with problems in the proposed monitoring plan and unit boundaries, made it impossible to find that regulatory mechanisms would be adequate to assure that the wolf population will remain above recovery levels). Wyoming's view that FWS considered improper non-biological factors is contrary to the statutory scheme. See Fund for Animals v. Babbitt, 903 F. Supp. 96, 110 n.4

(D.D.C. 1995) (court rejects claim that FWS relied on improper factors, and notes that "[t]he ESA's listing and delisting factors include considerations of manmade factors affecting the species' continued existence and overutilization of grizzly bears," and that "social consequences that might increase human-caused mortality are relevant, and consideration of such factors is not impermissible"). See also 50 C.F.R. 424.13 (confirming that "[w]hen considering any revision of the lists, * * * [d]ata reviewed by the Secretary may include, but are not limited to scientific or commercial publications, administrative reports, maps or other graphic materials, information received from experts on the subject, and comments from interested parties") (emphasis added).

Wyoming's claim (Br. 34) that FWS relied on "political concerns " rather than biological concerns is also unsupported by the record. Wyoming (Br. 32-33) picks out scattered statements by FWS personnel regarding the likely public reaction to Wyoming's management plan, but does not point to anything in the January 13 letter indicating that these concerns drove the decision not to propose listing at this time.[10/] In fact, the letter makes clear that FWS's reasons for not

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[10/] Wyoming particularly complains about statements by Interior officials to the effect that the agency was striving "to ensure that a decision to delist wolves will be sustainable in the event of litigation and subsequent judicial scrutiny," (APP 1739, letter from Craig Manson), and charges that the focus on litigation was improper. It was plainly not improper for the agency to strive to ensure that a

accepting Wyoming's plan had to do with the substance of Wyoming's approach. APP 1955-1956 (pointing out that "the unregulated harvest, inadequate monitoring plan, and unit boundaries proposed by the state's management plan do not provide sufficient management controls to assure the Service that the wolf population will remain above recovery levels," as well as the fact that the plan failed to clearly commit to managing for at least 15 packs, and failed to adopt a definition of "pack" that was biologically sound). As these concerns are clearly appropriate under the ESA, Wyoming's claim that the FWS relied on improper factors must be rejected.

B. FWS Properly Utilized Peer Reviewers. – Wyoming argues (Br. 35 - 38) that FWS' findings in the January 13 letter were arbitrary and capricious because most of the peer reviewers concluded that the three state management plans taken together would probably conserve a recovered wolf population. But as noted supra at 18-19, several of the peer reviewers who evaluated the Wyoming Plan questioned its adequacy and, in particular, the classification of the gray wolf as a predatory animal. See APP 1910, 1916, 1926, 1928. Moreover, the Service is entitled to rely on its own experts' conclusions that the "predatory animal"

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delisting decision would comply with the law, so as to survive likely litigation. In any event, it does not appear that either litigation concerns or concerns about public reaction were factors in the January 13 letter which Wyoming claims was the agency's final decision.

classification would make it impossible to ensure that wolves would remain at or above recovery levels. APP 1791-1797, 1955-1956. FWS' independent assessment of the Wyoming Plan is particularly significant in light of the fact that the peer reviewers were for the most part unaware of the conflict between the plan and Wyoming law. APP 2504 ("It is understandable how most reviewers, who were not aware of the wording in the state law or the background of its development, believed that Wyoming's management plan could be considered adequate to conserve the overall wolf population."). Moreover, those peer reviewers who believed that the Wyoming Plan was adequate relied heavily on the relative strength of the Idaho and Montana plans. APP 2504 ("most reviewers commented that the Wyoming Plan was adequate primarily because of the adequate wolf management plans developed in the adjacent States") (emphasis in original). FWS was entitled to conclude that its obligation to assure that wolves would not again fall below recovery levels did not allow it to approve a state management plan simply because the plans of neighboring states might make up in part for its shortcomings.

Contrary to Wyoming's assumption (Br. 37), the FWS is not required to adopt the majority view of a group of peer reviewers. Because the FWS is operating within its congressionally mandated area of expertise, it is permitted to

choose among competing scientific opinions. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989) ("[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive"); Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515, 1527 (10th Cir. 1992) (same). Peer review commentary was only one part of the body of data before FWS. FWS' position articulated in the January 13 letter was reasonably related to the entire body of facts before the agency.

C. The January 13 Letter Did Not Represent Unexplained Changes of Position -- Wyoming's argument (Br. 38) that FWS changed its position on the Wyoming Plan is based on a selective presentation of isolated statements from the record. Those statements, however, even if somehow inconsistent with the January 13 letter, did not bind the Service. See Smiley v. Citibank, 517 U.S. 735, 741-742 (1996) (preliminary statements of subordinate agency personnel do not bind the agency). If one assumes that the January 13 letter was a "final agency action" then that letter must be the focus of review, and earlier non-binding statements of agency personnel are of no relevance.[11/] Indeed, FWS had made clear that in

[11/] Wyoming's reliance (Br. 38) on Squaw Transit Co. v. United States, 574 F.2d 492 (10th Cir. 1978), is misplaced; in that case, an agency order was reversed because the agency failed to apply criteria that it had formally announced would be

commenting on drafts of a wolf management plan, the Service could not ""pre-approve' Wyoming's Plan" and that "[t]he Plan must be judged as a complete package, rather than by its individual parts." APP 1813.

In any event, the record demonstrates that the FWS was consistent in its criticism of the Wyoming Plan, and that the January 13 letter did not contain any departures from announced agency positions. Wyoming asserts (Br. 39) that the January 13 letter represented a "change in position" from the originally announced intent to judge the three states' plans as a group. However, FWS never took the position that it would approve a deficient management plan just because the other two states had adequate plans. Wyoming next contends (Br. 39-40) that FWS changed its position regarding the acceptability of a "predator classification," but as described supra at 12-20, FWS consistently questioned the efficacy of any plan that relied on the "predator" designation in significant areas of the State.

FWS' position on the need to maintain 15 packs within Wyoming has been consistent, contrary to Wyoming's argument at Br. 40-41. FWS made clear early that it would not proceed "with the delisting process unless State law

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controlling. See 574 F.2d at 495-96. Here, Wyoming attempts to create a conflict by pointing to informal statements of subordinate agency officials that were never represented to be controlling (and which were not, in fact, inconsistent with the January 13 letter).

unambiguously authorizes implementation of a state wolf management plan that will conserve wolves above recovery levels." APP 1793; see also APP 1791 ("there must be a minimum of 15 packs in Wyoming * * * at least 7 of those wolf packs must be maintained outside Yellowstone and Grand Teton National Park."). The Wyoming Plan and Wyoming law are in conflict or, at a minimum, highly ambiguous regarding the number of packs that Wyoming is committed to maintaining outside of the National Parks. Section 23-1-304 can be reasonably interpreted as preventing the Commission from maintaining the goal of seven or more packs outside of the National Parks by proscribing the reclassification of wolves from predatory animals to trophy game animals if there are more than 15 packs in Wyoming in total. See supra at 15. FWS ultimately concluded that, read together, the Wyoming Plan and state law did not ensure the long-term conservation of the gray wolf at or above recovery levels, and that conclusion was consistent with its position throughout this controversy.

FWS has consistently maintained that the definition of a "pack" must correlate to a breeding pair, so that the definition can be used as a substitute for the definition presently utilized to determine recovery levels. APP 1794. Five or more wolves traveling together does not necessary correlate to a breeding pair because this definition could include 1 adult wolf and 4 pups. With the January 13 letter,

the Director simply made clear that current biological information indicated that at least six wolves traveling together in the winter were needed to have a high likelihood that the wolf pack would include at least 1 breeding pair. APP 1956. Thus, the FWS position has consistently been that the definition of a "pack" should be biologically based and reflect whether wolves are maintaining recovery levels.

IV

FWS HAS NOT VIOLATED THE TENTH AMENDMENT OR THE GUARANTEE CLAUSE

The district court thoroughly refuted Wyoming's Tenth Amendment and Guarantee Clause claims. As the district court explained (Op. 61), federal regulation of a threatened species like the gray wolf is plainly a constitutional exercise of federal authority under the Commerce Clause.[12/] Regulation of listed species can be returned to states through delisting, but that is expressly made contingent on states possessing regulatory mechanisms adequate to assure that the species will not again need federal protection. States may participate in the development of management plans so as to further the delisting process, but this hardly suggests that the ESA thereby "commandeers" a state's legislative or

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[12/] See Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003) (upholding ESA as a valid exercise of Congress' Commerce Clause power); GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003) (same); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000) (same).

executive departments "by directly compelling them to enact and enforce a federal regulatory program." New York v. United States, 505 U.S. 144, 161 (1992). The provisions of the ESA that allow for state management plans exemplify the type of cooperative federalism that the Supreme Court has repeatedly upheld. See, e.g., FERC v. Mississippi, 456 U.S. 742, 765 (1982); Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288 (1981).

On appeal, Wyoming insists (Br. 46) that "it is not making a facial challenge to the constitutionality of the ESA, but instead submits that the decisions of the Federal Defendants under the ESA as applied to Wyoming violate the Tenth Amendment." Wyoming's current constitutional argument hinges on its contention that FWS "demanded" changes in Wyoming law in order to "promote a federal political agenda unrelated to the legal requirements of the ESA." Br. 45-46. Even if there were substance to this allegation (which there is not – see supra at 45-46), it would not state a constitutional claim. This argument is simply a reformulation of Wyoming's statutory claim that FWS considered improper "political" factors in determining that the Wyoming Plan and Wyoming Law were not sufficient to permit a proposal to delist wolves at this time. The argument fails for the same

reasons as the statutory claim fails.[13/] At any rate, the Tenth Amendment is a restraint on congressional power, New York v. United States, 505 U.S. 144, 156, 177-178 (1992), and Wyoming suggests no authority indicating that an agency's allegedly errant application of a concededly constitutional statutory provision can somehow violate the Tenth Amendment.[14/]

V

THE DISTRICT COURT LACKED JURISDICTION OVER CLAIMS BROUGHT UNDER 5 U.S.C. § 706 (1)

Appellants contend that they are entitled to relief under Section 706(1) of the APA because FWS allegedly "unreasonably delayed or unlawfully withheld" agency action by (1) failing to evaluate the adequacy of the Wyoming plan based

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[13/] Moreover, as a claim that could be brought under the APA, Wyoming's purported constitutional claim must comply with established limits on APA review. See e.g., Maxey v. Kadrovach, 890 F.2d 73, 75 (8th Cir.1989), cert. denied, 495 U.S. 933 (1990). Accordingly, the absence of a final agency action is also fatal to Wyoming's constitutional challenges to the January 13 letter.

[14/] The same rationale applies to Wyoming's Guarantee Clause claim. That Clause provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government...." Art. IV, § 4. The Clause applies to federal laws that "restructure the basic institutional design of the system a state's people choose for governing themselves." Kelley v. United States, 69 F.3d 1503, 1511 (10th Cir. 1995) (emphasis in original). To bring a Guarantee Clause claim, a plaintiff must at the very least allege that an Act of Congress improperly attempts to restructure the design of a state government. Here, Wyoming does not claim that the ESA achieves that forbidden result, but just reiterates its statutory claims against FWS.

solely on the best available science, and (2) failing to manage depredating wolves in contravention of the Service's regulations. Wyo. Br. at 48-50; Coalition Br. at 45-51. The district court properly dismissed these claims because appellants failed to demonstrate essential prerequisites for an action under §706(1). As stated in Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373, 2379 (2004) (SUWA), "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" (emphasis in original). Moreover, the action which plaintiffs seek to compel must be "'a ministerial or non-discretionary act.'" Id., quoting from Attorney General's Manual on the Administrative Procedure Act 108 (1947). This suit is not aimed at those sorts of agency actions, and § 706(1) accordingly does not apply.

A. The Alleged Failure to Use the Best Available Science Cannot Form the Basis for a §706(1) Claim. – Assuming, arguendo, that the "best available science" mandate applies to FWS's review of a state management plan (but see supra at 43-44), it is clear that an alleged failure in this regard could not form the basis of a §706(1) claim. The best available science requirement is not a free-standing statutory obligation, but governs the manner in which FWS takes action to list or delist species. SUWA makes clear that a statutory requirement for an agency to consider certain factors cannot by compelled by a suit under §706(1).

See 124 S. Ct. at 2380 (statutory requirement to consider multiple use could not be enforced by suit under § 706(1)). The best available science requirement of Section 4 is precisely the sort of "broad statutory mandate[]" that SUWA makes clear cannot be enforced through a §706(1) action. Id. at 2381; see also Center for Biological Diversity v. Veneman, 394 F.3d 1108 (9th Cir. 2005) (duty under Wild and Scenic Rivers Act, 16 U.S.C. 1276(d)(1), for agencies to consider impacts of actions on potentially eligible rivers cannot be enforced in suit under §706(1).[15/]

B. FWS' Management of Depredating Wolves is Not Subject to Suit Under §706(1). – As the district court noted (Op. 41-43), the applicable regulations give FWS discretion in determining how to deal with depredating wolves, thus rendering §706(1) inapplicable. 50 C.F.R. 17.84(i)(3)(vii) provides that the Service "may take wolves that are determined to be 'problem' wolves" and wolves "may be relocated or moved to other areas within the experimental population area if continued depredation occurs." (Emphasis added). Thus, while 50 C.F.R. 17.84(i) grants FWS authority and discretion to control the wolf

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[15/] Insofar as appellants' §706(1) claim relies on 16 U.S.C. 1533(c), which requires the Secretary to review the status of listed species every five years, FWS discharged that obligation in 2003 when it conducted a nationwide status review and issued new rules changing the status of gray wolves from endangered to threatened in Wyoming and neighboring states. See APP 2271 et seq.

population, it does not require the Service to take particular discrete actions in particular circumstances.[16/]

This Court in Gordon v. Norton, 322 F.3d 1213 (10th Cir. 2003), recognized the wide discretion 50 C.F.R. 17.84(i) provides FWS. Because of this discretion, complaints like those here that target FWS' management of depredating wolves are not ripe for review until FWS has been asked to remove particular wolves and has made a final determination regarding what action to take. Gordon, 322 F.3d at 1220-1221. The complaints regarding wolf depredation here are even less specific than those in Gordon, and consequently not ripe for review. Even if otherwise ripe, however, they could not support a claim under §706(1), since that provision only authorizes relief where an agency has a duty to undertake a discrete, non-discretionary actions. SUWA, 124 S. Ct. at 2379.

Wyoming isolates (Br. 50) a single sentence of 50 C.F.R. 17.84(i)(3)(vii), which states that "all chronic problem wolves (wolves that depredate on domestic animals after being moved once for previous domestic animal depredations) will be removed from the wild (killed or placed in captivity)." In context, it is plain that

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[16/] Wyoming's recent Petition for Amendment of 50 C.F.R. 17.84(i) requests "four fundamental changes" in 50 C.F.R. 17.84(i). Petition at 2 (see attachment to Brief). The first is to "make certain management actions mandatory." Id. Thus, Wyoming itself recognizes that management actions under the current rule are discretionary.

this statement regarding what FWS "will" do with chronic problem wolves does not mean that FWS is divested of discretion in this situation. Even the stronger term "shall" has been found not to divest the usual discretion officials have in an enforcement context. See Town of Castle Rock, Colo. v. Gonzales, 125 S. Ct. 2796, 2806 (2005). Moreover, chronic problem wolves are removed only when strict criteria are met – there must be 1) evidence of wounded or killed livestock that shows that injury or death was caused by wolves, 2) reason to believe that additional livestock losses would occur, and 3) on public lands, approved animal husbandry practices must have been followed. 50 C.F.R. 17.84(i)(3)(vii)(A-C). Appellants have not identified any particular instance where these criteria have been met yet FWS has not taken action. Hence, even if this sentence could otherwise create a non-discretionary duty, it is not applicable here.

Rather than identify particular wolf problems, appellants here seek broad programmatic relief relating to wolf depredation. See APP 53 (Wyoming seeks injunction requiring FWS to "control wolf depredation"); APP 260 (Coalition seeks injunction "mandating that the defendants properly manage and control the gray wolf population"). That type of relief is unavailable under the APA. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 891, 893 (1990); SUWA, 124 S. Ct. at 2379-80.

VI

THE DISTRICT COURT CORRECTLY DISMISSED THE WOLF COALITION'S NEPA CLAIM

The Wolf Coalition (Br. 51-57) argues that FWS violated NEPA by failing to prepare a supplemental environmental impact statement (SEIS) to supplement the EIS prepared in 1994 for the Recovery Plan (see supra at 8). The Coalition's argument is confusing, because it mixes together two different theories. First, the Coalition appears to believe that the January 13 letter represented a new decision by FWS "to 'reintroduce' wolves into the remainder of Wyoming," a decision that should have been analyzed in an SEIS. Br. 56-57. Second, the Coalition seems to argue that even if there was no new decision, the spread of the wolves by itself was a new circumstance that needed consideration in an SEIS.

Neither argument can succeed. The first theory fails because, as explained, supra, the January 13 letter was not a final agency action, and thus there was no jurisdiction under the APA to consider the claim that the letter triggered a duty under NEPA to prepare an SEIS. See Colorado Farm Bureau Federation v. Forest Service, 220 F.3d 1171, 1173 (10th Cir. 2000) ("Because NEPA does not provide for a private right of action, plaintiffs rely on the judicial review provisions of the APA * * * [and] must establish that defendants took 'final agency action for which

there is no other adequate remedy in court.' 5 U.S.C. §704."). Even putting aside this jurisdictional barrier, the January 13 letter would not constitute a "proposal" for a major federal action such that NEPA would apply. The letter just explains that FWS is not willing to propose action at this time, and hence is plainly not subject to NEPA duties. See Utah v. Babbitt, 137 F.3d 1193, 1214 (10th Cir. 1998).

To the extent that the Coalition argues that the expansion of the wolf population since the 1994 EIS requires an SEIS, the claim is plainly barred by SUWA. In SUWA, the Court considered a suit seeking to compel Interior to undertake an SEIS because off-road vehicle use had increased in a wilderness study area since an earlier EIS. Id. at 2378. The Court found that to trigger the requirement that an agency conduct a supplemental NEPA analysis, there still must be major Federal action to occur. Id. at 2384-85 ("[S]upplementation is necessary only if 'there remains 'major Federal actio[n]' to occur' as that term is used in §4332(2)(C)") (citing Marsh, 490 U.S. at 374). Once a land use plan has been approved, the Court explained, there is no further major Federal action to occur at the plan level. Id. at 2385.

Like the approval of a land use plan in SUWA, the Secretary's authorization of the wolf reintroduction plan – and decision to set guidelines and restrictions to

ensure that the reintroduction will ensure the conservation of the wolf – was consummated with the issuance of the Final Rule on November 22, 1994. See 59 Fed. Reg. 60252. The decision to adopt the Final Rule was preceded by preparation of an EIS, but the "major Federal action" was completed, at the very latest, when wolves were reintroduced in 1995-1996 (see supra at 9). SUWA makes clear that FWS is under no obligation to perform additional NEPA analyses unless the Final Rule is amended or revised, which has not occurred. The Coalition's claims that the FWS was required to prepare a supplemental EIS were properly dismissed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

KELLY A. JOHNSON
Acting Assistant Attorney General
Environment & Natl. Resources Div.

KRISTEN L. GUSTAFSON
JIMMY A. RODRIGUEZ
M. ALICE THURSTON
DAVID C. SHILTON
Attorneys, U.S. Dept. of Justice
P.O. Box 23795
Washington, D.C. 20026
(202) 514-5580

Of counsel:

DAVID GAYER
MARGOT ZALLEN
Office of the Solicitor
U.S. Dept. of the Interior

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STATEMENT REGARDING ORAL ARGUMENT

Counsel for the United States believes that oral argument may aid the Court in understanding the issues presented in this case.

David C. Shilton

BRIEF FORMAT CERTIFICATION

I certify that this brief is proportionally spaced, has a typeface of 14 points, and contains 13,905 words as counted by counsel's word processing program (Wordperfect 9).

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David C. Shilton

CERTIFICATE OF SERVICE

I certify that copies of the foregoing brief have been served by first class United States Mail, and by e-mail as indicated, on this 8th day of August, 2005, on the following counsel:

Jay A. Jerde
123 Capitol Building
Cheyenne, WY 82001
JJERDE@state.wy.us

Timothy C. Kingston
Graves, Miller & Kingston
408 W 23 St
Cheyenne, WY 82001
kingston@rockymtnlaw.com

James F. Davis
1002 Sheridan Ave
Cody, WY 82414
jdavis@parkcounty.us

Douglas L. Honnold
Abigail M. Dillen
Mark W. Poe
Earthjustice
209 South Wilson Ave
Bozeman, MT 59715
dhonnold@earthjustice.org

Thomas M. France
National Wildlife Federation
240 N. Higgins, Ste 2
Missoula, MT 59802
france@nwf.org

Thomas F. Darin
P. O. Box 2728
Jackson, WY 83001
tom@jhalliance.org

Harriet M. Hageman
Hageman & Brighton
1822 Warren Ave.
Cheyenne, WY 82001
hhageman@hblawoffice.com

Jack Tuholske
Tuholske Law Offce -
P.O. Box 7458
Missoula, MT 59897
tuholske@centric.net

Pursuant to 10th Circuit Emergency General Order, October 20, 2004, I further certify that:

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

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/S

David C. Shilton
Attorney, U.S. Department of Justice
P.O. Box 23795, L'Enfant Plaza Station
Washington D.C. 20026