FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING
JUL 24 2007
Stephan Harris, Clerk
Cheyenne

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING, Petitioner, BOARD OF COMMISSIONERS OF THE COUNTY OF PARK, Petitioner-Intervenor, WYOMING WOOL GROWERS ASSOCIATION, et al., Petitioners-Intervenors, vs. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Respondents, SIERRA CLUB, et al., Respondents-Intervenors, NATIONAL WILDLIFE FEDERATION, et al., Respondents-Intervenors.	)	Civil Action No. 06-CV-0245-J

REPLY BRIEF
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ARGUMENT

I. This Court should not defer to the Service's analysis and conclusions regarding the adequate regulatory mechanism factor.

The Federal Defendants have not rebutted two of the State's three arguments regarding deference. In response to the argument that they are not entitled to deference because the analysis and conclusions regarding the adequate regulatory mechanism factor in the 12 month finding are unreasonable, the Federal Defendants merely state that their explanation "is more than adequate" and accuse the State of mischaracterizing the standard of review. (Fed. Br., at 15 n.5, 18). They have not challenged or otherwise refuted the factual and legal bases supporting the State's argument that their biological analysis and conclusions are unreasonable.

In response to the argument that this Court should not defer to the analysis and conclusions because the Federal Defendants ignored their own experts, the Federal Defendants accuse the State of taking isolated statements out of context. (Fed. Br., at 20 n.8). They give only one example to support this accusation, claiming that the State was "disingenuous" in citing a four page document with the Bates Numbers AR 15586-15590 for the proposition that Mr. Bangs acknowledged that Mr. Williams ignored his advice in initially rejecting the Wyoming Gray Wolf Management Plan ("Wyoming Plan") in January 2004. (Id.). As previously argued in the Opening Brief, the statement "*[t]he Secretary's final determination differs from my recommendation*" in this document confirms that the Federal Defendants did not follow the advice of their own wolf biologist in evaluating the adequate regulatory mechanism question.

In response to the argument that this Court should not defer to the analysis and conclusions because the Federal Defendants prejudged their decision on the adequate regulatory mechanism issue, the Federal Defendants rely on an email authored by Ed Bangs on April 19, 2006, in an attempt to show that they did not prejudge the issue. The Federal Defendants argue that the phrase "no matter what the outcome" in the third sentence of the email clearly shows that they did not prejudge the decision on the adequate regulatory mechanism issue. (Fed. Br., at 39).

The phrase "no matter what the outcome" in no way changes the obvious meaning of the statement "[b]ut since we know that our response will kick off the next round of litigation by

WY" in the second sentence of the email. (See AR 11509). Only one response to the petition to delist would "kick off the next round of litigation by WY" — a denial of the petition. The phrase "[b]ut since we know that our response will kick off the next round of litigation by WY" thus permits only one reasonable inference – that Mr. Bangs knew the Service would deny the petition to delist even though he had not fully evaluated the petition.

II. The Service's denial of the petition to delist was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

A. Peer review of the Wyoming Plan

The Federal Defendants make alternative arguments in an attempt to defend their decision to disregard the peer review findings. They first contend that they properly disregarded the peer review findings for the four reasons listed in the 12 month finding. (Fed. Br., at 34-35). In support of this argument, the Federal Defendants offer only conclusory statements and do not rebut or otherwise refute the State's argument that the four stated reasons for disregarding the peer review findings in the 12 month finding lack merit factually and legally.

In the alternative, the Federal Defendants argue that their "conclusions regarding the classification of the wolf as a 'predatory animal' are rational and supported by at least [four] of the peer reviewers and the [Service's] own evaluation of the biological consequences of the Wyoming Plan." (Fed. Br., at 38). This statement belies the evidence in the administrative record.

As an initial matter, it is important to note that, in both the January 2004 letter and the 12 month finding, the Federal Defendants ultimately determined that wolves cannot be classified as predators anywhere in Wyoming. They contend that Dr. Kyran Kunkel, Dr. Daniel Pletscher, Mr. Adrian Wydeven, and Mr. James Hammill made a similar determination. (Fed. Br., at 35-36). However, an honest reading of their respective peer reviews shows that none of these experts concluded that a predator classification for wolves in Wyoming was *per se* unacceptable.

Dr. Kunkel referred to the predatory animal classification as a "concern," but he ultimately concluded that "[t]he dual classification will be O.K. as long as enough area is included in trophy management class as described above." (AR 462). Dr. Pletscher also referred

to the animal classification as a "concern," but he stated that the classification "*probably* won't make a difference in maintaining the desired number of wolf packs in Wyoming[.]" (AR 466)(emphasis in original). Although Mr. Wydeven opined that the predatory animal classification is "an extreme form of wolf management" and that the trophy game classification "would provide much more sound conservation of wolves," he did not conclude that wolves could not be classified as predators anywhere in Wyoming. (AR 475). Similarly, although Mr. Hammill stated that "Wyoming's plan exposes wolves in Wyoming to risk of catastrophic loss outside of [the] National Parks and Parkway," he also did not conclude that wolves could not be classified as predators anywhere in Wyoming. (AR 478). Viewed objectively, these peer reviews do not support the Federal Defendants' demand that the State eliminate the predator classification for wolves.

The Federal Defendants' contention that their conclusions regarding the predator classification are rational represents nothing more than an attempt to rewrite history to cover up the fact that they have done a complete reversal on the issue in recent months. This contention also ignores the fact that their own wolf biologist does not agree that wolves cannot be classified as predators anywhere in Wyoming.

In a recently issued proposed rule to delist the gray wolf in the northern Rocky Mountain region, the Federal Defendants have proposed two alternative delisting scenarios, either of which will result in the wolf being classified and managed as a predator in an area encompassing at least 88 percent of the total surface area of Wyoming, or at least 86,000 square miles. 72 Fed. Reg. 6106-6139 (Feb. 8, 2007). This proposed delisting rule shows that the Federal Defendants no longer believe that wolves cannot be classified as predators anywhere in Wyoming. This complete change in position makes the decision to deny the petition to delist arbitrary and capricious.

The Federal Defendants' ultimate decision on the predator issue also directly conflicts with the findings of their own wolf biologist. In a January 7, 2004 memorandum evaluating the Wyoming Plan, Mr. Bangs stated that, "[w]hile we do not believe dual status in and of itself will preclude Wyoming from maintaining its share of a recovered wolf population, the area where

wolves are managed as 'trophy game' has to be large enough to completely encompass a recovered wolf population."[1] (AR 90170)(emphasis added). This statement by Mr. Bangs indisputably shows that he believes that, biologically, a predator classification for wolves in Wyoming is not *per se* unacceptable.

In response to the State's argument that they have violated the Interagency Cooperative Policy on Peer Review ("1994 Peer Review Policy"), the Federal Defendants contend that the 1994 Peer Review Policy does not "have the force and effect of law and cannot be judicially enforced." (Fed. Br., at 38 n.19). They cite *Building Industry Association of Superior California v. Babbitt*, 979 F. Supp. 893 (D.D.C. 1997) as legal authority in support of this contention. In *Building Industry Association*, the court determined that "the language of [the 1994 Peer Review Policy] resembles the sort of nonbinding policy held unenforceable in *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974)." *See Building Industry Association*, 979 F.Supp. at 905 (citation omitted).

This Court should not follow *Building Industry Association* as persuasive guidance on the enforceability issue because the court's analysis in *Building Industry Association* incorrectly concludes that the language in the 1994 Peer Review Policy resembles the language in the Federal Power Commission ("FPC") order at issue in *Pacific Gas*. In *Pacific Gas*, the court addressed whether an FPC order concerning curtailment priorities bound the agency. The title of the order referred to the order as a general statement of policy. *Pacific Gas*, 506 F.2d at 40. The text of the order indicated that the order was intended to provide guidance and set forth a policy the FPC preferred and proposed to implement. *Id.* Based upon this language in the order, the

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[1] The Federal Defendants rely on this quote from Mr. Bangs in arguing that "[a]lthough it is true that several pre-decisional commentors urged the adoption of a statewide 'trophy game' designation, this was not the [Service's] final position." (Fed. Br., at at 22 n.11). Taken at face value, this argument concedes that the final decision on the petition to delist was made in part in January 2004, as the quoted language originated in a January 7, 2004, memorandum authored by Mr. Bangs. (*See* AR 90166-90171). In reality, however, this argument completely ignores the indisputable fact that, in both the January 2004 letter rejecting the Wyoming Plan and in the 12 month finding, the Federal Defendants determined that the State must classify wolves as trophy game animals throughout Wyoming for WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan to pass muster under the ESA. (*See* AR 505-506; 17784; 15618).

court in *Pacific Gas* concluded that "the stated purpose of [the order] was not to provide an inflexible, binding rule but to give advance notice of the general policy with respect to the curtailment priorities that the [FPC] prefers." *Id.*

Unlike the discretionary language in the FPC order in *Pacific Gas*, the 1994 Peer Review Policy unambiguously dictates that "[i]ndependent peer review <u>will be</u> solicited on listing recommendations … to ensure the best biological and commercial information is being used in the decisionmaking process[.]" 59 Fed. Reg. 34270 (emphasis added). The mandatory phrase "will be" demonstrates the Service's intent to be bound by the 1994 Peer Review Policy. Accordingly, the 1994 Peer Review Policy is legally enforceable against the Service. Given the obvious differences in the language of the FPC order in *Pacific Gas* and the 1994 Peer Review Policy, this Court should disregard *Building Industry Association* in addressing whether the 1994 Peer Review Policy binds the Federal Defendants.

B. Litigation and Political Concerns

In response to the State's argument that they impermissibly relied upon litigation concerns in denying the petition to delist, the Federal Defendants contend that the "best science" mandate in the ESA "does not prevent the Service from considering how legal factors may have a biological effect." (Fed. Br., at 28). They also argue that "it was appropriate" for them to consider litigation risk in evaluating whether WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan satisfied the adequate regulatory mechanism factor. (Fed. Br., at 28 n.14).

In making these arguments, the Federal Defendants have mischaracterized the evidence in the administrative record. On pages 44 and 45 of the Opening Brief, the State cites numerous documents in the administrative record which show that the Federal Defendants were concerned about litigation over the Wyoming Plan after delisting. None of these documents address "how legal factors may have a biological effect" or whether their evaluation of the Wyoming Plan complied with the ESA. To the contrary, the evidence cited by the State shows that the Federal Defendants primarily were concerned that "a judge in the East" might react negatively to the predator classification regardless of any biological justification for having such a classification.

In response to the State's argument that they impermissibly relied upon political and public relations concerns in deny the petition to delist, the Federal Defendants argue that "the public perception of the 'predatory animal' designation – especially when that designation endorses the unfettered elimination of the wolf – will have very real biological effects that the [Service] must consider." (Fed. Br., at 29). They then assert that, in the 12 month finding, they "did not rely on 'public relations' as a reason for denying [the State's] delisting petition." (Id.).

On pages 42-44 of the Opening Brief, the State cites numerous documents in the administrative record which show that the Federal Defendants were concerned about whether the public would accept a predator classification for wolves regardless of the biology. None of these documents address the biological effects of the public perception of the predator classification. In addition, the Federal Defendants have cited no documents in the administrative record that address the biological effects of the public perception of the predator classification.

In an attempt to disown all of the evidence in the administrative record which conflicts with their analysis in the 12 month finding, the Federal Defendants argue that the conflicting evidence in the record does not make their final decision arbitrary and capricious. (Fed. Br., at 19-20). They cite *National Association of Home Builders v. Defenders of Wildlife*, — U.S. —, 127 S.Ct. 2518 (2007), in support of this argument.

National Association of Home Builders involved a challenge to a decision by the Environmental Protection Agency to transfer National Pollution Discharge Elimination System permitting authority to the State of Arizona pursuant to the Clean Water Act. In *National Association of Home Builders*, the Supreme Court held that "the fact that a preliminary determination by a local agency representative is later overruled at a higher level within the agency does not render the decisionmaking process arbitrary and capricious." *National Association of Home Builders*, 127 S.Ct. at 2530.

This rule of law from *National Association of Home Builders* does not apply here because many of the contradictory statements cited by the State in its Opening Brief involve subordinate level officials from Interior and the Service contradicting statements or decision made by higher level officials, or subordinate level officials contradicting themselves with no legitimate

biological reason for doing so. (*See* Wyo. Br., at 37-39, 40-41).[2] By its own terms, the rule of law from *National Association of Home Builders* applies, if at all, only when a higher level official overrules a decision made at lower levels within the agency. *National Association of Home Builders* thus is factually inapposite and therefore irrelevant to the determination of the issues in this case.

C. Statewide trophy game status

In response to the State's arguments concerning the statewide trophy game status for wolves, the Federal Defendants contend that, "[a]lthough it is true that several pre-decisional commentators urged the adoption of a statewide 'trophy game' designation, this was not the [Service's] final position. See AR 90170[.]" (Fed. Br., at 22, n.11). The Federal Defendants also contend that "the 12-Month Finding did not conclude that a dual classification system would never be acceptable." (Fed. Br., at 22 n.11). These statements absolutely misrepresent the evidence in the administrative record.

Although the Federal Defendants do not specifically state in the 12 month finding that "the predator classification for wolves must be eliminated" or "wolves must be classified as trophy game statewide," the news release issued to announce the 12 month finding and explain its implications stated that "Wyoming state law must clearly authorize the Wyoming state wolf plan and professional wildlife managers in the Wyoming Game and Fish Department to … [c]lassify wolves ***in Wyoming*** as trophy game or similar status[.]" (AR 15618)(emphasis added). This unambiguous language in the news release permits only one reasonable inference – that the Federal Defendants denied the petition to delist in part because WYO. STAT. ANN. § 23-1-304 and

[2] For example, in the 12 month finding, H. Dale Hall, the Director of the Service, concluded that, without trophy game status statewide, the Department cannot "respond[] in a timely manner should modification in State management of wolves be needed to prevent the population from falling below recovery levels[.]" (*Id.*). Yet, in February 2003, Craig Manson, who was the Assistant Secretary for Fish and Wildlife and Parks in the Department of the Interior at the time and a higher ranking official than the Director of the Service, determined that the management authority set forth in HB229 (now codified as WYO. STAT. ANN. § 23-1-304) would "maintain the wolf population at or above recovery levels" and "allow flexibility to adapt protections to changing circumstances." (AR 246, 254).

the Wyoming Plan do not classify wolves as trophy game animals statewide. It defies both logic and the unambiguous evidence in the record for the Federal Defendants to now claim otherwise.

D. Commitment to manage for the State's share of the recovered wolf population

The Federal Defendants argue that WYO. STAT. ANN. § 23-1-304 "can be rationally interpreted as preventing the Commission and the Department from maintaining the goal of 7 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." (Fed. Br., at 26). The Federal Defendants then claim that "the ambiguity of the statutory framework authorizing the [Wyoming Plan] fails to ensure that an adequate regulatory mechanism would be in place should the wolf be delisted." (Id.).

In making these arguments, the Federal Defendants misunderstand the legal reality of the implementation of WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan. The Wyoming Legislature properly enacted WYO. STAT. ANN. § 23-1-304 in 2003. The Wyoming Game and Fish Commission properly adopted the Wyoming Plan in 2003. Given that WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan were properly adopted, both will have the full force and effect of law as soon as the Federal Defendants delist the gray wolf in Wyoming. Thus, any concerns about the implementation of WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan are unfounded.

The Federal Defendants' arguments also run afoul of the legal requirements of the ESA. In making decisions under the ESA, the Federal Defendants cannot rely on future actions. *See Fed'n of Fly Fishers v. Daley*, 131 F.Supp.2d 1158, 1165 (N.D.Cal. 2000). The only way that WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan would not take effect immediately upon delisting is if someone challenges the statute and the Plan in court and the court enjoins either or both. At the time the Federal Defendants made their final decision on the petition to delist, no court had enjoined WYO. STAT. ANN. § 23-1-304 or the Wyoming Plan, nor was there any pending litigation challenging either the statute or the Plan. By citing ""the ambiguity of the statutory framework" as a reason for deny the petition to delist, the Federal Defendants improperly relied on the future possibility that either WYO. STAT. ANN. § 23-1-304 or the

Wyoming Plan might be enjoined by a court of law. This improper speculation makes the denial of the petition to delist arbitrary and capricious.

In addition, the Federal Defendants' arguments ignore both the unambiguous text of the May 2003 Wyoming Attorney General opinion and the basic rules of statutory construction. In his May 2003 opinion, the Wyoming Attorney General expressly held that WYO. STAT. ANN. § 23-1-304 should not be interpreted in the manner suggested by the Federal Defendants because to do so "would defeat the clearly identified legislative goals of maintenance of 15 packs in the state and maintenance of seven (7) packs outside the [National] Parks." (AR 297). The Federal Defendants cannot ignore the May 2003 Wyoming Attorney General opinion just because it does not agree with their result-oriented decision on the adequate regulatory mechanism issue.[3]

The basic rules of statutory construction also support the interpretation of WYO. STAT. ANN. § 23-1-304 in the May 2003 Wyoming Attorney General opinion. "The primary goal of statutory interpretation is to enforce legislative intent." *Scott v. Scott*, 918 P.2d 198, 201 (Wyo. 1996). In Section 4 of HB229 (now codified as WYO. STAT. ANN. § 23-1-304), the Wyoming Legislature expressly stated that "[i]t is the purpose of this act ... to provide appropriate state management and control of gray wolves in order to facilitate the removal of the gray wolf from its listing as an experimental nonessential population, endangered species or threatened species[.]" 2003 WYO. SESS. LAWS ch. 115, § 4 (emphasis added).

The unambiguous language in Section 4 of HB229 shows that the Wyoming Legislature intended for HB229 to satisfy the requirements for delisting in the ESA. As a matter of statutory construction, therefore, WYO. STAT. ANN. § 23-1-304 must be interpreted in a manner which will allow for the delisting of the gray wolf. Given that the Federal Defendants have demanded that

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[3] In making other delisting decisions, the Federal Defendants have deferred to the Wyoming Attorney General's interpretation of Wyoming law. For example, in evaluating whether the grizzly bear should be delisted, the Service asked the Wyoming Attorney General to clarify what to what extent counties in Wyoming could legislate in the area of grizzly bear management. 72 Fed. Reg. 14,898 (March 29, 2007). In the Federal Register notice announcing the final delisting rule for the Yellowstone Distinct Population Segment of the grizzly bear, the Service relied on the Wyoming Attorney General's interpretation of state law on this issue in explaining its decision to delist the grizzly bear. (Id.).

the State manage for 15 total packs in Wyoming with seven packs in Wyoming outside the National Parks, the interpretation of WYO. STAT. ANN. § 23-1-304 in the May 2003 Wyoming Attorney General opinion gives full effect to the legislative intent of the statute.

The Federal Defendants and both Respondent-Intervenors argue that the 2003 Wyoming Attorney General opinion contradicts the plain language of WYO. STAT. ANN. § 23-1-304. (*See* Fed. Br., at 24-26; Sierra Club Br., at 30-32 & n.12; NWF Br., at 24-25). These arguments are incorrect as a matter of law. The well established rules of statutory interpretation dictate that the literal interpretation of the statutory language must yield to the evident legislative intent of the statute.[4] *See Houghton Bros. v. Yocum*, 274 P. 10, 11 (Wyo. 1929). Section 4 in HB229 explicitly states the Wyoming Legislature's enacted WYO. STAT. ANN. § 23-1-304 to facilitate the delisting of the gray wolf. The interpretation of WYO. STAT. ANN. § 23-1-304 in the May 2003 Wyoming Attorney General opinion gives full effect to the express intent of the statute and therefore is the only proper interpretation of the statute.

E. Definition of "pack"

The Federal Defendants offer a litany of arguments in an attempt to defend their position on the issue of the proper definition of "pack." The Federal Defendants first contend that the definition of "pack" in WYO. STAT. ANN. § 23-1-304(c) is "flawed" because it does include the phrase "in the winter." (Fed. Br., at 31). This argument is counterintuitive. If packs were only monitored once during winter, then the only opportunity to reclassify wolves would be the winter following the year in which the mortality events happened. By monitoring wolves quarterly, the Department will be able to detect sooner whether the number of packs declines to 7 packs or less. The fact that wolves only reproduce once a year is irrelevant. Given that the State will conduct surveys every 90 days, at least one survey will be done during December-March, which corresponds to the end of the biological year and minimum population levels for wolves. The State's definition of "pack," together with the quarterly monitoring requirements in WYO. STAT.

[4] In addition, the word "and" can be used in the disjunctive and the word "or" can be used in the conjunctive if doing so effectuates the obvious intent of the legislature. *See Smith v. City of Casper*, 419 P.2d 704, 706 (Wyo. 1966). In other words, "and" means "or" and "or" means "and" if defining the terms this way gives effect to the legislative intent of the statute.

ANN. § 23-1-304, thus provides a better management scheme that the "once a year" monitoring system inherent in the definition of "pack" advocated by the Federal Defendants.

The Federal Defendants also attempt to explain why Mr. Ausband's methodology is better than the linear regression methodology used in the State's petition to delist, even though they claim that they "fully explained" his methodology in the 12-month finding. (Fed. Br., at 32-33). This argument lacks merit for two reasons. First, this is nothing more than an attempt by appellate counsel to clarify the Federal Defendants' decision. This Court cannot give weight to appellate counsels' *post hoc* rationalizations for agency action. *See Katzson Bros. v. U. S. Envtl. Protection Agency*, 839 F.2d 1396, 1400 (10th Cir. 1988).

Second, when an agency changes its course of policy by revoking a long established policy, the agency must supply a "reasoned analysis" for the change. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). Until June 2007, the Federal Defendants relied on the same linear regression methodology as the State did in the petition to delist to estimate whether a wolf pack contained a breeding pair. (Fed. Br., at 32-33). In June 2007, they switched to Mr. Ausband's methodology after seeing nothing more than a power point presentation. In the 12 month finding, the Federal Defendants did not explain why Mr. Ausband's methodology is better than the linear regression methodology or why they replaced the linear methodology with Mr. Ausband's approach. The Federal Defendants' failure to provide such an explanation makes their decision on the pack issue arbitrary and capricious.

Finally, the Federal Defendants contend that they do not have the burden of demonstrating "why a specific study or piece of information is unequivocally the 'best' information available." (Fed. Br., at 33-34). Citing *Building Industry Association of Superior California v. Norton*, 247 F.3d 1241 (D.C. Cir. 2001) and *Center for Biological Diversity v. Norton*, 411 F.Supp.2d 1271 (D.N.M. 2005) as authority, they argue that they are entitled to rely on less than perfect information when making decisions under the ESA. (Id.).

The best science mandate prohibits the Federal Defendants "from disregarding available scientific evidence that is in some way better that the evidence [they rely] on." *Southwest Ctr. For Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000); *Las Vegas v. Lujan*, 891

F.2d 927, 933 (D.C. Cir. 1989)(the Service cannot disregard "scientifically superior evidence"). In this case, the Federal Defendants abandoned a long followed methodology for estimating whether a wolf pack has a breeding pair based upon a power point presentation of a new methodology which has not been published and has not been peer reviewed. Under these circumstances, the Federal Defendants have an affirmative duty to explain why they believe Mr. Ausband's unproven methodology is scientifically superior to the linear regression methodology they have adhered to since wolves were introduced into Wyoming in the mid-1990's. *See Citizens' Comm. to Save Our Canyons v. United States Forest Serv.*, 297 F.3d 1012, 1035 (10th Cir. 2002) (agency must articulate a satisfactory explanation for its decision). Their failure to provide such an explanation makes their decision on the pack issue arbitrary and capricious.

III. The two year delay in making the decision on the petition to amend violated 5 U.S.C. § 706(1).

The Federal Defendants argue that the Service's denial of the petition to amend on July 9, 2007, renders the State's "failure to act" claim moot. (Fed. Br., at 46). The State agrees. However, the fact that they denied the petition to amend at the last minute to evade judicial review of the "failure to act" claim does absolve them of the unlawful, incompetent and unprofessional manner in which this matter was handled. A two year delay in acting on a petition to amend rules violates 5 U.S.C. § 706(1) under any common sense standard, and the Federal Defendants should be rebuked for their actions.[5]

The Federal Defendants' excuses for not acting sooner on the petition to amend are absurd. The essentially argue that they were too busy and too understaffed to work on the

[5] The Federal Defendants cite *Telecommunication Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) in arguing that they did not unreasonably delay agency action. (Fed. Br., at 47-49). Citing *Qwest Communications International, Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005), the Sierra Club Intervenors make a similar argument. (Sierra Club Br., 35-38). The unreasonable delay factors set forth in *Telecommunication Research* and *Qwest Communications* apply when the agency statutes and regulations at issue do not impose a specific time requirement for action. The temporal word "prompt" in 43 C.F.R § 14.3 distinguishes this case from *Telecommunication Research* and *Qwest Communications* and, as a result, those cases do not apply here.

petition to amend. (Fed. Br., at 48-49). The Service has approximately 7,863 employees.[6] The Service's Region 6 office has approximately 1,277 employees (956 full time employees and 321 part-time employees).[7] Given these vast labor resources, it is simply inexcusable that the Service took two years to make a final decision on the petition to amend.

The State has been forced to waste scarce resources to require the Federal Defendants to make a decision that was legally required to be made in a "prompt" manner. It is outlandish that the Federal Defendants waited until the day before their brief was due in this Court to issue its decision on the petition to amend. Faced with the certainty that this Court would order them to comply with the law, the Federal Defendants finally took the action they were legally obligated to take "promptly" after July 2005. It is disappointing that a governmental entity like the Service would engage in such behavior. It is equally disappointing that the United States Department of Justice would condone and defend the ultra vires acts of their client agencies.

IV. Remedy

The Federal Defendants and the Sierra Club Respondent-Intervenors contend that the relief requested by the State is overbroad. (Fed. Br., at 49-50; Sierra Club Br., at 39). Generally, if the administrative record does not support the agency action, the reviewing court should remand the matter to the agency for further proceedings. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994); *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1226 (10th Cir. 2002). In "rare circumstances," however, a reviewing court may remand a matter and dictate the outcome of the matter to the agency. *See Middle Rio Grande Conservancy Dist.*, 294 F.3d at 1226; *Moisa v. Barnhart*, 367 F.3d 882, 887 (9th Cir. 2004). Such "rare circumstances" are present if: (1) the agency failed to provide a legally sufficient reason for rejecting evidence in the record; (2) there are no outstanding issues that must be resolved before a legal determination can be made; and (3) it is clear from the record that the agency would be

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[6] *See* www.usnews.com/usnews/biztech/best-places-to-work/sub-agencies/in15_at-a-glance.htm.

[7] *See* www.fws.gov/mountain-prairie/dcr/PDF%20Files/EEO_status_report_2005.pdf.

required to make a specific legal determination if the rejected evidence were given credit instead. *Moisa*, 367 F.3d at 887.

This case presents the type of "rare circumstances" which warrant this Court ordering the Federal Defendants to immediately approve WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan as adequate regulatory mechanisms, to approve the petition to delist, and to include the State in the pending proposal to delist the gray wolf in the proposed northern Rocky Mountain distinct population segment ("NRM DPS"). As explained in detail above and in the State's Opening Brief, the Federal Defendants' three stated reasons for denying the petition to delist have no merit factually or legally. In particular, the Federal Defendants improperly disregarded the best scientific evidence in the administrative record in evaluating the petition to delist. The best scientific evidence in the administrative record with respect to the adequacy of the Wyoming Plan is the peer review findings. The peer review findings show conclusively that the Wyoming Plan should have been approved, as 10 of the 11 peer reviewers concluded the Wyoming Plan satisfies the "adequate regulatory mechanisms" requirement in the ESA. The Federal Defendants thus had no legitimate legal reason for disregarding the peer review findings.

There also are no outstanding issues to be resolved before making a determination regarding the adequacy of WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan. The Federal Defendants have completed the process for reviewing the three state management plans

Finally, given that the peer review findings constitute the best scientific evidence available regarding the adequacy the Wyoming Plan, and given that the Federal Defendants concerns about WYO. STAT. ANN. § 23-1-304 and the definition of "pack" have no legal merit, it is clear from the record and the requirements for delisting in the ESA that the Federal Defendants would be required to approve the Wyoming Plan if they gave the proper weight to the peer review findings. Accordingly, this Court should remand this matter to the Federal Defendants with directions to immediately approve WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan as adequate regulatory mechanisms, to approve the petition to delist, and to include the State in the pending proposal to delist the gray wolf in the proposed northern Rocky Mountain distinct population segment ("NRM DPS").

If this Court elects not to grant this requested relief, this Court should specifically hold that the peer review findings on the question of whether the three state management plans collectively will conserve the tri-state wolf population is the "best science" regarding the adequacy of the Wyoming Plan, that the May 2003 Wyoming Attorney General opinion properly interprets WYO. STAT. ANN. § 23-1-304, and that the definition of "pack" in WYO. STAT. ANN. § 23-1-304(c) is biologically sound. This Court should thereafter remand this matter to the agency with directions for the agency to adhere to the "best science" mandate in the ESA and to follow the May 2003 Wyoming Attorney General opinion when reevaluating WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan. This Court should further order the Federal Defendants to complete the reevaluation of the Wyoming Plan no later than two weeks after the date of this Court's order. In addition, given the political nature of the decision to reject the Wyoming Plan, this Court should specifically retain jurisdiction over this matter during the remand to ensure that the Federal Defendants comply with this Court's directions on remand and with the legal requirements of the ESA.

Submitted this 24th day of July, 2007.

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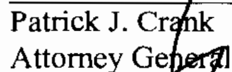

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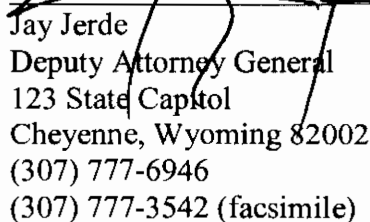

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **Petitioner State of Wyoming's Reply Brief** was placed in the United States mail, postage prepaid, on this 24th day of July, 2007, addressed to the following individuals:

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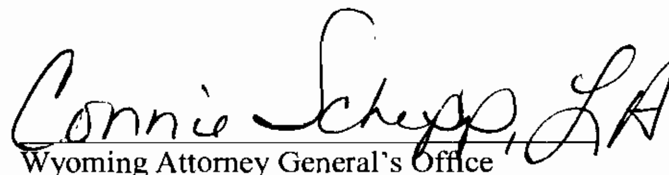

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