IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 05-8026
	)	
DEPARTMENT OF INTERIOR,	)	
	)	
Appellee.	)	

On Appeal from the United States District Court
For the District of Wyoming

The Honorable Alan B. Johnson
District Judge

Civil No. 04-CV-0123

APPELLANT STATE OF WYOMING'S REPLY BRIEF

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I. The January 13, 2004 letter was "final agency action" for purposes of the APA.

A. The January 13 letter marked the consummation of the Federal Defendants' decision-making process regarding the adequacy of the Wyoming Plan as written.

The Federal Defendants have offered a litany of arguments in an attempt to show that the decision set forth in the January 13 letter is not a "final agency action" for purposes of the APA. They first contend that the January 13 letter is not "final agency action" because the rejection of the Wyoming Plan and corresponding decision not to delist the gray wolf were not made in response to a petition to delist the gray wolf. (Fed. Aple. Br., at 26). They argue that only a final decision on the merits of a petition to delist a species are subject to judicial review. (Id.).

The Federal Defendants' "petition only" argument cannot be squared with the *Bennett v. Spear* test for final agency action. In *Bennett v. Spear*, 520 U.S. 154 (1997), the Supreme Court explained that two conditions must be satisfied for agency action to be "final" – the action must mark the consummation of the agency's decisionmaking process and 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 178. The *Bennett* "final agency action" test contemplates a case-by-case determination of finality based upon the specific facts surrounding each decision made by an agency. The *Bennett* test does not require a

showing that the decision in question was the end result of a process defined by statute or by regulation.

In a similar vein, the Federal Defendants contend that the doctrine of exhaustion of administrative remedies precludes this Court from reviewing the decision set forth in the January 13, 2004 letter. (Fed. Aple. Br., at 31 n.8). They argue that "[t]he January 13 letter does not require Wyoming to do anything[,]" and "[i]f Wyoming does not wish to continue to work toward a FWS delisting proposal it instead keeps its current law unchanged and petition for delisting[.]" (Fed. Aple. Br., at 33). They argue that their decision to reject the Wyoming Plan as written cannot be reviewed unless or until they have rejected the petition to delist the gray wolf which Wyoming filed in July 2005. (Id.). The exhaustion doctrine does not apply here, but even if it did apply, the predetermination exception to the exhaustion requirement excuses Wyoming from waiting for a decision on its petition to delist before seeking judicial review.

A review of the Endangered Species Act ("ESA") requirements for delisting a species shows that the doctrine of exhaustion does not apply in this case. The ESA establishes two procedural mechanisms for determining whether a species should be delisted — the petition process and the status review process. Under the petition process, any "interested person" may petition the Secretary to remove a species from the list of endangered and threatened species. 16 U.S.C. § 1533(b)(3)(A). Under the status review process, the Secretary shall review the status of each listed species at least once every five years to determine whether a species should be removed from the list of endangered and

threatened species. 16 U.S.C. § 1533(c)(2). Both the petition process and the status review process require the Secretary to evaluate the five delisting criteria based solely on the best scientific and commercial data available. *See* 16 U.S.C. § 1533(b)(1)(A), (c)(2).

When the Federal Defendants reviewed the Wyoming Plan, they already had determined that four of the five delisting criteria were satisfied. The Federal Defendants completed a status review of the gray wolf in 2003 and "determined that the species could be delisted once a state wolf management plan has been approved by the [FWS] for Montana, Idaho, and Wyoming." (Aplt. App., Vol. 9 at 2493). In late 2003, they conducted a formal review of the Wyoming Plan to determine whether the Wyoming Plan satisfies the "adequate regulatory mechanism" requirement in the ESA. (Aplt. App., Vol. 9 at 2497). Given the fact that the Federal Defendants previously had determined that the other four delisting criteria were satisfied, this formal review of the Wyoming Plan was the final step in a status review to determine whether the gray wolf should be delisted. After completing this formal review, the Federal Defendants unequivocally and conclusively determined that the Wyoming Plan as written does not satisfy the "adequate regulatory mechanism" requirement and that they will not propose a rule to delist the wolf until Wyoming makes the demanded changes to the Wyoming Plan. (Aplt App., Vol. 7 at 1955-1956, 1962; Vol. 9 at 2479, 2493).

Given that the review process for a petition to delist is exactly the same as the review process for a status review, the petition process is not an additional remedy that an "interested person" must pursue before challenging a decision made during a status

review. No provision of the ESA requires an "interested person" to file a petition to delist as a prerequisite to seeking judicial review of a decision made during a status review. Accordingly, the doctrine of exhaustion of administrative remedies does not apply here.

Even if this Court determines that the petition process is an exhaustable remedy under the ESA, Wyoming is excused from waiting for a final decision on its petition to delist because the Federal Defendants have predetermined the issue of whether the Wyoming Plan as written is an adequate regulatory mechanism. *Massengale, O.D. v. Oklahoma Bd. of Exam'rs in Optometry*, 30 F.3d 1325, 1328-1329 (10th Cir. 1994). The review process for a petition to delist is exactly the same as the review process for a status review. Given the unequivocal nature of the Federal Defendants' determination regarding the adequacy of the Wyoming Plan as written, this Court has no reason to believe that the Federal Defendants will reach a different decision on the adequacy of the Wyoming Plan as written during the petition process. Requiring Wyoming to wait for a decision on its petition to delist the wolf therefore would be futile because the Federal Defendants have already determined that the Wyoming Plan as written does not satisfy the "adequate regulatory mechanism" requirement for delisting. Given this predetermination on the "adequate regulatory mechanism" issue, the doctrine of exhaustion of administrative remedies does not preclude this Court from reviewing the legality of the decision set forth in the January 13 letter.

The Federal Defendants next contend that the January 13 letter is not final agency action because the rejection of the Wyoming Plan and corresponding decision not to

delist the gray wolf were both partial and preliminary. (Fed. Aple. Br., at 28). They argue that the decision set forth in the January 13 letter is partial "because the adequacy of Wyoming's plan is only one of several factors that must be considered before wolves can be delisted." (Id.).

This "partial decision" argument belies the evidence in the administrative record. In the January 13 letter, Director Williams stated that "delisting cannot be proposed at this time due to some significant concerns about portions of Wyoming's state law and wolf management plan." (Aplt. App., Vol. 7 at 1955). In the corresponding press release, Director Williams explained that "'[d]elisting can move forward *as soon as Wyoming makes the changes we've identified* to both its state law and its wolf management plan, *but not until then*[.]" (Aplt. App., Vol. 7 at 1962)(emphasis added). Viewed together, these statements permit only one reasonable conclusion – that the rejection of the Wyoming Plan as written is the only reason why the Federal Defendants have not proposed a rule to delist the gray wolf.

In January 2005, the Federal Defendants confirmed this conclusion when they stated publicly that they had "determined that the species could be delisted once a state wolf management plan has been approved by the [FWS] for Montana, Idaho, and Wyoming" and "once Wyoming has an approved wolf management plan, we intend to propose removing the gray wolf from the List of Endangered and Threatened Wildlife." (Aplt. App., Vol. 9 at 2476, 2493). These statements show beyond dispute that the

rejection of the Wyoming Plan as written is the only reason why the Federal Defendants have not proposed a rule to delist the gray wolf.

The Federal Defendants argue that the decision in the January 13 letter is "preliminary" because the January 13 letter "states no settled view on whether delisting is in fact appropriate" and because they "can freely change [their] view even on the issue of adequacy of existing regulatory mechanisms up until the time of a delisting decision[.]" (Id.).

This "preliminary decision" argument also belies the evidence in the administrative record. The January 13 letter stated unequivocally that "delisting cannot be proposed at this time[.]" (Aplt. App., Vol. 7 at 1955). The corresponding press release stated that delisting will not move forward until Wyoming makes the demanded changes to WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan. (Aplt. App., Vol. 7 at 1962). Viewed together, these statements communicated a "settled view" that the Federal Defendants will not delist the gray wolf unless or until Wyoming makes the demanded changes to WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan.

The Federal Defendants' argument that they "can freely change [their] view even on the issue of adequacy of existing regulatory mechanisms up until the time of a delisting decision" reeks with hypocrisy. In the January 13 letter, Defendant Williams stated that "[t]he 'predatory' animal status for wolves *must* be changed," "Wyoming state law *must* clearly commit to managing for at least 15 wolf packs in Wyoming," and that "state law *must* define pack size as at least 6 wolves traveling together in the winter."

(Alt. App., Vol. 7 at 1955-1956)(emphasis added). In the corresponding press release, he stated that delisting will proceed as soon as Wyoming makes the demanded changes, "but not until then." (Aplt. App., Vol. 7 at 1962). Nothing in the language used in these statements even remotely suggests that the Federal Defendants will change their mind regarding the adequacy of the Wyoming Plan as written. Moreover, in January 2005, almost a year after rejecting the Wyoming Plan, the Federal Defendants stated publicly that "[f]or a variety of reasons, the Service determined that Wyoming's current State law and its wolf management plan do not suffice as an adequate regulatory mechanism for purposes of delisting." (Aplt. App., Vol. 9 at 2493). Given the unequivocal language in the January 13 letter, and given the Federal Defendants continued intransigence on the issue as evidenced by their statements in January 2005, this Court reasonably can assume that the Federal Defendants will not change their determination that the Wyoming Plan as written does not satisfy the "adequate regulatory mechanism" requirement for delisting.

Finally, the Federal Defendants posit that permitting judicial review of the decision set forth in the January 13 letter "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." (Fed. Aple. Br. , at 31). This "Pandora's Box" argument ignores one salient fact – in the January 13 letter (and as explained in the corresponding press release), Director Williams made a final decision to not delist the gray wolf until Wyoming makes the demanded changes to WYO. STAT. ANN. § 23-1-304 and to the Wyoming Plan. (Aplt. App., Vol. 7 at 1955-1957, 1962).

In the final analysis, judicial review of the decision to reject the Wyoming Plan and to not proceed with delisting will allow the Federal Defendants and Wyoming to proceed on the proper course within the framework of the ESA regulatory relationship. *HRI, Inc. v. Envt'l Protection Agency*, 198 F.3d 1224, 1235-1236 (10th Cir. 2000). A judicial answer to the question of whether the Federal Defendants violated the ESA when they rejected the Wyoming Plan as written will give the Federal Defendants and Wyoming a clear roadmap as to what actions need to be taken, and by whom, in order for the delisting process to proceed forward as expeditiously as possible.

Denying judicial review, on the other hand, will do nothing but condone the type of heavy handed and illegal tactics employed by the Federal Defendants in this case. The Federal Defendants have blatantly ignored the ESA "best science" mandate in an arrant attempt to force Wyoming to implement their politically motivated interpretation of the "adequate regulatory mechanisms" requirement in the ESA. The reasons for demanding the changes to Wyoming law have nothing to do with the requirements of the ESA. The Federal Defendants have demanded the changes to mollify certain segments of the American public who find the predator classification to be politically unacceptable, regardless of the effect of predator status on the overall recovery of the wolf population. The Federal Defendants thus are using the "adequate regulatory mechanisms" requirement in the ESA as an excuse to force Wyoming to enact wolf management guidelines that promote a federal political agenda unrelated to the legal requirements of the ESA. Judicial review provides the most efficient and effective means of ensuring that

the Federal Defendants have complied with the legal requirements imposed upon them by the ESA.

B. The January 13 letter imposed rights and obligations on Wyoming and caused legal consequences for Wyoming.

The Federal Defendants contend that the rejection of the Wyoming Plan and corresponding decision not to delist the gray wolf is not final because no legal consequences flowed from these decisions. (Fed. Aple. Br., at 32-36). Citing *Public Serv. Co. of Colorado v. EPA*, 225 F.3d 1144, 1148 (10th Cir. 2000), the Federal Defendants argue that a letter that outlines an agency's views but does not order a party to take a particular action does not impose legal consequences. (Fed. Aple. Br., at 34).

The facts that drove the "legal consequences" analysis in *Public Serv. Co. of Colorado* are distinguishable from the facts in this case. In *Public Serv. Co. of Colorado*, a state regulatory agency asked the Environmental Protection Agency ("EPA") whether an existing electric generating facility and a proposed electric generating facility would constitute a single source of air emissions under the Clean Air Act. The EPA responded to the inquiry by letter, telling the state regulatory agency that the two generating facilities would constitute a single source of air emissions and that the construction of the proposed facility would require a PSD permit rather than a minor source permit. *Public Serv. Co. of Colorado*, 225 F.3d at 1146. One month later, the EPA reconfirmed its opinion in a letter sent to one of the companies that would be involved in the construction

of the proposed generating facility. *Id.* The owner of the existing generating facility appealed the EPA's decision.

The court in *Public Serv. Co. of Colorado* held that the two letters issued by the EPA were not "final agency action" under the APA. *Public Serv. Co. of Colorado*, 225 F.3d at 1149. The court opined that the letters did not mark the consummation of the EPA's decision making process because the EPA decision making process could not begin until the state regulatory agency issued a permit for the construction of the proposed facility. *Public Serv. Co. of Colorado*, 225 F.3d at 1147-1148. The court also determined that no legal consequences flowed from the letters because the EPA did not order the state regulatory agency or any other party to take any particular action. *Public Serv. Co. of Colorado*, 225 F.3d at 1148.

The facts in *Public Serv. Co. of Colorado* are distinguishable from the facts in this case. In *Public Serv. Co. of Colorado*, the EPA had not yet started its decision making process with respect to the permit in question because the state regulatory agency had not issued a required permit. In this case, the Federal Defendants have completed their review of the Wyoming Plan as written, and Wyoming has taken all steps necessary for delisting to begin. Although the Federal Defendants argue that the rejection of the Wyoming Plan is not a reviewable final decision because the decision is merely a step in the process of deciding whether to propose a rule to delist the wolf, this argument ignores the applicable legal standard for finality. The question is not whether the rejection of the Wyoming Plan is an interim decision in the delisting decisionmaking process, but whether

the decision to reject the Wyoming Plan is tentative or interlocutory in nature. *See Pennaco Energy, Inc. v. United States Dep't of Interior*, 377 F.3d 1147, 1155 (10th Cir. 2004) (an action marks the consummation of the decisionmaking process if it is neither tentative nor interlocutory in nature).

In *Public Serv. Co. of Colorado*, the court held that no legal consequences flowed from the letters in question because the EPA did not order the state regulatory agency or any other party to take any particular action. *Public Serv. Co. of Colorado*, 225 F.3d at 1148-1149. Unlike the letters at issue in *Public Serv. Co. of Colorado*, the January 13 letter categorically demands that Wyoming make specific changes to the Wyoming Plan and WYO. STAT. ANN. § 23-1-304 in order for delisting to move forward. (Aplt. App., Vol. 7 at 1955-1956, 1962). The statements in the January 13 letter and the corresponding press release are not tentative or interlocutory in nature. By demanding that Wyoming change the Wyoming Plan and WYO. STAT. ANN. § 23-1-304, and by making the delisting of the gray wolf contingent upon those demanded changes, the Federal Defendants have taken the definitive, unequivocal and non-negotiable position that WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan must be changed in order for delisting to move forward.

II. Wyoming's Section 702(2) and ESA claims are ripe for adjudication.

The Federal Defendants urge this Court to affirm the decision of the District Court because "the controversy over whether Wyoming's management plan is adequate to support delisting is not ripe." (Fed. Aple. Br., at 37). They cite *Coalition for Sustainable*

Resources, Inc. v. United States Forest Serv., 259 F.3d 1244 (10th Cir. 2001), and *Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990), in arguing that "[t]his Court has held similar informal determinations unripe when there was an opportunity for the agency to consider the issues in a more comprehensive proceeding." (Id.).

Both *Coalition for Sustainable Resources* and *Sierra Club v. Yeutter* are factually distinguishable from this case. In *Coalition for Sustainable Resources*, the Tenth Circuit panel determined that the suit was not ripe for review because, *inter alia*, the Forest Service had not yet rejected the possibility of implementing the proposed management techniques. *Coalition for Sustainable Resources, Inc.*, 259 F.3d at 1251. In this case, the Federal Defendants rejected Wyoming's proposed management techniques when they rejected the Wyoming Plan.

In *Sierra Club v. Yeutter*, the Tenth Circuit panel determined that the suit was not ripe for review because, *inter alia*, the United States Forest Service had not taken a definitive position as to whether the Wilderness Act creates federal reserved water rights, had not yet asserted any such rights, and even if the Court determined that such rights exist, the Forest Service was not obligated to assert those rights unless failure to do so would violate the Wilderness Act. *Sierra Club*, 911 F.2d at 1418.

The court in *Sierra Club v. Yeutter* held that the Forest Service's failure to act rendered the claims to speculative and hypothetical to allow for judicial review. *Sierra Club*, 911 F.2d at 1419-1420. In this case, Wyoming alleges that the Federal Defendants did not comply with the legal requirements of the ESA when they reviewed and rejected

the Wyoming Plan as written. The Federal Defendants have provided an administrative record for this Court to review to determine whether they have fulfilled their legal obligations under the ESA. This case thus has none of the infirmities which caused the court to dismiss the suit on ripeness grounds in *Sierra Club v. Yeutter*.

The inapplicability of *Coalition for Sustainable Resources* and *Sierra Club v. Yeutter* notwithstanding, a review of the administrative record shows that the issues raised by Wyoming are ripe for judicial review. To determine whether an agency's decision is ripe for review under the APA, the reviewing court must consider whether: (1) the issues in the case are purely legal; (2) the agency action involved is "final agency action" for purposes of 5 U.S.C. § 704; (3) the action has or will have a direct and immediate impact upon the plaintiff; and (4) the resolution of the issues will promote effective enforcement and administration by the agency. *See HRI*, 198 F.3d at 1236.

A. Purely Legal Issues

Questions of agency compliance with relevant statutes and regulations present purely legal issues. *HRI, Inc.*, 198 F.3d at 1236. Wyoming has alleged that the Federal Defendants have not complied with the "best science" mandate in the ESA and has not managed wolves in Wyoming in accordance with the requirements of 50 C.F.R. § 17.84(i). (Aplt. App., Vol. I at 20-64). Wyoming's claims thus present purely legal issues for judicial review.

B. Final Agency Action

For the reasons set forth on pages 19-30 and 48-50 in Wyoming's Opening Brief, the January 13 letter and the failure to comply with 50 C.F.R. § 17.84(i) are "final agency actions" for purposes of the APA.

C. Direct and Immediate Impact

To satisfy the "direct and immediate impact" requirement, a plaintiff must show that it was directly affected by the agency action. *Public Serv. Co. of Colo. v. United States Envtl. Protection Agency*, 225 F.3d 1144, 1147 (10th Cir. 2000). The rejection of the Wyoming Plan as written has directly affected Wyoming in at least three ways. First, as a result of this rejection, the Federal Defendants have indefinitely delayed the delisting of the gray wolf in Wyoming. Had the Federal Defendants followed the mandatory "best science" mandate in the ESA and approved the Wyoming Plan, they would have proposed a rule to delist the gray wolf. Second, the rejection of the Wyoming Plan as written has directly affected Wyoming because, as a result of this rejection, Wyoming is being subjected to different wolf management guidelines than the guidelines being used in Idaho and Montana. (Aplt. App., Vol. 9 at 2475-2501). Finally, Wyoming's other wildlife resources, including the prey base for the gray wolf, are being irreparably damaged by the overpopulation of wolves. The agriculture industry in Wyoming is suffering similar damage as a direct result of the unchecked wolf population.

D. Resolution of Issues will Promote Effective Enforcement and Administration

Judicial resolution of the merits of the claims asserted in the First Amended Complaint will promote effective enforcement and administration of the ESA by the Federal Defendants. Judicial review of the decision to reject the Wyoming Plan and to not proceed with delisting will allow the Federal Defendants and Wyoming to proceed on the proper course within the framework of the ESA regulatory relationship. *See HRI*, 198 F.3d at 1236. A judicial answer to the question of whether the Federal Defendants violated the ESA when they rejected the Wyoming Plan as written will give the Federal Defendants and Wyoming a clear roadmap as to what actions need to be taken, and by whom, in order for the delisting process to proceed forward as expeditiously as possible.

III. This Court should rule on the merits of Wyoming's claims.

The Federal Defendants urge this Court to follow its "usual practice" by remanding this case so that the District Court can first consider the merits of Wyoming's claims. (Fed. Aple. Br., at 39). They cite four cases in support of their "usual practice" argument: *Committee to Save the Rio Hondo v. Lucero*, 102 F.3d 445 (10th Cir. 1996); *United States v. Colorado Supreme Court*, 87 F.3d 1161 (10th Cir. 1996); *Riggs v. City of Albuquerque*, 916 F.2d 582 (10th Cir. 1990); and *In re R. Eric Peterson Constr. Co., Inc.*, 951 F.2d 1175 (10th Cir. 1991).

The rationale for remand in each of these cases does support remand in this case. In *Committee to Save the Rio Hondo* and *United States v. Colorado Supreme Court*, it does not appear that any party asked the appellate court to consider the merits of the case

after the reversal on the standing issue. Here, Wyoming has specifically requested that this Court consider the merits if it reverses the District Court's holding on subject matter jurisdiction.

In *Riggs v. City of Albuquerque*, the Tenth Circuit panel remanded the case so that the parties would have the opportunity to develop facts through the discovery process. *Riggs*, 916 F.2d at 587. This case is an administrative record review case. The parties do not need to conduct discovery to develop a factual record. The appellate record in this case includes all of the facts and information this Court needs to consider the merits of Wyoming's claims.

In *In re R. Eric Peterson Constr. Co., Inc.*, the Tenth Circuit panel remanded the case but did not explain why. However, the court in *In re R. Eric Peterson Constr. Co., Inc.*, did not hold that it lacked authority to consider the merits of the case.

A federal appellate court may consider issues that were not decided below when such issues are presented with sufficient clarity and completeness and resolution of the issues will materially advance the administration of justice. *See Katt v. Dykhouse*, 983 F.2d 690, 695 (6th Cir. 1992); *UHI, Inc. v. Thompson*, 250 F.3d 993, 996 (6th Cir. 2001).[1] In this case, the parties twice have fully briefed the merits of the case and this Court has

[1] The Federal Defendants correctly point out that undersigned counsel erroneously referred *Katt v. Dykhouse* as being an APA case in a parenthetical explanation in Wyoming's Opening Brief. This error was an unintentional result of the editing process. Undersigned counsel apologizes to this Court and opposing counsel for any confusion caused by this error.

before it an appellate record that includes the administrative record arising from the challenged agency action. By law, the administrative record must include all documents and materials directly or indirectly considered by the agency in rendering its decision. *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993). The issues thus are presented with sufficient clarity and completeness for this Court to rule on their merits.

Moreover, remanding this case to the District Court for it to consider the merits will materially hinder judicial economy and the administration of justice. On appeal after remand, this Court must review the District Court's decision on the merits *de novo* and owes no deference to the District Court's decision. S*ee New Mexico Cattle Growers Ass'n v. United States Fish & Wildlife Serv.*, 248 F.3d 1277, 1281 (10th Cir. 2001). Given this *de novo* appellate review, remanding the case to the District Court will serve no useful or efficient purpose in advancing this litigation.

IV. The Federal Defendants acted arbitrarily and capriciously and in violation of the ESA when they rejected the Wyoming Plan as written.

A. The Federal Defendants arbitrarily and capriciously considered improper factors in evaluating the Wyoming Plan.

To rebut the argument that they considered improper factors in evaluating whether the Wyoming Plan as written satisfies the "adequate regulatory mechanism" requirement for delisting, the Federal Defendants contend that the "best scientific and commercial data available" mandate in the ESA does not limit them to considering only factors related to the biological status of the gray wolf. (Fed. Aple. Br., at 43). They cite 50 C.F.R. §

424.13 and *Fund for Animals v. Babbitt*, 903 F.Supp. 96, 110 n.4 (D.D.C. 1995) as legal authority in support of this argument.

The legislative history of the ESA shows conclusively that Congress intended for the Federal Defendants to consider only factors related to the biological status of the species in evaluating each of the five delisting criteria. The ESA dictates that any determination on the adequacy of existing regulatory mechanisms "shall" be made "solely on the basis of the best scientific and commercial data available to her." *See* 16 U.S.C. §§ 1533 (b), (c)(2)(B); 50 C.F.R. § 424.11(d). The term "shall" imposes a mandatory duty upon the subject of the command. *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1186 (10th Cir. 1999). The Secretary thus has a mandatory duty to evaluate the adequacy of existing regulatory mechanisms based solely upon the best scientific and commercial data available to her.

The term "solely" in 16 U.S.C. § 1533(b) limits the type of information the Secretary may rely upon in evaluating the adequacy of existing regulatory mechanisms. Congress added the term "solely" to 16 U.S.C. § 1533(b) in 1982 "to remove from the process of listing or delisting of species any factor not related to the biological status of the species." H.R. REP. NO. 97-567, at 20 (1982). The Secretary thus shall consider only biological information in evaluating the adequacy of existing regulatory mechanisms and shall not consider any factors not related to the biological status of the species.

The authority in 50 C.F.R. § 424.13 does not require a different result. Although 50 C.F.R. § 424.13 sets forth a non-exclusive list of sources of information the Secretary

may review when considering any revision to the endangered or threatened species lists, no language in 50 C.F.R. § 424.13 authorizes the Secretary to consider or to rely on non-biological factors in evaluating the adequacy of existing regulatory mechanisms in the context of a delisting status review. Moreover, interpreting 50 C.F.R. § 424.13 in the manner suggested by the Federal Defendants would create a conflict between the regulation and the "best science" mandate in 16 U.S.C. § 1533(b). This Court may not interpret a regulation in a manner that conflicts with the unambiguous language of a statute. *See Snyder v. Shalala*, 44 F.3d 896, 899 (10th Cir. 1995).

The Federal Defendants' reliance on *Fund for Animals v. Babbitt* in support of this argument is misplaced. In *Fund for Animals v. Babbitt*, the plaintiffs alleged that the United States Fish and Wildlife Service ("FWS") violated the ESA "best science" mandate by considering political factors in developing a species recovery plan. *Fund for Animals*, 903 F.Supp. at 110 n.4. In rejecting this claim, the court held that human factors having biological consequences for a species are relevant considerations in evaluating the whether a species should be delisted. *Id.* The legal analysis in *Fund for Animals v. Babbitt* thus confirms that the Secretary may consider only factors related to the biological status of a species.

B. The Federal Defendants disregarded the findings of the peer review experts and, in doing so, failed to comply with the ESA "best scientific data" mandate.

In response to Wyoming's argument that they failed to comply with the "best science" mandate in the ESA, the Federal Defendants contend that they properly utilized

the peer review findings in evaluating the adequacy of the Wyoming Plan as written. (Fed. Aple. Br., at 45-47). They argue that "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." (Fed. Aple. Br., at 45). This argument belies the unambiguous written findings of the peer review experts.

None of the four peer review experts cited by the Federal Defendants in their brief (Mr. Hammill, Dr. Kunkel, Dr. Pletscher, and Mr. Wydeven) concluded that the Wyoming Plan must eliminate the "predator" classification. (Aplt. App., Vol. 7 at 1910-1912, 1915-1916, 1925-1927, 1928-1929). Moreover, despite their stated concerns about the "predator" classification, Mr. Hammill, Dr. Pletscher, and Mr. Wydeven each concluded that the Wyoming Plan, together with the management plans from Idaho and Montana, collectively will conserve a recovered wolf population in the tri-state region. (Aplt. App., Vol. 7 at 1910-1911, 1925-1926, 1928). Viewed together, the peer review findings show that only Dr. Kunkel questioned the adequacy of the Wyoming Plan as written, and even he did not opine that Wyoming must eliminate the "predator" classification.

Citing Ed Bangs' January 7, 2005 review of the Wyoming Plan, the Federal Defendants next argue that "those peer reviewers who believed that the Wyoming Plan was adequate relied heavily on the relative strength of the Idaho and Montana plans." (Fed. Aple. Br., at 46). In his January 7, 2005 review of the Wyoming Plan, Mr. Bangs stated that "most reviewers commented that the Wyoming plan was adequate primarily

because of the adequate wolf management plans developed in the adjacent States of Montana and Idaho[.]" (Id.)(emphasis in original). This unsupported statement by Mr. Bangs fundamentally misrepresents the findings of the peer reviewers. Although three of the peer review experts (Dr. Fuller, Mr. Hammill, and Mr. Wydeven) alluded to the relative strength of the Idaho and Montana plans in their comments, these peer reviewers did not opine that the Wyoming Plan was adequate primarily because of the strength of the other two plans. (Aplt. App., Vol. 7 at 1926-1928, 1932).

Finally, the Federal Defendants contend that they are "not required to adopt the majority view of a group of peer reviewers" in evaluating whether the Wyoming Plan as written satisfies the "adequate regulatory mechanism" requirement in the ESA. (Fed. Aple. Br., at 46). Citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989), and *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515 (10th Cir. 1992), they argue that they may choose among competing scientific opinions because they are operating within their congressionally mandated area of expertise and that they are "entitled to rely on their own experts' conclusion that the 'predatory animal' classification would make it impossible to ensure that wolves would remain at or above recovery levels." (Fed. Aple. Br. at 45-46).

The deference accorded to an agency's scientific or technical expertise is not unlimited. *Brower v. Evans*, 257 F.3d 1058, 1067 (9th Cir. 2001), *citing Defenders of Wildlife v. Babbitt*, 958 F.Supp. 670, 679 (D.D.C. 1997). To be entitled to judicial

deference, the agency expert in question must be "qualified," and the agency expert's opinion must be "reasonable." *Holy Cross Wilderness Fund*, 960 F.2d at 1526-1527.

The Federal Defendants' vague reference to "their experts" begs the question of who they consider to be their experts. If they consider Director Williams to be an expert on wolf recovery, then this Court should not defer to his unsupported findings in the January 13 letter because the administrative record does not show that he has sufficient expertise in wolf recovery to render a valid, scientifically supported determination regarding the adequacy of the Wyoming Plan. If they consider Mr. Bangs to be their expert, then this Court should not defer to the decision in the January 13 letter because the letter provides no indication that Director Williams in any way relied upon Mr. Bangs' opinions in the January 7, 2005 review of the Wyoming Plan. To the contrary, Director Williams' findings regarding the "predator" classification directly contradicts Mr. Bangs' findings. In his January 7, 2004 review of the Wyoming Plan, Mr. Bangs stated that "we do not believe that dual status in and of itself will preclude Wyoming from maintaining its share of a recovered wolf population[.]" (Aplt. App., Vol. 9 at 2506). This statement by Mr. Bangs simply cannot be reconciled with Director Williams' conclusion that Wyoming must classify wolves as "trophy game animals" throughout the entire state.

C. The Federal Defendants arbitrarily and capriciously changed positions with respect to the three stated reasons for rejecting the Wyoming Plan.

1. The "Predator" Classification

The Federal Defendants argue that they did not arbitrarily change positions on the "predator" classification issue, but instead "consistently questioned the efficacy of any plan that relied on the 'predator' classification in significant areas of the State." (Fed. Aple. Br., at 48). In support of this argument, the Federal Defendants apparently rely on three documents in the administrative record: a September 26, 2002 letter from Steve Williams to the Department, a December 2, 2002 letter from Ed Bangs to the Department, and a July 2, 2003 letter from Mr. Bangs to the Department. (Fed. Aple. Br., at 11-12, 15-16).

These three letters share at least two common attributes. First, in each letter the author tacitly approved of the predator classification by specifically referencing the size of the geographic area in which wolves would need protection from unregulated human take. (Aplt. App., Vol. 6 at 1478, 1502-1503; Vol. 7 at 1794). Both Director Williams and Mr. Bangs told Wyoming that a geographic area of some size smaller than the entire state would be acceptable. Second, in each letter the author did not inform Wyoming that the "predator" classification was *per se* unacceptable for purposes of the "adequate regulatory mechanism" requirement in the ESA. In fact, at no point before the issuance of the January 13 letter did either Director Williams or Mr. Bangs tell Wyoming that gray wolves needed to be classified as "trophy game animals" throughout the entire state.

2. Clear Authority to Manage for 15 Packs

The Federal Defendants assert that they consistently told Wyoming that they "would not proceed 'with the delisting process unless State law unambiguously authorizes implementation of a state wolf management plan that will conserve wolves above recovery levels." (Fed. Aple. Br., at 48-49, *citing* Aplt. App. 1791, 1793). They then argue that "[t]he 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." (Fed. Aple. Br., at 49). This argument lacks merit for three reasons.

First, Defendant Williams did not cite the alleged conflict between the Wyoming Plan and WYO. STAT. ANN. § 23-1-304 as the reason for his decision that Wyoming law must clearly commit to managing for at least 15 wolf packs in Wyoming. (Aplt. App., Vol. 7 at 1956). The Federal Defendants' "highly ambiguous" argument is nothing more than appellate counsel's *post hoc* rationalization of the agency decision. This Court may not accept such *post hoc* rationalizations to explain the agency's decision. *See Williams Gas Processing Co. v. Federal Energy Regulatory Comm'n*, 17 F.3d 1320, 1322 (10th Cir. 1994). The agency's decision must be upheld, if at all, on the basis articulated by the agency itself. *Pennaco Energy, Inc. v. United States Dep't of Interior*, 377 F.3d 1147, 1156 (10th Cir. 2004). Defendant Williams provided no explanation for his decision on the 15 pack issue and, as a result, the decision is arbitrary and capricious. Moreover, the

Federal Defendants cannot point to any scientific evidence in the record to support this allegation.

Second, even if this Court finds that Defendant Williams decided the 15 pack issue based on the perceived conflict between the Wyoming Plan and WYO. STAT. ANN. § 23-1-304, his consideration of such a legal issue was improper under the ESA. The Federal Defendants' concern about the perceived conflict between the Wyoming Plan and WYO. STAT. ANN. § 23-1-304 is based solely upon their speculation that the perceived conflict may prevent the Wyoming Plan from being implemented. The ESA cannot be administered on the basis of speculation or surmise. *Bennett v. Spear*, 520 U.S. 154, 176 (1997). To this end, the ESA does not permit the Federal Defendants to rely on future actions in deciding whether a species should be listed or delisted. *See Fed'n of Fly Fishers v. Daley*, 131 F.Supp.2d 1158, 1165 (N.D. Cal. 2000).

The Wyoming Game and Fish Commission adopted the Wyoming Plan in July 2003 and, to date, no court has ruled that the Wyoming Plan is invalid. In fact, no party has challenged the validity of the Wyoming Plan in court. If the Federal Defendants were to delist the gray wolf today, the Wyoming Plan would govern the management of wolves in Wyoming and the Department would manage wolves to maintain 15 packs in Wyoming with seven packs in Wyoming outside of the National Parks.

Finally, the Wyoming Attorney General has determined that the Wyoming Plan and WYO. STAT. ANN. § 23-1-304 are compatible. In May 2003, the Wyoming Attorney General opined that WYO. STAT. ANN. § 23-1-304 authorizes the Department to

implement a wolf management plan that requires the Department to manage for 15 packs in Wyoming as a whole and seven packs in Wyoming outside of the National Parks. (AR 295-298). This Wyoming Attorney General opinion is entitled to weight in determining the meaning of the laws enacted by the Wyoming Legislature. *Seyfang v. Bd. of Trustees of Washakie County Sch. Dist. No. 1*, 563 P.2d 1376, 1382 (Wyo. 1977). Moreover, the fact that WYO. STAT. ANN. § 23-1-304 was not amended during the 2004 and 2005 legislative sessions indicates that the Wyoming Legislature has acquiesced in the Wyoming Attorney General's interpretation of WYO. STAT. ANN. § 23-1-304. *See Seyfang*, 563 P.2d at 1382. The Federal Defendants thus have no legitimate basis to rely on a perceived ambiguity in WYO. STAT. ANN. § 23-1-304 as a basis for rejecting the Wyoming Plan.

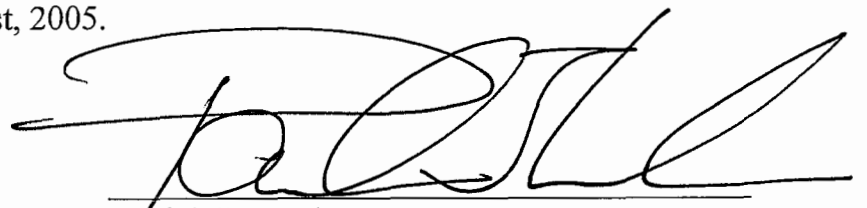
CONCLUSION

For the foregoing reasons, and for the reasons set forth in Wyoming's Opening Brief, Wyoming respectfully requests that this Court reverse the District Court's Corrected Memorandum Opinion and Order *in toto* and reverse the Order denying Wyoming's motion to supplement the administrative record. Wyoming further requests that this Court review the merits of the Section 706(2) and ESA claims asserted by Wyoming and hold that the Federal Defendants violated the "best science" mandate in 16 U.S.C. § 1533 when they rejected the Wyoming Plan. This Court also must find that the rejection of the Wyoming Plan violates the Tenth Amendment and Guarantee Clause as applied to Wyoming, and order the Federal Defendants to approve the Wyoming Plan as written.

STATEMENT REGARDING ORAL ARGUMENT

The State of Wyoming requests oral argument, as this appeal involves issues of great public importance and these issues arise from a somewhat convoluted factual background. The Sate of Wyoming believes that oral argument will benefit this Court's understanding of how the relevant facts relate to the issues raised in this appeal.

Dated this 25th of August, 2005.



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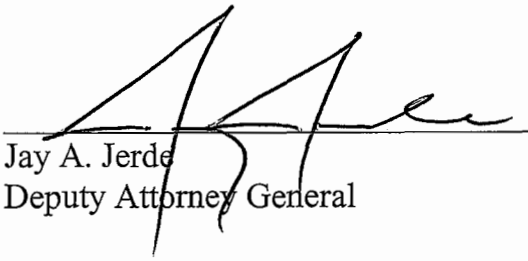

Jay A. Jerde
Deputy Attorney General

FED. R. APP. P. 32(a)(7)(B) CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(B), I certify the Appellant State of Wyoming's Reply Brief contains 6983 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Jay A. Jerde
Deputy Attorney General

10th Cir. R 31.3(B) CERTIFICATE OF COUNSEL

Pursuant to 10th Cir. R. 31.3(B), I certify that this brief is filed separately from co-appellants because Wyoming is exempt from Rule 31.3. *See* 10th Cir. R. 31.3(D).

Jay A. Jerde
Deputy Attorney General

CERTIFICATE OF SERVICE

I, Jay A. Jerde, hereby certify that a true and correct copy of the foregoing **APPELLANT STATE OF WYOMING'S REPLY BRIEF** was placed in the United States mail, postage prepaid (except as otherwise noted), this 25th day of August, 2005, to the following:

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Further, pursuant to the 10th Circuit Emergency Order, filed May 23, 2005, I hereby certify that:

(1) All required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital form is an exact copy of the written document filed with the Clerk; and

(2) The Digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program (Symantec Anti-Virus, Version 9.0.0.338, virus definition file version June 17, 2005 (rev. 8)) and, according to the program, is free of viruses.

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