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ATTORNEYS FOR WOLF COALITION  
Petitioners-Intervenors

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING,	)	
	)	CASE NO. 06-CV-245-J
Petitioner,	)	
	)	
BOARD OF COMMISSIONERS OF COUNTY	)	WOLF COALITION’S
PARK,	)	OPENING BRIEF FOR
	)	DECLARATORY
Petitioner-Intervenor,	)	JUDGMENT AND
	)	INJUNCTIVE RELIEF -
WYOMING WOOL GROWERS ASSOCIATION,	)	RELATED TO
et al., known as the “WOLF COALITION,”	)	RESPONDENTS’ DENIAL
	)	OF THE STATE OF
Petitioners-Intervenors,	)	WYOMING PETITION TO
	)	DELIST THE GRAY WOLF
	)	
vs.	)	
	)	
UNITED STATES DEPARTMENT	)	
OF THE INTERIOR; UNITED STATES	)	
FISH & WILDLIFE SERVICE; DIRK	)	
KEMPTHORNE, in his official capacity	)	
as the Secretary of the United States Department	)	

of the Interior; H. DALE HALL, in his official )  
capacity as Director of the United States Fish )  
and Wildlife Service, and MITCH KING, )  
in his official capacity as Region 6 Director of )  
the United States Fish & Wildlife Service, )

Respondents, )

SIERRA CLUB, NATURAL RESOURCES DEFENSE )  
COUNCIL, WYOMING OUTDOOR COUNCIL, )  
DEFENDERS OF WILDLIFE, JACKSON HOLE )  
CONSERVATION ALLIANCE, and BIODIVERSITY )  
CONSERVATION ALLIANCE, )

Respondents-Intervenors, )

NATIONAL WILDLIFE FEDERATION, and )  
GREATER YELLOWSTONE COALITION, )

Respondents-Intervenors. )

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**WOLF COALITION’S OPENING BRIEF FOR DECLARATORY  
JUDGMENT AND INJUNCTIVE RELIEF – RELATED TO RESPONDENTS’ DENIAL  
OF THE STATE OF WYOMING PETITION TO DELIST THE GRAY WOLF**

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## INTRODUCTION

On July 13, 2005, the State of Wyoming (“State” or “Wyoming”) filed with the United States Fish and Wildlife Service (FWS) 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 (Wyoming Petition to Delist).<sup>1</sup> AR 17789-17895. Wyoming’s Petition to Delist requested the FWS to (1) establish a Northern Rocky Mountain (NRM) Distinct Population Segment (DPS) for the gray wolf comprised of Montana, Idaho, and Wyoming; (2) eliminate the experimental non-essential designation established in 1994; and (3) remove the gray wolf in the NRM DPS from protections under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531, et seq. On October 26, 2005, the FWS issued its “90-day Finding” on the Wyoming Petition to Delist (90-Day Finding) (70 Fed.Reg. 61770; AR 17729-17734), in which it summarized its findings, in relevant part, as follows:

On the whole, we find that the Wyoming petition presents substantial scientific and commercial information indicating that the northern Rocky Mountain gray wolf population may qualify as a DPS and that this potential DPS may warrant delisting. Beyond substantial population and distributional information indicating the northern Rocky Mountain gray wolf population has met its biological recovery goals, the Wyoming petition presented substantial information regarding several of the five factors outlined in section 4(a)(1) of the ESA. ...

*Id.* at 61774; AR 17733.

On August 1, 2006, the FWS issued its Notice of 12-Month Finding (12-Month Finding) (71 Fed.Reg. 43410; AR 17763-17785), and summarized the questions that it evaluated: “(1) Whether there is any emergency or urgency to delist wolves in Wyoming and (2) if Wyoming’s regulatory

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<sup>1</sup> Citations to the “Administrative Record” submitted by the Federal Respondents in the above-captioned matter will be by use of “AR”, followed by the appropriate page number. The Wolf Coalition has filed with this Brief an Appendix containing copies of the referenced documents from the Administrative Record.



framework is adequate to maintain the wolf population above its numerical and distribution recovery levels in Wyoming should the ESA protections be removed.” *Id.* at 43413; AR 17766. This Brief is focused on the second question.

The FWS found that “[a]fter review of all available scientific and commercial information, we find that the petitioned action is not warranted. We have determined that Wyoming State law and its wolf management plan do not provide the necessary regulatory mechanisms to assure that Wyoming’s numerical and distributional share of the NRM wolf population be conserved if the protections of the ESA were removed.” *Id.*; AR 17763. Because the FWS’s 12-Month Finding was not based upon the best available scientific and commercial data available (as required by the ESA, 16 U.S.C. § 1533(b)), on August 9, 2006, Wyoming served the FWS with a 60-day Notice of Intent to Sue letter. On October 10, 2006, the State filed its Petition for Review of Final Agency Action and to Compel Agency Action Unlawfully Withheld or Unreasonably Delayed (Wyoming Petition for Review) challenging the 12-Month Finding.<sup>2</sup> The Wolf Coalition moved to intervene in the State’s action on behalf of its members on November 22, 2006, which Motion was granted on November 27, 2006.

The Wolf Coalition members are substantially the same entities who filed suit in 2004 against the Federal Respondents challenging their rejection of the Wyoming Wolf Management Plan (Wyoming Plan), and their failure and refusal to properly control and manage the gray wolf population in Wyoming. That 2004 lawsuit (Civil Action No. 04-CV-0253-J, consolidated with Civil Action No. 04-CV-0123-J) was dismissed on procedural grounds, with the Court finding that there was no final agency action subject to review. The expectation was that, upon the Federal Respondents’ formally rejecting the Wyoming Management Plan, as they have through their 12-Month Finding, the parties would again file suit challenging the Federal actions as being in violation

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<sup>2</sup> The State of Wyoming will also be filing an Opening Brief pursuant to this Court’s April 18, 2007 Scheduling Order. The Wolf Coalition adopts by reference, as though fully set forth herein, the arguments and analysis provided by the State of Wyoming.

of the ESA, 16 U.S.C. §§ 1531 et seq.

By rejecting Wyoming's Petition to Delist (in the 12-Month Finding), by rejecting the Wyoming Plan, and by refusing to issue a Supplemental Environmental Impact Statement (SEIS), the Respondents have damaged the interests of the Wolf Coalition members and have violated the ESA and the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq. The Wolf Coalition members have standing in the current action pursuant to 16 U.S.C. §§ 1540(g)(1)(A) and (C), to challenge the Respondents' failure to comply with 16 U.S.C. § 1533 of the ESA. They also have standing to challenge the Respondents' violation of NEPA.

#### **STATEMENT OF JURISDICTION**

This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), § 1361 (action to compel an officer of the United States to perform his duty), § 2201 (declaratory relief), §2202 (injunctive relief), and § 1346 (United States as a defendant). This Court also has jurisdiction pursuant to 16 U.S.C. § 1540(g) (citizen-suit provision of the ESA). Judicial review is sought pursuant to the Administrative Procedures Act (APA), 5 U.S.C. §§ 701-706 (APA right of review) and NEPA, 42 U.S.C. §§ 4321-4370. "Section 701 of the APA provides that agency action is subject to judicial review except where there is a statutory prohibition on review or where agency action is committed to agency discretion as a matter of law." *Olenhouse v. Commodity Credit Corporation*, 42 F.2d 1560, 1572 (10<sup>th</sup> Cir., 1994).

##### **I. Description of the Wolf Coalition**

The Wolf Coalition is made up of associations, private entities, and political subdivisions of the State of Wyoming that represent the livestock industry (Wyoming Wool Growers Association, Wyoming Stock Growers Association, Wyoming Farm Bureau Federation, Rocky Mountain Farmers Union, Green River Valley Cattlemen's Association, Upper Green River Cattle Association); Conservation Districts (Wyoming Association of Conservation Districts), County Commissioners (Wyoming County Commissioners Association; Boards of County Commissioners for the Counties Lincoln, Sublette, and Washakie), Predatory Animal Boards (Wyoming Association of County

Predatory Animal Boards; Fremont County, Teton County, and Converse County Predatory Animal Boards); the outfitting and guides industry (Wyoming Outfitters & Guides Association; Cody Country Outfitters and Guides Association; Jackson Hole Outfitters and Guides) business interests (Wyoming Business Alliance); grazing and range management interests (Rock Springs District 4 Grazing Board); and sportsmen groups (Sportsmen for Fish & Wildlife for Wyoming, Park County, Teton County, Lincoln County and Utah).

The Wolf Coalition described its interest in the current action in its Motion to Intervene:

The Wyoming Wolf Coalition has filed a Motion to Intervene in the above-captioned matter for the purpose of protecting its members' interests in Wyoming's wildlife populations, livestock industry, the outfitting and sportsmen industries and tourism industry. The Wolf Coalition members . . . have a direct, individualized and substantial interest in the subject matter of the above-captioned matter, including in the recovery and management of the gray wolf population in the Yellowstone Recovery Area and throughout the State of Wyoming.

Wolf Coalition's Brief in Support of Motion for Leave to Intervene as Petitioner-Intervenor at 1. The Wolf Coalition members have suffered injury, and will continue to suffer injury, as a result of the Federal Respondents' unlawful rejection of Wyoming's Petition to Delist and their rejection of the Wyoming Plan

## II. **Final Agency Action**

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. To meet the statutory requirements for judicial review under the APA, the challenged agency action must be "final". *Colorado Farm Bureau Federation v. United States Forest Service*, 220 F.3d 1171, 1173 (10<sup>th</sup> Cir. 2000). For purposes of the APA, an agency action is "final" if the impact of the action is direct and immediate, the action marks the consummation of the agency's decision-making process, and the action is one by which rights or obligations have been determined or from which legal consequences will flow. *Bennett v. Spear*, 520 U.S. 154, 178, 117 S.Ct. 1154, 1168, 137 L.Ed.2d 281 (1997); *see also Gordon v. Norton*, 322 F.3d 1213, 1220 (10<sup>th</sup> Cir. 2003).

The Respondents' 12-Month Finding and rejection of Wyoming's Petition to Delist represents "final agency action" subject to judicial review.

### **STATEMENT OF THE ISSUES**

The Wolf Coalition hereby adopts by reference the State of Wyoming's Statement of Issues.

### **STATEMENT OF THE CASE**

This action is brought pursuant to the Tenth Circuit's Decision in *Olenhouse v. Commodity Credit Corporation*, *supra* at 42 F.3d 1560. The Wolf Coalition hereby adopts by reference the State of Wyoming's Statement of the Case.

### **BACKGROUND AND STATEMENT OF FACTS**

#### **I. History of Gray Wolf Reintroduction and Recovery Goals**

In August, 1987, the FWS published its Northern Rocky Mountain Wolf Recovery Plan (Recovery Plan), the purpose of which was to "outline[] steps for the recovery of the gray wolf (*Canis lupus*) populations in portions of their former range in the Northern Rocky Mountains of the United States." Recovery Plan at iv; 2004AR at 899.<sup>3</sup> "The Northern Rocky Mountain Wolf Recovery Plan represents a 'road map' to recovery of the gray wolf in the Rocky Mountains." *Id.* at v; 2004AR at 900. The "Primary Objective" of the Recovery Plan was to "remove the Northern Rocky Mountain wolf from the endangered and threatened species list by securing and maintaining a minimum of ten breeding pairs of wolves in each of the three recovery areas for a minimum of three successive years." *Id.* at 12; 2004AR at 914. "The three recovery areas identified for the Northern Rocky Mountain wolf include northwest Montana, central Idaho, and the Greater Yellowstone Area" (GYA), which was defined as Yellowstone National Park (YNP), designated wilderness areas (Absaroka-Beartooth, north Absaroka, Washakie, Teton), and adjacent public lands.

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<sup>3</sup> Citations to the Administrative Record submitted by the Respondents in the 2004 proceeding will be by use of "2004AR", followed by the appropriate page number. Respondents made such documents a part of the 2006 Administrative Record by including the Index for those documents in this proceeding. Respondents' counsel also confirmed that they intended the 2004 Administrative Record to be included as part of the Administrative Record for this action.

*Id.* at v, 22; 2004AR at 900, 924. The Respondents recognized the controversy associated with “reintroducing” gray wolves into YNP, and sought to alleviate the public’s concerns regarding the impacts. *Id.* at 9; 2004AR at 911. Most importantly, they designed the overall gray wolf “reintroduction” plan to ensure protection for the interests of the Wolf Coalition members.

In their attempt to gain critical public support, the Respondents adopted numerous control and management techniques to be used in the Yellowstone Recovery Area (YRA), including adoption of a zone management protocol. The three management zones defined by the Recovery Plan were identified to minimize wolf-human/livestock conflicts and to protect other wildlife species (elk, moose, wild sheep), while at the same time allowing for wolf “recovery” within the geographic confines of the YRA. “Zone Management” is defined in the Recovery Plan Glossary as follows:

A management concept by which management priority and concern is de-emphasized beyond a central core area. For this document there will be three management zones: Zone I will give strong emphasis to wolf recovery; Zone II will be a buffer zone; and Zone III will contain established human activities such as domestic livestock use or developments in sufficient degree as to render wolf presence undesirable. Maintenance and improvement of habitat for wolves are not management considerations in Zone III.

*Id.* at 59; 2004AR at 961. “Zone I” contained “key habitat components in sufficient abundance and distribution on an annual basis to sustain ten breeding pairs of wolves. It should generally be an area greater than 3,000 contiguous square miles with less than 10% private land (excepting railroad grant lands) and less than 20% subject to livestock grazing.” *Id.* at 31; 2004AR at 933. Management “Zone II” was established as a “buffer” zone between Zone I and Zone III: “It should contain some key habitat components but probably not in sufficient abundance and distribution on an annual basis to sustain a viable wolf population. Zone II boundaries may be changed according to demonstrated wolf population and habitat needs, provided the change does not bring wolves into conflict with existing livestock areas/allotments.” *Id.* Management Zone III was defined as “undesirable” for wolf presence: “this zone contains established human activities such as domestic livestock use or other human activities or developments in sufficient degree to render wolf presence undesirable.” *Id.*

On November 22, 1994, the FWS issued the Final Rule for the “Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana.” 59 Fed. Reg. 60252 (1994 Final Rule, attached as Exhibit A). The effects of the Final Rule were evaluated in the May, 1994, Final Environmental Impact Statement (FEIS) titled, “The Reintroduction of Gray Wolves to Yellowstone National Park and Central Idaho.” *See* Final Rule at 60252. The 2003 “Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Coterminous United States” (2003 Final Rule to Reclassify), (68 Fed. Reg. 15804;<sup>4</sup> AR at 14902-14974), further refined the recovery goals:

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

*Id.* at 15817-15818; AR at 14916-14917.

Concurrently with publishing the 1994 Final Rule, the FWS also amended 50 C.F.R. Part 17 and promulgated “Section 10(j) Rules” (50 C.F.R. § 17.84), to establish a nonessential experimental population of gray wolves in YNP. The FWS explained that it was introducing the gray wolves into YNP using its “10(j) authority” to allow for a more flexible management approach: “By establishing a nonessential experimental population, more liberal management practices may be implemented to address potential negative impacts or concerns regarding the reintroduction.” 1994 Final Rule at 60253. While the recovery area was limited to the GYA (the National Park and certain surrounding wilderness areas), the nonessential experimental designation applied to the entire State of Wyoming to allow for the use of more aggressive management and control techniques.

The FWS designated the YNP as one of three recovery areas because it was under Federal

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<sup>4</sup> Although the 2003 Final Rule to Reclassify was vacated by courts in Oregon and Vermont, the FWS still “view[s] this document as a valid summary of our view of the science and a reliable summary of the information in our files.” 90-day Finding at 61771, AR 17730.

jurisdiction, it had high-quality wolf habitat and good potential release sites, and it was far from the natural expansion of wolf packs from Montana. *See* 1994 Final Rule at 60254. The FWS also found it important that “[m]ost of the reintroduction area is remote and sparsely inhabited wild lands.” *Id.* at 60256. In its February 8, 2006 Advanced Notice of Proposed Rulemaking (2006 ANPR), 71 Fed.Reg. 6634; AR 17735-17762, the FWS identified the “suitable habitat” within the NRM:

Suitable wolf habitat in the [Northern Rocky Mountain] wolf DPS is typically characterized by public land, mountainous forested habitat, abundant year-round wild ungulate populations, lower road density, lower number of domestic livestock that were only present seasonally, few domestic sheep, low agricultural use, and low human populations.

*Id.* at 6642; AR 17744. The area in which wolves are designated as “trophy game animals” under the Wyoming Plan is considered “suitable habitat.” Wyoming Plan at 1-6, 10-20; 2004AR 197-202, 206-216. The area in which the wolves are designated as “predators” is not. *Id.*

In 1995 and 1996 the FWS released a total of thirty-one (31) western Canadian gray wolves into YNP. *See* Wyoming Plan at 3; 2004AR at 199.

## II. Gray Wolf Recovery

The current NRM wolf population far exceeds the recovery goals. The FWS announced in 2003 that 2002 was the third consecutive year in which at least thirty (30) breeding pairs of wolves inhabited the NRM Recovery Area. *See* Wyoming Plan at 3; 2004 AR at 199. The FWS reported in its 2003 Final Rule to Reclassify that “[t]here have been at least 300 wolves in a minimum of 30 packs since the end of 2000, and at the end of 2001 there were 563 wolves in 34 packs in the Northern U.S. Rockies.” AR at 14909. In 2002, the NRM gray wolf population consisted of more than 663 wolves, including 43 breeding pairs. 2004AR 292-293. In 2003, the estimated NRM gray wolf population was a minimum of 761 wolves, including 51 breeding pairs. There were an estimated 835 wolves in 110 packs in the NRM by the end of 2004. Sixty-six of those packs met the definition of “breeding pair.” 90-Day Finding at 61770; AR 17729. “In 2005, 19 breeding pairs and approximately 256 wolves were known to occur in Montana; 16 breeding pairs and

approximately 252 wolves were known to occur in Wyoming; and 36 breeding pairs and 512 wolves were known to occur in Idaho, for a total of 71 breeding pairs and 1,020 wolves . . . .” 12-Month Finding at 43412; AR 17765. By the end of 2005, the *estimated* NRM wolf population exceeded the recovery goal by almost 250%. This population was sustained *despite* a suspected outbreak of canine parvovirus or distemper in 2005, resulting in a decline in the YNP wolf population. The population continued to grow in 2006: “Preliminary mid-year estimates indicate a total of **about 1,229 wolves, in 158 packs, with at least 87 potential breeding pairs,**” in the NRM wolf population. Weekly Report 9/15 to 9/22/2006, AR 15318-15323. “This represents an overall wolf population growth rate of over 20% since last year’s interagency official December 31, 2005 mid-winter wolf population estimate . . . .” (*Id.*), and exceeds the recovery goal by over 300%. There were at least 309 wolves in Wyoming in 31 packs, with 30 packs producing 127 pups, and at least 24 potential breeding pairs. The population has trended upwards since 1995 when the “reintroduced” wolves were first brought into YNP. In Wyoming the wolf population has increased every year, and now exceeds the recovery goal by almost 300%:

2000:	119 wolves (eight packs) living in YNP 36 wolves (six packs) living in Wyoming outside YNP
2001:	131 wolves (ten packs) living in YNP 56 wolves (eight packs) living in Wyoming outside YNP
2002:	148 wolves (fourteen packs) living in YNP 67 to 81 wolves (eight packs) living in Wyoming outside YNP
2003:	174 wolves (fourteen packs) living in YNP 76 to 88 wolves (eight packs) living in Wyoming outside YNP

In its 2003 Final Rule to Reclassify, the FWS reported that the wolf population throughout the northern Rocky Mountain recovery areas (including the YRA) had achieved the numerical and distributional recovery goals. *See* 2003 Final Rule to Reclassify at 15810-15811; AR 14909-14910. The FWS then described the relationship between a recovered wolf population and geographic needs: “That peer review indicated that population viability is a function of the population *and not the area it occupies*. *The reviewers felt that geographically expanding an area that a population*



*occupies had no impact on that population's viability.” Id. at 15828 (emphasis added).*

As part of the 2003 Final Rule to Reclassify, and again in its 12-Month Finding, the FWS analyzed the five (5) required ESA factors (16 U.S.C. § 1533(a)) to determine the status of the gray wolf population in the NRM. *Id.* at 15841-15857; AR 14940-14956; 12-Month Finding at 43417-43432; AR 17770-17785. The FWS's findings related to each factor are summarized below.

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

The FWS concluded in 2003 that there was no present or threatened destruction, modification, or curtailment of the gray wolf habitat or its range for the Western DPS.<sup>5</sup> In reaching that conclusion, the FWS focused upon the habitat available in the GYA, concluding that this area “of potential wolf habitat [is] secure, and no foreseeable habitat-related threats prevent [it] from supporting a wolf population that exceeds recovery levels.” 2003 Final Rule to Reclassify at 15845; AR 14944. The FWS went on to state that “[t]he only areas large enough to support wolf packs, but lacking livestock grazing, are Yellowstone National Park and some adjacent USDA Forest Service Wilderness . . . .” *Id.* “In summary, we do not believe that habitat loss or deterioration, habitat fragmentation, or a decline in the abundance of wild prey will occur at levels that will affect wolf recovery and long-term population viability in the Western DPS.” *Id.* The FWS so concluded *without relying* upon any “potential wolf habitat” outside of the GYA (i.e., where wolves are designated as “predators” under the Wyoming Plan).

In its 12-Month Finding (43417; AR 17770), the FWS described the criteria for habitat and range:

In regard to the NRM wolf population, the significant portions of the gray wolf's range are those areas that are important or necessary for maintaining a viable, self-sustaining, and evolving representative metapopulation in order for the NRM wolf

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<sup>5</sup> The purpose of the 2006 ANPR, was to establish the NRM DPS of the gray wolf in place of the “Western DPS,” which was the subject of the 2003 Final Rule to Reclassify. 71 Fed.Reg. 6634; AR 17736.

population to persist into the foreseeable future.

The FWS further explained that The NRM wolf population has not significantly increased its overall outer distribution in Montana, Idaho, and Wyoming since 2000 (Service at al. 2000-2006) but has continued to grow and expand within that area *and now occupies almost all suitable habitat in Montana, Idaho, and Wyoming* (71 FR 6643). (Emphasis added). *Id.* at 43415; AR 17768. “... [T]he most important habitat attributes for wolf pack persistence are forest cover, public land, high elk density, and low livestock density.” *Id.*, at 43418; AR 17771. The FWS then reaffirmed its 2003 conclusion regarding habitat:

We believe that impacts to suitable and potentially suitable habitat will occur at levels that will not significantly affect wolf numbers or distribution in the NRMs . . . . Occupied suitable habitat in key areas of Montana, Idaho, and Wyoming is secure and sufficient to provide for a self-sustaining population of gray wolves in the absence of any other threats. These areas include Glacier National Park, Teton National Park, YNP, numerous U.S. Forest Service (USFS) Wilderness areas, and other State and Federal lands. These areas will continue to be managed for high ungulate densities, moderate rates of seasonal livestock grazing, moderate-to-low road densities that will provide abundant native prey, low potential for livestock conflicts, and security from excessive unregulated human-caused mortality.

*Id.*

These have long been recognized as the most likely areas to successfully support 30 or more breeding pairs of wolves, comprising 300 or more individuals in a metapopulation with some genetic exchange between subpopulations. (Service 1980, 1987, 1994; 71 FR 6634). Unsuitable habitat, and small fragmented areas of suitable habitat away from these core areas, largely represent geographic locations where wolf packs cannot persist. Although such areas may have been historic habitat, these areas are not important or necessary for maintaining a viable, self-sustaining, and evolving representative wolf population in the NRMs into the foreseeable future. These areas are not a significant portion of the range for the NRM wolf population.

*Id.* at 43420; AR 17773. Thus, according to the FWS, the “suitable habitat” in Wyoming is found in Teton National Park, YNP, numerous USFS Wilderness areas and other state and Federal lands. These geographic areas provide sufficient habitat and range to protect a recovered wolf population. The FWS’s finding in that regard confirms that, *even if* wolves are designated as “predators” in

certain areas of the State, their population will remain *above* recovery levels, because such areas *are not so important* “to the continued existence of the [wolves] that threats to the [wolves] in that area can threaten the viability of the species, subspecies, or DPS as a whole. . . .” *Id.* In summary, “[h]abitat on the outer edge of the metapopulation is insignificant to maintaining the NRM wolf population’s viability.” *Id.* at 43419; AR 17772.

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

The FWS has found that the gray wolves in the NRM DPS, including the gray wolf population within Wyoming and the GYA, are not at risk of overutilization for commercial, recreational, scientific, or educational purposes. 2003 Final Rule to Reclassify at 15846; AR at 14945; 12-Month Finding at 43421; AR 17774.

**C. Disease or Predation**

The FWS has also reported that the gray wolves in the NRM DPS, including the gray wolf population within Wyoming and the GYA, are not at risk for disease or predation. According to the FWS, “in the studies of wolves in Montana, Idaho and Wyoming to date, disease and parasites have not appeared to be a significant factor affecting wolf population dynamics.” 2003 Final Rule to Reclassify at 15848; AR at 14947. Further, “[t]here are no wild animals that habitually prey on gray wolves.” *Id.* at 15849; AR at 14948. “Compared to naturally colonizing wolves, reintroduced wolves had a lower proportion of human-caused mortality because they were released in remote areas where contact and conflicts with people were less likely.” *Id.* at 15851; AR at 14950.

In its 12-Month Notice, the FWS identified the various diseases and predators that could potentially affect the wolf population (including canine parvovirus, canine distemper, lyme disease, sarcoptic mange, rabies, canine heartworm, brucellosis, predation), and reported as follows:

... [T]here are a wide range of diseases that may affect the NRM wolves. However, there are no indications that these diseases are of such magnitude that the population is in danger of extinction, particularly within Idaho, Montana, and Wyoming. Similarly, there are no indications that predation poses a significant threat to the NRM wolf population. The rates of mortality caused by disease and predation are

well within acceptable limits, and there is no reason to expect those rates to change appreciably if NRM wolves were delisted.

12-Month Finding at 43421-43422; AR 17774-17775.

#### D. The Adequacy or Inadequacy of Existing Regulatory Mechanisms

The FWS's criticism of the Wyoming Plan are habitat based and focus upon the State's decision to manage wolves under a "dual classification" management protocol. Under the Wyoming Plan, wolves will be classified as "trophy game animals" within the Recovery Plan's "Zone I" area, and as "predators" in the remainder of the State. This dual classification will work to protect a recovered wolf population for one simple and unassailable reason: that area in which the wolves will be designated as trophy game animals includes all of the "suitable habitat"; that area in which wolves will be identified as predators provides unsuitable habitat. According to the FWS:

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

2003 Final Rule to Reclassify at 15856; AR at 14955. The FWS refined the foregoing conclusion in its 12-Month Finding at 43425 (AR 17778): "[h]uman-caused mortality would have to remove 34 percent or more of the wolf population annually before population growth would cease. . . ."

The FWS has repeatedly identified the *federal lands* in Wyoming as the "suitable habitat" for supporting a recovered wolf population. To reiterate the FWS's findings:

The GYA recovery area has a core including over 8,094 km<sup>2</sup> (3,125 mi<sup>2</sup>) in YNP and although less useful to wolves due to high elevation, about 16,187 km<sup>2</sup> (6,250 mi<sup>2</sup>) of designated wilderness (Service 1994). *These areas are in public ownership, and no foreseeable habitat-related threats would prevent them from anchoring a wolf population that exceeds recovery levels.*

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Within occupied suitable habitat, enough public land exists so that NRM wolf populations can be safely maintained above recovery levels. Important suitable wolf habitat is in public ownership, and the States and Federal land-management agencies are likely to continue to manage habitat that will provide forage and security for high ungulate populations, sufficient cover for wolf security, and low road density. (Emphasis added).

12-Month Finding at 43419; AR 17772.

When needing to support its rejection of the Wyoming Petition to Delist, however, the FWS conveniently finds otherwise, and contradicts its own extensive research and data in the process:

In 2003, Wyoming passed a very specific and detailed State law that would have designated wolves as ‘trophy game’ in YNP, Grand Teton National Park, John D. Rockefeller Memorial Parkway, and the adjacent USFS designated Wilderness area (Wyoming House Bill 0229) once the wolf is delisted from the ESA. A large portion of the area permanently designated as ‘trophy game’ actually has little to no value to wolf packs because it is not suitable habitat for wolves and, thus, is rarely used (GYA wilderness, and much of eastern and southern YNP) (Jimenez 2006).

*Id.* at 43427; AR 17780.

The FWS’ sole support for the foregoing claim is a one-paragraph hand-written note authored by Mike Jimenez that was attached to a map showing 2005 wolf pack home ranges. Mr. Jimenez’s 2006 “analysis” as relied upon by the FWS is worth quoting in full:

Here is a map displaying Wyoming wolf home ranges overlaid with the various forest and wilderness designations . . . . All the packs go outside the Wyoming Plan’s Trophy Game areas.

AR 16626-16627. It is readily apparent that Mr. Jimenez does not support the FWS’s assessment that the wolf habitat available on the Federal lands has “little to no value” to wolf packs. Mr. Jimenez said no such thing. While it is clear that Mr. Jimenez sought to distort the overlay relationship between the wolf pack home ranges and the area in which wolves would be protected as trophy game animals under the Wyoming Plan, he did not go so far as to argue that the Federal lands were essentially worthless as wolf habitat. The FWS’s distortion of Mr. Jimenez’s notes confirms that the 12-Month Finding is not based upon science, but instead upon misrepresentation.

Fortunately, the map showing the location of the wolf packs in 2005 in relation to the trophy game area is not so easily distorted as are political opinions, and can be relied upon to correct the record.<sup>6</sup> That map shows that in 2005 the vast majority of the wolf packs were living within that area of the State in which they would be designated as trophy game animals under the Wyoming Plan. Wyoming's Plan designates wolves as "trophy game animals" in YNP, Grand Teton National Park (Grand Teton), the Parkway, and the contiguous wilderness areas (Absaroka-Beartooth, North Absaroka, Washakie, Teton, Jedediah Smith, Winegar Hole and Gros Ventre). The 2005 map attached to Mr. Jimenez's notes shows that at least fifteen (15) of the Wyoming resident wolf packs called YNP their home in 2005; one (1) pack was primarily located in the Teton National Park and the Gros Ventre Wilderness area; an additional three (3) packs relied upon the Washakie Wilderness area to provide approximately forty to fifty percent (40-50%) of their habitat and range; and another pack was reliant upon the Jedediah Smith Wilderness area. Only four packs had partially migrated off of the federal lands (Forest Service) onto private lands near Cody and Meeteetse, Wyoming. In short, the vast majority of the range and habitat used by the twenty-six (26) packs identified in 2005 were located within the National Parks and the Wilderness areas, and thus located within boundaries of Wyoming's trophy game area. The FWS estimated that there were approximately 16 breeding pairs and 252 wolves in Wyoming in 2005, or 60% more breeding pairs and 150% more wolves than Wyoming is required to manage for under the FWS's recovery goals. Habitat, as provided by the Federal lands has obviously *not been* a limiting factor.

The FWS's additional arguments regarding whether the Wyoming Plan is an "adequate regulatory mechanism" to protect a recovered wolf population will be discussed further below.

**E. Other Natural or Manmade Factors Affecting the Wolf's Continued Existence**

The FWS has found that there are no other natural or manmade factors affecting the

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<sup>6</sup> Attached to Mr. Jimenez's Notes is page 5 of the Wyoming Plan (2004AR 201), which identifies the subject wilderness areas and clarifies the map attached to Mr. Jimenez's notes.

continued existence of the gray wolves in the NRM DPS, including the gray wolf population in Wyoming. 12-Month Finding at 4341; AR 17784. In reaching that conclusion, the FWS stated that critical to long-term status of gray wolf populations in the United States is human attitudes based on, among other things, the conflicts between human activities and wolves, concern with the perceived danger the species may pose to humans, the economic effect of livestock losses, and the emotions regarding the threat to pets. *Id.* Flexible management regulations that effectively deal with wolf-human conflicts, such as those in the Wyoming Plan, are critical to public support for wolf recovery.

### III. The Wyoming Statutory Framework and Wyoming Plan

In 2002, the WGFD began drafting a plan to assume primary management responsibility for the wolf population. The WGFD worked closely with the FWS throughout that process. For example, on September 11, 2002, the WGFD requested the FWS to comment on its proposal to manage the wolf population pursuant to a dual classification – as “trophy game animals” within YNP, Grand Teton, and the Bridger-Teton and Shoshone National Forest wilderness areas (approximately 5.1 million acres), and as “predators” throughout the remainder of the State. 2004AR at 32. The FWS addressed the State’s proposal on September 26, 2002: “Wolves will need legal protection from unregulated human mortalities under State law in an area at least as extensive as they currently occupy to maintain the population above recovery levels.” 2004AR at 29.

On December 19, 2002, the FWS wrote to the WGFD, explaining that “[i]t appears that based on what we know now about the dual status proposal, this has the potential for working, provided the area where wolves are classified as trophy game animals is of sufficient size to preclude the relisting of the wolf once they are delisted. ... As described in your draft management plan, the size of that area is not large enough.” 2004AR at 75. The draft management plan that was current on December 19<sup>th</sup> was dated November, 2002. 2004AR at 113-149. The geographic area proposed for trophy game status in that version of the plan was limited to YNP, Grand Teton, the National Elk Refuge, and the Shoshone and Bridger-Teton wilderness areas. *See* 2004AR at 115-116. Wyoming responded to the FWS by broadening the area in which wolves would be considered trophy game

animals in its final Management Plan: “The State of Wyoming will commit to maintaining 15 packs of wolves in the State including the National Parks and Parkway with 7 of these packs occupying areas outside the National Parks and Parkway. From the date gray wolves are delisted, they will be classified as trophy game animals in those tracts of land within the boundaries of Wyoming designated as YNP, GTNP, the Parkway, and contiguous wilderness areas (Absaroka-Beartooth, North Absaroka, Washakie, Teton, Jedediah Smith, Winegar Hole, and Gros Ventre) in accordance with W.S. 23-1-101(a)(xii)(B)(I).” Wyoming Plan at 4; 2004AR at 200.

In 2003, Wyoming enacted Wyo.Stat. § 23-1-304 as the statutory framework for management of the Canadian gray wolf in Wyoming. In July, 2003, the WGFD issued the Final Wyoming Plan. The purpose of that Plan was to “establish guidelines for wolf management in Wyoming that will provide for a sustainable wolf population, while minimizing wolf/human conflicts, and ensuring the long-term health and viability of all big game herds once wolves are removed from federal protection under the Endangered Species Act.” Wyoming Plan at 3; 2004AR at 199.

The State of Wyoming has committed to managing at least fifteen (15) wolf packs in Wyoming as a whole and at least seven (7) wolf packs living outside of the area defined as the YNP, Grand Teton, and the Parkway (collectively referred to below as “the National Parks”). The National Parks encompass approximately 3,945 square miles (2,524,800 acres) in Wyoming. Wolves will always be classified as “trophy game animals” within the National Parks. Wolves will also be classified as “trophy game animals” within the wilderness areas contiguous to the National Parks (Absaroka-Beartooth, North Absaroka, Washakie, Teton, Jedediah Smith, Winegar Hole and potentially at the Gros Ventre). *See* Wyoming Plan at 1, 4; 2004AR at 197, 200. These wilderness areas encompass an additional 3,193 square miles (2,043,520 acres).

It is important to compare these areas (and acreages) within Wyoming with the FWS Recovery Plan. The FWS Recovery Plan defined “Zone I” as containing “key habitat components in sufficient abundance and distribution on an annual basis to sustain ten breeding pairs of wolves. It should generally be an area greater than 3,000 contiguous square miles with less than 10% private



land (excepting railroad grant lands) and less than 20% subject to livestock grazing.” Recovery Plan at 31; 2004AR at 933. The area protected by the Wyoming Plan (7,000 square miles; 4,568,320 acres) is more than double the recovery area defined by the Recovery Plan. Wyo.Stat. § 23-1-304 (as implemented and carried out by the Wyoming Plan) clearly meets the land-mass requirements identified in the Recovery Plan for the Zone I and Zone II management areas.

Wyo.Stat. § 23-1-304 provides that gray wolves will be classified as predatory animals outside of the National Parks, Parkway, and contiguous wilderness areas. The predator-status area generally equates to “Zone III” as defined in the Recovery Plan (i.e., the area where the Respondents concluded wolf presence is undesirable). If, however, there are less than seven (7) wolf packs located in Wyoming primarily outside of the National Parks, the Game & Fish Commission (Commission) will adopt rules and regulations to classify the gray wolf as a trophy game animal within that area of Wyoming that is determined to be necessary to reasonably ensure that seven (7) packs are located in Wyoming and primarily outside of the National Parks. The geographic area in which that designation will be made is known as the “Northwest Wyoming Wolf Data Analysis Unit” (“Wolf DAU”). *See* Wyoming Plan at 1; 2004AR at 197. Wolves located in Wyoming outside of the Wolf DAU will continue to be classified as “predatory animals.”

According to the Wyoming Plan, the Wolf DAU will initially encompass an area 9,780 square miles (6,259,200 acres). The Wolf DAU will include the National Parks, the contiguous wilderness areas, and 2,642 square miles of land in Wyoming surrounding those areas. The Wolf DAU will consist of three wolf management units. Wyoming Plan at 11; 2004AR at 207. The WGFD will manage for seven (7) wolf packs within the Wolf DAU, and will use the wolf management units to regulate public take to achieve specific harvest objectives and to ensure maintenance of a gray wolf population that meets or exceeds the recovery goals. *Id.* The Wolf DAU/wolf management unit method for managing wolves is the same as the data analysis unit/hunt area method used by the WGFD to manage all other species of big game and trophy game animals. *Id.* The WGFD will actively monitor gray wolf populations and collect appropriate management

data on wolves throughout Wyoming, including in those areas where wolves are classified as “predatory animals.” *Id.* At least every ninety (90) days, the WGFD will provide the Commission with a monitoring report on the number of wolf packs within Wyoming and their general location. The WGFD will provide this report more frequently than every ninety days as necessary. *Id.* Based upon the monitoring report, the Commission will review the classification of wolves in the Wolf DAU to determine whether the boundaries should be adjusted to maintain pack management objectives. *Id.* The Commission will then increase, decrease, or maintain the geographic size of the Wolf DAU to ensure that adequate regulatory mechanisms are in place to maintain seven (7) wolf packs outside of the National Parks and Parkway. *Id.* As the size of the Wolf DAU increases, the area in which the wolves are classified as “trophy game animals” increases, and the area in which they are classified as “predatory animals” decreases. The ability to increase the area of Wyoming where gray wolves are classified as “trophy game animals” allows the Commission to ensure the sustainability of the gray wolf population at or above recovery levels. *Id.*

The Commission and the WGFD regularly use the rule-making process to set hunting seasons, bag limits, and other limitations on hunting in Wyoming. *See* Wyo.Stat. § 23-1-302. The Commission is endowed with emergency rule-making powers to enact immediate regulations to address wildlife management issues. *See* Wyo.Stat. § 23-1-303 and Wyo.Stat. § 16-3-103(b). An emergency situation routinely results in the Commission enacting an emergency rule, which takes effect immediately, and is usually followed by the enactment of a final rule (usually within 120 days). *Id.* This rule-making authority allows the Commission to respond quickly to any threats that may impact maintenance of the gray wolf population at or above recovery goals.

In adopting Wyo.Stat. § 23-1-304, Wyoming has fully complied with, and will carry out, the goals of the Recovery Plan and the Final Rule, and will meet the requirements of the ESA. The Wyoming Plan ensures that the gray wolf population within the GYA exceeds the recovery goals.

#### IV. **Federal Review of the Wyoming Plan**

Throughout development of the Wyoming Plan the WGFD and the FWS “coordinat[ed] very

closely.” AR 12174. The WGFD sought guidance from the FWS, and the FWS responded with information about the protections that the States were required to provide and the standards by which the management plans would be judged, including the fact that the peer reviews would be decisive:

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

2004AR at 25. The FWS viewed the peer reviewers’ opinions as so critical that, should they find that the Wyoming plan would *not* conserve a recovered wolf population, the plan would be rejected. The FWS never stated that Wyoming’s plan would be rejected *even if* endorsed by the peer reviewers.

In February, 2003, Ed Bangs, the FWS Recovery Coordinator, reiterated the importance of the peer reviewers’ opinions:

I think we should make it clear that independent scientific peer review *will be the ultimate judge* of whether WY’s plan will conserve wolves or not. It isn’t us independently giving the thumbs up or down. We are making the decision whether they [sic] plan [sic] has a chance to pass the peer review process and if we proceed with the process. (Emphasis added).

AR 12173.

On June 20, 2003, Mr. Bangs described for the prospective peer reviewers the time-line and review process for evaluating the States’ management plans:

After Montana, Idaho, and Wyoming have all completed their State wolf management plans, the Service may forward those plans for independent peer review. The Service, itself, must first determine that they are likely to maintain a delisted wolf population above levels that would cause a wolf population in the western DPS to become listed again under the Endangered Species Act. *If we believe* that those plans are adequate, *we will then* forward them to a group of scientists, which we

select, for independent professional peer review. If that peer review determines that in combination those State laws will conserve a recovered wolf population throughout the western DPS, then the Service will develop a delisting proposal. That proposal will include the results of the peer review and will be available for further professional and public review as required by the procedures of the Endangered Species Act. (Underlined emphasis in original; italic added).

2004AR at 335. Ralph Morgenweck, Regional Director of the FWS, confirmed this process in corresponding with the Predator Conservation Alliance on June 26, 2003. 2004AR at 308.

On July 2, 2003, Mr. Bangs provided written comments to the WGFD on the then-current draft Wyoming plan. Mr. Bangs concluded that, from a biological standpoint, the draft Wyoming plan would protect the gray wolf population in Wyoming at or above recovery levels:

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

2004AR at 344. Mr. Bangs also pointed out that,

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

*Id.* Mr. Bangs noted that,

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

*Id.* Further,

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

*Id.* at 345.

While acknowledging that the draft Wyoming Plan met the recovery needs of the gray wolf, Mr. Bangs, referring to issues of public perception and public relations, encouraged Wyoming to forego designating the gray wolf as a “predator” in *any part of the State*.

While we understand that some people in Wyoming feel very strongly that this is necessary, we believe [adopting the predator classification] was a very serious mistake that will continue to haunt our efforts to successfully delist wolves. Predatory animal status for wolves will make the whole delisting process much more contentious, emotional, expensive, and filled with hurtful rhetoric than necessary.

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... We believe that the image that under predatory animal status in Wyoming, wolves could be hunted and killed without a clear regulatory safety-net, at any time, without limit, and particularly-by any means-is unacceptable to most Americans. We believe those perceptions will cause unimaginable rhetoric, conflict, emotion and mistrust. It could raise millions of dollars and provide a unifying justification for those groups who have most strongly supported wolf restoration, share animal fairness and humane concerns, but mistrust any type of state management-ie. the very organizations that are most likely to litigate over wolf delisting. While the [FWS] is mandated to focus on science and biology, public attitudes and comments will influence subsequent litigation. We urge you to reconsider the wisdom of ‘predatory animal’ status for wolves *anywhere* in Wyoming. The Wyoming legislature could help avoid a huge and very public brawl that will be damaging, if not fatal, to the [FWS’s] efforts to delist a recovered wolf population and would greatly improve the National public’s attitude and trust of Wyoming’s abilities to manage wolves, by authorizing wolf trophy game status statewide. ... *State-wide trophy game status would remove a major negative public relations perception that will cloud the real issues that are being discussed during the delisting process.* (Emphasis added).

2004AR at 347, 348. Importantly, Mr. Bangs did not at any time inform Wyoming that its Plan was biologically inadequate to maintain a recovered wolf population. Mr. Bangs’ sole concern related to public perception. *Id.* at 347. In fact, Mr. Bangs stated in closing that “[t]he biological recovery of wolves under the ESA has been completed. . . .” *Id.* at 348. *See also* AR 12091.

On July 14, 2003, Paul Hoffman, the FWS Deputy Assistant Secretary for Parks, reported

*While the predatory animal classification may be controversial, FWS biologists*

*believe it will not adversely affect the continued recovery of wolves since, for the most part, the area where wolves would be classified as predatory animal lies outside suitable wolf habitat.* The predatory animal classification does give the people who live with large carnivorous predators (wolves, grizzly bears, mountain lions, coyotes) a great degree of control over their quality of life and livelihoods which is considered by many a social necessity to insure the species continued recovery. (Emphasis added).

AR 12058-12059 (quotation found on 12059).

On July 16, 2003, Mr. Bangs critiqued the revised Executive Summary of the July 11, 2003 draft of the Wyoming plan. Mr. Bangs noted that “[i]n its July 2, 2003 letter on the June 2003 Draft Final Wyoming Gray Wolf Management Plan, the Service indicated that proposed DAU [all areas east of Cody and Meeteetse and north of Pinedale, WY] appeared of adequate size to meet Wyoming’s wolf management commitment of maintaining 7 packs outside of Yellowstone National Park.” 2004AR at 363-364. Mr. Bangs then reiterated how the Wyoming Plan would be judged:

The Service appreciates the opportunity to assist Wyoming as it develops its wolf management plan. I want to emphasize that assisting in helping develop a Wyoming wolf management plan does not mean that the Service can ‘pre-approve’ Wyoming’s plan. The plan must be judged as a complete package, rather than by its individual parts. After Wyoming completes its wolf management plan the Service, [sic] will determine, after consideration of the report of an independent scientific peer review panel, if the wolf management plans of Montana, Idaho and Wyoming will maintain the northern Rocky Mountain wolf population. If those plans will maintain a wolf population at or above recover levels the Service could *then* propose that the wolf population in the Western Distinct Population Segment be delisted.

2004AR at 364.

#### V. Scientific/Biological Peer Review of the Wyoming Plan

On September 12, 2003, the FWS retained an independent panel of “12 of the top recognized wolf researchers, wolf management and livestock depredation experts in North America. . . .” (2004AR at 428) to peer review the Wyoming Plan, along with the Plans submitted by Montana and Idaho. The FWS reported that “[a]ll [peer reviewers] are recognized authorities in wolf management and/or research, and each has 15-35 years of experience with wolves, large predator/prey or livestock

depredation issues.” *Id.* at 430. The FWS’ requested the independent peer reviewers to provide their professional review and opinion as to whether “(1) the state plans of Montana, Idaho, and Wyoming will achieve the stated objectives of each plan, and (2) if you believe that collectively they are adequate to maintain the wolf population at or above the recovery level into the foreseeable future.” *Id.* at 406. *See also* the “Suggested Response Form” provided by the FWS. *Id.* at 407-409.

Eleven (11) of the twelve experts provided written reviews, ten (10) of whom concluded that the Wyoming Plan would (collectively with the Idaho and Montana management plans), maintain a recovered gray wolf population. 2004AR at 431-481. Portions of the peer reviewers’ conclusions are quoted here (with the entire set of peer reviews included in the Appendix 2004AR 428-490):

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

L. David Mech, 2004AR at 433.

Yes, after review of the state wolf management plans of Montana, Idaho, and Wyoming, I believe that the plans for the three states will collectively maintain a recovered wolf population at or above 30 breeding pairs of wolves. ...

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

Bill J. Paul, 2004AR at 435.

Yes, I found Wyoming’s plan for 15 packs, 7 outside the parks, to be adequate to achieve the Service’s plan for 10 breeding pairs. Habitat is adequate and prey resources appear more than adequate for the immediate future. ... [G]iven the current use of space and far more than the required 10 breeding pairs, I see every reason to suspect that 10 breeding pairs *can be guaranteed* given Wyoming’s plans, apparent commitment to the process, and desire to assume responsibility. (Emphasis added).

Rod Boetje, 2004AR at 449.

*Wyoming’s proposal for trophy game classification for wolves within the 7*

*wilderness areas, the potential for expansion of trophy classification beyond the wilderness areas, and a revolving 90 day review period for wolf classification by the Wyoming Game and Fish Commission provides ample flexibility to respond to unanticipated declines in wolf numbers outside of National Parks. ... I do not believe establishing wolves in Wyoming outside the National Parks, contiguous wilderness areas, and DAU will be necessary to meet the objective of maintaining a recovered and viable wolf population as defined by the USFWS. The size and location of the current DAU should easily accommodate the objective of 7 wolf packs and probably several more depending upon the harvest and depredation control programs established within the DAU by the Commission. (Emphasis added)*

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I believe the Wolf Conservation and Management Plans of Idaho, Montana, and Wyoming in combination are adequate to insure equitable distribution of 30 or more breeding pairs in Idaho, Montana, and Wyoming for the foreseeable future.

Mark E. McNay, 2004AR at 456, 457.

... The dual classification will be OK as long as enough area is included in trophy management class as described above. Such a plan is basically a wolf zone management approach, which I think is generally OK. Managing wolves by way of the DAU system as other game is managed in the state appears to be a proven model for other carnivores including lions and black bears. Managing for 15 packs ensures and [sic] adequate buffer to stay above the 10 threshold.

Kyran Kunkel, 2004AR at 461.

*I believe that, collectively, these plans should maintain the wolf population at or above the recovery levels specified by the FWS, although I have concerns regarding the Idaho plan that undermine that judgment.*

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1a. I believe that the Wyoming plan will maintain the minimum numerical targets specified by the USFWS.

1b. There is ample ecological foundation for maintenance of the minimum population level required by USFWS, demonstrated by the existing population, and the Wyoming plan provides an unambiguous commitment to maintaining 15 packs in the state, including 7 outside of areas managed by the National Park Service.

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A zoning plan is proposed for Wyoming, but the plan has some flexibility such that the DAU areas where wolves are managed as trophy game animals can be expanded as necessary if the objective of maintaining 7 packs outside the national parks and parkway is not met. (Emphasis added).



Rolf O. Peterson, 2004AR at 467, 469, 470.

The methods that each state intends to use to monitor population objectives are sound and have been used extensively in Alaska, Canada, and other areas and should be quite adequate to maintain minimum population levels. ...*I believe each of the state's wolf management plans are adequate to maintain a viable population of wolves in the western Distinct Population Segment.* (Emphasis added).

Warren Ballard, 2004AR at 471.

The 3 state wolf management plans seem to be adequate for maintaining 30 breeding packs in the Northern Rock Mountains [sic] region.

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All three states recommend long term goals for 15 or more breeding packs, thus there should be a minimum of 45 packs in the area, or about *50% above federal delisting guidelines*. Bases [sic] on surveys in the Northern Rockies since reintroduction in 1995, each breeding pack represents a population of about 13.5 wolves, and thus 45 packs would consist of about 608 wolves. This would be a fairly viable wolf population, and if interchange among the 3 populations is maintained, 30+ packs and > 405 wolves will be maintained in the region. (Emphasis added).

Adrian P. Wydeven, 2004AR at 473.

The state plans will collectively maintain, at a minimum, the wolf population at or above 30 breeding pairs that are equitably distributed among Montana, Idaho, and Wyoming into the foreseeable future. This is because of the recent success of wolf recovery in the area, the current and foreseeable distribution of wolves in National Parks, Forests, Wilderness Areas, and Parkways, and the commitment of at least Montana and Idaho to let wolves not causing trouble to reside anywhere within their state boundaries. ...

Todd K. Fuller, 2004AR at 482.

On December 8, 2003, the State of Wyoming responded to the identified concerns about the Wyoming Plan that had been expressed by certain peer reviewers. 2004AR 485-490.

On January 13, 2004, the FWS informed the WGFD that, despite the peer review endorsement of the Wyoming Plan, "delisting cannot be proposed at this time due to some significant concerns about portions of Wyoming's state law and wolf management plan." 2004AR at 505-506. The FWS' expressed concerns are summarized below:

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

Significantly, the FWS did not mention the fact that, from a biological standpoint, the Wyoming Plan would achieve its stated objectives and would (collectively with the Montana and Idaho plans) adequately protect a recovered wolf population. It is apparent from the January 13, 2004 letter, and the coordination between the FWS and the WGFD leading up to that point, that science and biology were not the driving forces behind the decision. The FWS had obviously concluded that Wyoming would not be allowed to designate the gray wolf as a “predator” in any part of the State, regardless of what the expert peer reviewers found and regardless of whether the Wyoming Plan would protect a recovered wolf population. The peer reviewers did not support the FWS’s predetermined outcome so it simply ignored their input.

The peer reviewers’ conclusions constitute the best biological assessment of the Wyoming Plan and whether it is adequate to protect a recovered wolf population. The Administrative Record confirms that the peer reviews provide not only the best scientific evaluation of the Wyoming Plan and wolf recovery – they provide the *only* biological analysis. The Respondents have produced no valid or relevant data, studies, analyses, evaluations, materials, independent reviews, or statistical information, that challenges, undermines, or contradicts in any way the scientific and biological viability and validity of the peer reviewers’ endorsement of the Wyoming Plan individually, and their endorsement of the three State plans collectively.

#### **SUMMARY OF ARGUMENT**

During development of the Wyoming Plan, the Respondents expressed concern regarding the public relations aspect of designating the wolf as a “predator” in those areas of the State where the habitat is unsuitable (i.e., Zone III, identified by the FWS as “undesirable” for wolf presence). That

concern, however, was fully addressed by the peer reviewers, who concluded that predator status would not prevent Wyoming from protecting a recovered gray wolf population. The peer reviewers found that there was sufficient suitable habitat in that area of Wyoming where the wolves would be designated as trophy game animals, and that a “predator” designation in the remainder of the State would not affect maintenance of a recovered wolf population.

The Respondents never informed Wyoming that “predator” status was fatal to approval of the Wyoming Plan, nor did the FWS reject the Wyoming Plan before sending it to peer review. Rather, the FWS first concluded that the Wyoming, Montana and Idaho Plans were likely to maintain a recovered wolf population. *See* 2004AR at 308. After concluding that the plans were adequate, it then forwarded the plans to the wolf experts for independent professional peer review. *Id.* Those experts resoundingly endorsed and approved the Wyoming Plan.

Although the FWS had repeatedly assured Wyoming that it would evaluate the Wyoming Plan dual classification (trophy game animal and predator) based upon sound science, it rejected the only science that it had in favor of public perception, political considerations and fear of litigation – none of which are legally valid under the ESA for rejecting the Wyoming Plan. The ESA requires the Respondents to make all listing/delisting decisions based *solely* upon the best scientific and commercial data available. In this case the only scientific and commercial data available are the independent expert peer reviews, ten of eleven of whom concluded that the Wyoming, Montana, and Idaho Plans were adequate to protect the gray wolf population at or above recovery levels.

Respondents’ rejection of the Wyoming Plan was arbitrary, capricious, an abuse of discretion and in violation of the ESA. They have no authority to ignore the clear language of the ESA in order to elevate political and public relations considerations over sound scientific and biological analysis.

Respondents’ rejection of the Wyoming Plan was arbitrary, capricious, an abuse of discretion, in violation of the ESA because it was contrary to the best scientific and commercial data available, and not supported by substantial evidence. Respondents’ decision was also based upon factually insupportable assertions that Wyoming had failed to commit to managing for 15 wolf packs in

Wyoming and that Wyoming's definition of "pack" was somehow biologically deficient.

The Administrative Record confirms that the Wyoming Plan should have been approved. Respondents' rejection of the Wyoming Plan constitutes "agency action unlawfully withheld and unreasonably delayed" in violation of the APA. 5 U.S.C. § 706.

Respondents violated NEPA by demanding that Wyoming manage the wolf population as trophy game animals throughout the State. Respondents have not completed the required environmental analysis to determine the impact on both the wolf population and the human environment of forcing Wyoming to protect and manage wolves throughout Zone III – the area that was previously determined to be "undesirable" for wolf presence and an area that, by definition, is "unsuitable" for wolf propagation.

The gray wolf population far exceeds the numbers contemplated in the 1994 FEIS. Requiring Wyoming to designate the gray wolf as a "trophy game animal" throughout the State substantially expands the recovery area identified and evaluated in the FEIS. The Respondents have refused to prepare an SEIS to evaluate the impacts of a larger-than-expected wolf population and a larger-than-previously-demanded recovery area. The Respondents' failure to prepare an SEIS to address these impacts is arbitrary and capricious, contrary to NEPA, and not in accordance with law.

## **ARGUMENT**

### **I. Standard of Review and Deference**

The Wolf Coalition hereby adopts by reference the State of Wyoming's discussion regarding the standard of review applicable to the issues before this Court.

"An agency's interpretation of its own regulations may well be entitled to 'substantial deference'; but it nevertheless will be set aside if it is the product of a decisionmaking process deemed arbitrary or capricious, or if it lacks factual support." *Olenhouse*, 42 F.3d at 1575-1576. "In addition to requiring a reasoned basis for agency action, the 'arbitrary and capricious' standard requires an agency's action to be supported by the facts in the record." *Id.* at 1575.

We consider an agency decision arbitrary and capricious if the agency . . . relied on factors which Congress had not intended it to consider, . . . offered an explanation for

its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. (Citations and internal quotation marks omitted).

*Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1167 (10<sup>th</sup> Cir. 1999).

“Courts must defer to the interpretation administrative agencies accord their governing statutes and regulations, but such deference is appropriate only so long as the agency’s interpretation does no violence to the plain meaning of the provision.” *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 751 F.2d 1287, 1310-1311 (D. D.C. 1984), vac. in part on other grounds 760 F.2d 1320. It is a “bedrock principle” that “a court cannot blindly defer to the interpretations of an administrative agency simply because that agency has expertise in a field that bears some relation to the statute at issue.” *Navarro v. Pfizer Corporation*, 261 F.3d 90, 99 (1<sup>st</sup> Cir. 2001). “If the statute is clear and unambiguous that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. ... The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress.” *Sundance Associates, Inc. v. Reno*, 139 F.3d 804, 807 (10<sup>th</sup> Cir. 1998) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 1817, 100 L.Ed.2d 313 (1988) (internal quotations omitted). “[A]n agency’s interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear.” *Id.* at 808 (citation omitted). “An agency’s rulemaking power is not ‘power to make law,’ it is only the ‘power to adopt regulations to carry into effect the will of Congress as expressed by the statute.’” *Id.* (additional internal quotation marks and citations omitted).

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

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

## II. **Respondents 12-Month Finding is Not Based on Sound Science**

### A. **Review of Peer Reviews**

In denying the Petition to Delist, the FWS relies in large part upon four (4) “critical conditions” that it claims have allegedly changed since 2003 when the peer reviews were completed:

(1) Our review of the State law questioned whether commitments made in the Plan could actually be implemented under the law; (2) the wolf population in the YNP (most reviewers believed YNP would carry the bulk of Wyoming’s share of the wolf population) declined rapidly and dramatically by spring 2005; (3) in 2005, the Federal District Court in Oregon and Vermont ruled on a 2003 Service rule to establish two large DPSs and reclassify wolves in a Western and Eastern DPS to threatened status (68 FR 15804). Those court rulings emphasized the distribution of the wolf population in historical and still suitable habitat was a critical component of determining if recovery had been achieved. Peer reviewers were not asked whether Wyoming’s plan would maintain wolf pack distribution in suitable habitat outside of YNP; (4) in recent consultation with Montana, Idaho, Wyoming, the Nez Pierce Tribe, Yellowstone National Park, and the University of Montana, the service recognized the relationship between wolf pack size in winter and breeding pairs was not a linear regression as argued in the Wyoming Petition. The Service in consultation with the above groups, established a method of estimating wolf population status that is scientifically sound and consistent with the Service’s wolf breeding pair standard ... (Ausband 2006). However, the definition of a wolf pack in Wyoming law and Plan is not consistent with this analysis and the method in the Wyoming definition of a wolf pack would not allow the Wyoming segment of the wolf population to be maintained above recovery levels.

*Id.* at 43415-43416; AR 17768-17769. We address each of these claimed “conditions” below.

### 1. **Relationship Between Wyoming State Law and the Wyoming Plan**

In May, 2003, the Wyoming Attorney General's office issued a detailed legal analysis describing the fact that the Wyoming Plan is consistent with and supported by the Wyoming statutory framework (Wyo.Stat. W.S. 23-1-304 and related statutes). 2204AR 295-298. More specifically, that Opinion made it clear that the Wyoming Plan must be construed in light of the Legislative goal of directing the WGFD to craft a management plan that would achieve delisting. Using long-established principles of statutory construction, the Attorney General concluded that the Wyoming law allows the WGFD to adopt the Wyoming Plan and to implement the protections afforded therein. The Petition to Delist provides additional information on the relationship between the Legislation and the Wyoming Plan. Wyoming Petition at 45-54; AR 17835-17844.

The FWS has no expertise to question the Attorney General's Opinion or the relationship between the Wyoming law and the Wyoming Plan, a fact that was confirmed on July 13, 2006, when a FWS employee proposed that certain terminology be changed in the draft 12-Month Finding "because our contention goes against the clear wording of the State Attorney General's opinion . . . [and] because we are not experts on State law or participants in the commissions's actions. . . ." AR 11235. As far back as July 24, 2003, the FWS reported that "[i]t is up to Wyoming to determine if their state plan is compatible with state law." AR 12046-12048 (quotation found on 12048).

The FWS submitted the State management plans to the peer reviewers in September, 2003 (over three months *after* the Wyoming Attorney General had issued his opinion), and made no mention of any perceived conflict between the Wyoming Plan and the Wyoming Statutes, despite raising such issue earlier in July, 2003. The FWS completed its internal review of the Wyoming Plan (including its relationship to Wyoming law) before submitting it for peer review. The only logical explanation for the FWS's actions is that it did not view such alleged conflict to be of sufficient concern or import to delay submitting the Plan for peer review, or to even raise the issue with the very scientists that it identified as being responsible for evaluating whether the Plan would protect a recovered wolf population. In fact, while the FWS now claims that it is concerned about whether Wyoming law allows the WGFD to implement the Wyoming Plan, this was not always the

case. At the time that the Wyoming Legislature adopted the statutes in question, the FWS was congratulating the WGFD because it “got it done.” AR 12182. In other words, as of February 12, 2003, the FWS viewed the Wyoming Legislation itself as a major accomplishment for providing the regulatory certainty to protect a recovered wolf population. Whether the Wyoming Plan potentially provides additional protections is thus biologically insignificant, especially considering an Attorney General Opinion that finds no conflict.

This chronology of events shows that the first of Respondents’ “critical conditions” – its “questioning” of whether the Wyoming Plan could be implemented under State law – is nothing more than an after-the-fact excuse to attempt to undermine the peer reviewers’ conclusions, to avoid the significance of their findings under the ESA, and to circumvent the mandate that the Respondents rely *solely* upon the best scientific and commercial data available. The FWS has raised this issue, not for biological reasons, but to attempt to divert attention from the viability of the Wyoming Plan.

In short, the protections adopted in the Wyoming Plan are fully enforceable pursuant to Wyoming law. Those protections are adequate to sustain a recovered wolf population. The Respondents’ “questions” to the contrary are unimportant and irrelevant.

## 2. **Wolf Population in Yellowstone National Park**

The entire purpose of the Canadian gray wolf “reintroduction” program was to “return” wolves to YNP. That fact seems to be lost on the many who are insistent that Wyoming tolerate wolves, along with all of the attendant losses, throughout the State. Despite the purpose of the recovery program, Wyoming has committed to maintaining seven (7) packs outside of YNP.

The single-year “decline” in the YNP wolf population in 2005 referenced by the Respondents was an isolated, episodic event caused by a suspected outbreak of canine parvovirus or distemper. Despite this event, YNP maintained 11 packs of 5 or more wolves and 7 breeding pairs in 2005. April 6, 2006 WGFD Comments at 2-3, 13 (AR 13819-13840). There were 13 packs of 5 or more wolves in Wyoming outside YNP in 2005. *Id.* At least 9 of those 13 packs qualified as breeding pairs, and the breeding status of 3 packs was unknown. *Id.*



Even if the Wyoming Plan's theoretical minimum of just 7 packs of 5 or more wolves had existed outside YNP midwinter, and it is assumed (using the FWS's probabilities (Ausband 2006, AR 16083-16095)) that only 56% of those packs had a breeding pair, 4 breeding pairs remained outside the Park to complement the 7 known breeding pairs inside the Park. Applying the .56 probability to all 11 packs located in YNP plus 7 packs outside the park (18 packs of 5 or more wolves), the predicted number of breeding pairs would be 10.0, which meets the FWS's criterion for a recovered population. It must also be kept in mind that the criterion for emergency re-listing is a failure to achieve the recovery goal (10 breeding pairs) for 2 consecutive years in any one recovery area. *See* 2006 ANPR at 6660; AR 17762.

Even with the short-lived disease outbreak in 2005, the pack infrastructure was sufficiently robust in YNP to sustain and support 14-16 successful breeding pairs in 2006. April 6, 2006 WGFD letter at 2-3; AR 13820-13821. According to the 2006 mid-year wolf population estimates, YNP had a minimum of 143 wolves in 14 packs (13 packs producing 76 pups), with at least 12 potential breeding pairs. AR 15319. "These wolf population data are preliminary and are rough estimated [sic] based upon observations so far this year. They often represent a minimum estimate since many packs have not been fully surveyed." *Id.* at 15318. This immediate and substantial recovery further shows that the parvovirus/distemper outbreak was a short-lived (1-year) episodic event, with no long-term impact on the wolf population. The FWS estimated that there were 166 wolves in 17 packs producing 51 pups in Wyoming outside YNP, with 4 more packs suspected. *Id.* at 15319.

The sudden decline in the YNP wolf population in 2005 serves to illustrate a "worst-case" scenario. The fact that the wolf population rebounded within one year confirms, rather than refutes, the adequacy of the Wyoming Plan. The wolf population's immediate recovery also hollows out the Respondents' reliance upon this incident (melodramatically called a "critical condition") to undermine the peer reviewers' conclusions.

### 3. Maintenance of a Suitable Habitat Base Outside of YNP

The adequacy of wolf distribution throughout the NRM is confirmed by the FWS' own

recovery criteria, the most recent iteration being: “a minimum of 30 breeding pairs (an adult male and an adult female wolf that have produced at least 2 pups that survived until December 31 of the year of their birth, during the previous breeding season) and over 300 wolves well distributed among Montana, Idaho, and Wyoming.” 12-Month Finding at 43412; AR 17765. In February, 2006 the FWS stated as follows:

We determined that the current wolf population is a three segment metapopulation and that the overall area used by the NRM wolf population has not significantly expanded since the population achieved recovery in 2002. *This indicates there is probably limited suitable habitat for the population to expand significantly beyond its current borders ... Roughly ... 87% of [suitable habitat in Montana, Idaho, and Wyoming] is within the area we describe as the area currently occupied by the NRM wolf population. We consider this 57,374 mi<sup>2</sup> (148,599 km<sup>2</sup>) of occupied suitable habitat as the significant portion of the recovered wolf population’s range because it is the only area required to maintain the wolf population above recovery levels for the foreseeable future and it is important to the continued existence of the wolves in the NRM wolf DPS.*

*We believe the remaining roughly 13% of theoretically suitable wolf habitat that is unoccupied is primarily outside the NRM wolf population area, is unimportant to maintaining the recovered wolf population, and thus is not a significant portion of the NRM wolf DPS. The requirement that Montana, Idaho, and Wyoming each maintain at least 10 breeding pairs and 100 wolves in mid-winter insures that the recovered wolf population will be maintained throughout a significant portion of its range in the NRM wolf DPS into the foreseeable future.”*

2006 ANPR at 6645; AR 17747. *See also* 12-Month Finding at 43419-43420; AR 17772-17773.

The FWS reports that “[s]ince 2001, all suitable areas for wolves have been filled with resident packs, and consequently most wolves that repeatedly depredate on livestock are now removed from the population (Service et al. 2006).” 12-Month Finding at 43425; AR 17778 (emphasis added).

The FWS concedes that wolves currently occupy all potentially suitable wolf habitats in Wyoming. The 13% of potentially suitable habitat that is not occupied is primarily outside the NRM wolf population area and is also outside the Wyoming Plan’s Wolf DAU within which wolves will be protected as trophy game animals. The FWS further concedes that the original recovery criteria of 10 breeding pairs and 100 wolves in Wyoming and each of the other 2 states/recovery areas is

sufficient to maintain a recovered wolf population throughout a significant portion of the suitable wolf habitat in the NRM DPS. Stated another way, the FWS has expressly defined “significant portion” as being 10 breeding pairs and 100 wolves in each recovery area. So long as those criteria are met, the distribution requirement of a “significant portion of the species range” will be achieved.

The question posed to the peer reviewers was the exact question that the FWS now claims was not addressed – whether Wyoming’s Plan, individually and in conjunction with the two other State’s Plans, would be sufficient to assure that 10 breeding pairs are maintained. *See* September 12, 2003 letter, 2004AR 405-406 and “Suggested Response Form” provided to peer reviewers (2004AR 407-409). The peer reviewers concluded that the Wyoming Plan fulfills the FWS’s criteria for maintaining a recovered wolf population throughout a “significant portion” of its range.

There is no specific management action or requirement in the Wyoming Plan that would exclude wolves from any portion of suitable habitat within the Wolf DAU. Over time, the 7+ packs in Wyoming outside the National Park Units and wilderness areas will persist in various locations throughout the Wyoming Wolf DAU, with those locations occasionally changing in response to control actions, public and agency take of wolves, competition among packs, and dispersal of wolves to form new packs. Wyoming will sustain and protect a sufficient number and an adequate distribution of wolves to meet the FWS’s criteria of a recovered wolf population (10 breeding pairs and 100 wolves). Implementation of the Wyoming Plan will, according to the FWS, ensure that the wolf population is protected in a “significant portion” of its range.

If the interpretation of “significant portion of a species range” requires that wolf packs be tolerated and encouraged to propagate everywhere they *can* or *might* exist, then “recovery” must be defined as an unregulated wolf population, thereby removing all management flexibility and authority from the States. Such a development would obviously have significant, long-term impacts upon livestock and ungulate populations, citizen support for the wolf recovery program, and all other sociological and environmental factors analyzed in the FEIS. An unregulated wolf population was never the disclosed intent of the FWS’s recovery criteria, was never contemplated in the 1987

Recovery Plan or the 1994 Final Rule, and was never analyzed in the FEIS. For Respondents to argue otherwise in order to attempt to discredit the peer reviews exposes the 12-Month Finding for the sham that it is. The Respondents' new-found theory would also trigger the SEIS requirements of NEPA, and would require the FWS to take the requisite "hard look" at this concept before it may be proffered as a demand of the States' management plans.

The Oregon and Vermont decisions do not change the recovery goals of the 1987 Recovery Plan or the subsequent refinements that have been made and adopted by the Respondents. The Oregon and Vermont decisions do not alter the geographic area or habitat subject to the States' management plans, and cannot be relied upon to expand the "suitable habitat" criteria or definition. Perhaps more importantly to the discussion at hand, the Oregon and Vermont decisions do not, and cannot, undermine the peer reviewers' conclusions in any way. As such, those decisions cannot be categorized as a "critical condition" that arose since the peer reviews were completed in 2003.

#### 4. Definition of Pack Size

The FWS now contends that Wyoming's definition of wolf pack size, which is based on 5 or more wolves traveling together, is inconsistent with a more recent analysis of pack size that estimated a pack of exactly 5 wolves has a 56% chance of having a breeding pair. The FWS's sole support for that conclusion is an "analysis" prepared by David Ausband, a graduate student from the University of Montana. AR 16083-16095. The FWS also contends that the procedure used by Wyoming to define a minimum pack size as a surrogate for the number of breeding pairs, was "mathematically incorrect." 12-Month Rule at 43429; AR 17782. These contentions are inaccurate.

For several years, the FWS has conceded that pack size may be used as a surrogate to estimate the number of breeding pairs of wolves. This surrogate approach was in fact the basis of the monitoring protocol adopted by Montana, Idaho and Wyoming in their respective wolf management plans. The purpose of using pack size is to reduce the costs and burdens associated with physically documenting breeding pairs. Since the number of wolf packs that exceed a specific size is *highly correlated* with the number of breeding pairs, pack size can be used as a reliable

predictor of breeding pairs. By including a reasonable buffer between the number of packs exceeding a specific size and the 10 breeding pairs that must be present in a recovered wolf subpopulation, monitoring packs is a dependable and recognized way to document whether the subpopulation continues to meet the recovery criteria.

In the January, 2004 letter rejecting the Wyoming Plan, the FWS stated that a recovered wolf population must be defined as 15 packs of at least 6 wolves traveling together in winter, and rejected the Wyoming Plan in part because it defined a “pack” as five such wolves. 2004AR 505-506. The WGFD has since analyzed this question and, based on Wyoming data, found that the probability of a breeding pair in packs of 5 or more wolves traveling together is statistically the same probability as in packs of 6 or more wolves traveling together. That analysis is discussed in the Wyoming Petition at 54-55, 81-84; AR 17844-17845, 17871-17874. In the February 8, 2006 ANPR, the FWS confirmed that Wyoming’s definition of pack was sufficient to maintain the required number of breeding pairs within the Wyoming portion of the recovery area:

The Service’s recovery goal for each State is maintaining at least 10 breeding pairs, and at least 100 wolves per State. We define a breeding pair as an adult male and an adult female that raise at least two pups until December 31. This breeding pair definition *is likely equivalent to five or six* wolves traveling together in winter. . . . Our current data support the concept that 15 packs of 5 or more wolves traveling together in winter is equivalent to about 12-15 breeding pairs . . . There is no statistical difference between using either five or six wolves traveling together in winter to develop a biological equivalent definition of a pack to the current definition of a breeding pair. (Emphasis added).

*Id.* at 6655; AR 17757. In February, 2006, Mr. Bangs reported “in terms of bottom lines”: “[s]o I think calling a pack 5 wolves traveling together in winter is OK but that’s a minimum. If you figure the average pack has 4 pups it makes snese [sic] that 6 wolves in winter [more likely to contain 2 adults] would be a little more biologically defensible but not a deal killer and certainly nothing compared to the predatory animal status.” AR 17905. In January, 2004 (just three days before rejecting the Wyoming Plan for the first time), the FWS reported that 4 wolves traveling together were sufficient to be defined as a “pack.” AR 12459.

As stated above, Respondents' most recent position regarding Wyoming's definition of "pack" is based upon an analysis completed by Mr. Ausband, a University of Montana graduate student. Mr. Ausband's analysis for estimating breeding pairs, which has never been subjected to peer-review, is functionally equivalent to the Wyoming Plan definition of a "pack" and such definition's correlation to breeding pairs when applied to Wyoming data. The FWS's repeated changes to the recovery criteria and monitoring protocol are also not supported by any real biological necessity, although they do present a moving target to the States that is highly inappropriate.

According to the FWS, "... in recent consultation with Montana, Idaho, Wyoming, the Nez Perce Tribe, Yellowstone National Park, and the University of Montana, the Service recognized the relationship between wolf pack size in winter and breeding pairs was not a linear regression as argued in the Wyoming Petition." 12-Month Finding at 43416; AR 17769. The FWS also argues that "[o]ther important developments ... include ... an 'improved' method of estimating wolf population status that demonstrated that earlier attempts to correlate pack size in winter with the probability of being a breeding pair were 'mathematically incorrect' and are clearly inconsistent with both the Service's previous and current breeding pair standards." *Id.* at 43429; AR 17782.

The FWS's claim that the method used by Wyoming was "mathematically incorrect" is itself incorrect. Linear regression is a mathematical operation (like addition or multiplication) that is applied to a cluster of data points in a 2-dimensional field. The procedure can be applied to any such cluster of data points and the purpose is to define the line that best fits the cluster by minimizing the sum of the squares of the vertical deviations of data points from the line. If the regression demonstrates a high degree of linearity (i.e., the points defined by the concomitant variables tend to line up), then the 2 variables are closely correlated. The interpretation of what that correlation means and how useful it is depends upon the characteristics of the variables themselves and the assumptions inherent in the regression. These are logical rather than mathematical questions.

Contrary to the Service's statements, the Wyoming Plan does not postulate that the relationship between pack size and the probability of a breeding pair is linear. The Wyoming

analysis only postulated that the relationship between the number of packs of 5 or more wolves and the number of breeding pairs is linear. The Wyoming analysis demonstrated that, *given the distribution of pack sizes and data collection through 2003*, the number of breeding pairs in 15 packs of 5 or more wolves is expected to be approximately 14, with a range of 12-15.

Thus, the fundamental question is whether the assumptions inherent in the Wyoming analysis are *reasonable* given the purpose of the analysis, and whether the results can be *reasonably* applied to the future. The Wyoming Plan's definition of a "pack" as five wolves traveling together in winter is scientifically sound and is appropriate to use as a surrogate for the costly individual surveys that would be otherwise required. The Wyoming Plan is not only scientifically defensible, but meets the Respondents' criteria for protecting a wolf population at or above recovery levels. Ausband's 2006 work simply cannot be relied upon to undermine the peer reviewers' almost unanimous conclusions in 2003 regarding the Wyoming Plan.

#### B. Conclusion

The Respondents' excuses for ignoring the peer reviews are fundamentally inadequate. They are not based *solely* on the best scientific and commercial data available. They are clearly after-the-fact rationalizations that were developed to provide political cover for the 12-Month Finding. They are contradicted by the peer reviews themselves, by the Respondents' own findings, by the 90-Day Finding, the 12-Month Finding, the 2006 ANPR, and by the recently-published Proposed Rule (72 Fed. Reg. 6106-6138 (2007), attached as Exhibit B), in which the FWS has proposed to establish a DPS of the NRM, and allow the gray wolf to be delisted in the vast majority of Wyoming (i.e., to be designated as "predator" in all of Wyoming except for the northwestern corner).

This Court should not allow the Respondents' excuses to be substituted for the sound science that is reflected in the Wyoming Plan and the peer reviewers. This Court must find that the 12-Month Finding is contrary to the science and to instruct the FWS to approve the Wyoming Plan.

#### III. The Remainder of the 12-Month Finding is also Flawed

The FWS's arguments against the adequacy of Wyoming's regulatory framework are largely

based on misconstructions of Wyoming's Plan and the assumption the Plan cannot be implemented under State law. The FWS also relies on several infeasible or highly unrealistic examples of how wolf management under the Wyoming Plan might reduce the population below recovery objectives. The FWS has selectively used data and references that appear to support its case, while ignoring any contrary data or information. Such an approach is not "science." The FWS continues to allege that wolves will be excessively vulnerable to human-caused mortality within portions of the Wolf DAU where they are classified as predatory animals, and that this vulnerability could rapidly drive the population below recovery goals before the WGFD could react and reclassify wolves as "trophy game." The only evidence the FWS provides in support is a laundry list of ways in which wolves could possibly be taken as "predatory animals," along with a historic context that is no longer relevant. The Service greatly exaggerates the possible effectiveness of the control methods they list, as well as the public's ability to actually use those methods within the Wolf DAU.

Under the Wyoming Plan, wolves would be swiftly classified as trophy game throughout the Wolf DAU should the number of packs be reduced *to* 7 or fewer. Emergency rules providing for change in predatory status or expansion of the DAU can be effective within a matter of days. Wolf packs in this population would be monitored *at least* quarterly and at least one wolf in each pack will be fitted with a radio telemetry transmitter. Therefore, any change in status of the wolf population will be quickly detected. The FWS does not, and cannot, dispute these fundamental facts.

The FWS continues to allege that the State's management authority over wolves could be revoked within 90 days as the population flips back and forth between "predatory animal" and "trophy game" status. This scenario, however, is not permissible under the Wyoming Plan. Once wolves are classified as "trophy game" throughout the Wolf DAU, they can be classified back to "predatory animal" only after the conditions that led to the decline have changed sufficiently that a recovered population can be sustained with the trophy game classification reduced to a smaller portion of the DAU.

The FWS alleges that the WGFD would have limited ability to prevent further declines in



the wolf population should the number of breeding pairs outside the National Park Units and wilderness areas decline below 7. The FWS contends that lethal removal of problem wolves would likely continue, and could drive the population even lower. “Attempting to manage a wolf population that is constantly at minimum levels would *likely* result in the population falling below recovery levels due to factors beyond WGF’s control.” 12-Month Finding at 43428; AR 17781. The FWS’s claims are conjectural and unfounded. The wolf population will not be “constantly maintained at minimum levels.” The management status cannot be changed back to “predatory animal” until and unless the factors that originally led to the decline have changed or otherwise been addressed. Thus, if a change to “trophy game” status in the Wolf DAU should be necessary, this status will be long-term assuring the WGF greater regulation of human-caused mortality factors.

The FWS has postulated several hypothetical examples to illustrate situations in which Wyoming’s pair definition might fail to assure at least 10 breeding pairs are maintained in the State. These examples are based on misconstructions of the Wyoming Plan and infeasible assumptions. For example, the FWS presumes Wyoming could wipe out all wolves outside the National Park Units and that the “predatory animal” and “trophy game” classifications could be potentially change every 90 days. Neither assumption is feasible under the Wyoming Plan.

The FWS cites the 2005 data as evidence Wyoming might not have maintained 10 breeding pairs under the Wyoming Plan and the Wyoming definition of a “pack.” The fewest breeding pairs that would have been maintained in Wyoming in 2005, assuming Wyoming sustained the smallest number and size of packs theoretically possible under the Wyoming Plan, would have been 11, which exceeds the recovery goals.

The FWS’s alleged analysis of the Wyoming Petition is essentially nothing more than a long list of excuses for ignoring the relevant science. The arguments proffered by the FWS fall under their own weight when subjected to even the most rudimentary critique.

#### IV. **Respondents Violated the ESA and APA by Rejecting the Wyoming Plan**

The purpose of the Wyoming Plan was to provide the adequate “regulatory mechanisms” for

protecting the gray wolf population at or above recovery levels. 16 U.S.C. § 1533(a). Congress has established the standard by which Respondents were required to evaluate whether the Wyoming Plan met that goal:

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

16 U.S.C. § 1533(b)(1)(A). Congress’ use of the mandatory “shall” imposed upon the Respondents an unequivocal duty to rely solely on the best scientific and commercial data available when evaluating the adequacy of the Wyoming Plan. *See Forest Guardians v. Babbitt*, 174 F.3d 1178, 1186 (10<sup>th</sup> Cir. 1999). This mandate cannot be rejected in lieu of public relations concerns.

The obvious purpose of the requirement that each agency ‘use the best scientific and commercial data available’ is to ensure that the ESA not be implemented haphazardly, on the basis of speculation and surmise. While this no doubt serves the to advance the ESA’s overall goal of species preservation, we think it readily apparent that another objective . . . is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.

*Bennett*, 520 U.S. at 176, 117 S.Ct. at 1168. “An agency determination must not ‘disregard superior data. . . .” *Blue Water Fishermen’s Association v. NMFS*, 226 F.Supp.2d 330, 338 (D. Ma. 2002).

The peer reviews provide the best scientific and commercial data available on whether the Wyoming Plan is a sufficient “regulatory mechanism” for protecting a recovered wolf population. Respondents have produced no contrary “science” or biology” to support their 12-Month Finding. Respondents ignored the peer reviews, proceeding instead under a “public relations” model. Respondents cannot ignore existing data and cannot make their decisions based upon speculation. *Heartwood, Inc. v. United States Forest Service*, 380 F.3d 428, 436 (8<sup>th</sup> Cir. 2004). “The Service may not base its listings on speculation or surmise or disregard superior data.” *Building Industry Association of Superior California v. Norton*, 247 F.3d 1241, 1246-1247 (D.C. Cir. 2001).

The Respondents have also demanded that Wyoming commit to managing for at least 15 wolf packs in the State, and that the definition of “pack” be consistent among the three States and be biologically based. As noted above, however, the Wyoming Plan did commit to managing for at least 15 wolf packs in Wyoming, a fact that was acknowledged in the FWS’ July 2, 2003 letter, 2004AR at 344. The FWS had also repeatedly expressed its support for Wyoming’s definition of “pack” (*Id.* at 345), most recently in the 2006 ANPR. The peer reviews provided additional biological support for Wyoming’s commitment to managing for 15 packs within the State and its definition of “pack.” It was arbitrary and capricious for the Respondents to reject the Wyoming Plan based upon provisions that had been previously approved. *See Smiley v. Citibank*, 517 U.S. 735, 741-742, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996) (it is arbitrary and capricious for an agency to suddenly, and without explanation, change its position).

The Administrative Record does not contain an adequate scientific or biological basis for rejecting the peer reviewers’ conclusions and the Respondents have failed to support their rejection of the Wyoming Petition to Delist and the Wyoming Plan.

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

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

In *Northern Spotted Owl v. Hodel*, various environmental organizations brought suit against the FWS challenging its decision not to list the northern spotted owl as endangered or threatened.

Prior to its decision not to list, the FWS conducted a status review of the spotted owl by expert FWS biologists. A peer review was then conducted on the status review by a number of population viability experts. Both the status review and peer review concluded that the then-current situation strongly supported listing of the northern spotted owl as threatened or endangered. The FWS, however, concluded that listing the owl as endangered was not warranted at that time. In holding that the FWS's action was arbitrary and capricious, the Court explained that the FWS "failed to articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* at 482 (citation and internal quotations omitted). The Court continued that "[j]udicial deference to agency expertise is proper, but the Court will not do so blindly. The Court finds that the Service has not set forth the grounds for its decision against listing the owl." *Id.* The Court ultimately concluded that the decision not to list was arbitrary and capricious because the FWS lacked any expert analysis to support its decision not to list the owl, and the expert opinions from the status review contradicted the FWS' conclusions. *Id.*

In *Defenders of Wildlife v. Babbitt*, the plaintiffs challenged the FWS' refusal to list the Canada lynx as an endangered or threatened species. The Court granted plaintiff's summary judgment motion, holding in relevant part that: 1) the FWS acted arbitrarily and capriciously when it rejected the views of its own experts that the lynx met four out of five criteria for listing under the ESA; and 2) the FWS acted arbitrarily and capriciously by basing its decision on faulty factual premises that were contradicted by the undisputed facts. Region 6 biologists prepared a 50-page study analyzing each of the five listing factors set out in 16 U.S.C. § 1533(a)(1). The study included the FWS experts' analysis and concluded that the lynx should be listed. In its decision not to list, the FWS only referred to the study in a cursory manner, ignoring the experts' analysis and evidence. The Court held that it was arbitrary and capricious for the FWS to ignore its own experts.

The NRM gray wolf population has exceeded the recovery goals. The only question for the Respondents to evaluate was whether the three State Recovery Plans together provided the adequate regulatory mechanism to protect a recovered wolf population. The expert biologists found that they

did. The ESA (specifically, 16 U.S.C. § 1533(b)) required Respondents to approve the Wyoming Plan and to begin the delisting process at that time (2003). The Respondents's refusal to do so by rejecting the Wyoming Petition to Delist and the Wyoming Plan constitutes agency action unlawfully withheld and unreasonably delayed in violation of 5 U.S.C. § 706(1).

If Respondents are allowed to stray from the "best scientific and commercial data available" standard, endangered species evaluation and management will sink into a quagmire of subjective and emotional control. If science is rejected, all future decisions related to species management and recovery will become political, with the "scientists" relying upon polling data rather than biology. If adherence to the requirements of the ESA is dependent upon public relations, or fear of litigation, it will be manipulated in the very manner that Congress sought to prevent.

V. **Respondents Have Improperly and Unlawfully Ignored the State's Petition to Amend**

The Respondents have improperly and unlawfully ignored the State's Petition to Amend 50 C.F.R. § 17.84(i). The Wolf Coalition hereby adopts by reference the State's arguments regarding this particular issue.

VI. **Respondents Have Violated the National Environmental Policy Act**

The Respondents have never analyzed the impact of expanding the recovery area to include all of Wyoming, their modification of the recovery goals by changing the definition of "pack," or their demand that Wyoming be responsible for a larger share of the recovered gray wolf population. Their efforts to change these components of the recovery plan, are subject to NEPA's requirement that they be evaluated through an environmental impact analysis (42 U.S.C § 4332) and Respondents cannot proceed under their current strategy until they have completed the required SEIS.

"Under NEPA, 'major federal actions significantly affecting the quality of the human environment' must be preceded by an environmental impact statement." *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d at 1521. The EIS requirement serves two important functions:

It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental

impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

*Id.* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S.Ct. 1835, 1845, 104 L.Ed.2d 351 (1989)). “A federal agency’s duties under NEPA do not end when an initial decision is made or when an EIS is prepared. (Citation omitted). Rather, there are circumstances which require an agency to supplement an EIS.” *Chemical Weapons Working Group, Inc. v. US Dept. of the Army*, 963 F.Supp. 1083, 1097 (D. Ut. 1997).

Ordinarily, a NEPA claim no longer presents a live controversy when the proposed action has been completed and when no effective relief is available. (Citations omitted). However, courts still consider NEPA claims after the proposed action has been completed when the court can provide some remedy if it determines that the agency failed to comply with NEPA. (Citations omitted).

*Airport Neighbors Alliance, Inc. v. U.S.*, 90 F.3d 426, 428-429 (10<sup>th</sup> Cir. 1996). The Respondents cannot demand Wyoming to protect a substantially higher number of wolves in a substantially expanded “recovery area” until they have completed the necessary SEIS to evaluate the impact that such a strategy will have on the “human environment.” Under the CEQ regulations, agencies

[s]hall prepare supplements to either draft or final environmental impact statements if:

- (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
- (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action *or its impacts*.

40 C.F.R. § 1502.9(c)(1). (Emphasis added).

*Holy Cross Wilderness Fund*, at 1523.

If after preparing either a DEIS or FEIS, the proposed action substantially changes in a way ‘relevant to environmental concerns,’ or if new information comes to light about environmental impacts, an agency must prepare a supplemental EIS (SEIS).

*Citizens’ Committee to Save Our Canyons v. USFS*, 297 F.3d 1012, 1022 (10<sup>th</sup> Cir. 2002). *See also*,

*Friends of Marolt Park v. USDOT*, 382 F.3d 1088, 1096 (10<sup>th</sup> Cir. 2004). “Courts have routinely recognized the appropriateness of injunctive relief requiring the preparation or completion of an EIS or SEIS.” *Ross v. Federal Highway Administration*, 162 F.3d 1046, 1054 (10<sup>th</sup> Cir. 1998).

Whether an SEIS is required is a question of fact. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376-377, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989). “[I]n the context of reviewing a decision not to supplement an EIS, courts should not automatically defer to the agency’s express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance – or lack of significance – of the new information.” *Id.* at 378.

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

*Holy Cross Wilderness Fund v. Madigan*, 960 F.2d at 1524.

The foundational tool for controlling the “reintroduced” gray wolf population was “zone management,” which was adopted to confine the gray wolf population within those geographic areas of Wyoming where there would be minimal impacts on livestock and domestic animals. The 1987 Recovery Plan, the FEIS and the 1994 Reintroduction Rule were based upon managing and maintaining the gray wolf population within Zone I and, to a limited extent, Zone II. Zone III, was defined as “unsuitable habitat” and is “undesirable” for wolf presence. Zone management was an integral component of the FEIS preferred alternative (*see* FEIS, Chapter 1 at 10). The Respondents’ decision to “reintroduce” the gray wolf to YNP pursuant to 16 U.S.C. § 1539(j) as a non-essential experimental population was based upon the recognition that the population would have to be geographically confined and effectively managed to avert impacts on livestock and on other wildlife. The sole purpose for the “non-essential experimental” designation was to allow flexible management and control of the wolves, both numerically and geographically.

In rejecting the Wyoming Petition to Delist and the Wyoming Plan, and without undertaking any environmental analysis, the Respondents demanded that Wyoming protect wolves throughout the State – outside of Zones I and II. At the same time the Respondents have refused to take the requisite “hard look” at the environmental consequences of requiring Wyoming to afford protections to all wolves who migrate into Zone III, regardless of whether the wolf population within the “trophy game animal” area exceeds the recovery goals. “[T]hrough a set of action-enforcing procedures NEPA requires agencies to take a ‘hard look’ at the environmental consequences of proposed actions.” *Holy Cross Wilderness Fund*, 960 F.2d at 1521-1522 (citations and quotations omitted).

The purpose of the FEIS was to determine the impact on the human environment of “reintroducing” the gray wolf into YNP and the Respondents identified the geographic area in Wyoming that would be impacted. The Respondents made certain assumptions regarding the impact that a recovered wolf population would have on livestock and other wildlife. Those depredation assumptions were intertwined with the geographic area that was analyzed – the bigger the geographic area in which the gray wolves would be protected, the greater the impact on livestock and other wildlife. The Respondents have never analyzed the impact of expanding the protected area.

The “major federal actions” at issue here are (1) Respondents’ rejection of the Wyoming Petition to Delist based upon an improper demand that Wyoming adopt protections that are designed to secure the gray wolf population in those areas of the State that provide unsuitable habitat and are “undesirable” for wolf presence; (2) the Respondents’ rejection of the Wyoming Petition to Delist based upon the definition of “pack” that is not biologically based; and (3) the Respondents’ decision to force Wyoming to be responsible for the entire recovered wolf population. These demands are designed to force Wyoming to maintain and manage for an ever-increasing wolf population that far exceeds the recovery goals and that exceeds the population analyzed in the FEIS.

### CONCLUSION

The Respondents unlawfully denied the Wyoming Petition to Delist. The Wyoming Plan meets every aspect of the Recovery Plan and the Final Rule and provides the regulatory mechanism



necessary to protect a recovered gray wolf population. The expert biologists' opinions support the Wyoming Plan. The Administrative Record supports approval of the Wyoming Plan. The Administrative Records do not support the Respondents' decision to reject the Petition to Delist.

Respondents' decision to reject the Petition to Delist is arbitrary, capricious, an abuse of discretion, and not in accordance with the ESA. Respondents' have acted in excess of their statutory jurisdiction and authority by ignoring the ESA and the independent peer reviews. Respondents have unlawfully withheld and unreasonably delayed approval of the Wyoming Plan.

Respondents have violated NEPA by refusing to prepare an SEIS.

The Wolf Coalition respectfully requests that the Court enter an Order remanding this matter back to the Respondents with instructions to approve the Wyoming Plan and to immediately begin the delisting process. Such relief is appropriate here because Respondents have failed to provide a sufficient legal or biological basis for rejecting the Wyoming Petition to Delist and Wyoming Plan, there are no outstanding issues that must be resolved, and it is clear from the Administrative Record that the Respondents would be required to approve the Wyoming Plan based on the best scientific and commercial data available. *See Moisa v. Barnhart*, 367 F.3d 882, 887 (9<sup>th</sup> Cir. 2004).

In the alternative, the Wolf Coalition respectfully requests that the Court enter an Order requiring the Respondents to prepare an SEIS.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of June, 2007

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 11, 2007, a true and correct copy of the foregoing **WOLF COALITION'S OPENING BRIEF FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF – RELATED TO RESPONDENTS' DENIAL OF THE STATE OF WYOMING PETITION TO DELIST THE GRAY WOLF**, was served upon the following via the Electronic Case Filing system of the United States District Court for the District of Wyoming.

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