

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING,)	
Petitioner,)	
)	
BOARD OF COMMISSIONERS OF COUNTY)	Civil No. 06-CV-00245-J
OF PARK,)	
Petitioner-Intervenor,)	
)	
WYOMING WOOL GROWERS)	
ASSOCIATION, et al.,)	
Petitioners-Intervenor,)	
)	
vs.)	
)	
UNITED STATES DEPARTMENT OF THE)	
INTERIOR, et al.,)	
Respondents,)	
)	
SIERRA CLUB, et al,)	
Respondents-Intervenor,)	
)	
NATIONAL WILDLIFE FEDERATION, et al.,)	
Respondent-Intervenors.)	

RESPONSE BRIEF
By Respondent-Intervenors

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I. INTRODUCTION

This case underscores a long-standing tug-of-war between the state of Wyoming and the U.S. Fish and Wildlife Service (Service). Wyoming insists that the Service honor the state's wolf management plan and delist wolves from the Endangered Species Act (ESA). The Service demurs, stating that elements of the plan fail to provide the long-term protection required by law before delisting occurs. Wyoming refuses to change its plan, repeatedly puts forth the same inadequate elements. The Service repeatedly demurs, citing the same portions of the plan as unacceptable. This scenario is played out in letters, lawsuits, and Federal Register notices that span years.

While Wyoming wins the tug-of-war in the state legislature and the press, Wyoming loses in court. The Service need not sanction Wyoming's plan simply because Wyoming tugs harder. The Service has discretion to set the bar high for delisting. Here the Service has consistently concluded that elements of Wyoming's plan – the "shoot on sight" predator classification over most of the state and failure to properly define pack size – fail to provide an adequate regulatory mechanism to insure that wolves are protected after delisting. The Service's rejection of the Wyoming plan is based on science and the agency's considerable experience with wolf management. Recovery and delisting are meaningless if the remaining management plan leaves wolves vulnerable to same problems that led to listing. The ESA's purpose requires the Service to err on the side of species protection – no matter how hard Wyoming tugs.

While Wyoming derides the Service for obstinately refusing to recognize its plan, Wyoming is the obstinate party. Wyoming could make relatively minor adjustments required by the Service to render its plan acceptable. Yet Wyoming clings to its plan, and in the process delays the result it claims to pursue - removal of wolves from the ESA. As the Court will see below, the Service's rejection of the Wyoming plan is not arbitrary, but is a reasonable response to a flawed approach to wolf delisting.

II. STATEMENT OF JURISDICTION AND STATEMENT OF THE CASE

Respondent-Intervenor National Wildlife Federation and the Greater Yellowstone Coalition (Federation) accept Wyoming's Statement of Jurisdiction and Statement of the Case.

III. STATEMENT OF THE ISSUES

Wyoming has generally stated the proper issues presented for review.

IV. BACKGROUND AND STATEMENT OF FACTS

A. The Extirpation and Reintroduction of Gray Wolves.

In pre-Columbian times, wolves thrived in virtually every corner of the continent, from the dry reaches of the southwestern United States, to the California foothills, and across the northern Rockies and Great Plains, colonizing every possible climate except high alpine mountain tops. The gray wolf can live nearly anywhere there is adequate ungulate prey and moderate human-caused mortality, *2004 AR* 16-17¹, and "is the most widely distributed large carnivore in the northern hemisphere." *2004 AR* 15. But European settlement of North America created conflicts both real and imagined between humans and wolves, and resulted in lethal efforts to control and eradicate wolves. 68 Fed. Reg. 15,804, 15,805 (April 1, 2003), *2004 AR* 822. The "few wolves" that tangled with livestock "created a climate of fear and hatred against all wolves." *2004 AR* 903. Wolf extirpation under the guise of predator control was encouraged by government. "Widespread persecution" led to the near extirpation of the species from the lower 48 states: "poisons, trapping, and shooting... resulted in extirpation of this once widespread species from more than 95 percent of its range." *2004 AR* 822.² Succumbing to this extensive persecution, "gray wolf populations were eliminated from Montana, Idaho, and Wyoming, as well as adjacent southwestern Canada, by the 1930s." 70 Fed. Reg. 1286, 1286 and 1294

¹Citations here (AR) are to the Administrative Record filed by the Service, which includes both the record from the first lawsuit, and subsequent documents pertaining to Wyoming's 2005 Petition that is at issue here.

² Locally, the extirpation of wolves was pursued with zeal. Settlers slaughtered "a minimum of 136 wolves, including about 80 pups" between 1914 and 1926 in the Yellowstone Region. *Wolf Recovery Plan* at 1, *2004 AR* 903.

(January 6, 2005). Unlike many game species imperiled by over-hunting and habitat loss, wolves were never protected under state law. Wolves were exterminated because they were labeled predators, and could be killed without regulation or concerns for dwindling numbers.

Wolves were among the first species protected under the 1973 Endangered Species Act. They were listed almost solely because of “excessive persecution.” *See* 38 Fed. Reg. 14,678 (June 4, 1973), and 2004 AR 54, 199. Because killing, or even harassing ESA-protected species subjects a person to serious civil and criminal penalties, listing under the ESA effectively ended wolves’ predator status. 16 U.S.C. § 1540 (a) and (b). The Service adopted a wolf recovery plan in 1987, which included a recommendation for reintroduction if wolves did not naturally move into Yellowstone within five years. 2004 AR 899-900. Reintroduction followed in 1995 and 1996 in Yellowstone and Idaho. AR 832. As a nod to state concerns, the reintroduced wolves were designated non-essential experimental populations in Wyoming and central Idaho. 16 U.S.C. § 1539 (j). This designation allowed flexibility to respond to local concerns. Regulations developed for Wyoming’s wolves allowed managers to easily remove or kill wolves that attacked livestock.³ *See* 50 C.F.R. §§ 17.84(i)(3),(7), and (8).

Reintroduction was highly successful – no party here disputes that fact. Wolf populations quickly exceeded original recovery goals. In 2003 the Service determined that recovery objectives had been met. 68 Fed. Reg. 15804 (April 1, 2003), 2004 AR 834-835. The Service then began discussing delisting with Idaho, Montana and Wyoming; each state began the process of developing wolf management plans.

B. Delisting under the ESA.

Under Section 4, the Service backs out of a listing determination the same way it goes in; any person may petition to remove a species protected by listed status. The Service evaluates

³ The decision to reintroduce wolves was challenged by some agricultural organizations and a few environmental groups. The agricultural organizations objected to any reintroduction program while the environmental groups attacked the experimental population designation. The Tenth Circuit rejected both claims. *See Wyoming Farm Bureau et. al. v. Babbitt*, 987 F.Supp. 1349 (D. Wyo. 1997), *rev’d and remanded by* 199 F.3d 1224 (10th Cir. 2000).

five factors to list or delist a species. 16 U.S.C. § 1533(a)(1).⁴ One of those factors - the presence (or lack) of adequate regulatory mechanisms, is the focus of this case. Even when a species meets the biological goals for recovery, the Service must be assured that all “Five Factors” are met before delisting is proposed; otherwise delisting could be doomed to failure. 68 Fed. Reg. 15881.

Though communication over delisting commenced earlier, the Service formally began wolf delisting by proposing to split the nation-wide wolf population into Western and Eastern Distinct Population Segments (“DPS”). 68 Fed. Reg. 15879 (April 1, 2003) (2003 DPS Rule). Each DPS would proceed with its own delisting. The Service “down-listed” gray wolves in those DPSs from endangered to threatened status. *Id.* at 15,804. In addition to designating Western and Eastern DPS, the 2003 DPS Rule provided notice to affected states that delisting would proceed when affected states developed adequate regulatory mechanisms. The delisting determination would be based upon an “evaluation of the future threats to the gray wolf in the Western DPS, especially those...that would occur after removal [] of protections of the Act” and “based upon the wolf management plans and assurances of the States.” *Id.* at 15881. State management plans weighed heavily in the delisting process as “indicators of attitudes and goals [] especially important in assessing the future of a species that was officially persecuted by government agencies as recently as 40 years ago and still [] reviled by some members of the public.” *Id.*

The Service’s 2003 DPS Rule to split wolves into two DPS was invalidated by two courts because the new DPS designations violated the ESA and The Service’ own DPS policy. *See Nat’l Wildlife Fed. v. Norton*, 386 F. Supp. 2d 553 (D. Vt. 2005); *Defenders of Wildlife v.*

⁴The “Five Factors” for listing and delisting decisions are: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence.

Secretary, U.S. Dep't of the Interior, 354 F. Supp. 2d 1156 (D. Or. 2005). However, those court cases did not alter the ESA's requirement of an adequate state regulatory plan prior to delisting, nor did they halt efforts in the Northern Rockies to develop such plans. While Montana and Idaho promptly developed acceptable state plans, Wyoming did not. Consequently, the Service has never proposed formal delisting of the entire Western DPS.

C. The Wyoming Wolf Plan - Round One.

From the outset Wyoming pledged, along with Montana and Idaho, that the success “of a wolf management program is predicated upon a unified, regional approach to managing a regional wolf population and that such a regional approach will entail coordination and collaboration among the signatories and the respective fish and wildlife agencies.”⁵ *2004 AR 1*. Wyoming charted its own course from the beginning, insistent upon maintaining wolves as predators to be shot on sight in much of the state. Unlike Montana and Idaho, Wyoming embarked on a “dual classification” system, labeling wolves as either predators or trophy game animals depending on their location. The predator classification covered over 90% of Wyoming and allowed unregulated killing. In Yellowstone and Grand Teton National Parks and remote federal Wilderness, wolves were classified as trophy game animals, and could not be killed without a hunting license, like other game animals. The trophy game classification in National Parks is legally meaningless, because no hunting occurs in National Parks.

As discussed below, the Service consistently expressed concern over the dual classification. Predator designation allowed unregulated killing. A wolf pack's legal status could change daily, as packs naturally migrate from Yellowstone where they are protected to other lands where they are labeled predators. The Service has long recognized that human persecution of wolves was the primary reason wolves received federal protection. *See* 70 Fed. Reg.1294.

⁵ Montana and Idaho both presented plans which would manage wolves as other game animals according to a regulated hunt, and were deemed “adequate” by the Service in maintaining their share of a tri-state population. Wyoming's Draft Plan concedes that their plan deviates from the Idaho and Montana management plans. *2004 AR 53*.

2004 AR 343, and 2004 AR 54. Yet from the outset Wyoming insisted on the predator label. Thus began the tug-of-war between Wyoming and the Service over the adequacy of the Wyoming Plan.

Wyoming began its effort to delist before the 2003 DPS Rule. In response to Wyoming's inquiry, in 2002 the Service informed Wyoming that the Service would propose to delist only when they could "be assured that State management of wolves by Montana, Idaho, and Wyoming will prevent human-caused mortality from reducing the wolf population so it becomes threatened or endangered again." 2004 AR 25. To the question, "Does Wyoming need to change the [predator] status of wolves," the Service responded simply: "Yes." 2004 AR 26. And, the Service emphasized that Wyoming must protect the wolf under trophy game status in an area larger than Yellowstone National Park if they were going to provide the "roughly one-third contribution to the overall recovery objective."⁶ 2004 AR 36. In other words, Wyoming must regulate human-caused mortality outside of National Parks and Wilderness areas.

Forging ahead, Wyoming again asked the Service in September 2002 for its perspective on their proposed dual-status law. Service Director Williams responded that Wyoming's dual classification law would not provide adequate regulatory mechanisms to "provide the assurance necessary to meet the Endangered Species Act requirements for delisting." 2004 AR 27. Again, the Service mentioned that Wyoming law must "provide the legal authority to protect wolves from unregulated, human-caused mortality." 2004 AR 27. The Service advised that the dual-status classification providing for regulated hunting only within the National Parks (where no hunting is allowed) and wilderness would likely not provide an area large enough to maintain the wolf population. 2004 AR 28.

Service Director Steve Williams explained the need to regulate human-caused mortality to maintain populations: "[E]lk typically migrate long distances outside of Yellowstone National Park and wolf packs will occasionally follow them. Wolves will need legal protection from

⁶ Recovered status requires that wolves are distributed throughout Wyoming, Idaho, and Montana to help maintain demographic and genetic diversity. See 2004 AR 34.

unregulated human mortalities under State law in an area at least as extensive as they currently occupy to maintain the population above recovery levels.” *2004 AR 28*. This could potentially act as a wolf “sink” where wolves are drawn into the unoccupied areas in exploring new territory, and then shot. *2004 AR 43*. The Service also interpreted Wyoming’s dual-status classification as an attempt to restrict wolf populations to federal National Parks and Wilderness Areas: “By attempting to maintain a wolf population in a very restricted area, Wyoming would inadvertently be concentrating wolf predation on a few wild ungulate herds, certain livestock producers, and limiting the State’s ability and options to manage wolves on a case-by-case basis.” *2004 AR 30*. Wyoming stubbornly continued developing a state management plan based on the dual-status classification. In response to a Draft Wyoming Gray Wolf Management Plan submitted in November of 2002, the Service concluded, “Wyoming law and wolf management as recommended by this draft management plan would not allow for delisting of wolves to be proposed.” *2004 AR 53*. To maintain a tri-state metapopulation, some wolf packs must be able to live outside of Yellowstone National Park. *2004 AR 53*. The Service noted that the “**biological facts** appeared to be ignored by the document’s management recommendations.” *2004 AR 53* (emphasis added). Because “wolf populations disappeared because of unlimited human-caused mortality,” maintaining predator status throughout most of the state could cause wolves to become threatened or endangered again. *2004 AR 68*.

The dual-status classification presented severe regulatory/enforcement obstacles. Wolf territories are not static; wolves range to follow prey, explore, or expand their territory. *2004 AR 54-55*. The legal status of a given pack could change daily, as wolves roamed from Yellowstone National Park to adjacent National Forests in search of big game. Allowing “Park” wolves to be shot as soon as they cross over a man-made boundary with no biological basis is not adequate protection. *2004 AR 55*. The large home range size of “large carnivores [such as wolves] makes them particularly vulnerable to extinction, even inside of protected areas if they are persecuted outside of those protected areas.” *2004 AR 56*.

Nonetheless, Wyoming remained “confused” over the “adequate regulatory mechanisms” requirement. In 2003 the Wyoming Congressional delegation requested “clear guidance” on what is an adequate regulatory mechanism, implying that the Wyoming Legislature would make the needed adjustments. *2004 AR 245*. The Service responded on February 14, 2003 that “management authority was needed “to provide protections for wolves beyond National Parks and National Forest Wilderness Areas.” *2004 AR 242*. This letter was followed by a companion letter to Governor of Wyoming Dave Freudenthal on February 21, 2003. The Service suggested that “regulated State harvest programs, such as used by Wyoming Game and Fish to manage other large predators, such as mountain lions and black bears, can easily control wolf populations and yet satisfy requirements for delisting the wolf.” *2004 AR 254*.

In 2003 Wyoming enacted its dual classification plan (Wyoming Plan) into state law. This law contained the “dual-status classification,” where a wolf could be a trophy game animal one day and a predator the next, depending on its location. In limited areas (National Parks and Wilderness) wolves were “trophy game” animal, and thus managed according to a regulated hunt like elk or black bears. However, once a wolf drifted past this “predator” boundary, it would no longer be afforded any protection and subject to unregulated kill. *See Wyo. Stat. Ann. § 23-1-101(a)(v)(iii) and (xi)(B)(I & II)*. Under predator classification, wolves would be subject to take “without a license in any manner and at any time,” except in the limited trophy game areas.⁷ *Wyo. Stat. Ann. § 23-3-103* (referred to as the Wyoming Law).

The Service reiterated their concern with “predator classification” as well as the ambiguity of *Wyo. Stat. Ann. § 23-1-304(b)* calling for the Game and Fish Commission to manage for “at least seven (7) packs of gray wolves located in this state and primarily outside of Yellowstone National Park, Grand Teton National Park and John D. Rockefeller, Jr. Memorial Parkway or at least fifteen (15) packs within this state, including Yellowstone National Park, Grand Teton National Park and John D. Rockefeller, Jr. Memorial Parkway as of the end of the

⁷ Wyoming law groups wolves with coyotes, jackrabbits, porcupines, raccoons, skunks and stray cats under the predatory animal classification. *See Wyo. Stat. Ann. § 23-1-101(a)(viii)(A)*.

preceding calendar quarter.” The Service was concerned that the number of packs which would be maintained under state law was ambiguous, and recommended that the law clearly called for maintaining a total of 15 packs, with at least eight outside the Park. *2004 AR 293*. Wyoming admitted that the law was “susceptible to more than one reading,” and the Governor requested a legal opinion from the Attorney General regarding the Wyoming Law. *2004 AR 200, 289, & 294*. Wyoming responded to the Service’s concerns and defended its plan to manage for a total of 15 packs, regardless of “whether inside or outside of the national parks and parkway.” *2004 AR 289*.

The Service continued to emphasize that wolves should be managed like other game populations, with regulated hunting and public harvest, and not under predator status. On May 14, 2003, the Service advised Wyoming to provide assurance that the number of packs would be maintained above recovery levels. *2004 AR 292*. The Service also reiterated their concern that “one interpretation of the recent legislation could allow all of those [15] packs to be maintained within Yellowstone and Grand Teton National Parks.” *2004 AR 293*. The Service concluded: “as we have repeatedly stated, and continue to believe, that only protecting wolves from unregulated human-caused mortality in this small area will not provide adequate assurances that the wolf population in the Greater Yellowstone area will not decline to the point where it becomes threatened again.” *Id.*

Wyoming clung to its Plan, and submitted it for final approval to the Service. Edward Bangs, Wolf Recovery Coordinator for the Western DPS, advised “Wyoming to re-consider having wolves listed as predatory animals anywhere in Wyoming...that designation may spoil our mutual desire to successfully delist the wolf population and maintain a recovered population.” *2004 AR 343*. He suggested retreating from the boundary line scheme, which would result in “endless flip-flopping, and widespread public confusion.” *2004 AR 345*. Mr. Bangs also reminded Wyoming that “wolves became extirpated almost solely because of unregulated excessive human-caused mortality.” *2004 AR 343*. Caution is necessary because the largest mortality factors facing adult wolves (illegal actions, disease, nutritional stress, accidents,

and private and agency control of problem wolves) will exist even under a trophy game animal classification. *2004 AR 347*. The “predator” issue alone could derail the listing process, as it infers that “wolves should be eliminated and not maintained as a recovered population.” *2004 AR 347*. Mr. Bangs provided additional reasons on the inadequacy of a dual-status classification: “all wolf packs in Wyoming outside of Yellowstone National Park, and at least 3 packs in the park, would have at least part of their home range designated in predatory animal status until the trigger was tripped to a larger trophy game designation.” *2004 AR 363*. Again, dual-status is unacceptable as the major causes of wolf death (illegal killing and agency control) would not be reduced by trophy game status. *Id.* Mr. Bangs also noted that no other state with wolves has taken such an extreme approach to classifying wolves as predatory animals subject to unregulated take. *2004 AR 347*.

The Service also submitted the Wyoming plan to a group of esteemed scientists and wildlife managers for peer review. Many of these outside experts expressed the same concerns discussed above. *See 2004 AR 446, 461, 476, & 478*. For example, the Wolf Control and Depredation expert for the U.S. Department of Agriculture commented:

“I have some concern about how the Department can simultaneously manage for the required 7 packs outside the National Parks and Parkway while also potentially allowing a public harvest quota on some of these same packs in the trophy game animal area. While ‘thinning’ of some of these packs may not affect their continued existence, it could have an effect on their status as a ‘breeding pack.’” *2004 AR 446*.

Mark McNay, Biologist for the Alaska Department of Fish and Game, commented that the Wyoming plan could manage only near the minimum recovery population level. *2004 AR 457*. Recognizing the history of persecution, McNay noted the “primary challenge for all three states will be maintaining human tolerance of wolves in rural areas[.]” *2004 AR 458*.

Dr. Kyran Kunkel of Montana State University found the moving boundary line was the “crux of the plan,” yet “confusing and difficult to enforce.” *2004 AR 461*. Dr. Daniel Pletscher of the University of Montana recommended “game status over a broader area.” *2004 AR 466*.

According to Dr. Pletscher, “wolf packs are dynamic everywhere, but especially where they are highly controversial. Boundaries where wolves are managed as a game animal may have to be shifted quite often. This will be painfully controversial each time it occurs.” *Id.* And Adrian Wydeven, Lead Wolf Biologist for the Wisconsin Department of Natural Resources found that the Wyoming Plan “seems like an **extreme form** of wolf management.” *2004 AR 476.* (emphasis added). Peer reviewers were concerned for the extent of the region in Wyoming which would remain open to unregulated harvest of wolves, questioning whether Yellowstone wolves could disperse to other populations in the Rockies. *See 2004 AR 457* (“Management at minimum population size and pack numbers may also raise concerns about connectivity and genetic diversity of the recovered wolf population.”); *2004 AR 472* (“Wyoming Plan seems to limit the potential for wolves to colonize other areas of suitable wolf habitat further to the south.”).

In January 2004, the Service again advised Wyoming that its Plan was unacceptable and delisting could not occur until the plan changed. The Service reiterated that: (1) “[t]he ‘predatory animal’ status for wolves must be changed” because “[t]he unregulated harvest, inadequate monitoring plan, and unit boundaries proposed by the state’s management plan do not provide sufficient management controls to assure the Service that the wolf population will remain above recovery levels;” (2) “[t]he Wyoming state law must clearly commit to managing for at least 15 wolf packs in Wyoming;” and (3) “[t]he Wyoming definition of a pack must be consistent among the three states and should be biologically based” to insure the inclusion of “at least one breeding pair.” *2004 AR 505-506.*

Wyoming, along with Plaintiff-Intervenors Park County and the “Wolf Coalition” (collectively, “Petitioners”) then sued.⁸ Though no final administrative action had been taken with respect to delisting, Wyoming asked this Court to compel delisting. This Court determined

⁸ Montana and Idaho never entered the legal fray. the Service followed through on its promise to let states with acceptable management plans control local populations. Interior Secretary Norton announced on January 3, 2005, that Idaho and Montana, with Service-approved wolf management plans would largely manage state wolf populations. 70 Fed. Reg. 1286 (January 6, 2005).

it lacked jurisdiction under the APA to mandate the Service to approve the Wyoming Plan. *See Wyoming v. U.S. Dept. of Interior*, 360 F. Supp. 2d 1214 (D. Wyo. 2005), *aff'd*, 442 F.3d 1262 (10th Cir. 2006).

D. Wyoming Wolf Plan - Round II

Recognizing its folly of trying to compel a delisting without using the petition process required by Section 4 of the ESA, Wyoming petitioned to delist while its lawsuit was pending in this Court. The Service commenced a status review. 16 U.S.C. § 1533(b)(3)(A). Wyoming did not alter any aspect of its 2003 Plan. The Service's position regarding the 2003 Wyoming Plan did not change. But the record demonstrates the Service took another look at the Wyoming Plan, and make a reasoned rejection of the Plan.

Ed Bangs, Wolf Recovery Coordinator provided a detailed Briefing Paper to the Regional Director in June, 2006. *AR* 15543-15571. The Briefing Paper provides detailed analysis of Wyoming's Petition. Bangs refutes Wyoming's claim that wolves are an economic detriment by showing that Wyoming ignored the twenty million dollar per year boost from wolf watching in Yellowstone. *AR* 15549. Bangs notes on-going problems with interpretation of the language of Wyoming's 2003 wolf statutes.⁹ Bangs addresses Wyoming's previous arguments that the peer reviews mandate delisting, by noting that not only did the peer reviews not provide a ringing endorsement of Wyoming's Plan, that conditions have changed since 2003, especially the significant population decline in 2005. *AR* 15559. Bangs addresses at length the problems with the dual status classification. The predator status is biologically indefensible from a recovery standpoint. *AR* 15565 *citing* Carroll et al 2006; Oakleaf et al 2006. The administrative

⁹Wyoming asserts here that this Court must accept without question the Attorney General's representation that the Wyoming wolf law can be implemented to achieve the Service's requirements. *Wyoming Brf. at 24*. The Service is not required to accept *carte blanche* the A.G.'s opinion, when the ESA (which has preempted the field of endangered species management) requires the Service to make an independent assessment of the adequacy of the state's regulatory mechanism. As well, the fact that the A.G. is now relying on his own opinion as "proof" that this lawsuit must be decided in the A.G.'s favor undercuts the independent validity of that opinion.

problems of wolves migrating from predator to trophy-game areas are also discussed. *AR* 15568. While Wyoming vehemently disagrees with Bangs' conclusions, Wyoming cannot inform this Court that the Service did not consider its 2005 Petition in detail. *See also AR* 15608; 15586-15593.

On August 1, 2006, after first conducting a status review the Service issued its 12-month finding on Wyoming's petition. *AR* 17763-17785 (71 Fed. Reg. 43,410-43,432). Because of the earlier Oregon and Vermont litigation over DPS designation, the Service postponed identification of the Northern Rockies DPS. *AR* 17769-70. The Service then concluded that delisting is not warranted because the Wyoming plan fails to provide an adequate regulatory mechanism to maintain a viable Northern Rockies gray wolf population for the foreseeable future. *Id.* at 17783. The same inadequacies that have been at the heart of Wyoming's tug-of-war – predator status across most of its range and lack of adequate pack size – provided the principle basis for the rejection of Wyoming's Petition. Predator status and the corresponding unregulated killing of wolves under the Wyoming Plan could “reduce population levels to a point at which wolves in the [Northern Rockies] are, within the foreseeable future, likely to become in danger of extinction throughout a significant portion of the range.” *Id.*

E. Post-Lawsuit Events.

Despite its rejection of Wyoming's Petition, on February 8, 2007, the Service proposed to designate a Northern Rocky Mountain gray wolf DPS and delist, subject to conditions. 72 Fed. Reg. 6,106-6,139 (Feb. 8, 2007). In the proposed rule, the Service stated that, “[i]n order to finalize this rule as proposed, Wyoming would have to adopt a State law and wolf management plan that would adequately conserve a recovered wolf population into the foreseeable future in the significant portion of range outside the National Parks in northwestern Wyoming.” 72 Fed. Reg. 6117. Absent an adequate Wyoming plan, the Service intends to delist the DPS in Idaho, Montana, Washington, Oregon and Utah, and part of Wyoming that deems an significant portion of the Northern Rocky Mountain wolf's range. *Id.* However, “[t]he significant portion of the range that exists outside the National Parks within the State of Wyoming would continue as a

Section 10 (j) ‘nonessential experimental population’ because those lands are critical for wolf recover, and because of the “continuing unacceptable level of threats that occur under the State’s current statute and management plan.” *Id.* In essence, the Service would delist the areas covered by Montana and Idaho plans, and National Parks, where wolves are protected regardless of what Wyoming does.

The Service reiterated its concerns with the Wyoming Plan. The Service also “determined that human-caused mortality associated with Wyoming's current management strategy for treating delisted wolves as “predatory animals” would exceed sustainable levels if the species were delisted in the State.” *Id.* at 6122. The dual classification had numerous flaws. Wolves in other portions of the State would alternate back-and-forth between “trophy game” and “predatory animal” status based on oscillating population numbers.” *Id.* at 6128. The lands that Wyoming was willing to protect were insufficient for long-term wolf recovery because “[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.” *Id.* 6129.

Wyoming enacted House Bill No. 213 in 2007. H.B. 213, 59th Leg., Gen. Sess. (Wyo. 2007), eliminating predator status on additional lands in northwestern Wyoming, though wolves remained predators throughout most of the state. *Id.* §§ 11-6-302(a)(ix), 23-1-101(a)(viii)(B). Wyoming also addressed the pack size issue as requested by the Service, defining a pack to include “an adult male and an adult female gray wolf raising at least two (2) pups of the year until December 31.” *Id.* § 23-1-304 (c). The legislation requires Wyoming to protect seven breeding pairs from hunting, but fails to fully protect a baseline population size and appears to allow the state vast latitude to “protect” big game species from the “threat” of depredating wolves.¹⁰ Moreover, the new law is effective only if Wyoming loses or settles the present lawsuit. H.B. 213 §29(c). This new legislation is not at issue in this lawsuit, and is not part of

¹⁰ *See* § 23-1-304(e) (“Notwithstanding other provisions of [title 23] ... the department shall manage the gray wolf population as necessary to ensure the long-term health and viability of any big game animal herd that is being threatened in this state.”).

the record upon which the Service denied the Wyoming Petition to delist. Finally, on July 9, 2007, the Service sent Wyoming a letter formally denying its 10 (j) Petition, thus mooting out Wyoming's "failure to act" claim regarding that Petition.

V. STANDARD OF REVIEW

Judicial review of agency actions under the APA is premised under the deferential arbitrary and capricious standard. *Holy Cross Wilderness Fund v. Madigan*, 960 F. 2d 1515, 1524 (10th Cir. 1990). That standard is narrow. "In making the factual inquiry concerning whether an agency decision was "arbitrary or capricious," the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." This inquiry must be "searching and careful," but "the ultimate standard of review is a narrow one." When scientific matters are disputed – i.e. a debate about what constitutes the best science – the Service's discretion is broad: "[W]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989).

Where the Service errs on the side of species protection, courts should be reluctant to overturn such protections. "The plain intent of Congress in enacting this statute [ESA] was to halt and reverse the trend toward species extinction, whatever the cost." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978) (emphasis added).

VI. SUMMARY OF ARGUMENT

The Service's rejection of Wyoming's Petition was not arbitrary. Wyoming still clings to its dual status classification scheme and definition of pack size. The Service has stated for years that these aspects of the Wyoming Plan render it inadequate. Predator status led to wolves' demise. Maintaining that status over vast portions of Wyoming, and trying to implement a complex, ever-shifting scheme aimed at minimizing the areas where wolves are protected is unreasonable. No other state has advanced such a scheme. The Service's rejection is based upon scientific evidence and its years of managing wolves in Wyoming. The Service knows it is

folly to approve a delisting plan that will lead to an effort to re-list the species. Recovery and delisting under the ESA are not a race to the bottom. The purpose and structure of the ESA give the Service ample authority to set the delisting standard high. The deferential standard of review under the APA further sanctions the Service's rejection of the Wyoming Petition, because Wyoming and other Petitioners ask this Court to substitute its judgment for the Service, relying at best on scattered and conflicting bits of the record to support its claims.

VIII. ARGUMENT

This case does not involve the misapplication of the ESA, or its implementing regulations. *See e.g. New Mexico Cattle Growers Assoc et al v. U.S. Fish and Wildlife Service*, 248 F.3d 1167 (10th Cir. 2001) (invalidating critical habitat designation based on the Service's misinterpretation of the applicable law). Nor can Plaintiffs allege that the record is devoid of justification for the rejection of the Wyoming petition. *See e.g. Northern Spotted Owl v Hodel*, 716 F. Supp. 479, 482 (W.D. Wa 1988) (Overturning decision where the "Service's documents also lack any expert analysis supporting its conclusion. Rather, the expert opinion is entirely to the contrary.") Instead this case presents a classic arbitrary and capricious challenge – did the Service have a reasonable basis to deny Wyoming's petition? Wyoming and the Intervenor argue that under the APA, the Service failed to provide a "reasonable" basis for its rejection of the Wyoming Petition. *See e.g. Wyoming Brf. at 18* ("The Service's analysis of the adequate regulatory mechanism factor is unreasonable in at least three respects.")

Wyoming cannot win under the arbitrary and capricious standard. Wyoming makes sweeping assertions that "the Service has cited no legitimate scientific evidence" in rejecting the Wyoming Plan. *Wyoming Brf. at 13*. That statement is false. The record contains ample evidence supporting denial of the petition. The record does contain statements wherein Service officials supported some aspects of the Wyoming Plan. It is also true that some peer reviewers accepted the Wyoming Plan, though acceptance was in the context of Montana's and Idaho's plans that did not allow unregulated killing of wolves. But equally true that the record contains ample evidence that the Service found the Wyoming Plan was an inadequate regulatory

mechanism. That Wyoming cites conflicting evidence from the record is not determinative. Under the arbitrary and capricious standard, the Tenth Circuit grants agencies substantial deference and discretion in making scientific determinations. *See Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, (10th Cir. 1992) (“When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.”).

A. The Service Properly Concluded that the Wyoming Plan Provides an Inadequate Regulatory Mechanism to Protect Wolves.

The parties agree that the Service must consider the “Five Factors” in 16 U.S.C. 1533 § (a) (1) for delisting decisions. The Service’s evaluation of the Five Factors is informed by the “best scientific and commercial data available.” *Id.* The only relevant factor is the adequacy of existing regulatory mechanism. 16 U.S.C. 1533 (a) (1) (D). The regulatory mechanism at issue is the Wyoming Plan as embodied in the 2003 Wyoming’s Law.

The Petitioners begin their argument with a faulty legal premise. Wyoming argues that under the “best available science” requirement, the adequacy of the existing regulatory structure for a species is viewed *only* through a scientific lens: “the unambiguous language of the ESA precludes the Service from questioning whether the plan can be implemented in the context of its evaluation of the adequate regulatory mechanism factor.” *Wyoming Brf. at 25*. Such a reading distorts how the Service must assess the efficacy of regulatory mechanisms designed to replace the strong mandate of the ESA. The Service must have full authority to consider if a regulatory mechanism can be legally and administratively implemented. If Wyoming’s interpretation is correct, then state’s could adopt regulatory mechanisms that are biologically sound but legally worthless. Such mechanisms cannot be considered adequate, or even regulatory.

Courts traditionally view the phrase “regulatory mechanisms” to embrace state fish and game laws. Whether or not those laws, *as they are enforced*, protect species becomes the focal point for evaluating this factor. *See e.g. Friends of the Wild Swan v. U. S. Fish and Wildlife Service*, 12 F. Supp. 2d 1121, 1130 (D. Or. 1998) (“Though lack of Canadian regulations and enforcement was cited as a major bull trout status issue..., the 1994 administrative record

indicates that angling restrictions are in place and anglers are encouraged to protect bull trout.”). The Service’s failure to evaluate the effectiveness of state laws as part of determining the adequacy of existing regulations would render a listing decision arbitrary. *Defenders of Wildlife v. Babbitt*, 957 F. Supp 670, 684 (D. D.C. 1997) (Service failed to examine effectiveness of state trapping laws and international treaties in rejecting petition to list lynx.) The effectiveness of the Wyoming plan is contingent upon enforcement of the state laws upon which it is based. For Wyoming to now contend that “the Service has no legal authority under the ESA to rely on concerns about the legal implementation of the Wyoming Plan” contravenes the ESA’s requirement to assess the adequacy of state regulations before delisting. *Wyoming Brf. at 33*.

The Service must assess both the science underlying the Wyoming Plan and the administrative realities of enforcing it. The record is replete with evidence that the Service fully aired the regulatory mechanism factor, and reasonably found the Wyoming Plan inadequate.

1. The record supports the Service’s rejection of the dual-status classification scheme that Wyoming has clung to, despite repeated criticism.

Human-caused mortality poses the single greatest threat to wolves in the Northern Rockies. *2004 AR 23*, 54, 68. The classification of wolves as predators led to their near extinction. It is reasonable for the Service to require Wyoming to eliminate or minimize the predator status that is the basis for the Service’s objections to the dual classification system. Montana and Idaho reject such a label. As the Service found, Wyoming law allows that predators “may be taken by anyone, anywhere in the predatory animal area, at any time, without limit, and by any means” (including, among other things, “bounties and wolf-killing contests; locating and killing pups in dens ...; [and] aerial gunning”). *AR 17781* (71 Fed. Reg. 43,428). And while Wyoming argues exhaustively about the need to base delisting decisions on the best available science, Wyoming has offered little scientific or biological support for predator classification. Wyoming does not cite a single scientific study that demonstrates that predator classification is a sound, biologically superior way to manage wolves. History teaches otherwise.

The record demonstrates the Service’s repeated concern over the dual classification. *See e.g. 2004 AR 24* (Service letter of July 16, 2002); *2004 AR 29* (Service Director Williams letter

of September 26, 2002); 2004 AR 499 (Service Director Williams letter of February 14, 2003 to Wyoming Senators regarding adequate regulatory mechanism); 2004 AR 343-348 (Letter of July 2, 2003 from Wolf Recovery Coordinator Ed Bangs to Wyoming Dept. of Fish and Game regarding inadequacies in Wyoming Plan). The same concerns were expressed in rejecting the Wyoming Petition, which changed none of the inadequacies of the Wyoming Plan. In 2006 the Service concluded “(W)e determined that problems with the Wyoming legislation and plan, and inconsistencies between the law and management plan did not allow us to approve Wyoming's approach to wolf management.” 72 Fed. Reg. 6111; *see also* AR 90096

Park County's claims that unregulated killing in areas where wolves are predators would “result in no different results for wolves on the ground” than current ESA-based management is unfounded. *Park County Brf. at 9*. Park County, like Wyoming, fails to acknowledge the scientific reality that wolves, labeled as predators, were driven to extinction, while wolves protected by the ESA (which even allowed a regulated take) continue to thrive.

Even if wolves could be delisted but still are classified as predators in part of Wyoming, the trophy game areas in National Parks and adjacent wilderness areas alone are insufficient to overcome unregulated human killing in predator areas. The record supports this conclusion. *See* 2004 AR at 24, 29, 55, 57-67. Yellowstone's wolves don't remain in Park, especially in winter, and don't often use the adjacent wilderness designated as “trophy game” areas. AR 17781 (71 Fed. Reg. at 43,428). “Wolves packs in Wyoming have almost no use of the adjacent Wilderness Areas outside of the GYA Park Units because those areas' high elevation, deep snows, and low productivity renders them unsuitable for wolves”; AR 15561; *see also* AR 90096 (2003 Briefing Paper criticizing Wyoming Plan for same reasons). Even Wyoming notes that “90% of the home range area of wolf packs living outside the National Parks and Parkway in Wyoming is not in these trophy game wilderness areas.” 2004 AR 214.

While Wyoming derides the Service's reliance on the maps prepared by Dr. Mike Jiminez, the Service employee with years of field experience managing and controlling Wyoming's wolves, *Wyoming Brf. at 20*, the maps depicting current pack areas is the most

current field data. Current data has value. The maps were a direct response to Wyoming's allegations that the high mountain wilderness areas where Wyoming was labeling wolves as trophy game animals provided suitable habitat. Dr. Jiminez's maps, based on actual field data, show that wolves do not rely much on the Wilderness areas. *AR 17781*.

The record supports the Service's concern that the dual-status classification created an administrative nightmare. The best available science proves that wolves are highly migratory, and vacillate between areas where they would be predators and trophy game animals. The dual-status boundaries follow administratively-designated units and not biologically based home ranges. The resulting management scheme creates "real potential for flipping back and forth between predatory animal status and trophy game status" and would undermine Wyoming's ability to effectively control wolf mortality. *AR 17781 (71 Fed. Reg. at 43,428)*. As the Service explained, "[a] situation could develop whereby every time a new pack is discovered or a pack is lost to telemetry monitoring or killed, the trigger could theoretically flip back and forth within days." *Id.* at 90169. Such a program "would be nearly impossible to administer and enforce." *AR 17781 (71 Fed. Reg. at 43,428)*. The Service concluded: "[t]he uncertainty caused by changing back and forth with the 7-pack trigger w[ould] lead to an ineffective, expensive, controversial, and confusing monitoring and management program and would result in a host of enforcement and public information conflicts." *AR 90169*.

2. The record supports the Service's concerns over Wyoming's definition of pack size.

Wyoming, Park County and the Wolf Coalition also criticize the Service's failure to accept the Wyoming Plan's definition of pack size. Wyoming adopted a definition of "pack" that could significantly inflate the apparent number of breeding pairs in the state's population. The legislature defined "pack" as "5 or more gray wolves traveling together." Wyo. Stat. § 23-3-304 (c). The Service has criticized Wyoming's definition of pack size from the outset. *2004 AR 343-348*. This definition could apply to "a female with 4 newborn pups, not a breeding pair" or even five orphaned pups. *AR 90169; AR 17781 (71 Fed. Reg. at 43,428)*. Based on the

Service's extensive experience, wolves traveling together have only 56% probability of containing a breeding pair. *AR* 17781-82 (71 Fed. Reg. at 43,428-29).

Petitioners argue the Service has inconsistently stated the required definition of pack size for recovery and delisting. *See e.g. Wyoming Brf. at 41-42; Wolf Coalition Brf. at 37-39*. But it is Wyoming that has failed to provide legitimate scientific basis for the definition of pack size in the Wyoming Plan. The Service's position has been consistent. *See e.g. 2004 AR* 300 ("until the analysis was completed," the Service refused to accept Wyoming's definition of pack size). The Service informed Wyoming that a proper definition of pack size must include reference to the number of animals traveling together in winter (to avoid counting pups that may not survive) and should include breeding pairs. *AR* 12077; *see also AR* 15563-4.

The Service revisited the pack size issue again after Wyoming submitted its petition. In May 2006, the Service and Wyoming addressed the best methods for estimating breeding pairs. *AR* 14301-14312. David Ausband, from the University of Montana, developed a new regression model for estimating breeding pairs in relation to pack size. He discredits a linear regression model previously utilized by both Wyoming and the Service to correlate pack size with breeding pair numbers. *AR* 16083-16095. Mr. Ausband's research addressed concerns about the accuracy of the linear regression model. *AR* 16100. Mr. Ausband discovered that the linear regression model was mathematically incorrect and greatly overestimated wolf breeding pairs in Wyoming, because the relationship is logistic (Ausband 2006). Wyoming data show that groups of 5 wolves traveling together in winter only have a 0.56 probability of having a breeding pair in Wyoming (Ausband 2006). Wyoming attacks Mr. Ausband's model, and argues that its linear regression model is proper. *Wyoming Brf. at 19, 36*.

The debate over which regression model to use to correlate pack size and breeding pairs is precisely the type of technical scientific debate that this Court should be hesitant to adjudicate. While the ESA certainly does require the "best available science," Wyoming has not shown that the Service's reliance on Mr. Ausband's model is arbitrary, only that it prefers a different

regression model. Mr. Ausband's work represents the most current attempt to address a complex issue. It is the *best available* information because it is based on current Wyoming data.

3. The Service can legitimately question the adequacy of the Wyoming Law as written.

Yet another concern pertains to whether the plain language of the Wyoming Law as written will even allow the state to implement the Wyoming Plan. The Attorney General recognizes that there is an inconsistency in the plain language of the Wyoming Law, and the manner in which Wyoming asserts it will implement the law in the Plan. The Attorney General opined that the Wyoming Fish and Game Commission could interpret the law in a manner that promotes delisting, notwithstanding the plain language of the law. The Service analyzed the differences between the Wyoming Law and Wyoming Plan, and determined that it had concerns about these differences, which in turned weighed upon the inadequacy of Wyoming's regulatory scheme. *AR 15557-8.*

It should be noted that the Service has repeatedly advised that "Wyoming should commit to manage for at least 15 packs in Wyoming AND maintain at least 7 of those packs outside the National Parks in Wyoming." *AR 90167* (emphasis in original). *See also 2004 AR 344, 348, 499.* The Wyoming Plan includes such a provision. But the Wyoming Law contradicts the Plan. Under the Law, the Commission is required to maintain the original trophy game boundary if there are at least 7 wolf packs in Wyoming primarily outside of the national parks *or* 15 wolf packs in Wyoming total. Wyo. Stat. § 23-1-304 (b)(ii). If Yellowstone National Park support 15 packs, then the Fish and Game Commission could not adopt measures restricting wolf killing outside of parks and wilderness areas. If the number of packs in Yellowstone fell below 8, the Commission couldn't protect more than 7 packs outside the parks to ensure 15 packs overall. The Service properly concluded there is "very specific wording in the Wyoming state law that [is] in direct conflict with many portions of the state plan." Under the Wyoming Law the state "cannot commit to maintaining the 15 and 7 pack goal." *AR 90169.* The Service reiterated the same finding in rejecting the Wyoming Petition. *AR 17782* (71 Fed. Reg. at 43429). The Attorney General cannot annul the Wyoming Law's plain terms. While the Attorney General

demands that the Service (and this Court) accede to his interpretation that the Commission could ignore the law and instead implement “legislative intent,” basic rules of statutory construction deem otherwise.

4. The rejection of the Wyoming Plan based on the Service’s legitimate concerns was not arbitrary.

At best Wyoming, Park County and the Wolf Coalition show that the record contains some evidence that some persons believed on some occasions that the Wyoming Plan could work. But mere disputes within the record are not grounds for overturning the decision to deny the Petition. The record contains ample evidence to support that decision. A benchmark of administrative law for half a century cautions against courts substituting their judgment for that of the agency. As the Tenth Circuit recently noted, "the ultimate standard of review is a narrow one [and we are] not empowered to substitute [our] judgment for that of the agency." *Utah Environmental Congress v. Richmond*, 483 F.3d 1127, 1134 (10th Cir. 2007) citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Furthermore, the structure and purpose of the ESA demand that decisions that protect species be given deference over decisions that do not. *TVA v. Hill*, *supra*. Wyoming wants this Court to substitute its judgment on a range of matters - linear vs. logical regression models for pack size, manageability of shifting boundaries for predator vs. trophy game status, appropriate number of packs in Yellowstone and other areas, use of the predator label as retarding long-term recovery, weight of multiple peer reviews in the delisting process and so forth. This Court should decline that invitation. The tug-of-war between the state and federal government over wolf delisting will no doubt continue in the halls of the Wyoming Legislature and in the press. But it should not continue in the courts.

B. Wyoming’s Unreasonable Delay Claim Also Fails.

Wyoming claims that Service has unreasonably delayed action on its other ESA petition to amend the Section 10 (j) Regulation governing wolf management. *Wyoming Brf. at 15*. The claim is styled as a “failure to act” claim under Section 706 (1) of the APA. Wyoming argues that this Court must order the Service to act upon Wyoming’s petition to change the 10 (j)

Regulations governing wolves in Wyoming. It is true that regulations do require the Service to act upon Wyoming's Petition. But the Service has not denied its responsibility to act. So the issue is whether the delay in addressing Wyoming's Petition is unreasonable.

Wyoming's claim suffers from two legal deficiencies. First, the claim is moot. On July 9th, 2007 the Service denied the 10 (j) Petition. The Service also recently proposed amendments to the 10 (j) regulations. 72 Fed. Reg. 36,942 (July 6, 2007). Wyoming can participate in the newly proposed rule-making. But for purposes of this lawsuit, the Service has acted by first proposing new 10 (j) rules and then denying Wyoming's 10 (j) Petition.

Second, even if Wyoming's claim is not moot, its claim fails to justify the "extraordinary remedy" of "a court-imposed deadline for agency action." *Qwest Comm. Int'l, Inc. v. FCC*, 398 F.3d 1222, 1238-39 (10th Cir. 2005). The Tenth Circuit has adopted what are known as the "TRAC" factors¹¹, to evaluate whether agency action is unreasonably delayed. These factors include: (1) the extent of the delay, (2) the reasonableness of the delay, (3) the consequences of the delay, and (4) administrative difficulties pertaining to the agency's ability to resolve an issue.

The Service's delay is reasonable under these circumstances. Wyoming has filed two Petitions, one to delist and the other to change the 10 (j) regulation. The Service first focused on the delisting petition, a reasonable response given the prior litigation and Wyoming's proclaimed (but unsubstantiated) urgency in the delisting matter. The Service began review of Wyoming's 10 (j) Petition in October 2006, after making a formal decision on the delisting petition. *AR* 15698. Thus the Service has actually been working for 10 months on the 10 (j) Petition, after first devoting its efforts to Wyoming's delisting petition. Such delay is much less than delays that courts find unreasonable. *See e.g. Qwest, supra.*, 398 F.3d at 1238-39 (no unreasonable delay despite nine year delay in agency rulemaking). In addition "the consequences of the delay," are not harmful to human health, nor do they impose serious economic harm. *Id.*, *citing*

¹¹The so-called "TRAC" factors were first enunciated in *Telecommunications Research and Action Center v. F.C.C.* 750 F.2d 70 (D.C.Cir. 1984) and are widely used to assess whether agency action is unreasonably delayed under 5 U.S.C. §706 (1).

In re International Chemical Workers Union, 958 F.2d 1144 (D.C. Cir 1994) (discussing unreasonable delay in rulemaking involving rules designed to protect human health). Wolf depredation is only a small fraction of livestock mortality, and no hard evidence shows that wolves have significantly harmed Wyoming's ever-expanding elk populations. *AR 15547-9*. Wyoming will not suffer a crisis if the Service takes additional months to respond to Wyoming's 10 (j) Petition, even if this Court finds that the rulemaking discussed above does not provide a sufficient administrative remedy.

The Service has the discretion to first address the delisting petition, which is subject to discrete time deadlines. Wyoming argues that the Service has no discretion to prioritize its work load. *Wyoming Brf. at 17*. Wyoming's position is directly at odds with the Tenth Circuit's most recent discussion of the matter. *Qwest*, 398 F.3d at 1239. ("administrative difficulties bearing on the agency's ability to resolve an issue" are relevant); *See also Cutler v. Hayes*, 818 F.2d 879, 898 (D.C.Cir. 1986) (discussing factors that make administrative delay unreasonable).

C. The Service Does Not Have to Prepare a Supplemental EIS.

The Federation adopts and incorporates arguments raised by Respondent and Respondent Intervenors regarding the Supplemental EIS claim.

VIII. CONCLUSION

Based on the foregoing, the Petition for Review filed by Wyoming should be denied.

Respectfully submitted this 11th day of July, 2007.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of July, a true and correct copy of the foregoing was filed electronically with the US. District Court for the District of Wyoming and electronically filed upon the parties:

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