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

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING, WYOMING WOOL GROWERS, et al., and PARK COUNTY,	)
Plaintiffs-Appellants,	)
vs.	)
UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,	)
Defendants-Appellees,	)
and	)
GREATER YELLOWSTONE COALITION, et al.,	)
Defendants-Intervenors-Appellees.	)

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

The Honorable Alan B. Johnson
District Judge

D.C. No. 04-CV-0123-J

PLAINTIFF-APPELLANT PARK COUNTY, WYOMING'S OPENING BRIEF

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Park County requests oral argument. This case addresses issues of great concern for Park County residents and which arise from a complicated factual background. Park County believes oral argument will benefit this Court's understanding of how the relevant facts relate to the issues raised.

Dated this 20th day of June, 2005.

Bryan A. Skoric
Park County Attorney

STATEMENT OF JURISDICTION

Park County adopts this section of Plaintiff-Appellant State of Wyoming's Brief.

STATEMENT OF THE ISSUES

Park County adopts this section of Plaintiff-Appellant State of Wyoming's Brief.

STATEMENT OF THE CASE

Park County adopts this section of Plaintiff-Appellant State of Wyoming's Brief.

STATEMENT OF THE FACTS

Park County adopts this section of Plaintiff-Appellant State of Wyoming's Brief.

SUMMARY OF THE ARGUMENT

Park County adopts this section of Plaintiff-Appellant State of Wyoming's Brief.

STANDARD OF REVIEW

Park County adopts this section of Plaintiff-Appellant State of Wyoming's Brief.

ARGUMENT

Park County adopts this section of Plaintiff-Appellant State of Wyoming's Brief and submits the following additional argument.

I. The District Court erred in holding that it lacked jurisdiction to review the claims asserted under Section 706(2) of the APA and under the ESA.

The District Court held that it lacked jurisdiction over this case because the Fish and Wildlife Service's (FWS) January 13, 2004 letter rejecting the Wyoming Wolf Management Plan (Wyoming Plan) did not amount to reviewable "final agency action" in the context of a decision regarding whether or not the FWS should propose a rule to delist the gray wolf. (Aplt. App., Vol. 5 at 1226). The District Court held that the FWS decision could only be reviewable as final action if it was made following a decision on the merits after review of a petition to delist or following the status review of the species. (Aplt. App., Vol. 5 at 1219-1220, 1223) (citing 16 U.S.C. § 1533(a)(1)(A-E); 50 C.F.R. §§ 424.14 and 424.21)). The District Court ruled that the January 13, 2004 letter came neither as the result of a status review of the gray wolf nor as a petition to delist the species. (Aplt. App., Vol. 5 at 1221-1223). The District Court was in error in this regard. Somehow, the District Court ignored the fact that a petition to

delist the wolf *had been filed* and that the review of the species was based in part on that petition.

The District Court observed that the FWS by statute and regulation, examines five categories upon a status review of a species or upon review of a petition to delist as set forth at 16 U.S.C. § 1533(a)(1)(A-E):

> The Secretary shall by regulation in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:
>
> (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
> (B) overutilization for commercial, recreational, scientific, or educational purposes;
> (C) disease or predation;
> (D) the inadequacy of existing regulatory mechanisms; or
> (E) other natural or manmade factors affecting its continued existence.

(Aplt. App., Vol. 5 at 1220) (citing 16 U.S.C. § 1533(a)(1)(A-E)).

The District Court held that the January 13, 2004 letter only addressed one category among the five categories and for that reason was insufficient as a final decision. (Aplt. App., Vol. 5 at 1218). While the letter did in fact only address one category—the adequacy or inadequacy of existing regulatory mechanisms—the District Court ignored the fact that this category was the only category remaining in determining a delisting

proposal. The District Court ignored the fact that the other categories had been reviewed as a result of a petition to delist the gray wolf.

On April 1, 2003, the FWS issued its Advance Notice of Proposed Rulemaking proposing to completely delist the gray wolf in the Northern Rocky Mountains and to remove their nonessential experimental designation. 68 Fed. Reg. 15879-15882.[1] This advance notice was put forth in response to evidence that the wolf was exceeding recovery goals *and* in response to a petition to delist the gray wolf filed by Karl Knuchel on behalf of the Friends of Northern Yellowstone Elk Herd, Inc. (hereinafter Knuchel Petition). *Id.* at 15880. This petition to delist was also noted in the Federal Register under the FWS final reclassification rule reclassifying the wolves from endangered to threatened, which was also filed on April 1, 2003. (Aplt. App., Vol. 8 at 2004). At oral argument, Plaintiff-Appellant Park County noted this petition to delist and the Federal Register citation. (Aplt. App., Vol. 5 at 1322) (citing 68 Fed. Reg. 15879-15882)).

[1] While Appellees' administrative record indicates this document is part of the record, the record document actually submitted discusses the advanced notice of proposed rulemaking to delist the wolf in the *Eastern* Distinct Population Segment rather than the *Western* Distinct Population Segment. This appears to be a mistake. Park County noted this mistake at oral argument and cited the proper document. (Aplt. App., Vol. 5 at 1322) (citing 68 Fed. Reg. 15879-15882)). Due to this mistake, the document is not part of the official appendix.

In the final reclassification rule, the FWS stated, as it regards the Knuchel Petition, that the data review resulting from processing the petition to delist would amount to a "subset" of the review begun under the reclassification rule. *Id.* Thus, the data review necessary to process the petition to delist was a subset of the review included in the final reclassification rule. In its April 1, 2003 Advance Notice of Proposed Rulemaking, the FWS stated that the FWS's intent to propose a rule to delist was based on the evidence presented in the final reclassification rule. 68 Fed. Reg. 15880. The final reclassification rule presented evidence and evaluated the five factors necessary in the review of a petition to delist. (Aplt. App., Vol. 8 at 2038-2054).

On January 6, 2005, the FWS proposed special rules for addressing wolf management in states with approved wolf management plans. (Aplt. App., Vol. 8 at 2221-2247). In that document, the FWS stated:

> As we discussed in our advance notice of proposed rulemaking regarding delisting the Western DPS of the gray wolf (68 FR 15879; April 1, 2003), once Wyoming has an approved wolf management plan, we intend to propose removing the gray wolf in the Western DPS from the List of Endangered and Threatened Wildlife.

(Aplt. App., Vol. 8 at 2222)

This is not the only comment from FWS indicating that the only remaining factor in proposing a rule to delist was the question of Wyoming's Wolf Management Plan. Park County adopts those various statements as set forth in the State of Wyoming's brief but sets forth specifically the following:

> "Director Williams stated that "[d]elisting can move forward as soon as Wyoming makes the changes we've identified to both its state law and its wolf management plan, *but not until then*." (Aplt. App., Vol. 7 at 1962)(emphasis added)."

In synopsis:

1. A petition to delist had been filed;
2. FWS announced an advance notice of intent to delist based on evidence in a final reclassification rule and on the petition to delist, review of which was a subset of the review in the reclassification rule;
3. All five statutory factors required in reviewing a petition to delist have been addressed;
4. The only remaining issue at the time of the January 13, 2004 letter was the adequacy of Wyoming's Wolf Management Plan (*see* Aplt. App., Vol. 8 at 2225 ("The Service [has] determined that Wyoming's current State law and its wolf management

plan do not suffice as an adequate regulatory mechanism for purposes of delisting (letter from Service Director Steven Williams to Montana, Idaho and Wyoming, January 13, 2004).");

5. On January 13, 2004, the FWS rejected that plan;

6. That decision was a final agency action.

With this argument set forth, it is understandable why the State of Wyoming and Plaintiff-Intervenors argued below that filing their own petition to delist, as suggested by the District Court, would be futile. (*See* Aplt. App., Vol. 5 at 1222). In addressing the futility argument the District Court stated:

> These arguments fail to recognize the significance of the petition process. The petition process strikes a delicate balance between judicial review, agency expertise and the public's right to a healthy, sustainable eco-system which fosters biological diversity. The petition process sets up mandatory bright lines of both timing and behavior that are readily open to judicial review.

(Aplt. App., Vol. 5 at 1221).

Respectfully, it is the FWS and the District Court who have failed to recognize the significance of the petition process. Clearly, if the FWS had a petition to delist in hand and, pursuant to that petition, was pursuing a review of the species, it would not be necessary for other parties to file

duplicatory petitions in order to precipitate the same review. Parties are not required to partake in an exercise in futility with a federal agency in order to exhaust their administrative remedies. *McGraw v. Prudential Insurance Co. of America,* 137 F.3d 1253, 1263 (10th Cir. 1998). A district court has discretion to abandon the requirement that a plaintiff exhaust its administrative remedies "under two limited circumstances: first, when resort to administrative remedies would be futile; or, second, when the remedy provided is inadequate." *Id.* In this case, it is obvious that resort to the administrative remedy Defendants-Appellees and the District Court suggested would be futile. The January 13, 2004 letter was the consummation of the decision-making process.

Rejection of the plan created direct legal consequences for the Appellants. *Bennett v. Spear,* 520 U.S. 154, 178 (1997) (final action must be action by which rights or obligations have been determined or from which legal consequences flow); *Public Service Co. of Colorado v. United States Envtl. Protection Agency*, 225 F.3d 1144, 1147 (10th Cir. 2000) (a plaintiff must show it was directly affected by the agency action for the action to be final). Rejection of the plan placed Wyoming in a position to defend its peer review-approved plan by seeking legal redress. No other adequate remedy

existed. The suggestion that Plaintiffs file their own petition to delist would have been futile. In order to exercise its wolf management plan, the State of Wyoming was obligated to modify both the plan and state statutes. (Aplt. App, Vol. 7 at 1955-56). For Appellants, rejection of the plan created obligations and legal consequences.

The District Court ruled that the January 13 letter rejecting Wyoming's Wolf Management Plan was interlocutory and tentative. (Aplt. App, Vol. 5 at 1218). Even if it were, rejecting the plan nonetheless altered the legal regime under which Appellants existed. In *Bennett v. Spear*, the FWS issued an advisory, nonbinding biological opinion which the United States Supreme Court determined to be final agency action because it "alter[ed] the legal regime" under which the Bureau of Reclamation (Bureau) operated. *Bennett,* 520 U.S. at 178. In *Bennett*, the Bureau sought a biological opinion from the FWS regarding how its Klamath Irrigation Project in Oregon might affect two endangered species of fish. *Bennett,* 520 U.S. at 154. The ESA requires that federal agencies consult with the FWS to determine whether their actions are likely to jeopardize the continued existence of a threatened or endangered species. 16 U.S.C. § 1536(a)(2). The FWS then details in a written statement how an action may affect the

species. *Id.* § (b)(3)(A). If the FWS determines jeopardy will result, FWS must provide reasonable and prudent alternatives to avoid the consequence. *Id.*

The FWS' biological opinion in *Bennett* determined that long-term operation of the irrigation project was likely to jeopardize the fish species and identified as a reasonable and prudent alternative, maintenance of minimum water levels on certain reservoirs; these levels became the subject of the lawsuit. *Bennett,* 520 U.S. at 154. If the Bureau operated according to the opinion's advisements, incidental take of the species would not violate the law. *Id.* at 169. Even though the biological opinion was advisory and nonbinding, the Court held that the opinion was final agency action. *Id.* at 178. The opinion, the Court said, had a "powerful" coercive effect on the Bureau. *Id.* at 169. Rarely does an agency act counter to FWS biological opinions. *Id.* In its briefs, the FWS argued the Bureau was not obligated to comply with FWS' reasonable and prudent alternatives, and even if it did comply, the alternatives did not conclusively determine how water would be allocated. *Id.* at 177. The Court found that argument without merit. *Id.*

The circumstances and affect of the biological opinion in *Bennett* are analogous to the January 13, 2004 FWS letter. In the process of delisting,

the states were required to submit management plans that the FWS deemed the determinative factor in preserving the gray wolf. The FWS reviewed those plans to determine whether their implementation would jeopardize the species. In Wyoming's case, the FWS required significantly different alternatives to provisions of the Wyoming Plan despite the Plan having been peer-review approved by FWS handpicked experts. If Wyoming didn't adopt those alternatives the FWS would halt the process. That decision altered the "legal regime" for Wyoming. It placed Wyoming in a position where no adequate remedy to the FWS rejection existed. Further, to reinforce the coercive affect of the decision on Wyoming, in March of 2004, prior to Wyoming filing its lawsuit, the FWS proposed rules allowing greater management flexibility for states with FWS approved management plans.[2] 69 Fed. Reg. 10956 (March 9, 2004). If Wyoming did not adopt FWS alternatives to the Wyoming Plan, Wyoming and Park County would be in a position where their neighbor citizens in Montana and Idaho could "take" a gray wolf under circumstances where Wyoming and park County citizens could not without suffering the same kind of potential civil and criminal penalties the Bureau would have suffered in *Bennett*. The coercive

[2] The FWS published a final rule January 6, 2005. (Aplt. App., Vol. 8 at 2221-2247).

affect on Wyoming from the FWS' rejection of the Wyoming Plan is indeed powerful. For all the above reasons, and for those reasons stated in the State of Wyoming's brief regarding the January 13 letter's direct and immediate effect, rejection of the Wyoming Plan was a final agency action.

Because a petition to delist the gray wolf had been filed, the District Court was also in error for determining that the "best science available" mandate at 16 U.S.C. § 1533(b)(1)(A), did not apply in the context of the Fish and Wildlife Service's evaluation of Wyoming's Wolf Management Plan. (Aplt. App., Vol. 5 at 1219-1224). The ESA dictates that any determination on the adequacy of existing regulatory mechanisms "shall" be made "solely on the basis of the best scientific and commercial data available to her." *See* 16 U.S.C. §§ 1533 (b),(c)(2)(B); 50 C.F.R. § 424.11(d). The Court made its ruling based on the faulty analysis that FWS review of the Wyoming Plan was neither as the result of a "status review" of the gray wolf nor as the result of a petition to delist. Because review of the Wyoming Plan was in part due to a petition to delist, the District Court's analysis is in error. The peer-review performed on the Wyoming Plan was done to ensure that FWS decisions are based upon the best scientific data

available as required by law; the "best science available" mandate applied in this case.

CONCLUSION

For all the above reasons, the District Court's decision should be reversed. Park County requests that this Court: (1) reverse the District Court's Corrected Opinion and Order *in toto*. Park County further requests that this Court review the merits of the Section 706(2) and ESA claims asserted by Appellants and hold that the Federal Defendants violated the "best science" mandate in 16 U.S.C. § 1533 when they rejected the Wyoming Plan.

Respectfully submitted this 20th day of June, 2005.

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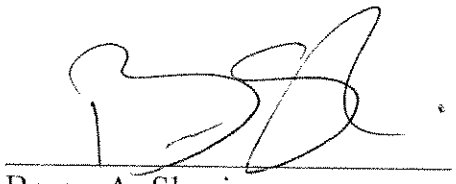
10th Cir. R 31.3(B) CERTIFICATE OF COUNSEL

Pursuant to 10th Cir. R. 31.3(B), I certify that this brief is filed separately from co-appellants because Park County is a governmental entity and exempt from 10th Cir. Rule 31.3(D).



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing PLAINTIFF-APPELLANT PARK COUNTY, WYOMING'S OPENING BRIEF was served by placing same in the United States mail, postage prepaid and by electronic mail, on the 20th day of June 2005, addressed correctly as follows:

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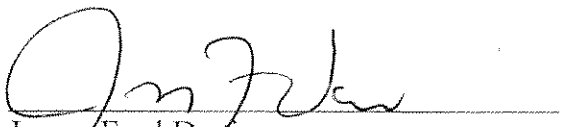

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CERTIFICATE OF SCANNING FOR VIRUSES

The undersigned hereby certifies that the enclosed submission, Plaintiff-Appellant Park County, Wyoming's Opening Brief, has been scanned for viruses by Computer Associates eTrust Antivirus, Version 7.0.139, last updated June 19, 2005, and, according to said program, is free of viruses.

6/20/05

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