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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

STATE OF WYOMING,)	
)	
Petitioner,)	
)	Civil Action No. 06CV 245J
BOARD OF COUNTY COMMISSIONERS)	
OF PARK COUNTY,)	
)	
Petitioner-Intervenor,)	
)	
WYOMING WOOL GROWERS)	
ASSOCIATION, et al.,)	
)	
Petitioners-Intervenors,)	
)	
vs.)	
)	
UNITED STATES DEPARTMENT)	
OF THE INTERIOR, et al.,)	
)	
Respondents,)	
)	
SIERRA CLUB, et al.,)	
)	
Respondent-Intervenors,)	
)	
)	

NATIONAL WILDLIFE FEDERATION,)
et al.,)
Respondent-Intervenors.)

PETITIONER-INTERVENOR PARK COUNTY'S OPENING BRIEF

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STATEMENT OF JURISDICTION

Park County adopts this section of Petitioner State of Wyoming’s Brief.

STATEMENT OF THE ISSUES

Park County adopts this section of Petitioner State of Wyoming’s Brief.

STATEMENT OF THE CASE

Park County adopts this section of Petitioner State of Wyoming’s Brief.

STATEMENT OF THE FACTS

Park County adopts this section of Petitioner State of Wyoming’s Brief.

STANDARD OF REVIEW

Courts review administrative agency decisions under the Endangered Species Act pursuant to the Administrative Procedure Act (APA). *Biodiversity Legal Foundation v. Babbitt*, 146 F.3d 1249, 1252 (10th Cir. 1998). A court will uphold an agency decision unless it is “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” *Id.* (citing 5 U.S.C. § 706(2)(A)). An agency decision is arbitrary and capricious if:

“the agency . . . relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, 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.”

Colorado Env't'l Coalition v. Dombeck, 185 F.3d 1162 (10th Cir. 1999) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Inc. Co.*, 463 U.S. 29, 43 (1983)). An agency must make a rational connection between the facts found and the choice made. *Id.* Further, the decision must be supported by substantial evidence in the administrative record to avoid being deemed arbitrary. *Colorado Wild v. U.S. Forest Service*, 435 F.3d 1204, 1213 (10th Cir. 2006). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.*

Where an agency has failed to perform a discrete agency action, a court shall compel the agency to carry out that action. 5 U.S.C. § 706(1); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004). The agency action in question must be demanded by statute or agency regulations having the force of law. *Id.* at 65. When a statute requires an agency to act within an “expeditious, prompt of reasonable time,” a court has discretion to decide whether agency delay is unreasonable. *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir.

1999). If the court deems the delay unreasonable, it must compel the action. *Id.* at 1191.

SUMMARY OF THE ARGUMENT

Park County adopts this section of Petitioner State of Wyoming's Brief.

ARGUMENT

Park County adopts this section of Petitioner State of Wyoming's Brief and adds the following:

- I. The Fish and Wildlife Service's (FWS) analysis of the "adequate regulatory mechanism" factor in the 12-Month Finding is unreasonable, arbitrary and capricious.**

Predator status.

The FWS 12-month finding at issue in this case claims that the Wyoming Gray Wolf Management Plan (Wyoming Plan) fails as an adequate regulatory mechanism for regulating human-caused mortality and therefore maintaining viable wolf populations in Wyoming. (AR 17763-17785; 71 Fed. Reg. 43410, 43432 (August 1, 2006)[*hereinafter* "12-Month Finding"]). The primary reason for finding Wyoming's Petition to delist unwarranted results from the Wyoming Plan's classification of wolves as predators in areas outside the core suitable wolf habitat. The number of wolves in Wyoming outside of Yellowstone Park at the time of the 12-month finding, according to FWS, was approximately 101 adults in

20 packs. (AR 10734). Fourteen of those packs had confirmed pups. (Id.) Shortly thereafter in November 2006 wolf counts in Wyoming outside Yellowstone Park totaled approximately 174 wolves (adults and pups) in 20 packs with 13 of those packs having breeding pairs, up from 2005 numbers of 120 wolves, 13 packs and 10 breeding pairs. (AR 15293, 15097). Preliminary wolf counts for Yellowstone Park in 2006 totaled 140 wolves in 14 packs with 12 breeding pairs, a rise from the end of 2005 when wolf numbers had apparently dropped to around 118 wolves and seven packs. (AR 15295). In 2006, based on these figures, the number of wolves in Wyoming and Yellowstone Park, according to FWS, equaled approximately 314 wolves, 34 packs and 25 breeding pairs, numbers significantly greater than the 100 wolves and 10 breeding pairs required to maintain a viable wolf population in Wyoming and Yellowstone Park, according to FWS.

Against this backdrop, FWS has determined that wolves occupy all suitable habitat in Wyoming: “Since 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.” (AR 17778). As FWS biologist Ed Bangs has said:

“I think we have all the “easy” wolves and the new ones that show up aren’t going to last long. We just did a look at wolf packs in the tri-state

area and nearly ¼ of the packs don't last very long and it is basically any wolves outside the core "safe" areas – like Yellowstone, central Idaho wilderness and NW MT – aren't going to stick around. . . . Outside those areas the wolves get killed either by us or illegal mort." (AR 17899). "All the wolves are confined to NW Wyo and probably always will be – and the USFWS aggressively controls problems." (AR 17905).

FWS removal of wolves is demonstrated in the record. For example, in 2005 and 2006 FWS by lethal control action completely removed several packs including the Daniel, Farson and Upper Green River packs in Wyoming due to livestock depredations. (AR 15147). Attempts were made to remove other packs including the South Fork pack in Park County. (AR 15334). Individual wolves were removed from various packs including the Carter, Absaroka and Owl Creek packs in Park County. (AR 15170, 10734). The Park County packs are or were packs that lived in and very near the wilderness areas.

Thus, while FWS is critical of the Wyoming Plan regarding predator classification and unlicensed take outside the core habitat around Yellowstone Park, that criticism is unreasonable and arbitrary under the circumstances. The classification of wolves as predators outside core habitat areas would result in no different results for wolves on the ground under the Wyoming Plan as exist today under the federal management regime. With their efficient use of aircraft over intermixed public and private lands, the FWS is at least as efficient and no doubt

more efficient at removal of wolves under the current federal regulatory mechanism as random predator hunters would be under the Wyoming Plan. Yet FWS will not approve the Wyoming Plan and begin the process of turning management over to the State.

Hysteria exists over the term “predator” under the dual status mechanism. Distaste for the term is not based in biology but rather in politics and emotion. (AR 90045; 347-348). FWS’s 12-month Finding sets forth an irrational fear of wolf extirpation under predator status based on historic practices. (“The Wyoming Petition’s claim that such extensive removal of wolves is unlikely, even if they receive no legal protection, is not supported given the past history of wolf extirpation.” (AR 17783). The fear that historic practices leading to wolf extirpation, often government-sponsored, would continue upon delisting is unsupported in the record. In fact, FWS recognizes that “[p]ublic attitudes towards wolves have improved greatly over the past 30 years, and we expect that, given adequate continued management of conflicts, those attitudes will continue to support wolf restoration.” (AR 17783). In Park County, where the greatest number of wolf packs exist, citizens have become adept at living successfully with listed and recovered species such as the grizzly bear. FWS concerns regarding predator status are irrelevant and speculative and the kind of political and

emotional considerations that are improper under the Endangered Species Act's "best science" mandate required in delisting decisions. 16 U.S.C. § 1533(b); 50 C.F.R. § 424.11(d). The Wyoming Petition and the Wyoming Plan establish proper and convincing scientific factors justifying the Wyoming Plan's dual status. The great majority of peer reviews support the plan as an adequate regulatory mechanism. (AR 424-482). Upon this information it is clear that the Wyoming Plan is sound; the reason for finding the Petition unwarranted is non-biologically based animosity toward the term "predator."

Pack size.

The Wyoming Plan uses established scientific guidelines in determining the definition of pack as five wolves traveling together in winter. (AR 17844-17845). FWS has admitted that the issue in this regard is in essence a non-issue. FWS biologist Ed Bangs stated to the Wyoming Game and Fish Department in July 2003 that any concerns about the definition of "pack" in WYO. STAT. ANN. § 23-1-304 are not "biologically significant enough to jeopardize delisting." (AR 345). More recently in February 2006 Mr. Bangs stated that

"[t]he whole pack thing isn't that big a deal if it didn't trigger the predatory animal designation and strip away WGF D mgt. authority. So I think calling a pack 5 wolves traveling together in winter is OK but that's a minimum."

(AR 17903, 17905).

To state that the Wyoming Plan's definition of "pack" is fine on one hand and then in its 12-month Finding determine that the definition fails in supporting an adequate regulatory mechanism is arbitrary and capricious and therefore unreasonable. The FWS decision to modify its interpretation of "pack" late in the day based on a supposed better theory where that theory has not been peer-reviewed and has not been sufficiently explained in the record as superior, does not save the day for FWS. (AR 17769 (*citing* "Ausband 2006")). Reliance on that theoretical analysis as the best science on pack size is unreasonable.

Peer Review.

FWS minimizes the peer reviews that found Wyoming's Plan in combination with other state plans would provide an adequate regulatory mechanism for preserving wolf populations. (AR 424-482). FWS essentially asserts in its 12-month Finding that the peer reviews are invalid because of four factors not within reviewers knowledge at the time of their review. (AR 17768). However, FWS did not return to the reviewers to ask them their opinion regarding the four factors for purposes of reviewing Wyoming's Petition. FWS does not know whether those four factors would cause the reviewers to modify their opinions. FWS simply proposes factors that *might* make them change their minds.

The FWS view that the peer reviews are essentially invalid is based on speculation and therefore arbitrary and capricious.

The first of the four factors is the FWS preoccupation with whether the Wyoming Plan is consistent with WYO. STAT. ANN. § 23-1-304 (setting forth a classification scheme for wolves after delisting). The Wyoming Plan provides that Wyoming will manage for a minimum of 15 wolf packs in Wyoming with a minimum of seven of those packs living outside Yellowstone Park. (AR 162). So long as those numbers occur, the wolf would be managed as a trophy game animal in the wilderness areas surrounding the national parks and parkways and as a predator elsewhere. (AR 197). While the Plan is clear in this regard, the statute is ambiguous regarding whether seven packs must *always* exist outside Yellowstone Park. (AR 17782). Based on this ambiguity, the Wyoming Attorney General provided the Wyoming Game and Fish Department with an Attorney General's Opinion stating that the Wyoming Plan as drafted was consistent with the statute in light of the statute's intended goals of achieving delisting and maintaining recovery. (AR 297).

Despite this opinion FWS continues to use alleged inconsistencies between the Plan and the statute as a reason to reject the Wyoming Petition. This concern is unjustified and unreasonable. Not only is the Wyoming Plan supported

by the Attorney General's Opinion but the Department's implementation of the statute is by law owed deference by the courts. As recognized by the Department, the Wyoming Gray Wolf Management Plan was developed to implement the Wyoming statute. (AR 11676). In Wyoming when an administrative agency implements an ambiguous statute courts give deference to the agency's construction of the statute unless that construction is clearly erroneous. *Mowry v. State ex rel. Wyoming Retirement Board*, 866 P.2d 729, 731 (Wyo. 1993); *see also Wedelstedt v. Wiley*, 477 F.3d 1160, 1165 (10th Cir. 2007) ("A reviewing court must uphold an agency regulation that relies on a reasonable construction of an ambiguous or silent statute as long as the regulation is not "arbitrary, capricious, or manifestly contrary to the statute.'" (citing *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984)). In this case, the Wyoming Plan sets forth a management directive that is clearly allowable under the statute even with its ambiguity. The construction given the statute by the Department is permissible and not by any argument "clearly erroneous." FWS concern with this issue is an overreaction and unreasonable.

The second critical condition FWS asserts was not taken into consideration by peer reviewers was a decline in wolf numbers in Yellowstone Park in 2005. However, the decline was a one-year event and as predicted by the

Wyoming Game and Fish Department in its April 2006 comments on the FWS advanced notice of proposed rulemaking regarding delisting, the Yellowstone Park population bounced back in 2006. (AR 11677). It is reasonable to believe that trained peer reviewers could have made the same prediction based on known wolf resiliency and the known numbers of total wolves in 2005 which, regarding the latter, the Game and Fish Department accurately predicted constituted a sufficient infrastructure for population recovery in 2006. (*Id.*). Furthermore, and again as the Department pointed out in its comments, a single episodic population reduction should not be a determining factor in rejecting the Wyoming Plan considering the protocol for initiating a review of the species to determine if re-listing is warranted. (*Id.*) That protocol requires two consecutive years in which minimum recovery criteria are not met. (*Id.* (*citing* 71 Fed. Reg. 6660)).

FWS also claims that recent court decisions emphasized that distribution of the wolf population in historical and still suitable habitat was a critical component in determining if recovery had been achieved and that the peer reviewers were not asked if the Wyoming Plan would maintain wolf pack distribution in suitable habitat outside Yellowstone Park. (AR 17769). The peer reviewers were asked to determine if the three state management plans were sufficient to maintain a recovered population *post-delisting* to which they

overwhelming responded in the affirmative. (AR 17768). Furthermore, FWS has determined that suitable habitat in Wyoming is saturated and that wolves outside that area will not persist. Again, FWS did not ask the peer reviewers to review this issue and is therefore speculating regarding how the peer reviewers would have responded.

CONCLUSION

Because the FWS decision rejecting the Wyoming Petition and the Wyoming Plan is unreasonable this Court need not defer to the agency's conclusions. For this reason and those reasons otherwise set forth in the State of Wyoming's brief, this Court should find the FWS decision arbitrary and capricious, an abuse of discretion, unsupported by substantial evidence and otherwise not in accordance with law. Park County agrees with the State of Wyoming that the remedy in this case is for the Court to find that the Wyoming Plan is an adequate regulatory mechanism, order the Federal Respondents to immediately approve the Wyoming Plan and WYO. STAT. ANN. § 23-1-304 and to include Wyoming in the pending proposal to delist the gray wolf in the Northern Rocky Mountain Distinct Population Segment. Further, the Court should find that the Federal Respondents have unreasonably withheld action on the State of Wyoming's petition to amend the gray wolf management regulations set forth at

50 C.F.R. § 17.84(i) and issue a mandatory injunction ordering the Federal Respondents to immediately take action on the petition to amend.

RESPECTFULLY SUBMITTED this 11th day of June, 2007.

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Board of County Commissioners of Park County, Wyoming

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing PETITIONER-INTERVENOR PARK COUNTY'S OPENING BRIEF was served upon the following via the Court's electronic filing system on the 11th day of June, 2007, addressed as follows:

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