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

STATE OF WYOMING,)	
)	No. 06-CV-0245J
Petitioner,)	
)	
BOARD OF COMMISSIONERS OF THE)	
COUNTY OF PARK,)	
)	
Petitioner-Intervenor,)	
)	RESPONDENT-INTERVENORS
and)	SIERRA CLUB, <u>et al.</u>'s RESPONSE
)	BRIEF
WYOMING WOOL GROWERS, <u>et al.</u> ,)	
)	
Petitioner-Intervenors,)	
)	
vs.)	
)	
UNITED STATES DEPARTMENT)	
OF THE INTERIOR, <u>et al.</u> ,)	

Respondents,)
SIERRA CLUB, et al.,)
Respondent-Intervenors,)
and)
NATIONAL WILDLIFE FEDERATION, et al.,)
Respondent-Intervenors.)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Respondent-Intervenors Sierra Club, Natural Resources Defense Council, Wyoming Outdoor Council, Defenders of Wildlife, Jackson Hole Conservation Alliance, and Biodiversity Conservation Alliance hereby disclose that they are non-profit organizations without parent corporations or shareholders of any kind.

Respectfully submitted this 11th day of July, 2007,

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INTRODUCTION

The U.S. Fish and Wildlife Service (“FWS”) has, for more than a decade, overseen one of the most successful recovery efforts in the history of the Endangered Species Act (“ESA”), 16 U.S.C. § 1531, et seq. Since gray wolves were translocated and released in Wyoming and Idaho in 1995 and 1996, the Northern Rockies wolf population has grown from 30-40 wolves to more than one thousand today. By this lawsuit, Wyoming seeks to reverse that recovery progress by compelling FWS to approve wolf management practices that led to wolves’ near extirpation from the western United States in the first place. See generally 12-Month Finding on a Petition to Establish the Northern Rocky Mountain Gray Wolf Population (Canis lupus) as a Distinct Population Segment To Remove the Northern Rocky Mountain Gray Wolf Distinct Population Segment From the List of Endangered and Threatened Species, 71 Fed. Reg. 43,410-43,432 (Aug. 1, 2006) (reprinted at A.R. 17763-17785). The result that Wyoming seeks is not only unwise but illegal.

Under the ESA, a species may be threatened or endangered due to “inadequate regulatory mechanisms” that fail to ensure the conservation of the species into the foreseeable future. 16 U.S.C. §1533(a)(1). Thus, wolves cannot be removed from the federal list of endangered species unless laws and regulations are in place to protect the species from persecution and overutilization. The inadequacy of laws and regulatory mechanisms in Wyoming to justify removal of ESA protections for wolves is the decisive issue of this case. Wyoming’s wolf management legislation and implementing management plan fail to provide assurances that

Wyoming's wolf population would not drop below recovery goals,¹ because they allow for unregulated killing of wolves throughout most of the state. FWS has consistently stressed that human-caused mortality is the greatest threat to wolves and that adequate regulation of wolf-killing is therefore an essential prerequisite to delisting. However, Wyoming has remained determined to maintaining an "open season" on wolves in nearly all of the areas where they currently live outside Yellowstone National Park.

While Wyoming now seeks, once again, to compel court-ordered approval of its management plan, the best available science fully supports FWS' conclusion that eradicating wolves in 90% of their Wyoming habitat outside Yellowstone National Park is not consistent with conserving wolves in the Northern Rockies.

STATEMENT OF FACTS

A. Historic Persecution Of Wolves

According to FWS, "wolves were hunted and killed with more passion and zeal than any other animal in U.S. history." U.S. Fish and Wildlife Service, Gray Wolf, <http://training.fws.gov/library/Pubs/graywolf.pdf>. (last checked July 9, 2007). With the European settlement of North America, "superstition and fears . . . led to widespread persecution of wolves" such that "[p]oisons, trapping, and shooting — spurred by Federal, state and local

¹ FWS wolf recovery goals are 300 wolves and 30 breeding pairs, well-distributed among Idaho, Montana and Wyoming for three consecutive years. A.R. 17765 (71 Fed. Reg. at 43,412). These demographic goals are a mere fraction of recovery goals established by international endangered species conventions and even FWS recovery targets for gray wolves in the Midwest, but all parties here agree that falling below those standards would prevent delisting this wolf population.

government bounties — resulted in the extirpation of this once widespread species from more than 95 percent of its range” in the lower-48 states. See Final Rule, 68 Fed. Reg. 15,804, 15,805 (Apr. 1, 2004). In Montana, Idaho, Wyoming, and adjacent southwestern Canada, wolves were exterminated by the 1930s. Id. at 15,815; see also A.R. 17776² (71 Fed. Reg. at 43,423) (“An active eradication program is the sole reason that wolves were extirpated from the N[orthern] R[ocky] M[ountains].”)

B. Gray Wolf Reintroduction And Recovery In The Northern Rockies

Efforts to reverse this history of persecution and restore wolves to the Northern Rockies were many years in the making. In its 1987 Northern Rocky Mountain Wolf Recovery Plan, FWS recommended that dispersing wolves from Canada should drive recovery in northwestern Montana, and that wolves should be reintroduced into Yellowstone National Park and, if necessary, central Idaho. See id. In 1991, Congress directed FWS to analyze the environmental impacts of wolf reintroduction in an Environmental Impact Statement (“EIS”), and on June 15, 1994, FWS signed a final decision to reintroduce gray wolves into both Yellowstone and central Idaho. See id. In 1995 and 1996, FWS released wolves from southwestern Canada into remote public lands in both recovery areas. See id.; 68 Fed. Reg. 15,815.

These reintroduced wolves were classified as nonessential, experimental populations under § 10(j) of the ESA, 16 U.S.C. § 1539(j), which affords FWS latitude in managing listed species that are reintroduced outside of their current range. See 59 Fed. Reg. 60,252. In an

² References to the administrative record lodged in this action by FWS are indicated by “A.R.” followed by the page number. References to the administrative record first lodged in Civil Action No. 04-CV-0253 are indicated by “2004 A.R.” followed by the page number.

effort to “reduce local concerns about excessive government regulation of private lands, uncontrolled livestock depredations, excessive big game predation, and the lack of State government involvement in the program,” *id.*, FWS invoked its §10(j) authorities to relax the ESA’s prohibition on “take,” which otherwise would preclude actions that “harass, harm, pursue, hunt, wound, kill, trap, capture, or collect” gray wolves. 16 U.S.C. § 1532(19).

Accordingly, the § 10(j) regulations for gray wolves provide significant leeway for regulated take. For instance, the regulations permit landowners and livestock producers on public lands to “harass any wolf in an opportunistic ... and noninjurious manner,” and to kill wolves in the act of killing livestock. *See* 50 C.F.R. § 17.84(i)(3)(i)-(iii). The regulations further authorize states and tribes to relocate and, under certain circumstances, kill wolves that “negatively impact[] localized ungulate populations at an unacceptable level,” which is defined as a decline in a wild ungulate population or herd, such as elk, caused primarily by wolf depredation. *Id.* § 17.84(i)(3)(iv),(ix). Further responding to Wyoming’s concerns about wolves’ impact on wild ungulates, FWS recently proposed amendments to these regulations that would more liberally allow killing of wolves whenever wolves are determined to be one of the major causes of any impact to ungulate populations, including their behavior, movement, and nutrition. 72 Fed. Reg. 36,942 (July 6, 2007).

The current regulations also give FWS discretion to “control” wolves that attack livestock and domestic animals or come into conflict with ungulates — first by non-lethal methods such as aversive conditioning and translocation, and then, if necessary, by killing them. *Id.* § 17.84(i)(3)(v),(vii),(ix). In keeping with these authorities, FWS has consistently employed both

non-lethal and lethal wolf control measures in managing the reintroduced wolves. While wolves have had a negligible overall impact on livestock and ungulate populations since their reintroduction in 1995, FWS has undertaken aggressive efforts to address the sporadic conflicts that have been reported over the past nine years. See 2004 A.R. 204-205; A.R. 17768 (71 Fed. Reg. at 43415); 2004 A.R. Weekly Wolf Reports folder (chronicling frequent wolf control measures and authorizations to shoot wolves from 1995 through the present); A.R. 15081-15514 (2005 and 2006 Weekly Wolf Reports).

The wolf population has grown significantly since wolves were reintroduced in 1995 and FWS has recently focused efforts on removing the Northern Rocky Mountains population from the ESA's protections. On April 1, 2003, FWS published a final rule that designated Eastern and Western distinct population segments (DPS), and "down-listed" gray wolves in those DPSs from endangered to threatened status. See 68 Fed. Reg. 15,804 (specifying threatened status for all wolves within a newly designated Western Distinct Population Segment, which includes the Northern Rockies).³ When the down-listing was subsequently held invalid, see Nat'l Wildlife Fed. v. Norton, 386 F. Supp. 2d 553 (D. Vt. 2005); Defenders of Wildlife v. Secretary, U.S. Dep't of the Interior, 354 F. Supp. 2d 1156 (D. Or. 2005), FWS immediately began work on a rule to withdraw ESA protections altogether for wolves within a Northern Rocky Mountain DPS. See, e.g. A.R. 14783-98 (7/21/05 draft Northern Rockies DPS); A.R. 14763-67 (10/20/05 email re: Wolf delisting status); A.R. 17735 (2/8/06 Advanced Notice of Proposed Rulemaking). FWS

³ The rule retained the nonessential, experimental population status for the Idaho and Yellowstone wolf populations.

has issued a proposed delisting rule, which would turn over wolf management to the states within the Northern Rockies DPS, including Wyoming, Montana, and Idaho. See 72 Fed. Reg. 6,106-6,139 (February 8, 2007); 72 Fed. Reg. 36,939-36,942 (July 6, 2007).

C. State Wolf Management

Before wolves can be removed from the federal list of endangered species, FWS must determine that wolves are no longer threatened or endangered by any one of the listing factors set forth in the ESA:

(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.

16 U.S.C. § 1533(a)(1). Thus, FWS must determine not only that wolf populations are large enough to survive in the long term, but also that wolves are not threatened or endangered due to inadequate legal protections or other factors. 16 U.S.C. § 1533(a)(1); 50 C.F.R. § 424.11(d).

In the Northern Rockies, the most conspicuous threat to wolves is human hostility. “Since excessive human persecution was the reason that wolves became listed,” FWS has repeatedly stressed that “prevent[ion] of human-caused mortality” is the single most important issue that must be addressed for wolves to be delisted. 2004 A.R. 23; see also id. at 54 (same); id. at 68 (“Wolf populations disappeared because of unlimited human-caused mortality and might do so again if that mortality was not regulated.”); 68 Fed. Reg. at 15,827 (“The one factor that applies most to wolves is that human-caused mortality be regulated.”). For precisely this reason, FWS’ Gray Wolf Recovery Plan calls for state management of delisted wolves as “game

animals,” “furbearers,” or “protected species” so that widespread, unregulated killing of wolves does not occur. See 2004 A.R. 943-44.

In keeping with the Northern Rocky Mountain Wolf Recovery Plan, FWS requested that “the States of Montana, Idaho and Wyoming prepare state wolf management plans to demonstrate how they would manage wolves if the Act no longer protected them from excessive human-caused mortality.” Id. at 90166. These plans are to become the basis for FWS’ determination of whether “regulatory mechanisms” are adequate to ensure that the Northern Rockies gray wolf population remains viable for the foreseeable future after delisting.

D. The 2003 Wyoming Wolf Plan

WGFD began developing a wolf management plan for Wyoming in 2002. Id. at 32. In March 2003, the Wyoming legislature passed House Bill 229 to govern management of gray wolves, and in July 2003, WGFD released its final “Wyoming Gray Wolf Management Plan.” See id. at 90074-90087,194-236; Wyo. Stat. § 23-1-304.

Over repeated objections expressed by FWS and staff at the U.S. Department of Interior, see, e.g., id. at 24, 54, 68, Wyoming established a “dual-classification” system for wolves. Even though Wyoming manages other carnivores such as black bears and mountain lions as “trophy game” subject to regulated hunting seasons,⁴ Wyoming elected to manage gray wolves as trophy game solely within Yellowstone and Grand Teton National Parks and adjacent wilderness areas. See id. at 197. Everywhere else in Wyoming, wolves would be classified as “predators,” which

⁴ See Wyo. Stat. §§ 11-6-302(a).

“may be taken without a license in any manner and at any time.” Id.; Wyo. Stat. § 23-3-103(a).⁵ Under this management regime, it would be legal in nearly all of Wyoming to bait, trap, and shoot wolves, to dynamite and suffocate pups in their dens, to hunt wolves down from the air, with motor vehicles, and with bright lights at night — in short, to aggressively exterminate wolves by means that will be even more expedient than the 19th century killing programs that successfully eradicated the species from the state. A.R. 17781; 2004 A.R. 214. FWS anticipates that under Wyoming’s plan, wolves would be eliminated from 90% of the area they now use and occupy outside of the National Parks. A.R. 17781; 2004 A.R. 214, 90170.

Recognizing that predator status may threaten wolf viability, Wyoming law provides for expansion of the state’s trophy game area if monitoring reveals less than “seven (7) packs of gray wolves located in [Wyoming] and primarily outside of [the National Parks] and less than fifteen (15) packs within [Wyoming], including [the National Parks].” Wyo. Stat. § 23-1-304(b)(ii) (reprinted at 2004 A.R. 90075) (emphasis added). Once such a determination is made, the Game and Fish Commission must “adopt rules and regulations to classify the gray wolf as a trophy game animal ... within that area of the state the commission determines is necessary to reasonably ensure seven (7) packs of gray wolves are located in [Wyoming] and primarily outside of [the National Parks].” Id. § 23-1-304(b)(i)(A). If monitoring subsequently reveals that 7 packs are once again established outside the National Parks or that there are 15 packs total

⁵ The only statutory limitations on take of predators are that: (1) the Game and Fish Commission retains discretion to promulgate rules and regulations governing the use of traps and snares to kill wolves, see Wyo. Stat. § 23-3-304(a); (2) hunting or killing of wildlife, including wolves, from public highways is illegal, see Wyo. Stat. § 23-3-305(a); and (3) a private citizen seeking to kill wolves from an aircraft must obtain an aerial hunting permit. See Wyo. Stat. § 11-6-105.

in the state, the commission must then reclassify wolves as predators. See id. In short, Wyoming has committed to manage for no more than 7 wolf packs outside the Parks. For purposes of this statutory provision, “pack” is defined as “five (5) wolves traveling together.” Wyo. Stat. § 23-1-304(c).

Wyoming’s approach differs substantially from wolf management proposed by Montana and Idaho. While the Montana and Idaho plans present their own problems for wolves, they are at least superior to the Wyoming plan in allowing state wildlife officials to regulate wolf killing and in committing to maintain at least 15 packs in each state. Montana has finalized a management plan that commits to maintaining at least 14-17 wolf packs to be managed as big game or furbearers. See 2004 A.R. 437, 439. Lethal control would be permitted only when there are 15 or more packs in the State. See id. Idaho has committed to managing wolves in a manner similar to black bears or mountain lions — as big game, furbearers, or “a special classification of predator” that provides for controlled take after delisting. See id. at 441. If the number of wolf packs in Idaho falls below 15, the State would be required to adopt a more protective management regime. See id. at 462.

E. FWS Correspondence With Wyoming Regarding The State Plan

Throughout Wyoming’s development of a state wolf management plan and legislation, FWS repeatedly expressed to Wyoming “significant concerns about portions of Wyoming’s state law and wolf management plan.” 2004 A.R. 505. Chief among these concerns were “[t]he large areas of predator status, the uncertainty of timely monitoring of take of these predatory animals, the change between ‘predatory animal’ and ‘trophy game’ status in certain areas, and the limited

area in which human-caused mortality of wolves could be regulated.” *Id.* at 90167. While the Wyoming plan would protect wolves as trophy game only within national parks and wilderness areas, FWS determined that this trophy game area does not contain sufficient suitable habitat to maintain Wyoming’s share of a recovered Northern Rockies wolf population. *Id.* at 29, 90170.

Wyoming was well-aware of the problems with its wolf management regime. At the beginning of the state planning process, on July 16, 2002, FWS Regional Director Ralph Morganweck sent a letter to Tom Thorne, Acting Director of WGFD, stating that “wolf conservation in Wyoming must take place over a significantly larger area than just that portion of Yellowstone and Grand Teton National Parks that are in Wyoming if the Greater Yellowstone area is going to support its roughly one-third contribution to the overall recovery objective in the three states.” 2004 A.R. 24. FWS reiterated these comments by correspondence dated September 26, 2002 (*id.* at 29), December 2, 2002 (*id.* at 53-54), December 19, 2002 (*id.* at 73-75), February 14, 2003 (*id.* at 242), February 21, 2003 (*id.* at 499), July 2, 2003 (*id.* at 342-48), and January 13, 2004 (*id.* at 505-506). See also Wyoming v. U.S. Dept. of Interior, 360 F. Supp. 2d 1214, 1220 (D. Wyo. 2005) (describing correspondence), *aff’d*, 442 F.3d 1262 (10th Cir. 2006).

In its January 13, 2004 letter, FWS approved the Montana and Idaho wolf management plans. *Id.* at 505-506. With respect to Wyoming’s plan, consistent with its position throughout the process, FWS stated 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.” *Id.* However, FWS advised that if Wyoming were to address FWS’ concerns, it would “proceed with the proposed delisting process for the gray wolf in the Western Distinct Population Segment,” including Wyoming. *Id.* at 505.

F. Wyoming’s First Lawsuit To Compel Delisting

In response to FWS’ January 13, 2004 letter, Petitioners filed suits challenging FWS’ determination that the Wyoming plan is an inadequate regulatory mechanism to prevent excessive human-caused wolf mortality, as well as the agency’s alleged failure to “properly manage and control” wolves in Wyoming under the ESA and the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* This Court granted two motions filed on behalf of numerous conservation organizations to intervene and defend FWS’ rejection of the Wyoming Plan.⁶ After full briefing, this Court dismissed Wyoming’s lawsuit for failing to challenge final agency action or action “unlawfully withheld or unreasonably delayed” under the Administrative Procedure Act, 5 U.S.C § 706.⁷ *See Wyoming v. U.S. Dept. of Interior*, 360 F. Supp. 2d 1214 (D. Wyo. 2005). The Tenth Circuit affirmed. *See Wyoming v. U.S. Dept. of Interior*, 442 F.3d 1262 (10th

⁶ Defendant-Intervenors included Sierra Club, Natural Resources Defense Council, Wyoming Outdoor Council, Greater Yellowstone Coalition, National Wildlife Federation, Jackson Hole Conservation Alliance, and Predator Conservation Alliance.

⁷ Both this Court and the court of appeals also rejected Wyoming’s constitutional claims and the Wolf Coalition’s NEPA claim.

Cir. 2006). The Court instructed Wyoming that, before challenging FWS' decision not to delist gray wolves in Wyoming based upon the 2003 Wyoming Plan, Wyoming must first petition FWS to delist pursuant to 16 U.S.C. § 1533(b)(3). Wyoming, 360 F. Supp. 2d at 1245.

G. FWS' 12-Month Finding Rejecting Wyoming's Petition To Delist

On July 13, 2005, the State of Wyoming submitted a petition to establish a northern Rocky Mountain DPS for the gray wolf and to delist the Northern Rockies gray wolf from its "threatened" status under the ESA. A.R. 17786-17895. "To the maximum extent practicable, within 90 days after receiving a petition," the Secretary of the Interior is required to "make a finding whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted." 16 U.S.C. § 1533(b)(3)(A). If the Secretary issues a positive 90-day finding, he must "promptly commence a review of the status of the species concerned." Id. Then, within 12 months, the Secretary must make a finding that the petitioned action is either: (1) "not warranted," (2) "warranted," in which case he must promptly publish a "proposed regulation to implement the action," or (3) "warranted, but that the immediate proposal and timely promulgation of a regulation implementing the petitioned action . . . is precluded by other pending [listing] proposals" or priorities. Id. § 1533(b)(3)(B)(i)-(iii).

On August 1, 2006, after first conducting a status review pursuant to 16 U.S.C. § 1533(b)(3)(A), FWS issued a 12-month finding in response to Wyoming's petition. A.R. 17763-17785 (71 Fed. Reg. 43,410-43,432). FWS deferred designation of a Northern Rockies DPS to a future rulemaking process, A.R. 17769-70, and concluded that delisting is

not warranted because the Wyoming Plan is not an adequate regulatory mechanism to maintain a viable Northern Rockies gray wolf population for the foreseeable future. Id. at 17783. Indeed, FWS found that 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.

H. Current Delisting Proposal

1. Notice of Proposed Delisting

Notwithstanding its finding that the 2003 Wyoming plan still does not constitute an adequate regulatory mechanism to ensure a viable wolf population in Wyoming, on February 8, 2007, FWS proposed to designate and delist the Northern Rocky Mountain gray wolf DPS. 72 Fed. Reg. 6,106-6,139 (Feb. 8, 2007). FWS 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. at 6117. If Wyoming fails to adopt such a state law and plan, the Service plans to delist the DPS in Idaho, Montana, Washington, Oregon and Utah, as well as the portion of Wyoming that FWS does not deem a significant portion of the Northern Rocky Mountain wolf’s range. See id. However, “[t]he significant portion of the range that exists outside the National Parks within the State of Wyoming would continue to be listed as ‘nonessential experimental’ based on the biologically significant nature of that portion of the species’ range and the continuing unacceptable level of

threats that occur under the State's current statute and management plan." Id. The Service would thus delist only a portion of the Northern Rocky Mountains DPS to address the inadequacy of Wyoming's state law and wolf management plan.

2. Wyoming's New Statutory Framework And Wolf Management Plan

The Wyoming legislature enacted House Bill No. 213 in its most recent legislative session to attempt to alleviate some of FWS' concerns regarding Wyoming's post-delisting wolf management, and to persuade FWS to include Wyoming in the agency's delisting proposal. H.B. 213, 59th Leg., Gen. Sess. (Wyo. 2007). The new legislation was made contingent on the resolution of the present lawsuit, meaning that Wyoming would implement the compromise legislation only if it cannot either settle its legal claims or force FWS to approve its original wolf management plan by court order. Wyo. Stat. § 23-1-109(b). Under H.B. 213, the trophy game area would be minimally expanded within the northwest corner of Wyoming, but wolves would still qualify as predators throughout the majority of the state. Id. §§ 11-6-302(a)(ix), 23-1-101(a)(viii)(B). H.B. 213 also would replace the "pack" definition for establishing population size with FWS' preferred breeding pair definition, which requires "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 would require WGFD to reserve seven breeding pairs of wolves in Wyoming from licensed hunting, but does not establish a minimum population size that would prohibit lethal wolf control activities to protect big game species or livestock from the threat of depredating wolves. See id. § 23-1-304(e) ("Notwithstanding other

provisions of [title 23] ... the [game and fish] 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.”); *id.* § 23-3-115(c) (authorizing landowners to take wolves “doing damage to private property” without a permit, as long as they later notify Wyoming Department of Agriculture of the killing).

In May 2007, Wyoming’s governor and FWS struck a deal to amend Wyoming’s 2003 wolf management plan to conform to H.B. 213. On July 6, 2007, FWS announced that it was satisfied that the new plan, if adopted by WGFD, appeared to constitute an adequate regulatory mechanism and thus might enable Wyoming to be included in the delisting. 72 Fed. Reg. 36,939, 36,940. Before rendering a final conclusion on these issues, FWS must first review the public comments submitted during the comment period that closes on August 6, 2007. *Id.* at 36,939. The amended plan, like H.B. 213, will become effective only if Wyoming loses or settles the present lawsuit. H.B. 213, §2(c). Therefore, although Wyoming has developed a wolf management regime that appears to satisfy FWS and still give Wyoming the flexibility to control wolves causing harm to livestock and ungulate populations, it has determined to proceed with the present lawsuit to compel FWS to approve its inadequate 2003 state management plan.

SUMMARY OF THE ARGUMENT

At every stage of development of Wyoming's wolf management plan and state law, FWS informed staff of the Wyoming Game and Fish Department ("WGFD") and state officials that Wyoming's proposal to designate wolves as predators subject to unregulated killing throughout approximately 90% of lands used by wolves outside Yellowstone National Park within the state of Wyoming would result in an unacceptable level of wolf mortality. Further, FWS repeatedly informed Wyoming that the Wyoming plan's definition of wolf "pack" would not ensure that Wyoming maintains its share of a recovered tri-state wolf population.

Petitioners attempt to characterize this determination as contrary to the results of the peer review of the state management plans commissioned by FWS. As described below, however, the majority of peer reviewers expressed serious concerns about Wyoming's plan. Further, FWS' analysis of Wyoming's statutory law pertaining to wolf management, which differs from the state plan in significant respects and was not subjected to peer review, indicated that Wyoming wildlife officials would lack the legal authority to prevent the wolf population from dropping below recovery levels. FWS has consistently stated that it will approve Wyoming's plan and formally commence the delisting process when Wyoming cures these defects in its state management regime.

The record is clear that FWS based its decision not to approve Wyoming's 2003 wolf management plan on the best available science. Because FWS properly chose not to propose delisting gray wolves in the Northern Rockies on the basis of Wyoming's inadequate state management regime, its determination should be upheld.

ARGUMENT

I. STANDARD OF REVIEW

Because FWS exercised reasonable judgment based upon its scientific expertise and the record before it, this Court should defer to FWS' decision not to propose delisting gray wolves in the Northern Rockies based upon Wyoming's inadequate wolf management plan. Actions taken by FWS pursuant to the ESA are reviewed pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. See Gordon v. Norton, 322 F. 3d 1213, 1219 (10th Cir. 2003). Under the APA, reviewing courts may set aside agency action only when it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

II. FWS' DECISION TO REJECT WYOMING'S WOLF MANAGEMENT PLAN IS SUPPORTED BY THE RECORD AND BASED ON THE BEST AVAILABLE SCIENCE.

Petitioners ask this Court to order FWS to approve Wyoming's wolf management plan and delist gray wolves in the Northern Rockies, despite the fact that FWS has repeatedly and consistently expressed serious concerns, firmly grounded on the best available science, that the Wyoming plan will cause the wolf population in Wyoming to drop below minimum numbers determined by FWS to be necessary to maintain a viable wolf population over the long term. Although Petitioners have attempted to portray FWS' determination that the Wyoming plan constitutes an inadequate regulatory mechanism as arbitrary and capricious, in fact, it is Wyoming's position that is unreasonable. FWS and Wyoming have now agreed upon revisions to Wyoming's wolf management regime that FWS has determined would allow FWS to include

Wyoming in its current delisting proposal. Rather than formally adopting and implementing the agreed-upon revisions, however, Petitioners have decided to return to this Court to compel approval of a wolf management plan that would allow unregulated wolf killing in 90% of the area wolves now use in Wyoming outside of the national parks. Because FWS properly determined that the 2003 Wyoming plan is not adequate to support delisting, this Court should reject Petitioners' claims.

A. FWS Consistently Informed Wyoming that the Predator Classification for Wolves Throughout The Vast Majority Of Their Current Range Within The State Does Not Constitute An Adequate Regulatory Mechanism

FWS' concerns with the Wyoming wolf plan are eminently reasonable in light of Wyoming's proposed management of wolves as "predators" subject to unregulated killing in nearly all of the wolf's statewide range outside of the National Parks. The record is clear that human-caused mortality poses the single greatest threat to wolves in the Northern Rockies, see, e.g. 2004 A.R. at 23, 54, 68, and that Yellowstone and Grand Teton National Parks and adjacent wilderness areas do not, in themselves, provide sufficient refuge from human killing to support Wyoming's share of a recovered wolf population. See id. at 24, 29, 54, 57-67. Given that Wyoming's plan does not afford wolves any consistent protection outside of the National Parks, FWS reasonably concluded that "the 'predatory animal' status for wolves must be changed." Id. at 505.

1. Problems With Predator Classification

Classifying wolves as predators jeopardizes the recovery gains of the last decade because it "exposes wolves to the risk of catastrophic loss outside the National Parks." 2004

A.R. 478. As FWS noted, under Wyoming law predatory animals “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”). A.R. 17781 (71 Fed. Reg. 43,428).

Park County’s suggestion that unregulated killing in areas where wolves are classified as predators would somehow “result in no different results for wolves on the ground” than current federal management that includes selective removal of predating wolves is illogical. See Park County Br. at 9. As predators under Wyoming law, wolves would be subject to far greater killing than current levels due to FWS control actions. Not only is predator killing allowed under Wyoming law, it is actively encouraged. Wyoming law designates each county a “predator management district.” Wyo. Stat. § 11-6-201(a). The districts are required to “[d]evise and put in operation those methods that best manage or control damage caused by predatory animals,” and are authorized to pay bounties. Id. §§ 11-6-205(a)(ii), 11-6-206. Wyoming law also established the Wyoming animal damage management board (ADMB), which accepts applications for assistance to prevent and mitigate damage by predatory animals. See id. § 11-6-304; ADMB Reg., Ch.1, § 1. In 2006 alone, \$5.7 million was appropriated to the ADMB to assist funding predator management districts. ADMB, 2006 Annual Report, at <http://www.wyadmb.com/reports/06legisreport.pdf> (last checked July 9, 2007). Thus, predator management districts in Wyoming are well-funded to exterminate wolves in areas where wolves are not managed as trophy game.

2. Problems With The Trophy Game Area

Not surprisingly, FWS projects that “‘predatory animal’ status will mean virtually no wolf packs in any area so designated.” 2004 A.R. 90170; A.R. 17781 (71 Fed. Reg. at 43428). This means that “the area where wolves are managed as ‘trophy game’ has to be large enough to encompass [Wyoming’s share of] a recovered wolf population.” 2004 A.R. 90170. As even Wyoming has recognized, this area must extend well beyond Yellowstone and Grand Teton National Parks. *Id.* at 54 (“maintenance of wolf packs outside of those currently in Yellowstone and Grand Teton will be necessary for the wolf population to be maintained above recovery levels”). Yet Wyoming’s plan does not provide any effective refuge for wolves outside of the Parks. As explained by FWS, “the National Parks and a few surrounding wilderness areas,” which constitute Wyoming’s trophy game area, “are not large enough to reliably achieve ... [recovery] objective[s].” *Id.* at 90170 (emphasis added); *see id.* at 29. Many of Yellowstone Park’s packs regularly leave the park, particularly in winter, and utilize very little habitat in the surrounding wilderness areas included in the “trophy game” areas. A.R. 17781 (71 Fed. Reg. at 43,428).

Petitioners point to no contrary evidence. In fact, Wyoming reports 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 A.R. 214 (emphasis added). Moreover, it is unlikely that wolves will expand into these wilderness areas in the future, given that they “are mainly high mountains that do not include adequate ungulate wintering areas for year-round wolf territories.” *Id.* at 476; *see also id.* at 460 (“There is no good reason to believe that pack

occupancy will not continue to be largely outside the wilderness areas”); A.R. 17780 (71 Fed. Reg. at 43,427) (“Many of the wilderness areas ... are rarely used by wolves because of their high elevation, deep snow, and low ungulate productivity.”). Thus, wilderness areas add little effective wolf habitat to the State’s trophy game area.

Given the inadequacy of the wilderness lands as wolf habitat, Wyoming’s plan essentially puts all of its eggs in one basket: Yellowstone. However, Yellowstone is not enough, even for Yellowstone wolf packs. See 2004 A.R. at 24, 29. FWS explains that:

[E]ven wolf packs that are considered primarily “Park” packs ... may take occasional long distance trips outside their normal home ranges and can actually be drawn into “sink areas.” If resident wolves are removed, this can cause neighboring wolves or packs to investigate or expand into that area. That in turn can expose them to the same mortality factors that caused their neighbors to disappear.

Id. at 55; see also id. at 57 and A.R. 17773 (citing “Edge Effects and the Extinction of Populations Inside Protected Areas” (Woodroffe & Ginsberg 1998) (reprinted at A.R. 13846), which “discusses why the home range of large carnivores makes them particularly vulnerable to extinction, even inside of protected areas if they are persecuted outside of those protected areas.”). Given this biological reality, Yellowstone cannot be presumed an effective safe haven. If wolves are subject to unregulated killing as soon as they wander out of the National Parks (and little used wilderness areas), it will be virtually impossible to maintain wolves in Wyoming at even the meager recovery levels established by FWS.

The Wolf Coalition erroneously suggests that the trophy game boundary is sufficient because it purportedly protects nearly all suitable habitat in Wyoming, wolves currently occupy

all suitable areas in Wyoming, and FWS has stated that only occupied areas constitute a significant portion of the wolf's range.⁸ Wolf Coalition Br. at 11-12, 35-36. This argument suffers from a fatal factual flaw, since all of Wyoming's wolf packs use areas in which Wyoming would classify them predators. A.R. 16627; see also A.R. 15544-55 (more than half of all wolves in Wyoming primarily reside in suitable habitat outside national parks and wilderness areas); 16004 (home ranges of 10 Wyoming wolf packs, all of which use habitat outside of national parks and wilderness). Therefore, even if the Wolf Coalition is correct that unoccupied areas of Wyoming are not necessary to maintaining a viable wolf population, there is considerable occupied wolf habitat within Wyoming that is not protected as a trophy game area under the Wyoming plan.

Contrary to Petitioners' shrill statements, FWS does not require "that wolf packs be tolerated and encouraged to propagate everywhere they can or might exist." Wolf Coalition Br. at 36 (emphasis in original); see also id. at 29; Wyo. Br. at 37. Instead, the 12-month finding explained that the trophy game area did not contain enough suitable habitat to sustain a recovered wolf population in Wyoming. A.R. 17781 (71 Fed. Reg. at 43,428). Indeed, in connection with FWS' pending delisting proposal, FWS proposed amendments to Wyoming's

⁸ Two separate federal district courts overruled the 2003 FWS finding on which the Wolf Coalition relies. See Nat'l Wildlife Fed. v. Norton, 386 F. Supp. 2d 553 (D. Vt. 2005); Defenders of Wildlife v. Sec'y, U.S. Dep't of the Interior, 354 F. Supp. 2d 1156 (D. Or. 2005). In its current delisting proposal, FWS explicitly found that a larger portion of Northwest Wyoming, including areas outside the national parks and wilderness areas, constitutes a significant portion of the gray wolf's range. See 72 Fed. Reg. at 6,117 ("In 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.").

plan would enlarge the trophy game management area to encompass a majority of existing wolf packs in northwest Wyoming, leaving wolves in the rest of the state subject to control as predators. See 72 Fed. Reg. at 36,940.

The 12-month finding rejecting Wyoming's inadequate trophy game area conforms to FWS' consistent and repeated direction to Wyoming that, if Wyoming determines to proceed with a dual classification approach to wolf management, the trophy game area must be large enough to support secure habitat for Wyoming's share of a recovered wolf population. See, e.g., A.R. 12078 (FWS comments on Wyoming's draft wolf plan, recommending trophy game management of all wolves within the proposed "Data Analysis Unit," which includes areas outside the Parks and wilderness areas); 2004 A.R. 24 (FWS letter to Wyoming stating that "wolf conservation in Wyoming must take place over a significantly larger area than just that portion of Yellowstone and Grand Teton National Parks that are in Wyoming ... "); id. at 345 (FWS letter to Wyoming stating that Wyoming's plan could work if the state's trophy game area were expanded, and stressing that any such expansion must be permanent); id. at 90096 (April 2003 briefing paper stating that "the Service repeatedly, in person and in writing, advised Wyoming that its law must allow for wolves to occupy sufficient areas in Wyoming outside of Yellowstone and Grand Teton National Parks to maintain the current level of pack distribution and must provide adequate protection from excessive human-caused mortality").

Because Wyoming's wolf management regime fails to protect wolves over a large enough area, FWS properly determined that Wyoming's plan does not constitute an adequate

regulatory mechanism to ensure that the Wyoming wolf population is sustained at recovery levels for the foreseeable future.

3. The Problem With Shifting Trophy Game Area Boundaries

The problem with predator classification is not solved by the Wyoming plan's provisions for expanding trophy game status in the event of a wolf population decline. FWS has warned that "it will be very difficult to monitor the wolf population closely enough to detect [the] 7-pack trigger" for a status change. 2004 A.R. 90169. By the time it becomes apparent that wolves need more protective management, and the Game and Fish Commission actually promulgates new rules, and the public becomes aware of these rule changes, many or all of Wyoming's wolf packs outside the National Parks may be lost. See id. at 460.

Moreover, even with timely management changes, a shifting management scheme would cause major confusion and roller-coaster fluctuations in the wolf population. As FWS suggests, "[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." A.R. 17781 (71 Fed. Reg. at 43,428). Even without such frequent flip-flops, "[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." 2004 A.R. 90170. Nevertheless, the 2003 management plan and companion legislation provide for shifting trophy game boundaries, which will, at best, oblige WGFD to "lurch from crisis to crisis" while running "a very intensive and

costly management program.” *Id.* at 347-48. FWS reasonably determined that the “real potential for flipping back and forth between predatory animal status and trophy game status” would undermine Wyoming’s ability to effectively control wolf mortality. A.R. 17781 (71 Fed. Reg. at 43,428).

B. FWS Reasonably Determined That Wyoming’s Wolf Management Plan Would Not Maintain 15 Breeding Pairs Of Wolves

As FWS cautions, “[i]t will be much more difficult to keep wolves around than remove them.” *Id.* at 346. Thus, FWS is justifiably concerned by the fact that Wyoming law does not require WGFD to manage for 7 packs outside the parks and for 15 packs total. *See* A.R. 17782 (71 Fed. Reg. at 43,429). Given natural fluctuations in the number of wolf packs in the Greater Yellowstone area, the record shows that management for 15 packs, at the very least, is necessary to insure that the State continues to meet the minimum recovery objective of 10 breeding pairs in Wyoming. For example, as the 12-month finding explains, if Wyoming had managed the state’s wolf population as proposed during the 2005 wolf population crash in Yellowstone National Park, Wyoming’s wolf population could easily have dropped below the 10-breeding-pair minimum. A.R. 17782 (71 Fed. Reg. at 43,429). FWS necessarily balked at statutory provisions that would permit this outcome.

In addition to failing to meet FWS’ minimal wolf recovery standards, Wyoming adopted a definition of “pack” that does not correlate with FWS’ definition of breeding pair. A breeding pair is “[a]n adult male and an adult female wolf that have produced at least two pups during the previous breeding season that survived until December 31 of that year.”

A.R. 17781 (71 Fed. Reg. at 43,428). Not all packs contain a breeding pair, and generally, only the alpha male and alpha female within a pack breed, regardless of the pack size. Id. at 16916. As FWS points out, the Wyoming legislature's "pack" definition of "5 or more gray wolves traveling together," Wyo. Stat. § 23-3-304(c), could apply to "a female with 4 newborn pups, not a breeding pair," or even five orphaned pups. 2004 A.R. at 90169; see also A.R. 17781 (71 Fed. Reg. at 43,428). Indeed, 5 wolves traveling together have only 56% probability of containing a breeding pair. A.R. 17781-82 (71 Fed. Reg. at 43,428-29). Counting these wolves as "packs" would paint an inaccurate picture of the number of breeding wolves in Wyoming, and potentially forestall the implementation of protective measures necessary to ensure that the Wyoming population does not fall below minimum recovery levels.

Petitioners suggest that FWS has taken inconsistent positions regarding the appropriate definition of "pack" for the purpose of establishing compliance with recovery standards. See Wyo. Br. at 41-42; Wolf Coalition Br. at 37-39. However, FWS consistently informed Wyoming that it could not approve Wyoming's pack size definition until the scientific analysis to establish a post-delisting monitoring protocol was complete. For example, in a May 30, 2003 letter, FWS gray wolf recovery coordinator Ed Bangs reiterated to WGFD Deputy Director Bill Wichers, that "until the analysis [of the correlation of pack size and breeding pair] was completed," FWS could not guarantee that Wyoming's definition of wolf pack was acceptable. 2004 A.R. 300; see also A.R. 12077 (7/2/2003 email from Mr. Bangs to Mr. Wichers, noting that "[t]he Service must develop a post-delisting wolf monitoring plan as part of the delisting

package,” which would include a pack size definition, and that “[t]he definition of ... a wolf pack is a scientific issue”). Mr. Bangs then repeated his suggestion that Wyoming law define “pack” as “5 wolves traveling together in winter or ‘as determined by the delisting package or subsequent determinations.’”⁹ 2004 A.R. 300. The Wolf Coalition points to a January 2004 email from Mr. Bangs to the Idaho Department of Fish and Game, stating that “FWS reported that 4 wolves traveling together were sufficient to be defined as a ‘pack.’” Wolf Coalition Br. at 38 (citing A.R. 12459). Quite the opposite, Mr. Bangs actually stated that he found “it very hard to believe that 4 [wolves] could equal 1 B[reeding] P[air].” A.R. 12459. Instead, he suggested following the recommendation of a peer reviewer, which was to “let your data decide if some [number of wolves] in winter equals a breeding pair.”¹⁰ Id.

At the time of these communications, the study of what number of wolves traveling together constitutes a breeding pair was ongoing. As recently as May 2006, FWS and state wolf managers met to discuss appropriate methods for estimating numbers of breeding pairs post-delisting. A.R. 14301-14312 (notes from May 2006 meeting). Subsequently, in June 2006, David Ausband, a wolf researcher affiliated with the University of Montana, presented

⁹ The difference between “5 wolves traveling together” and “5 wolves traveling together in winter” is significant because it insures pack stability (disease and human-caused mortality is greatest in summer) and indicates whether pups—born in the spring—have survived until the end of the year. See A.R. 17781 (71 Fed. Reg. at 43,428).

¹⁰ Park County and the Wolf Coalition point to Mr. Bangs’ statement in an internal Department of Interior email dated February 2006 that “[t]he whole pack thing isn’t that big a deal if it didn’t trigger the predatory animal designation and strip away WGFD mgt. authority.” Park County Br. at 11 (citing AR 17905) (emphasis added); Wolf Coalition Br. at 38. However, Wyoming’s pack definition does apply to wolves’ classification as predatory or trophy game in Wyoming, and therefore may eliminate WGFD management authority; thus, Wyoming’s definition of “pack” is a “big deal.”

the results of his research —based upon known composition of wolf packs in the three states — establishing a logistic regression model (as opposed to the previously employed linear model) to correlate pack size with numbers of breeding pairs. A.R. 16083-16095. Wyoming deems Mr. Ausband’s model for estimating breeding pairs “preliminary and unproven.”¹¹ Wyo. Br. at 19. Mr. Ausband conducted his statistical analysis, however, to address the concerns of state and federal wolf managers that the existing method of estimating breeding pairs (linear regression) “is not valid.” A.R. 16100. The analysis confirms that the “statistical validity of [the] linear model [is] questionable.” *Id.* at 16090. The logical regression model, by contrast, yields accurate and consistent results. *Id.*

FWS is entitled to determine that the new statistical analysis constitutes the “best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A). Although it would of course have been preferable if time permitted publication and peer review of Mr. Ausband’s analysis prior to the 12-month finding, the lack of such formal procedures does not preclude FWS’ determination that the analysis was the best science available. See Northwest Ecosystem Alliance v. U.S. Fish and Wildlife Serv., 475 F.3d 1136, 1147 (9th Cir. 2007) (“Of course a rigorous, large-scale study of Washington gray squirrels’ behavior and morphology would be preferable, but in the absence of such a study, credible anecdotal

¹¹ Wyoming also states that Mr. Ausband’s analysis is “highly suspect” because it applies differently in Idaho and Wyoming. Wyo. Br. at 36. However, biologists have recognized that wolf packs residing in different habitat conditions will exhibit different pack structure. See A.R. 16099 (state and federal wolf managers recognizing that the probability of a group of wolves containing a breeding pair may vary for each state due to habitat availability); *id.* at 17765 (71 Fed. Reg. at 43,412) (“Different habitat characteristics result in slightly different probabilities of breeding pair status in each state.”)

evidence represents the ‘best scientific ... data available’ and cannot be ignored.”); see also Southwest Ctr. for Biological Diversity v. Babbitt, 215 F.3d 58, 60 (D.C. Cir. 2000) (“Even if the available scientific and commercial data were quite inconclusive, [FWS] may—indeed must—still rely on it at that stage.”) (quoting City of Las Vegas v. Lujan, 891 F.2d 927, 933 (D.C.Cir.1989)).

The Wolf Coalition has the standard of review backward with respect to FWS’ definition of pack size; “the fundamental question” is not “whether the assumptions inherent in the Wyoming analysis are reasonable,” but whether the FWS analysis is reasonable given the record before it. Wolf Coalition Br. at 40 (emphasis omitted); see Citizens For Alternatives To Radioactive Dumping v. U.S. Dept. of Energy, 485 F.3d 1091, 1099 (10th Cir. 2007) (“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.”); Kandra v. United States, 145 F. Supp. 2d 1192, 1208 (D. Or. 2001) (“it is presumed that agencies have used the best data available unless those challenging agency actions can identify relevant data not considered by the agency.”). Although Wyoming apparently dislikes Mr. Ausband’s analysis, it offers no evidence to support its definition of pack, let alone evidence that would call into serious question FWS’ reliance on Mr. Ausband’s expertise. Because FWS reasonably adopted the most current information available, based upon empirical observations of pack composition in the three states, to develop a model for estimating the number of breeding pairs in a population, its rejection of the “pack” definition in Wyoming’s plan must be upheld.

C. FWS Did Not Arbitrarily Reject The Results Of The Peer Review

Petitioners further argue that FWS was required to find Wyoming's wolf management plan an adequate regulatory mechanism to support delisting because most of the peer reviews solicited by FWS felt that the three state management plans, taken together, were sufficient to maintain a population of 300 wolves for the foreseeable future. This is wrong both as a matter of law and of fact. First, as a matter of law, FWS is required to consider factors outside of the peer review in determining the adequacy of regulatory mechanisms under the ESA. FWS must consider not only scientific data bearing on the biological soundness of management objectives, but also non-scientific issues such as legal enforceability and availability of funding in order to determine whether management objectives will actually be achieved. See, e.g. Oregon Natural Res. Council v. Daley, 6 F. Supp. 2d 1139, 1154-55 (D. Or. 1998) (requiring FWS, in making listing determinations, to ensure that regulatory mechanisms to protect species are mandatory rather than voluntary). In this case, the peer reviewers did not address the question of whether Wyoming is capable of implementing its wolf management plan under applicable law. Unlike Wyoming's plan, Wyoming state law does not commit, even in theory, to managing for the 15 breeding pairs necessary to ensure a minimum of 10 breeding wolf pairs in Wyoming.

In order to ensure that wolves are sustained at recovery levels notwithstanding imperfect monitoring and natural fluctuations in pack numbers, FWS has consistently 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." 2004 A.R. 90168 (emphasis in original), see also id. at 242, 344, 499. While the state plan incorporates this direction, Wyoming

state law directly contradicts it. Wyoming's statute requires WGFD to meet every 90 days to review the status of the wolf population. 2004 A.R. 317-18 (Wyo. Stat. § 23-1-304 (b)). If there are at least 7 wolf packs in Wyoming primarily outside of the national parks or 15 wolf packs in Wyoming total, the statute requires WGFD to maintain the original trophy game boundary. Id. (Wyo. Stat. § 23-1-304 (b)(ii)). Therefore, even if there are fewer than 7 wolf packs outside of the national parks, as long as the national parks support 15 packs, WGFD would not have authority under the plain language of the statute to adopt measures restricting wolf killing outside of parks and wilderness areas. Similarly, if the wolf population in the national parks were to crash below 8 packs, WGFD would have no authority to adopt protective measures to manage for more than 7 packs outside the parks to ensure 15 packs statewide. In short, given "very specific wording in the Wyoming state law that is in direct conflict with many portions of the state plan," Wyoming "cannot commit to maintaining the 15 and 7 pack goal." 2004 A.R. at 90169; see also A.R. 17782 (71 Fed. Reg. at 43429) (FWS is "concerned that WGFD would have no authority to act contrary to the categorical requirements of an operative provision of the state law."). FWS' conclusion that WGFD would be legally vulnerable if it attempted to manage Wyoming's wolf population to maintain a minimum of 15 packs statewide is thus well-founded.¹² Id. at 90168.

¹² The WGFD director, recognizing the inconsistency of the Wyoming statute and FWS delisting criteria, requested review by the Wyoming attorney general. 2004 A.R. 295-298. The Attorney General opined that the statute might be construed in light of the legislative goal of wolf delisting to require that 15 packs are maintained in Wyoming, with at least 7 outside of the parks, at all times. Id. at 296. Wyoming incorrectly states that the Wyoming attorney general has "exclusive authority" to interpret an ambiguous Wyoming law. Wyo. Br. at 40. However, Congress

Moreover, as a factual matter, FWS' assessment of the Wyoming plan is not at odds with the peer review. FWS asked peer reviewers to determine whether wolf management plans developed by Montana, Idaho, and Wyoming "collectively ... are adequate to maintain the wolf population at or above the recovery level into the foreseeable future." 2004 A.R. 406 (emphasis added). As FWS' wolf recovery coordinator observed, "most reviewers commented that the Wyoming plan was adequate primarily because of the adequate wolf management plans developed in the adjacent states of Montana and Idaho and the buffer that Yellowstone National Park wolf packs provide for the maintenance of a recovered wolf population segment in Wyoming." 2004 A.R. 90168 (emphasis in original). While Petitioners characterize this result as a monolithic endorsement of the Wyoming plan, several reviewers noted serious concerns with regard to Wyoming's ability to maintain its share of the Northern Rockies wolf population under the terms of the Wyoming plan. See, e.g., 2004 A.R. 460 (stating that "the Wyoming Plan may not achieve their objective of [maintaining] 15 packs" in Wyoming" due to predator classification); id. (expressing concern that "right at the outset of the enactment of the plan, within 90% of the areas [outside national parks and wilderness areas] occupied by wolves today, wolves would be classed as predatory and would be subject to unregulated take," and "this could

directed FWS—not the Wyoming Attorney General—to determine the existence of adequate regulatory mechanisms for delisting. See 16 U.S.C. § 1533(a)(1)(D). Indeed, even in Wyoming state courts the Attorney General's opinions are not dispositive. See Dir. of Office of State Lands & Investments v. Merbanco, Inc., 70 P.3d 241, 256 (Wyo. 2003) (courts afford attorney generals' opinions "some weight"). Here the statutory language governing Wyoming's wolf management scheme is not ambiguous. The 2003 Wyoming Attorney General opinion contradicts the plain language of the statute, and FWS is justifiably "concerned that WGFD would have no authority to act contrary to the categorical requirements of an operative provision of the state law." A.R. 17782 (71 Fed. Reg. at 43,429).

then immediately result in a drop in wolf packs below the 7 pack threshold” for packs outside the Parks); *id.* at 478 (“Wyoming’s plan exposes wolves in Wyoming to the risk of catastrophic loss outside of National Parks and Parkways”); *id.* at 476 (commenting that managing wolves as predators is “an extreme form of wolf management. It appears that trophy management, with more liberal controls available for livestock producers would be more appropriate and would provide much more sound protection of wolves.”). Thus, FWS was not alone in its concerns regarding predatory status and low pack objectives under the Wyoming plan.

To the extent that FWS rejected the conclusions of some peer reviewers and adopted the concerns of others, FWS properly exercised its expertise and resolved the conflict in favor of wolf conservation.¹³ See Utahns for Better Transp. v. U.S. Dept. of Transp., 305 F.3d 1152, 1168 (10th Cir. 2002) (“it is well established that agencies are entitled to rely on their own experts so long as their decisions are not arbitrary and capricious.”) (citing Custer County Action Ass’n v. Garvey, 256 F.3d 1024, 1036 (10th Cir. 2001)). Thus, contrary to Petitioners’ arguments, FWS’ treatment of the peer review was appropriate.

D. FWS Did Not Improperly Rely On Factors Congress Did Not Intend the Agency To Consider

FWS’ position regarding Wyoming wolf management is readily justified on grounds that the plan and companion legislation allow for extensive unregulated killing of wolves and

¹³ Wyoming argues that because FWS purportedly rejected the results of the peer review, it essentially rejected Wyoming’s delisting petition without undertaking peer review at all, thus violating the “Interagency Cooperative Policy on Peer Review.” Wyo. Br. at 36-37. This argument is entirely lacking in merit, as FWS clearly did solicit an independent peer review and consider its results.

management for packs in very low numbers. While FWS explained these concerns to the State of Wyoming, Petitioners nevertheless maintain that the true reason FWS declined to approve the Wyoming plan is that the agency is afraid of litigation and political backlash. See Wyo. Br. at 42-45; Wolf Coalition Br. at 40.

For the first proposition, Wyoming cites to a statement by Assistant Secretary Manson asserting that “we want to do as much as we can to ensure that a decision to delist wolves will be sustainable in the event of litigation and subsequent judicial scrutiny.” Wyo. Br. at 44 (citing 2004 A.R. 290). Far from establishing a legal violation, this statement only affirms that FWS was seeking to ensure that a delisting proposal would comply with the ESA and therefore would be legally sustainable. See 2004 A.R. 344 (“The Service will not propose delisting if it believes its decisions aren’t clearly supported by sound science or do not satisfy its legal responsibilities under the ESA.”). There is nothing improper about FWS seeking to comply with the ESA.

For the second proposition, Wyoming cites comments by Recovery Coordinator Bangs noting the political pitfalls of classifying wolves as predators. However, as Wyoming itself points out, Bangs advised WGFD that FWS would approve dual-classification for wolves if Wyoming would permanently expand its trophy game area to ensure adequate protection for wolves that are using areas outside of the National Parks. See id. at 342, 345. This makes clear that FWS’ animating concern was not a semantic concern with the word predator, but a practical concern with protecting wolves from unregulated human take in a sufficient area to safeguard their biological recovery. Wyoming’s own decision to retain

shifting trophy game boundaries prompted FWS' rejection of the Wyoming plan — not overblown legal concerns or a political agenda.

III. THE COURT SHOULD REJECT WYOMING'S UNREASONABLE DELAY CLAIM

The Court should reject Wyoming's claim that FWS has unreasonably delayed action on the state's petition to amend the regulation governing wolf management within Wyoming. First, Wyoming's unreasonable delay claim is moot, as FWS recently acted on Wyoming's petition and has proposed amendments to the ESA §10(j) regulations that apply to states with approved state management plans. 72 Fed. Reg. 36,942 (July 6, 2007); see City of Erie v. Pap's A.M., 529 U.S. 277, 287 (2000) (case is moot if “the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome”); Wyoming v. U.S. Dep't of Agric., 414 F.3d 1207, 1212 (10th Cir. 2005) (agency's adoption of rule mooted case by “eliminating the issues upon which this case is based”). If Wyoming is not satisfied with FWS' proposed revisions, it may submit comments on the proposed rule during the 30-day notice and comment period, but may pursue a legal challenge only after FWS takes final action to amend the regulations.

Even if its claim were not moot, Wyoming 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). Although Wyoming fails to mention them, the Tenth Circuit has looked to the following factors in determining whether such extraordinary relief is appropriate:

- (1) the extent of the delay, (2) the reasonableness of the delay in the context of the legislation authorizing agency action, (3) the consequences of the delay, and (4) administrative difficulties bearing on the agency's ability to resolve an issue.

Id.

Here, these factors do not support Wyoming's claim. Given Wyoming's submission of the wolf management petition, which is not subject to any statutory deadlines, followed only 10 days later by the state's submission of its wolf delisting petition, which is subject to strict ESA deadlines, see 16 U.S.C. § 1533(b)(3)(A), (B), FWS sensibly prioritized work on the delisting petition. See A.R. 15698-99. Thus, "in the context of the legislation authorizing agency action," Qwest, 398 F.3d at 1239, FWS' conduct was both necessary and appropriate.

With respect to "the extent of the delay," id., after completing work on the delisting petition in August 2006, FWS promptly commenced work on Wyoming's wolf management petition in October 2006. See A.R. 15698. In addition, "the consequences of the delay," Qwest, 398 F.3d at 1239, appear to be minor. While Wyoming proclaims the need for an amended regulation to address "wolf depredations on livestock and wild ungulates," Wyo. Brief at 15, in fact wolf depredation represents a relatively minor source of total livestock mortality in the state, and Wyoming elk populations are booming despite more than a decade of wolf presence. See A.R. 15888-90 (documenting overpopulation of elk in Jackson-area herds); A.R. 15665-70 (responding to Wyoming's claims of wolf impacts on elk and moose and noting abundant elk populations in state); A.R. 15644 ("Livestock depredations and wolf control remain lower than predicted" by FWS); see also Harbine Dec., Exh. 1 (survey of Wyoming ranchers indicates that wolves caused 0.4% of total sheep/lamb mortality in 2004, 2.0% in 2005, and 0.6% in 2006); Harbine Dec. Exh. 2 (survey of Wyoming ranchers indicates that wolves caused 1.5% of total

cattle/calf mortality in 2004, 1.7% in 2005, and 1.9% in 2006).¹⁴ And while Wyoming alleges harm to elk populations due to lower cow/calf ratios, FWS disputes the factual basis for Wyoming's assertion. See A.R. 15665-70. Accordingly, there is no emergency crying out for immediate FWS action on Wyoming's petition.

Ignoring all of these factors, Wyoming grounds its argument solely in the language of 43 C.F.R. § 14.3, requiring "prompt consideration" of rulemaking petitions, and claims that this language precludes the Court from even considering FWS' staffing and workload constraints. See Wyo. Brief at 17. To the contrary, however, the Tenth Circuit has recognized that "administrative difficulties bearing on the agency's ability to resolve an issue" must be considered in assessing agency delay claims. Qwest, 398 F.3d at 1239. In this case, Wyoming presented FWS with two petitions that competed for attention from FWS' limited staff at the same time. Given that Wyoming's delisting petition triggered statutory deadlines under the ESA, FWS reasonably prioritized work on that petition, but then promptly turned to the wolf management petition once work on the delisting petition was concluded. FWS continues to consider the issues raised by Wyoming's petition. See A.R. 15698. This course of conduct

¹⁴ This Court's review of Wyoming's claim of unlawful agency delay is not confined to the record submitted by the agency. Where, as here, a claim arises under 5 U.S.C. § 706(1), "review is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record." Friends of the Clearwater v. Dombeck, 222 F.3d 552, 560 (9th Cir. 2000); see also Independence Mining Co. v. Babbitt, 105 F.3d 502, 511-12 (9th Cir. 1997) (holding that district court did not err in considering litigation affidavit because plaintiff challenged agency delay, not final agency action). Moreover, The Tenth Circuit holds that a reviewing court may take judicial notice of certain government documents, including in cases involving review of agency action. See Pueblo of Sandia v. United States, 50 F.3d 856, 861 n. 6 (10th Cir. 1995); see also Clappier v. Flynn, 605 F.2d 519, 535 (10th Cir. 1979) (proper for a district court to take judicial notice of an official government publication).

provides no basis for a claim of unreasonable delay. See Coalition for Sustainable Res., Inc. v. U.S. Forest Serv., 259 F.3d 1244, 1252 (10th Cir. 2001) (holding that Forest Service did not unreasonably delay decision on whether to implement requested management practices where agency was still considering the issue and “anticipate[d] final action within a reasonable period of time given the enormous complexity of the issues involved”).

IV. THE WOLF COALITION’S NEPA CLAIM IS BARRED

The Wolf Coalition’s argument that FWS must supplement its 1994 environmental impact statement analyzing the impacts of the Yellowstone National Park wolf reintroduction, see Wolf Coalition Br. at 46-49, simply repackages the Coalition’s previous claim already considered and rejected by this Court. See Wyoming v. U.S. Dep’t of the Interior, 360 F. Supp. 2d at 1235-38. Because the Wolf Coalition’s NEPA claim was laid to rest by this Court in 2005, the Coalition is barred from raising it again here. Allen v. McCurry, 449 U.S. 90, 94 (1980) (“Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.”) (citation omitted).

As this Court held, “once the reintroduction plan went into effect the need for supplementation was at an end.” 360 F. Supp. 2d at 1238 (citing Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004)). Specifically, this Court rejected the Wolf Coalition’s argument, which it makes again here, that FWS’ “demand that Wyoming adopt specifically

designed protections for the sole purpose of securing the gray wolf population in areas of the State that [FWS] previously concluded ‘were undesirable’ satisfies the major federal action requirement” for preparation of supplemental environmental analyses. *Id.* at 1237-38. Further, “[s]hifting the responsibility of management of the gray wolf recovery from the Federal Government to Wyoming is not a ‘major federal action’ as contemplated by NEPA.” *Id.* at 1238.

Having raised these arguments once and lost, the Wolf Coalition may not prevail on these same contentions now. Moreover, in the two years since this Court’s decision, no circumstances have changed that convert the Wolf Coalition’s NEPA argument into a meritorious claim. Thus, this Court should reject the Wolf Coalition’s argument that FWS was required to prepare a supplemental environmental impact statement.

V. PETITIONERS’ REQUESTED RELIEF IS OVERBROAD

For all of the reasons set forth above, this Court should reject Petitioners’ claims. However, even assuming arguendo that any of Petitioners claims have merit (which they do not), Petitioners would not be entitled to the relief that they request in their complaints, which include such draconian measures as wolf killing orders and [fill in other examples]. Rather, where the administrative record does not support an agency action, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985); see also Sierra Club-Black Hills Grp. v. U.S. Forest Serv., 259 F.3d 1281, 1289 (10th Cir. 2001) (same); INS v. Ventura, 537 U.S. 12, 16 (2002) (“Generally speaking, a court ... should remand a case to an agency for decision of a matter that statutes place primarily in agency hands.”).

CONCLUSION

For the foregoing reasons, this Court should: 1) uphold FWS' 12-month finding and rejection of Wyoming's petition to delist gray wolves in the Northern Rockies, 2) find that FWS has not "unreasonably delayed" action on Wyoming's petition to amend ESA § 10(j) regulations, and 3) find that FWS was not required to prepare a supplemental environmental impact statement to reevaluate impacts of wolves in Wyoming.

Respectfully submitted this 11th day of July, 2007,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that Respondent-Intervenors Sierra Club, et al.'s Response Brief is proportionately spaced and contains 11,395 words.

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I hereby certify that on July 11, 2007, I served a copy of the foregoing upon the following
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