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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING	)	
	)	
Petitioner,	)	
	)	
BOARD OF COMMISSIONERS OF THE COUNTY OF PARK,	)	Civil Action No. 06CV245J
	)	
	)	
Petitioner-Intervenors,	)	

WYOMING WOOL GROWERS ASSOCIATION, et al.,	)
Petitioner-Intervenors,	)
v.	)
UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,	)
Respondents,	)
SIERRA CLUB, et al.,	)
Respondent-Intervenors,	)
NATIONAL WILDLIFE FEDERATION, et al.,	)
Respondent-Intervenors.	)

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INTRODUCTION

The United States Fish and Wildlife Service (the "Service" or "FWS") has worked closely with the States of Wyoming, Montana, and Idaho and other interested parties in order to achieve the common goal of recovering the gray wolf in the western United States so that it may be removed from the list of threatened and endangered species. To this end, the FWS, states, tribes, and private groups have participated in restoring the wolf in the northern Rocky Mountains, an endeavor that is widely perceived as one of the most successful wildlife conservation efforts in this century. Now that the gray wolf has achieved the numerical and distributional recovery goals relevant to the proposed northern Rocky Mountain ("NRM") distinct population segment ("DPS"), the FWS has turned its attention to ensuring that the proper conditions exist for the gray wolf population to remain at or above recovery levels upon delisting.

Prior to proposing delisting under the Endangered Species Act ("ESA"), the Service must be assured that "adequate regulatory mechanisms" are in place at the time of delisting to ensure that a species will not be placed in danger of extinction throughout all or significant portion of its range in the foreseeable future. Here, in order to consider delisting of the entire NRM DPS of the gray wolf, Wyoming, Montana, and Idaho must establish wildlife management plans for the delisted wolves that will ensure that the wolf population in the three states remains at or above recovery levels. After carefully reviewing the State of Wyoming's petition to delist the gray wolf, the Service has determined that Wyoming's state law and wolf management plan (the "Wyoming Plan"), taken together, do not provide an adequate regulatory mechanism to ensure that the gray wolf population in the NRM DPS will remain recovered if it were to be removed from the list of endangered species. See 12-Month Finding on a Petition To Establish the Northern Rocky Mountain Gray Wolf Population (*Canis lupus*) as a [DPS] To Remove the Northern Rocky Mountain Gray Wolf [DPS] From the List of Endangered Species, 71 Fed. Reg. 43410 (Aug. 1, 2006), Administrative Record ("AR") at 17763 (hereinafter "12-Month Finding"). Petitioners challenge the FWS's 12-Month Finding with this suit.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether Federal Respondents acted arbitrarily, capriciously, or otherwise not in accordance with law in denying Wyoming's petition to delist the gray wolf.

II. Whether Petitioners' claims brought pursuant to National Environmental Policy Act ("NEPA") are barred bar this Court's previous ruling.

III. Whether, if Petitioners' NEPA claims are not barred, the FWS was required to perform a NEPA analysis of the 12-Month Finding.

IV. Whether Petitioners' claims regarding Wyoming's petition to modify the 10(j) rules are moot and, if not, whether any delay in acting on the petition was unreasonable.

STATEMENT OF THE CASE

The FWS's decision to deny Wyoming's petition to delist due to the inadequacies of the Wyoming Plan was rational and is fully supported by the Administrative Record. Although Petitioners State of Wyoming, Wyoming Wool Growers, et al. ("Wolf Coalition"), and Board of Commissioners of the County of Park, et al., ("Park County") (hereinafter collectively referred to as "Petitioners") disagree with the FWS's determination, they have failed to show that the 12-Month Finding is arbitrary and capricious or otherwise in violation of the ESA, NEPA, or the Administrative Procedure Act ("APA"). Further, Petitioners' NEPA claims are barred by this Court's previous ruling and, even if they are not barred, they fail as a matter of law. With regard to Petitioners' claim that the FWS's has unreasonably delayed acting on its petition to modify certain wolf management rules, that claim is moot and any delay in responding to the petition to modify the rules was not unreasonable. For these reasons and all the reasons set forth below, the Court must reject the Petitioners' claims and enter judgment for Federal Respondents.

STATUTORY BACKGROUND

I. The Endangered Species Act

Enacted in 1973, the Endangered Species Act, is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978). Congress has identified several purposes for the ESA,

including (1) "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," and (2) "to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). The terms "conserve," "conserving," and "conservation" are defined as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary." 16 U.S.C. § 1532(3); 50 C.F.R. §424.02(c). The Supreme Court has interpreted the overarching intent of the ESA as follows: "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy that it described as 'institutionalized caution.'" TVA, 437 U.S. at 194.

An endangered species is a species that is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6); 50 C.F.R. § 424.02(e). A threatened species is a species that is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20); 50 C.F.R. § 424.02(m). A nonessential, experimental population is a population that is wholly separate geographically from the remaining population of a listed species (either threatened or endangered) that is not essential to continued existence of that species. 16 U.S.C. § 1539(j)(1)-(2). A species includes any subspecies of fish, wildlife, or plants, and any distinct population segment of any species of vertebrate fish or wildlife that interbreeds when mature. 16 U.S.C. § 1532 (16).

The Secretary of the Department of the Interior ("Secretary") is charged with determining whether a species should be listed, or continue to be listed, as threatened or endangered based upon five statutorily prescribed factors. 16 U.S.C. § 1533(a)(1) (collectively referred to as "listing factors"). The listing factors are: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued

existence. 16 U.S.C. § 1533(a)(1). Any one of the five listing factors is sufficient to support a listing determination if that particular factor causes the species to be "in danger of extinction" or "likely to become an endangered species in the foreseeable future" throughout all or a significant portion of its range. The same five factors must be used to determine whether threats to the species have been diminished or removed to the point that downlisting or delisting is appropriate.

Decisions about whether a species is endangered or threatened must be made "solely on the basis of the best scientific and commercial data available to him [or her] after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State . . . to protect such species." 16 U.S.C.§ 1533(b)(1)(A); 50 C.F.R. § 424.11(b)-(f). When considering revision of a listing, in addition to a state's conservation efforts, the Secretary may consider administrative reports, maps or other graphic materials, information received from experts on the subject, and comments from interested parties. 50 C.F.R. § 424.13. Courts have construed the ESA's "best available data" standard as requiring only the consideration of that information "presently available." Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 679-680 (D.D.C. 1997).

The FWS defines "recovery" to mean "improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in [ESA] section 4(a)(1)." 50 C.F.R. § 402.02. The ESA instructs the Secretary to develop and implement plans, known as "recovery plans," for the conservation and survival of listed species, "unless he finds that such a plan will not promote the conservation of the species." 16 U.S.C. § 1533 (f)(1). In order to remove a species from the list, the Secretary must find that the species is extinct, that the species has recovered, or that the original data supporting classification (or that data's interpretation) was in error. 50 C.F.R. § 424.11(d).

II. The National Environmental Policy Act

The purpose of NEPA is to focus the attention of the government and the public on the likely environmental consequences of a proposed action before the action is implemented.

Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989). If an agency proposes to undertake a "major federal action[ ] significantly affecting the quality of the human environment," NEPA requires the preparation of an environmental impact statement ("EIS") to consider the environmental consequences of the proposed action. 42 U.S.C. § 4332(2)(C). NEPA imposes essentially procedural requirements on the agency, not substantive ones. "NEPA does not work by mandating that agencies achieve particular substantive environmental results." Marsh, 490 U.S. at 371. Thus, instead of "mandat[ing] particular results," NEPA "simply prescribes the necessary process" to ensure that federal agencies will take the necessary "hard look" at environmental consequences. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

NEPA's implementing regulations require an agency to prepare a supplement to a final EIS (an "SEIS") only under certain circumstances, including when "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). It is for the agency to determine in the first instance whether a supplemental EIS must be prepared, and the Supreme Court has held that the question of whether information rises to the level of requiring a SEIS "is a classic example of a factual dispute the resolution of which implicates substantial agency expertise." Marsh, 490 U.S. at 376. "[A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." Id. at 373; see also Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-54 (1978). Rather, the Court in Marsh held that a SEIS must be prepared only if (1) there remains major federal action to occur; (2) there is new information relevant to environmental concerns; and (3) the new information will affect the quality of the human environment in a significant manner or to a significant extent not already considered. Id. at 374.

STATEMENT OF THE FACTS

Biology and Ecology of the Gray Wolf

The gray wolf (*Canis lupus*) is the largest wild member of the Canidae, or dog family. 68 Fed. Reg. 15804 (April 1, 2003). Gray wolves are social animals, usually living in packs of 2 to 12 wolves. Id. at 15805. Packs are primarily family groups which may consist of a breeding pair, pups from the current year, offspring from the previous year, and occasionally an unrelated wolf. Id. Usually, only the top ranking male and female in a pack breed and produce pups. Litters are typically born from early April into May and can range from 1 to 11 pups, with 4 to 6 pups being average. Id.

The gray wolf historically occurred across much of North America; however with the arrival of European settlers to the continent, the species' numbers took a rapid downturn. Id. at 15805. Fears and superstitions about wolves, coupled with hostility bred from both real and perceived conflicts between wolves and human activities along the frontier, led to the widespread persecution of wolves. Id. Spurred by bounties offered by Federal, State, and local governments, people poisoned, trapped, and shot wolves until the species was extirpated from more than 95% of its range in the lower 48 states. Id. When the ESA was passed in 1973, likely only several hundred wolves occurred in northeastern Minnesota, with possibly a few scattered lone wolves in Montana and the American Southwest. Id. Human persecution was the primary reason that the gray wolf became an endangered species. Id. at 15827.

Listing History and Recovery Planning

The FWS listed gray wolf subspecies *Canis lupus lycaon* and *Canis lupus irremotus* as endangered on the first list of species protected after passage of the ESA in 1973, 39 Fed. Reg. 1158 (Jan. 4, 1974), and added *Canis lupus baileyi* and *Canis lupus monstrabilis* to the list of endangered species in 1976. 41 Fed. Reg. 17740 (Apr. 28, 1976); 41 Fed. Reg. 24064 (June 14, 1976). In March 1978, the FWS published a rule re-listing the gray wolf at the species level (*Canis lupus*) to eliminate problems inherent in the prior practice of listing the gray wolf by subspecies. 43 Fed. Reg. 9607 (Mar. 9, 1978). The 1978 rule listed the gray wolf as threatened

in Minnesota and endangered throughout the remaining 47 conterminous United States and Mexico. Id.

The FWS has developed a recovery plan for the gray wolf in the northern Rocky Mountain states. Recovery plans are guidance documents designed to assist the agency by establishing measurable criteria against which to gauge a species' recovery. Such documents are not binding on the agency, however, and achievement of the criteria set forth in a recovery plan is not, standing alone, a sufficient basis for the FWS to delist a listed species. The agency must also undertake the five-factor analysis described under the ESA. The Northern Rocky Mountain Recovery Plan focuses efforts on restoring gray wolves in the states of Montana, Idaho, and Wyoming. 68 Fed. Reg. at 15810-11. The recovery plan identifies a recovery criterion of at least ten breeding pairs of wolves (defined as a male and female capable of reproduction) for three successive years in each of three distinct recovery areas, with a northern Rocky Mountain wolf population of about 300 adult wolves upon delisting. Id. at 15815, 15817. Finally, it should be noted that certain aspects of the Recovery Plan are no longer in effect; for example, the management "zone" approach set forth in the plan is no longer utilized by the FWS per the subsequent wolf control plans. 64 Fed Reg. 60453 (notice of availability for 1999 wolf control plan).

In 1994, the FWS completed an EIS on the Reintroduction of Gray Wolves to Yellowstone National Park and Central Idaho, in which the agency evaluated whether the population goal for delisting wolves contained in the Northern Rocky Mountain Recovery Plan would result in a viable population. Id. at 15817. Appendix 9 to the EIS determined that the goal of 10 breeding pairs in 3 separate recovery areas for 3 consecutive years was sufficient, but minimal. Id. By contrast, the evaluation proposed that a goal of 30 or more breeding pairs of 300 or more wolves in a metapopulation structure, with some exchange between populations, would have a high probability of long-term persistence. Id. The 1994 EIS also adopted a more conservative definition of “breeding pair” than the one contained in the recovery plan.

Specifically, the EIS defines a "breeding pair" as an adult male and an adult female that raise at least two pups until December 31 of the year of their birth. Id. In 2002, following a review of the relevant literature and a survey of 88 experts in wolf biology, the FWS adopted the definitions of wolf population viability and recovery developed in the 1994 EIS. Id. at 15810-17.

In November 1994, as part of an effort to reintroduce gray wolves in Central Idaho and Yellowstone National Park, the FWS designated nonessential experimental populations of gray wolves under ESA § 10(j) in Wyoming and parts of Idaho, and Montana.[1] In January 1995, the FWS began releasing wolves captured in Alberta, Canada, into the Central Idaho and Greater Yellowstone Experimental Population Areas in furtherance of the agency's effort to recover the gray wolf in the northern Rocky Mountains. Id. at 15815-16. In January 1996, the FWS released additional wolves from British Columbia into these two experimental population areas. Id. at 15816. Since January 1996, the FWS has conducted no additional releases of gray wolves in these areas and has no plans to do so.

As a result of the above regulatory actions, wolves within the NRMs are classified as either endangered or members of a nonessential experimental population under section 10(j) of the ESA. Rules regarding wolf control in the experimental population areas, 10(j) rules, are more liberal than in the areas where wolves are listed as endangered. 71 Fed. Reg. at 43425; AR 17778. In the area where wolves are listed as endangered, only designated agencies may

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[1/] In 1994 the FWS promulgated special rules under ESA § 10(j) for the purpose of wolf reintroduction in central Idaho and in the Yellowstone area. The 1994 10(j) rules, codified at 50 C.F.R. § 17.84(i), established two non-essential experimental populations ("NEPs"), one for central Idaho and the other for Yellowstone, and provided increased management flexibility to address potential human-wolf conflicts. On January 6, 2005, the Service published a rule relating to the management of non-essential experimental populations within the Western DPS. 70 Fed. Reg. 1286 (Jan. 6, 2005). Under the new rule, landowners in states with a Service-approved, post-delisting, wolf management plans are able to take additional steps to protect their livestock and dogs from attacks by wolves on their private property without prior written authorization. Before assuming management authority, however, a state must enter into a cooperative agreement or Memorandum of Agreement ("MOA") with the FWS. Id.

conduct control under the conservative protocols established by the Service's 1999 wolf control plan. Id.

Recent Rulemaking

On April 1, 2003, the FWS issued a Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States, 68 Fed. Reg. 15804, et seq. Prior to publication of the Final Rule, the gray wolf (*Canis lupus*) was listed as an endangered species throughout the lower 48 states and Mexico, except in Minnesota, where the species was listed as threatened, and in the three nonessential experimental population areas. The Final Rule changed the classification of the gray wolf under the ESA by creating three distinct population segments ("DPS") -- an Eastern DPS, a Western DPS, and a Southwestern DPS -- for the species in the conterminous United States. In total, the boundaries of the three DPSs encompassed the entirety of the gray wolf's historical range in the lower 48 states and contained all that remains of the species' genetic diversity in these states and Mexico. The Reclassification Rule was challenged in federal court. See Defenders of Wildlife v. Norton, 354 F. Supp. 2d 1156 (D. Or. 2005); National Wildlife Federation v. Norton, 386 F.Supp. 2d 553 (D.Vt. 2005). The rule was found to be contrary to law and remanded to the Service. Id.

On July 5, 2005, the FWS received Wyoming's petition to modify the rules governing the management of the nonessential experimental population of wolves in Wyoming ("10(j) petition"). Approximately two weeks later, on July 19, 2005, the Service received a petition from the Office of the Governor, State of Wyoming, and the Wyoming Game and Fish Commission to revise the listing status of the gray wolf by establishing the NRM DPS and concurrently removing the NRM DPS of gray wolf from the list of threatened and endangered species ("delisting petition"). 71 Fed. Reg. at 4315; AR 17768. The FWS confirmed the receipt on the two petitions on August 17, 2005. AR 14066. The Service published a finding that the delisting petition presented substantial scientific and commercial information indicating that the NRM gray wolf population may qualify as a DPS and that this potential DPS may warrant

delisting. See 70 Fed. Reg. 61770; AR 17729 ("90-day finding"). Pursuant to the ESA, the Service then initiated a review of the status of the NRM gray wolf. 71 Fed. Reg. at 4315; AR 17768.

While the Wyoming petitions were still being considered, the Service published an advance notice of proposed rulemaking ("ANPR"), which announced its intention to conduct rulemaking to establish a DPS of the gray wolf in the Northern Rocky Mountains of the United States ("NRM"). 71 Fed. Reg. 6634 (Feb. 8, 2006); AR 17735. The proposed NRM DPS of gray wolf would encompass the eastern one-third of Washington and Oregon, a small part of north-central Utah, and all of Montana, Idaho, and Wyoming. The threats to the wolf population in the proposed NRM DPS have been reduced or eliminated as evidenced by the population exceeding the numerical, distributional, and temporal recovery goals each year since 2002. Id. However, as noted in the ANPR, although the Service was still carefully considering the Wyoming Petition to delist, it believed that Wyoming's law and wolf management plan did not provide adequate regulatory assurances that Wyoming's share of the proposed NRM DPS population would remain at recovered levels. Id. The Service made clear that, if Wyoming modified its State law and its wolf management plan and the Service approved them, it would then consider the delisting of wolves throughout the NRM DPS. Id. However, the Service has since made clear that "if Wyoming fails to modify its management regime to adequately conserve wolves . . . wolves in the significant portion of the range in northwestern Wyoming, outside the National Parks, will retain their nonessential experimental status under section 10(j) of the Act. [The FWS would] remove the remainder of the NRM DPS from the List of Endangered and Threatened Species." 72 Fed. Reg. 6106 (Proposed Rule to Establish and Delist NRM DPS).

On August 1, 2006, the Service announced its 12-month finding on the Wyoming Petition. 71 Fed. Reg. 43410; AR 17763. After reviewing the available scientific and commercial information, the Service found that the petitioned action was not warranted. Id.

Specifically, the Service determined that Wyoming state law and its management plan do not provide the necessary regulatory mechanisms to ensure that Wyoming's numerical and distributional share of the NRM wolf population would be conserved if the protections of the ESA were removed. Id. On July 9, 2007, the FWS made a final determination on Wyoming's petition to modify the 10(j) rules. See Exhibit 1.

The Wyoming Management and Wyoming Law

The States of Montana, Idaho, and Wyoming have been aware of the need for state wolf management plans for several years; the Governors of the three states signed a Memorandum of Understanding in August 1997 stating that the states would all develop wolf management plans so that the delisting process could be completed in a timely manner. AR 1. In October 2002, the Wyoming Game and Fish Department (the "Department") issued a draft plan to manage the gray wolf in Wyoming once it was delisted. AR 76. The Wyoming management plan underwent several revisions and was the subject of extensive written comments from the FWS. See AR 76-236. In commenting on the drafts of the Wyoming management plan, the FWS consistently maintained that the plan and Wyoming law were deficient in several respects, including the lack of management flexibility afforded the Department as a result of classifying the wolf as a predatory animal subject to unregulated take. See AR 24-30; AR 54; AR 68; AR 286; AR 293; AR 343; AR 505.

While the management plan was being developed, the Wyoming Legislature enacted HB229, which was codified as WYO. STAT. ANN. § 23-1-304. The statute was intended to provide the legal authority necessary to implement the management plan. However, the statute fails in this regard because the language of § 23-1-304 conflicts with the commitments outlined in the management plan and the statute is internally inconsistent. Ultimately, as a result of deficiencies in the plan itself and the ambiguity created by § 23-1-304, the FWS concluded that the Wyoming management plan, as constrained by Wyoming law, would not ensure that wolves

would not once again become threatened or endangered.[2]

The Wyoming Game and Fish Commission approved the final Wyoming management plan in July of 2003. AR 194-236. The provisions of the Wyoming Plan relevant to this action are as follows:

- The management plan commits to maintaining a minimum of 15 packs within Wyoming and to maintaining at least seven of those packs outside of the National Parks. AR 197.

- The management plan adopts a dual classification system that allows the Department to manage a limited portion of the wolf population as a "trophy game animal," but continued to recognize it as an unregulated "predatory animal" in the remaining portions of the state.[3] AR 197; AR 17781.

- Wolves found within the National Parks and the wilderness areas contiguous to the National Parks would be classified as trophy game animals. Wolves living outside of the National Parks and the contiguous wilderness areas would be classified as predatory animals subject to unregulated take. AR 197; AR 17781.

- The management plan provides that if the number of packs were to fall to or below seven (7) outside of the National Parks, this would "trigger" the Commission to promulgate a rule to classify the gray wolf as a trophy game animal in a larger area known as the Northwest Wyoming Data Analysis Unit

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[2] It should be noted that Wyoming was not singled out in this regard. The law in Montana and Idaho were also independently reviewed and continue to be monitored. See AR 15560 (noting that the FWS had written "a letter to Montana alerting them that pending changes in Montana State Law that where not present when Montana's wolf management plan was approved . . . would result in a mandatory re-evaluation of the approved status of their wolf plan").

[3] The Wyoming Game and Fish Commission is empowered with the authority to regulate the take of "trophy game animals," while it is proscribed from regulating the take of "predatory animals." See WYO. STAT. ANN. § 23-1-302 (a)(i) ("The commission is directed and empowered: *** To fix season and bag limits, open, shorten or close seasons on any species or sex of wildlife for any type of legal weapon, except predatory animals . . . .") (emphasis added).

(DAU).[4] AR 197.

- The Wyoming law requires that when there are 7 or more wolf packs in Wyoming primarily outside the National Park/wilderness areas or there are 15 or more wolf packs anywhere in Wyoming, all wolves in Wyoming outside of the National Park/wilderness areas shall be classified as a "predatory animal." AR 17781.

- The management plan calls for the application of the definition of a "pack" (i.e., 5 or more wolves traveling together) found in WYO. STAT. ANN. § 23-1-304(c). AR 209; AR 17781.

On January 13, 2004, Director Steven A. Williams identified several concerns that FWS had about portions of the management plan and Wyoming's state law and also provided recommendations to address those concerns. AR 505-07. Wyoming filed suit challenging the substance of the January 13, 2004 letter. Wyoming v. U.S. Dept. of Interior ("Wyoming I"), 360 F. Supp.2d 1214 (D.Wyo. 2005). This Court dismissed the case for want of jurisdiction and noted that plaintiffs had failed to avail themselves of the ESA's petition process. Id. at 1229. Plaintiffs appealed and the Tenth Circuit Court of Appeals affirmed the Court's dismissal order. State of Wyoming v. U.S. Dept. of Interior, 442 F.3d 1262 (10th Cir. 2006).

Recent Modification to Wyoming law and the Wyoming Management Plan

Despite Wyoming's steadfast commitment to litigating this matter, the FWS has continued to work with Wyoming in order to achieve the common goal of establishing an adequate regulatory framework for the management of wolves. To this end, on July 6, 2007, the FWS announced that it was reopening of the comment period for its proposal to delist the NRM DPS of gray wolf because Wyoming has passed a new statute regarding wolf management and has further advised the FWS that it is appropriate to analyze a new draft wolf management plan.

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[4] The Wolf DAU includes the National Parks (Absoroka-Beartooth, North Absoroka, Teton, Jedediah Smith, Winegar Hole, and Gros Ventre), wilderness areas contiguous to the National Parks, and 2,642 square miles of land in Wyoming surrounding the National Parks and wilderness areas. AR 197.

72 Fed. Reg, 36939 (July 6, 2007). The FWS believes that the new state law and management plan could allow the wolves in northwestern Wyoming outside the National Parks to be removed from the protections of the Act. Id. As explained in the Federal Register Notice, the revised Wyoming law and plan now provide for an expanded trophy game area; an area that would remain constant regardless of changes in the number of breeding pairs in the state. Id. In addition, the new Wyoming law and plan adopt the FWS's definition of breeding pair and eliminates the flawed definition of a "pack" found in the existing statute. Id. at 36940; 2007 WY H.B. 213. Thus, the FWS believes that "[w]hen effective, this law and wolf management plan would commit the State to maintain at least 15 breeding pairs in the northwestern portion of the State including the National Parks, with 7 of these breeding pairs occupying areas outside the National Parks [and] . . . would ensure that Wyoming's wolf population, including wolves in National Parks, never drops below 10 breeding pairs and 100 wolves." 72 Fed. Reg. at 36940. Although Federal Respondents believe that, in light of these recent events, it is a waste of judicial resources to proceed with this case, this action is not moot. Indeed, the modifications to Wyoming law were written in a way that prevents the law from taking effect until, among other things, "such time as all claims in U.S. District Court Docket No. 06CV-245J . . . have been resolved by a final order issued by the federal district court for the district of Wyoming and that order is no longer subject to potential or ongoing appeal to any federal appellate court with jurisdiction over the district court decision." See 2007 WY H.B. 213, W.S.1977 § 23-1-109.

STANDARD OF REVIEW

According to the Tenth Circuit, "in examining whether the [Fish and Wildlife] Service's actions violated the ESA, we rely on the standards of review provided in the APA." Biodiversity Legal Foundation v. Babbitt, 146 F.3d 1249, 1252 (10th Cir. 1998). In particular, "[u]nder the APA, administrative decisions involving the ESA are upheld unless they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' 5 U.S.C. § 706(2)(A), or if they are 'in excess of statutory . . . authority.' 5 U.S.C. § 706(2)(C)." Id.

Likewise, because NEPA does not create a private right of action, and the Court must review Petitioners' challenge under the arbitrary and capricious standard. Utah v. Babbitt, 137 F.3d 1193, 1203 (10th Cir. 1998). Or as the Tenth Circuit has stated in an earlier case, "the essential function of judicial review is a determination of (1) whether the agency acted within the scope of its authority, (2) whether the agency complied with prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious or an abuse of discretion." Olenhouse v. Commodity Credit Corporation, 42 F.3d 1560, 1574 (10th Cir. 1994).

The scope of review under the arbitrary and capricious standard is narrow, and a court is not to substitute its judgment for that of the agency. Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983). According to the Tenth Circuit, "[t]he duty of a court reviewing agency action under the 'arbitrary and capricious' standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made. . . . In reviewing the agency's explanation, the reviewing court must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment." Olenhouse, 42 F.3d at 1574 (citation omitted). More specifically, an agency action will be set aside "if the agency relied on factors which Congress has not intended for 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." Id. (citing Motor Vehicle Mfrs., 463 U.S. at 43).[5]

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[5] Wyoming mischaracterizes the applicable standard of review when it argues that the Service's 12-Month Finding is "unreasonable." Wyoming Opening Brief ("Wyo. Br.") at 18. The arbitrary and capricious -- rather than a "reasonableness" -- standard of review controls here. See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 375 (1989) (rejecting the argument that the reviewing court must make its own determination of reasonableness to ascertain whether the agency action complied with the law and making clear that arbitrary and capricious standard controlled); Village of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970, 972 (10th Cir. 1992) (same).

In an administrative record review case such as this, Petitioners bear the heavy burden of establishing that the Service's decision was entirely flawed, ran counter to the weight of the evidence in the record, or failed to take into account factors required by Congress. See, e.g., Colorado Environmental Coalition v. Dombeck, 185 F.3d 1162, 1167 (10th Cir. 1999). The court in Olenhouse pointed out that, "[i]f the agency has failed to provide a reasoned explanation for its action, or if limitations in the administrative record make it impossible to conclude the action was the product of reasoned decisionmaking, the reviewing court may supplement the record or remand the case to the agency for further proceedings." Olenhouse, 42 F.3d at 1575.

A deferential approach is particularly appropriate where, as here, the challenged decision implicates substantial agency expertise. "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." Marsh, 490 U.S. at 378. "Because analysis of the relevant documents 'requires a high level of technical expertise,' we must defer to 'the informed discretion of the responsible federal agencies.'" Id. at 377 (citing Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976)); see also Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination . . . a reviewing court must generally be at its most deferential."). Courts must defer to agencies "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." Marsh, 490 U.S. at 378.[6]

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[6] In its opening brief, Wyoming argues that the Service's determinations are not entitled to deference here. Wyo. Br. at 17. This is simply not the case. The FWS's determination on whether a species should be on the list of endangered species "presents exactly the type of informed agency discretion to which [a court] must defer" because it involves a "classic example of a factual dispute the resolution of which implicates substantial agency expertise." National Ass'n of Home Builders v. Norton, 340 F.3d 835, 843-844 (9th Cir. 2003) (quoting Mt. Graham Red Squirrel v. Espy, 986 F.2d 1568, 1576 (9th Cir. 2003)) (internal quotations omitted).

SUMMARY OF THE ARGUMENT

The Service's determination that the Wyoming Plan is not an adequate regulatory mechanism is rational, based on the best available scientific and commercial data, and is fully supported by the Administrative Record. First, the Service rationally concluded that Wyoming Plan fails to adequately manage human-caused mortality. Rather than addressing this threat, the Wyoming plan establishes a management system under which wolves could be taken in large portions of the state without limit or regulation. Because managing human-caused mortality remains the primary challenge to maintaining a recovered wolf population, a regulatory scheme -- like the Wyoming Plan -- that permits the unregulated taking of wolves in biologically significant areas cannot be deemed an adequate regulatory mechanism. Second, the strictures and inconsistencies found in Wyoming law and management plan prevent the Wyoming Commission from maintaining Wyoming's segment of the wolf population above the recovery levels and from maintaining an adequate distribution of the Wyoming segment of the NRM wolf population. If the current Wyoming Plan became the governing regulatory framework, Wyoming's share of the NRM wolf population, and thus the overall NRM wolf population, would likely once again become in danger of extinction throughout a significant portion of its range. Further, the Wolf Coalition's NEPA claim is barred by the doctrine of issue preclusion and, even assuming arguendo that it is not barred, the FWS was not under a duty to perform a NEPA analysis of the 12-Month Finding. Finally, Petitioners' claims regarding Wyoming's petition to modify the 10(j) rules are moot and, assuming the Court reaches the issue, any delay in finalizing a decision on the petition was not unreasonable.

ARGUMENT

I. The Service's denial of Wyoming's Petition was rational and based upon the best available scientific and commercial data.

The Service's position on the adequacy of the Wyoming Plan, as set forth in the 12-Month Finding, is rational and based upon the best available scientific and commercial data.

The Service's 12-Month Finding explains its decision, and the rationale supporting that decision, in great detail.[7] Although Petitioners may disagree with the Service's opinion of the Wyoming Plan, they have failed to demonstrate that the Service's position is arbitrary and capricious.

The Service went to great lengths to ensure that its evaluation of the Wyoming petition and the Wyoming Plan was based on the best scientific and commercial data available. To this end, the Service conducted a thorough review of the available data (including the peer review responses) and performed its own independent assessment of the state management plans. See, e.g., AR 342-348; AR 90166-71; AR 12959; AR 15543-71; AR 15661. The FWS Director reviewed the scientific evaluations of Wyoming's proposed regulatory framework, provided by the agency's own expert personnel, and reasonably concluded that the Wyoming management plan and law did not provide the Service with adequate assurances that the gray wolf would not once again become threatened or endangered. AR 17783. Specifically, the Service rationally concluded that Wyoming's management plan fails to adequately manage human-caused mortality. In addition, the Service determined that the strictures and inconsistencies found in Wyoming State law prevent Wyoming from maintaining its segment of the wolf population above the recovery levels or an adequate distribution of the Wyoming segment of the NRM wolf population. Id. Because the Service is operating within its area of scientific expertise, its determinations in regard to the adequacy of the Wyoming Plan are entitled to a high degree of deference. Baltimore Gas, 462 U.S. at 103 (deference is highest when the agency is "making predictions, within its area of special expertise, at the frontiers of science"); Environmental Defense Fund v. U.S. Nuclear Regulatory Commission, 902 F.2d 785, 789 (10th Cir. 1990) (where an agency is making "a technical judgment 'within its area of special expertise . . . a

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[7] Wyoming argues that the 12-Month Finding failed to explain the Service's conclusion and that it "falls far short of the quality necessary to be considered reasonable." Wyo. Br. at 18-21. However, as explained in detail below, the 12-Month-Finding is more than adequate. Indeed, even a cursory reading of the finding demonstrates that it offers a thorough explanation of the Service's decision to deny the petition.

reviewing court must generally be at its most deferential'").

In challenging the FWS's 12-Month Finding, Wyoming and Intervenor-Petitioners spend a great deal of time discussing statements made by FWS personnel (including statements found in informal email communications) which are allegedly inconsistent with the final decision document. See, e.g., Wyo. Br. at 37-39 (arguing that the 12 Month Finding "belies the prior statements of officials"); Wyo. Brief at 40 (arguing that a statement "contradicts the prior statements of officials"); Wyo. Br. at 41 (alleging that a "statement contradicts prior statements of officials"); Wolf Coalition Opening Brief ("Coalition Br.") at 20-23. For example, Wyoming points to statements made by Mr. Bangs concerning the "predatory animal" classification and the January 2004 letter from FWS concerning the Wyoming Plan and argues that they are inconsistent with the FWS's final explanation for its decision to deny Wyoming's petition as set forth in the 12-month finding. Wyo. Br. at 23-26 (arguing that the FWS ignored its own experts). This type of argument is based on a misunderstanding of proper scope of review in this case, which is an issue that was recently addressed by the United States Supreme Court in National Ass'n of Home Builders v. Defenders of Wildlife ("Defenders"), --- U.S. --- , 2007 WL 1801745 (June 25, 2007).

In Defenders, the lower court had found the Environmental Protection Agency's position to be arbitrary because of inconsistent statements made by subordinate EPA officials during the preliminary stages of the decisionmaking process. Id. at *9. The Supreme Court rejected this line of reasoning and held that "the fact that a preliminary determination by a local agency representative is later overruled at a higher level within the agency does not render the decisionmaking process arbitrary and capricious." Id. Accordingly, here, assuming for the sake of argument that there are inconsistent statements in the record, this fact would not render the FWS's ultimate decision, as set forth in the 12-Month Finding, arbitrary and capricious. Instead, the issue before the Court is whether the FWS's 12-Month Finding is itself rationally related to the facts -- the entire Administrative Record, not isolated statements taken out of context -- that

were before the agency.[8] When viewed in the proper context, it becomes clear that the FWS's denial of Wyoming's petition was perfectly rational and fully explained in the 12-Month Finding.

A. The Classification of Wolves as a Predatory Animal

The Service's primary concern with the Wyoming Plan was its classification of the gray wolf as a "predatory animal" subject to unregulated take in portions of the state outside the National Parks and contiguous wilderness areas. 71 Fed. Reg. at 43427-28, AR 17780-81. When wolves are classified as a "predatory animal" they "may be taken by anyone, anywhere in the predatory animal area, at any time, without limit, and by any means (including shoot-on-sight; baiting; possible limited use of poisons; bounties and wolf-killing contests; locating and killing pups in dens including use of explosives and gas cartridges; trapping; snaring; aerial gunning; and use of other mechanized vehicles to locate or chase wolves down)."[9] Id. at 43428, AR 17781. Unfortunately, wolves are very susceptible to this type of unregulated human-caused mortality. Id.; see also AR 15565-66 (explaining that "[w]olves are so suseptable to human-caused mortality that it needs to be regulated if wolf packs are to persist"); AR 15685 (same). Indeed, excessive human-caused mortality of this type is the primary reason that wolves were driven to the brink of extinction and required the ESA's protections in the first place. 71 Fed. Reg. at 43423; AR 17776. Accordingly, wolves are unlikely to persist in areas of Wyoming

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[8] As one of the many examples of the Petitioners taking isolated statements out of context, Wyoming cites to AR 15588 for the proposition that "Mr. Bangs has acknowledged that Mr. Williams ignored his advice." Setting aside the fact that this argument assumes the Court is reviewing the January 2004 Letter and not the 12-Month Finding, Federal Respondents simply urge the Court to read AR 15588 in its entirety (AR 15586-90). After a review of this four-page document, it becomes abundantly clear that Petitioners' assertion that this informal memorandum somehow supports their case is disingenuous.

[9] Park County misunderstands either the "predatory animal" designation or the FWS's current management actions (or both) when it argues that the current, highly-controlled wolf management protocols -- the 10(j) rules and the 1999 wolf control plan -- are equal to the management scheme proposed in Wyoming management plan. Park County Br. at 7-10.

where they are classified as a "predatory animal" and, therefore, subject to extensive human-caused mortality. Id. This conclusion is supported by the best available science and common sense. AR 15564-68.

Under the Wyoming Plan, wolves that are not classified as "predatory animals" are designated as "trophy game"; i.e., wolves within the National Parks and contiguous wilderness areas are "trophy game." In their briefs, Petitioners appear to argue that the designated "trophy game" area is adequate. However, any such argument is untenable. First, a large portion of the area permanently designated as "trophy game" actually has little or no value to wolf packs. 71 Fed. Reg. at 43427, AR 17780. For example, much of the wilderness area is "rarely used by wolves because of [its] high elevation, deep snow, and low ungulate productivity." Id. Second, many of the packs that inhabit areas designated as "trophy game" actually leave those areas during certain times of the year, thereby exposing themselves to unregulated taking. 71 Fed. Reg. at 43426, AR 17781. In particular, "many southern and eastern [Yellowstone National Park] packs leave the National Park/wilderness areas in winter and regularly utilize habitat on non-wilderness public lands and some private lands, these packs would be subject to unregulated and unlimited human-caused mortality to the extent wolves are classified as predatory in these lands." Id.[10] Thus, the FWS properly concluded that the "trophy game" area was inadequate and

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[10] This point is key and apparently lost on Petitioners. For example, the Wolf Coalition contends that the FWS's statement -- that the "core" recovery area is publically owned land -- proves that the "trophy game" area is adequate. Coalition Br. at 13-14; 17-18. However, even if a wolf pack's "core" range is within the "trophy game" area or that the Recovery Plan identifies portions of the "trophy game" area as containing "key habitat," if a pack nevertheless leaves that area during certain times of year thereby subjecting it to unregulated take, the usefulness of the "trophy game" area is compromised. AR 17781. Further, the Wolf Coalition's assertion that the FWS's finding that the wilderness area has little biological value is supported only by one hand-written note, Coalition Br. at 14, is belied by the evidence in the Administrative Record. See, e.g., AR 15648 (discussing the issue in detail); AR 90152 (same); AR 29; AR 460 (Dr. Kunkel's peer review assessment discussing the issue); AR 15561 (section titled: "Wolf packs rarely use GYA Wilderness").

a management system under which wolves can be killed in portions of the state outside the National Parks and contiguous wilderness areas without limit or regulation would not adequately ensure the wolf population's long-term health.[11]

The importance of healthy packs outside of the current "trophy game" area cannot be overemphasized. In 2005, this point was driven home by the fact that wolf packs outside of the National Park/wilderness areas contributed more to Wyoming's overall share of the recovered NRM wolf population than those wolves in Yellowstone National Park. 71 Fed. Reg. at 43428, AR 17781. This redistribution of wolf packs was due to a natural reduction of the Yellowstone wolf population. Id. If wolves outside of the National Parks/wilderness areas had been extirpated (which is a likely outcome if they would be designated as "predatory animals"), then the Wyoming portion of the NRM wolf population would have fallen below the breeding pair recovery level. Id. (noting that the population "would have fallen 3 breeding pairs below the 10 breeding pair recovery level in Wyoming by the end of 2005"); see also AR at 15562-63 (discussing 2005 decline); AR 15608 (same); AR 15681 (same).

Petitioners attempt to discount the importance of the 2005 decline in the Yellowstone wolf population by characterizing it as a isolated, single-year event. See, e.g., Coalition Br. at 33-34; Wyo. Br. at 33-34. However, with regard to this decline, the Yellowstone Wolf Project leader noted the following:

- "This population decline signals the end of the first phase of wolf restoration to

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[11/] Petitioners' argument that the FWS's has arbitrarily required Wyoming to adopt a statewide "trophy game" area is a red herring. See, e.g., Wyo. Br. 37-39. Although it is true that several pre-decisional commenters urged the adoption of a statewide "trophy game" designation, this was not the FWS's final position. see AR 90170 ("we do not believe that dual status in and of itself will preclude Wyoming from maintaining its share of a recovered wolf population"). Moreover, the 12-Month Finding did not conclude that a dual classification system would never be acceptable. In fact, the FWS has made the opposite clear -- with an expanded, permanent trophy game area that ensures that a recovered population will be maintained, a dual classification system may be acceptable. See 72 Fed. Reg, 36939.

YNP which can be characterized as rapid growth and likely the high population mark . . ."

- "We do not expect the population to reach this peak again, but we do expect it to rebound from this year's poor pup survival."

- "In the near future (~5 years) we expect the population to stabilize at a slightly higher level than 2005 (10-12 packs), but in the long term (~10 years) we expect a gradual decline to some lower, stable equilibrium point (6-10 packs) . . ."

AR at 10450 (Wolf Briefing End of Year 2005). Hence, the decline was not merely an isolated event; instead, it is a potential indicator of the long-term health and population size of wolves within Yellowstone National Park. It was therefore perfectly reasonable, and in no way arbitrary and capricious, for the FWS to consider the 2005 decline in the Yellowstone wolf population in evaluating the Wyoming Plan; to note that the peer reviewers did not have the benefit of this new information; and for the FWS to conclude that the decline weighed against approving the Wyoming Plan, which relies heavily on large population numbers in Yellowstone National Park.

B. Inconsistencies between the State Law and the Wyoming Plan

The Wyoming management plan and Wyoming law are in conflict or, at a minimum, very ambiguous regarding the number of packs that Wyoming is committed to maintain outside of the National Parks. As a result, the Wyoming management plan cannot be implemented. For example, the Wyoming management plan recognizes and provides for maintaining a minimum of 15 packs in Wyoming in total and a minimum of 7 packs outside of the National Parks, regardless of the number of packs found within the borders of the National Parks. AR 197; AR 298; AR 344; AR 17781. Wyoming law, however, does not allow for the fulfillment of the goal set forth in the Wyoming management plan. AR 17781. To the contrary, as explained below, Wyoming law can be reasonably interpreted as preventing the Commission and the Department from maintaining the goal of 7 or more packs outside of the National Parks by proscribing the reclassification of wolves from predatory animals to trophy game animals if there are more than

15 packs in Wyoming in total. AR 17781.

In 2003, the Wyoming Legislature enacted a statute governing the management of gray wolves in Wyoming upon delisting. The statute is codified as WYO. STAT. ANN. § 23-1-304 and creates a dual classification system for the wolf by providing that wolves would be classified as "trophy game animals" in the National Parks and the federally designated wilderness areas contiguous to the National Parks and classified as "predatory animals" throughout the remainder of the state. § 23-1-101(b)(ii). In addition, § 23-1-304 (c) defined the term "pack" as five or more gray wolves traveling together. The statute also granted the Wyoming Game and Fish Commission[12] the authority to reclassify the gray wolves outside the National Parks and wilderness areas from predatory animals to trophy game animals when there are less than 7 packs outside of the National Parks and less than 15 packs in the entire state, § 23-1-304 (b)(i). Another provision of the statute requires the Commission to maintain the wolf's predatory animal classification outside of the National Parks as long as there are "at least seven (7) packs of gray wolves . . . primarily outside of [the National Parks] . . . or at least fifteen (15) packs within this state, including [the National Parks] . . . ." § 23-1-304(b)(ii) (emphasis added). Thus, a situation could arise where there are less than 7 packs outside of the National Parks, but because the total number of packs -- including the packs inside the parks -- were at least 15, the Commission would be required to maintain the predatory animal classification. Id.; AR 17782. In fact, if there were 7 packs outside of the National Parks, the Commission would be required to maintain the predatory animal classification even if there were no packs within the parks. Id.

In recognition of the conflict between the goals of the management plan and the plain language of § 23-1-304, the Director of the Wyoming Game and Fish Department requested a legal opinion from the Wyoming Office of the Attorney General in order to clarify the

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[12/] The Commission serves as the policy making board of the Wyoming Game and Fish Department and is responsible for the direction and supervision of the Director of the Wyoming Game and Fish Department. See WYO. STAT. ANN. §§ 23-1-301-303; 23-1-401.

circumstances under which the Commission would be required to classify the gray wolves as predatory animals. AR 295-98; AR 17782. In responding to this request, the Office of the Attorney General acknowledged that "the plain language of the [statute] is in conflict and thus suffers from internal ambiguity." Id. The Office of the Attorney General identified the following two scenarios under which the stated goal of the state management plan could not be met:

> Scenario #1: 10 packs inside the Parks & 5 packs outside the Parks. Classify as a predatory animal because at least 15 packs in the state. *This scenario leaves less than 7 packs outside of the Parks.*
>
> Scenario #2: 3 packs inside the Parks & 10 packs outside the Parks. Classify as a predatory animal because at least 7 packs outside the Parks. *This scenario leaves less than 15 packs total in the state.*
>
> These scenarios defeat the clearly identified legislative goals of maintenance of fifteen (15) packs in the state and maintenance of seven (7) packs outside the Parks.
>
> Moreover, given the publicly stated position of the federal Fish and Wildlife Service regarding the requirements for delisting, either or both of these scenarios could well defeat the overarching goal of the act - to achieve and maintain delisting of the gray wolf. . . . The position of the Service appears to be that *both* the goal of fifteen (15) packs within the state as a whole, *and* seven (7) packs outside of the Parks will be simultaneously required for delisting. Management for these numbers then is what is required to achieve and maintain delisting, the overarching goal of the act.

AR at 297 (emphasis in the original); AR 17782. Despite these findings, the Office of the Attorney General concluded that the language of § 23-1-304, when read in light of the purposes stated by the Wyoming Legislature (to "provide appropriate state management and control of gray wolves in order to facilitate the removal of the gray wolf from its listing" AR 296), authorized the Department of Game and Fish "to prepare a management plan that will satisfy the requirements of the Service." AR 298; AR 17782. The opinion letter, however, acknowledged the existence of an "alternative interpretation" based on a more restrictive reading of the

statutory language, that would defeat the Department's ability to satisfy the requirements outlined by the Service and established by the ESA. Id.

As the foregoing clearly demonstrates, Wyoming law can be rationally interpreted as preventing the Commission and the Department from maintaining the goal of 7 or more packs outside of the National Parks by proscribing the reclassification of wolves from predatory animals to trophy game animals if there are more than 15 packs in Wyoming in total. As the Wyoming Office of the Attorney General explained, based on a plain reading of the WYO. STAT. ANN. § 23-1-304, a scenario could unfold in which there are fewer than 7 packs outside of the National Parks, but the Commission would be prevented by law from converting wolves outside the parks from predatory animal classification to trophy game status. AR 297; AR 90169; AR 17781. In other words, even though there would be less than 7 packs outside of the National Parks, the Commission could be unable to stop the unregulated take of wolves, depending upon the interpretation of § 23-1-304. Similarly, based on a plain reading of Wyoming law, maintaining only 7 packs outside of the park -- even if there were no wolf packs within the parks -- would preclude the Commission from classifying the wolf as a trophy game animal. See WYO. STAT. ANN. § 23-1-304(b)(ii); AR 17781. Thus, under state law, it is unclear whether the terms of the Wyoming management plan could in fact be implemented. AR 17781; AR 15555-58; AR 15676. The ambiguity of the statutory framework authorizing the Wyoming management plan fails to ensure that an adequate regulatory mechanism would be in place should the wolf be delisted. AR 17781; AR 15555-58; AR 15676-79. Consequently, the FWS correctly concluded that, read together, the Wyoming management plan and state law did not ensure the long-term conservation of the gray wolf at or above recovery levels.[13]

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[13] In addition to apparent conflict between the state law and the Wyoming Plan, the FWS noted the additional concerns of establishing an unpredictable and confusing regulatory framework that will be difficult to administer. AR 17781. For example, the Wyoming Plan allows for the temporary expansion of the "trophy game" area, but only while the wolf population remains below minimum levels. Id. The flipping back and forth between "predatory animal" and "trophy

In response to the FWS's conclusions regarding the inconsistencies between Wyoming law and the plan, Petitioners argue that the FWS's considered impermissible factors in evaluating Wyoming's proposed regulatory framework and further argue that the Wyoming Attorney General's opinion letter is the ultimate authority on whether the law and plan are consistent. Wyo. Br. at 32-33, 39-41, 44; Coalition Br. 31-33; Park County 13-14. None of these arguments have merit. First, the FWS did not err in evaluating both the state law and the post delisting plan. Nor did the FWS improperly consider "public relations" or "litigation risks" in reviewing the adequacy of the regulatory mechanism. Second, the FWS has an independent duty under the ESA to review the entire regulatory framework and to exercise institutionalized caution in evaluating the adequacy of the regulatory regime.

The ESA mandates that determinations regarding the listing, delisting, or reclassification of a species be made "solely on the basis of the best scientific and commercial data available to him [or her] after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State . . . to protect such species." 16 U.S.C. § 1533(b)(1)(A) (emphasis added). Here, Petitioners take too narrow a view of the "best available science" requirement, and read out the requirement that the FWS take into account efforts being made by a state, when they argue that the Service may only consider factors that relate purely to the biological status of the gray wolf. The ESA listing/delisting factor at issue here -- the adequacy of existing regulatory mechanisms -- must include an analysis of a state's entire regulatory framework. 16 U.S.C. § 1533(a)(1)(D), (b)(1)(A). To prohibit the FWS from considering the applicable law in deciding whether adequate regulatory measures are in place would undermine purpose of this listing factor, contravene the plain language of the ESA requiring the FWS to consider a state's efforts, and defy all common sense. The ESA's

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game" status would likely cause widespread public confusion over the status gray wolves and create a regulatory scheme that is difficult to enforce. AR 17781; AR 15568; AR 15687.

overarching mandate to make determinations based solely on the basis of the best scientific and commercial data does not prevent the Service from considering how legal factors may have a biological effect.[14]

With respect to Petitioners' arguments regarding the FWS' alleged reliance on impermissible factors, the Fund for Animals v. Babbitt decision is particularly instructive. 903 F. Supp. 96 (D.D.C. 1995). In Fund for Animals, the court addressed the issue of whether ESA listing factors require the FWS to consider the social consequences of a decision despite the directive that the FWS base its determinations solely on the basis of the best scientific and commercial data. 903 F. Supp. at 110 n.4. The Fund for Animals Court first noted that the FWS included language in the decision document which stated that it was "sensitive to the social concerns of people living in [grizzly ecosystems]" and a FWS official stated that criticisms of the plan were "politically naive." Id. The Court then concluded that "[t]he ESA's listing and delisting factors include considerations of manmade factors affecting the species' continued existence and overutilization of grizzly bears" and held that this listing factor showed that human factors have biological consequences for species which are relevant and valid considerations. Id. Similarly, here, in addressing the "adequate regulatory mechanisms" listing factor, the Service must analyze the biological effects of the legal framework at issue -- the Wyoming management plan and law -- in order to determine whether they assure the Service that the species will not become endangered or threatened in the foreseeable future.

Here, Petitioners point to statements made by Mr. Bangs, including e-mail

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[14] In a similar, but equally flawed, line of argument, Petitioners assert that the FWS erred in considering litigation risks when evaluating the Wyoming Plan. See Wyo. Br. at 44-45. However, to say that the FWS is concerned about legal challenges and whether its determination will withstand judicial scrutiny is to say that the FWS wants its decisions to comply with the ESA. In other words, the litigation risk at issue with respect to the adequacy of state management plans is the risk that a court will find that the Wyoming Plan does not provide an adequate regulatory mechanism to ensure that the wolf will remain at or above recovery levels. Naturally, it was appropriate for the FWS to consider this point.

correspondence and a July 2003 letter (written before the receipt of the 2005 petition), as proof that the FWS rejected the Wyoming Plan based upon impermissible political/public relations considerations. Wyo. Br. at 43. In his July 2003 letter, Mr. Bangs did note that the classification of wolves as "predatory animals" would "make the whole delisting process much more contentious, emotional, expensive, and filled with hurtful rhetoric." AR 347. Mr. Bangs went on to say, however, that "[i]f wolves were listed as trophy game statewide, the Wyoming Game and Fish Department's authority would be clear and their flexibility to utilize regulated public hunting to minimize conflicts would be greatly increased. [In addition] [t]he controversial "trigger" issue would be resolved." Id. The FWS has repeatedly emphasized the biological need for the Department to have a high degree of flexibility in managing wolves. See, e.g., AR 29; AR 242; AR 254; AR 347; AR 466. Additionally, the public perception of the "predatory animal" designation -- especially when that designation endorses the unfettered elimination of the wolf -- will have very real biological effects that the FWS must consider. AR 15564-68; AR 15683-84. Although Mr. Bangs personally may believe that the "predatory status" designation would make delisting more difficult from a public relations standpoint, that was not the basis of his recommendation to the Director to deny Wyoming's petition to delist. AR 15543-71. Further, the 12-Month Finding did not rely on "public relations" as a reason for denying Wyoming's delisting petition. Even if it had, because the FWS provided a plethora of valid criticisms, any such statement would be harmless error. Defenders, at *9.[15]

Finally, although Federal Respondents are aware of no cases that address the factual scenario presented here, an analogous line of cases that addresses the Service's use of state conservation agreements in deciding not to list species as endangered or threatened is instructive.

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[15] Similarly, even assuming for the sake of argument that one of many independent rationales for denying Wyoming's petition were deemed arbitrary and capricious or contrary to law, any such error would be harmless in light of the remaining justifications supporting the denial. See Defenders, at *9 (holding that stray statements in a Federal Register Notice are subject to the harmless error rule).

With few exceptions, courts have held that the Secretary may not rely on ambiguous commitments to future conservation measures in deciding not to list a species under ESA §4(a)(1), 16 U.S.C. §1533(a)(1), because "the ESA cannot be administered on the basis of speculation or surmise." Federation of Fly Fishers v. Daley, 131 F. Supp.2d 1158, 1165 (N.D. Cal. 2000) (holding decision not to list steelhead was arbitrary and capricious because it relied on speculative future actions to be taken under state conservation agreements); see also Friends of the Wild Swan, Inc. v. Fish & Wildlife Service, 945 F. Supp. 1388 (D. Or. 1996) (holding FWS cannot rely upon speculation as to effects of another agency's management plans). Courts have similarly precluded reliance on voluntary or unenforceable measures because "[a]bsent some method of enforcing compliance, protection of a species can never be assured." Oregon Natural Resources Council v. Daley, 6 F. Supp. 2d 1139, 1155 (D. Or. 1998).

In this case, Wyoming has promulgated a law that is internally inconsistent, is inconsistent with its wolf management plan, and does not, on its face, appear to provide for maintenance of the minimum number of breeding pairs that the FWS has deemed necessary for the long-term viability of the gray wolf. Petitioners have argued that the Wyoming Attorney General should be the final arbiter of whether the state law provides the necessary authority for the Wyoming Department of Game and Fish to carry out the provisions of the Wyoming management plan. The ESA, however, does not place final responsibility for gray wolf recovery and delisting in Wyoming's hands. That is the FWS's responsibility. 16 U.S.C. § 1533(b)(1)(A). The Wyoming Attorney General's opinion notwithstanding, the FWS cannot rely on speculation and surmise when the plain language of Wyoming's authorizing statute counsels an ambiguous, if not contrary, reading of the law.

C. The Flawed Definition of a Pack

In addition to flaws in the Wyoming Plan and law discussed above, the Service determined that the Wyoming Plan failed to adequately ensure the Wyoming's segment of the wolf population would remain at recovery levels because it utilizes a definition of a pack that has

little biological relationship to wolf recovery goals or population viability. The Wyoming Plan adopts the statutorily created definition of a pack -- "five (5) or more gray wolves traveling together." AR 209; AR 17781-82. As explained below, this definition is incomplete and its utilization would allow Wyoming to manage for less than its share of the recovered wolf population.

The argument over whether Wyoming has properly defined a "pack" in a way that can serve as a surrogate for counting a "breeding pair" after delisting is not simply a war of words; instead, it is a key component of the existing and future regulatory framework because the Service measures wolf recovery (i.e., whether wolves are recovered and whether they are maintaining their recovered status) by determining the number of "breeding pairs" that are present in a particular population. Thus, the utilization of a proper metric for making this determination is vital. 71 Fed. Reg. 43412, AR 17765. A "breeding pair" is defined as "[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." Id. at 43428, AR 17781. The Service has recognized that pack size in winter can be used to reliably identify breeding pairs because most wolf mortality occurs in the spring, summer, and fall and winter is the beginning of the annual courtship and breeding seasons for wolves. Id. at 43412, AR 17765. Wyoming law, however, defines a pack as simply 5 wolves traveling together regardless of the group's composition or the time of year; wolves in this "pack" could be with or without offspring and could be traveling together at any time of the year. Id. at 43428, AR 17781. This could, for example, lead to a situation in which 1 adult and 4 pups traveling together in the spring were counted as a "pack." AR 345; AR 90168-69; see also AR 15563; AR 17781-82. Moreover, the most recent information shows that "[t]he probability of a pack of wolves having a 90% chance of being a breeding pair doesn't occur until there are at least 9 wolves in a pack in winter." AR 17765. Accordingly, Wyoming's definition of a "pack" -- 5 of more wolves traveling together at any time -- cannot form the basis of an adequate state management plan.

Petitioners attack the FWS's conclusions with regard to pack size by arguing that the FWS erred in relying on its method of defining a pack rather than the "linear" method utilized by Wyoming in its petition to delist and the FWS failed to satisfactorily explain its decision in violation of the APA. Wyo Br. at 18-19; Coaltion Br. at 37-40. Petitioners' arguments fail because the FWS fully explained its methodology, see AR 17765; AR 17769; AR 1782, and Petitioners' analysis of the issue is flawed. In this regard, the Wolf Coalitions spends a great deal of time testifying about (i.e., making factual assertions and conclusions without citations to the record or other authority) and discussing the method for defining a "pack" set forth in the Wyoming petition. Coalition at 37-40. Their analysis, however, is untenable. The Administrative Record demonstrates that the issue of pack size and how it relates to an actual breeding pair was the subject of much debate and deliberation by experts in the field of wolf biology. See, e.g., AR 14301; AR 14313; AR 17769. In fact, the issue was investigated by an interagency working group, which met in May and June of 2006 and included members of the FWS, National Park Service, the Nez Perce Tribe, and various state agencies (including the Wyoming Game and Fish Department). AR 14301; AR 14313; AR 17769. At the first meeting, Mike Mitchell, Ph.D., University of Montana, and Carolyn Sime, Montana Statewide Wolf Coordinator, reported on this very issue: "Mitchell and Carolyn showed that using a linear regression to compare the # of packs of 4 or more wolves to the # of breeding pairs is not valid because the relationship is not linear . . . it is a logistic relations." AR 14305. As the graph at AR 14306 shows, the relationship between pack size and its chance of containing a breeding pair is not a straight line relationship. Thus, the FWS correctly "recognized that the relationship between wolf pack size in winter and breeding pairs was not a linear regression as argued in the Wyoming Petition." AR 17782. Subsequently, at the June meeting, Mr. Ausband made a presentation that further clarified that the number of delisted breeding pairs could not be determined based solely on six or more wolves in mid-winter standard (as the FWS had previously believed). AR 14313; AR 17782; AR 14323 (demonstrating that the linear regression

methodology overestimated the number of breeding pair compared to the logistic relationship). The tables supporting Mr. Ausband's presentation showed that 10 groups of 5 wolves traveling together in winter would only be the equivalent of approximately 5.6 breeding pairs. AR 14322; AR 17765. Hence, based on the totality of the information, the FWS rationally concluded that the Wyoming definition of a pack -- 5 wolves traveling together at any time -- would not allow the State to ensure that it was maintaining a recovered population.

At best, Petitioners attempt to show that the Wyoming's definition of pack and the data supporting that definition are "just as good as" as any other methodology. The Wolf Coalition's conclusion to its discussion of the "pack" issue shows that this is, in fact, their argument. Specifically, the Wolf Coalitions asserts that "[t]hus the fundamental question is whether the assumptions inherent in the Wyoming analysis are reasonable given the purposes of the analysis, and whether the results can be reasonably applied in the future." Coalition Br. 40 (emphasis in the original). This is not the case. With regard to properly defining a "pack", the question here is whether the FWS's rejection of Wyoming's definition was arbitrary and capricious; if it was not, then the Court must affirm the administrative decision. The issue is the not whether other "reasonable" alternatives existed.[16]

The burden is not on the FWS to demonstrate why a specific study or piece of information is unequivocally the "best" information available. Building Industry Ass'n of Superior California v. Norton, 247 F.3d 1241, 1246 (D.C. Cir. 2001) ("Assuming that studies the Service relied on were imperfect, that alone is insufficient to undermine those authorities' status

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[16] Similarly, Wyoming challenges the work of Mr. Ausband, which showed that packs of the same size in Idaho and Wyoming, had different probabilities of containing a breeding pair. Specifically, Wyoming argues that "[t]here is no logical reason for this difference between Idaho wolves and Wyoming wolves, and neither Mr. Ausband nor the Service has explained why there is a difference." Wyo. Br. at 19. However, in the 12-Month Finding, the FWS made clear that "[d]ifferent habitat characteristics result in slightly different probabilities of breeding pair status in each state." 71 Fed. Reg. 43412, AR 17765. Thus, to argue, as Wyoming has, that the FWS failed to explain the difference is inaccurate.

as the "best scientific ... data available."); Center For Biological Diversity v. Norton, 411 F.Supp. 2d 1271, 1276 n.6 (D.N.M. 2005) (noting that "[t]he best available data standard requires far less than conclusive evidence") (internal quotations omitted). Similarly, the fact that a reasonable argument can be made for the adoption of more than one decision is not controlling. See Marsh, 490 U.S. at 378 ("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."). Instead, the record must reflect that the FWS considered the available scientific information and made a rational decision. See Bldg. Indus. Ass'n v. Babbitt, 979 F. Supp. 893, 903 (D.D.C. 1997) (upholding listing determination where "plaintiffs have pointed to no data that was omitted from consideration."); Nat'l Fisheries Inst. v. Mosbacher, 732 F. Supp. 210, 227 (D.D.C. 1990) (that the administrative record reflects a certain amount of disagreement is "inevitable and indicates that the debate was as open and vigorous as Congress intended."). Here, the FWS considered the best available information and fully explained why Wyoming's definition of a pack was biologically inadequate. AR 17765; AR 17781-82.

D. The FWS properly considered the peer reviewers' evaluation of the Wyoming Plan.

Petitioners argue that the FWS arbitrarily rejected the findings of the peer reviewers and that the opinions of the peer reviewer, and those opinions alone, were the best available scientific information available. Neither contention is accurate. As an initial matter, the FWS properly considered the peer reviewers' analysis of the Idaho, Montana, and Wyoming state plans in making its 12-Month Finding. AR 17768. Although it is true that the majority of peer reviewers determined that the three state plans taken together would be adequate, see AR 17768, several of the peer reviewers criticized the Wyoming Management Plan and, as explained below, they did not review the Wyoming law. In addition, the FWS determined that conditions had changed since the peer reviewers had reviewed the three state plans, and that the present conditions

prohibited the FWS from approving the Wyoming Plan. See AR 17768-69. Finally, the mere fact that a majority of the peer reviewers approved the three plans is not controlling. The FWS has the prerogative as the expert agency charged with implementing the ESA to review the peer reviewers comments; to conduct its own expert evaluation; and to then reach a conclusion that is not the "majority" opinion.

With regard to the peer reviewers' opinions, no less than 4 of the 11 peer reviewers who returned comments to the Service expressed concerns over the classification of wolves outside of the National Parks and wilderness areas as a "predatory animal." For example, Kryan Kunkel, Ph.D., Montana State University, stated the following:

> Management as directed by the Wyoming Plan may not achieve their objective of 15 packs especially initially given that all wolf packs outside national parks and wilderness areas in the northwest portion of the state will initially be classed as predators. This problem is indicated in the statement on p. 18 that '90% of the home range area of wolf packs outside the National Parks and Parkway in Wyoming are outside of these designated trophy game wilderness areas.' As indicated in the plan, initially, wolves would only be classified as trophy within the wilderness areas and as predators outside those areas, and thus right at the onset of enactment of the plan within 90% of areas occupied by wolves today, wolves would be classed as predatory and would be subject to unregulated take. We must assume conservatively that many of these wolves would be killed (and some packs eliminated) since unregulated take is sanctioned, and that could then immediately result in a drop in wolf packs below the 7 pack threshold (since as indicated above, 90% of area used by the 8 packs currently outside the national parks is outside the wilderness areas and thus they are all subject to unregulated take as predators) dictated in the plan.

AR 460, AR 13632. Similarly, Daniel H. Pletscher, Professor, University of Montana, raised the following concerns:

> My second concern has to do with the State of Wyoming managing wolves as a predatory animal elsewhere in the state. . . . Management as a game species allows managers to close seasons when populations are low and the objective is to increase numbers, or liberalize seasons when populations are high and the objective is to decrease numbers. Management as a predatory animal allows little flexibility. This probably won't make a difference in maintaining the desired number of wolf packs in Wyoming given the current high density of prey, but times change. The wolf is a species that will require

> considerable flexibility. Game animal status over a broader area would provide more flexibility.

AR 466, AR 13643. (emphasis added and deleted).

In discussing the weaknesses of the Wyoming Plan, Adrian P. Wydeven, Mammalian Ecologist and Wolf Biologist, Wisconsin Department of Natural Resources, observed that:

> [i]t appears the predatory status would allow anyone to shoot wolves anytime anywhere in the state outside the small area of trophy status in the northwest corner of the state. This seems like 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 conservation of wolves.

AR 476, AR 13615. Likewise, James Hammill, President, Iron Range Consulting & Services, Inc., noted that "Wyoming's Plan exposes wolves in Wyoming to risk of catastrophic loss outside of National Parks and Parkway." AR 478, AR 13656.

Further, as explained in the 12-Month Finding, the peer reviewers' analysis, which was conducted in 2003, is premised on a set of factual circumstances that have since changed. AR 17768. First, the peer reviewers who reviewed the three state plans believed that the Wyoming Plan was adequate primarily relied on a belief that the wolf population in Yellowstone National Park would carry most of Wyoming's share of the NRM population. AR 17768-69. However, this assumption is no longer valid in light of the fact that the wolf population in Yellowstone declined rapidly and dramatically by the spring of 2005. See AR 17768-69; AR 10450; AR 15608; AR 15651. Further, the peer reviewers were largely unaware of the possible conflict between Wyoming law and the Wyoming Plan that called into question whether the Wyoming Plan could actually be implemented as written.[17] AR 17768-69. Finally, the peer reviewers did not consider recent Federal court rulings on the FWS's attempt to reclassify the gray wolf and,

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[17] The one peer reviewer that did allude to Wyoming law stated the following: "some news reports have indicated that Wyoming's plan conflicts with Wyoming's law. If so, obviously, such a problem must also be solved before one could have faith that the Wyoming plan could be put into effect." AR 13608 (comments of L. David Mech).

more specifically, the courts' direction to the FWS to consider whether the wolf population has recovered in portions of its historical range that still contain suitable habit. AR 17769.

Petitioners' challenge to the FWS's conclusions, particularly those regarding the predatory animal classification, rests primarily on the fact that the majority of peer reviewers believed that the Wyoming Plan, considered alongside Idaho and Montana's management plans, would be adequate.[18] The FWS, however, is simply not required to adopt the more popular view. Specifically, with regard to whether peer review was the best available science, Wyoming is incorrect in asserting that "the peer review findings necessarily must be the best scientific information available regarding the biological soundness of the three state management plans." Wyo. Br. at 28. Similarly, Wolf Coalition mistakenly argues that the FWS "ignored" the peer reviews and "produced no contrary 'science' or 'biology' to support their 12-Month Finding." Wolf Coalition Br. at 43. Here, in addition to the peer reviews, the Service conducted its own evaluation of the Wyoming Plan. The peer reviewers findings combined with the FWS's own analysis constituted the best available science and the FWS thoroughly considered (rather than ignored) the peer review analysis of the Wyoming Plan and explained why it was not controlling in the 12-Month Finding. AR 17768-69. Moreover, because new information had come to light (e.g., the population decline in Yellowstone), it would have violated the ESA's requirement to consider the best available science, to rely solely on the peer reviewers' assessments. See Conner v. Burford, 848 F.2d 1441, 1454 (9th Cir. 1988) (holding that the FWS cannot ignore presently available biological information under the ESA's best available science mandate).

Additionally, because the FWS is operating within its congressionally mandated area of expertise, it is permitted to choose among competing scientific opinions. Marsh, 490 U.S. at 378

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[18] The peer reviewers who determined that the three state management plans were adequate to ensure the wolf's long-term health relied heavily on the relative strength of the Idaho and, in particular, the Montana plan. AR 90168 (noting "that 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 . . . .") (emphasis in original).

("[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."); Public Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1505 (D.C. Cir. 1986) ("[A]s long as Congress delegates power to an agency to regulate on the borders of the unknown, courts cannot interfere with reasonable interpretations of equivocal evidence."). So long as the agency considers all the relevant factors and articulates a rational relationship between the facts found and the choice made, its decision is not arbitrary and capricious. State of La. ex rel. Guste v. Verity, 853 F.2d 322, 327 (5th Cir. 1988). Petitioners' disagreement with the Service's ultimate findings or its decision not to follow the majority of the peer reviewers does not render the Service's decisions arbitrary and capricious. Id. at 329 ("[W]here, as here, the agency presents scientifically respectable conclusions which appellants are able to dispute with rival evidence of presumably equal dignity, we will not displace the administrative choice. Nor will we remand the matter to the agency in order that the discrepant conclusions be reconciled.").[19]

Here, the FWS's conclusions regarding the classification of the wolf as a "predatory animal" are rational and supported by at least 4 of the peer reviewers and the FWS' own evaluation of the biological consequences of the Wyoming Plan. The position articulated in the FWS's 12-Month Finding is reasonably related to the facts that were before the agency and is a prime example of a determination that is entitled to considerable deference because it represents an expert agency's decision within its congressionally mandated area of expertise.

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[19] Petitioners also contend that the FWS failed to abide by its 1994 Peer Review Policy. Wyo. Br. at 36. This argument fails as a matter of law. Agency policy statements, such as the peer review policy, do not have the force of law and cannot be judicially enforced. The FWS is therefore not bound by the published policy guidance on peer review. Building Industry Ass'n of Superior California v. Babbitt, 979 F.Supp. at 905 (holding that the 1994 Peer Review Policy is non-binding and unenforceable against the FWS).

E. The Service did not improperly prejudge or otherwise predetermine the outcome of its decision-making process.

Wyoming argues that the FWS prejudged its decision to deny Wyoming's petition to delist. Wyo. Br. at 21-23. This claim is without merit. Although it is true that the FWS has consistently expressed concerns about the adequacy of the Wyoming law and plan, it did not predetermine that it would deny Wyoming's petition. Because the FWS's official statements were clear on this point, Wyoming cites to email correspondence that stated that the FWS's response to Wyoming's petition would "kick off the next round of litigation" as supposed proof that the FWS had prejudged its petition. Wyo. Br. at 22. However, Wyoming quotes from only a portion of the email because, as the following demonstrates, the remainder makes clear that the facts were not prejudged:

> I haven't looked through the comments on the ANOPR yet or started any kind of serious look at the WY petition. But since we know that our response will kick off the next round of litigation by WY [the WY comments were certainly designed with that in mind], I think we look at our response to the petition as preparation for the next round of litigation. The petition response should be our chance to strenghten [sic] and solidify the admin record no matter what the outcome- as litigation from one side or the other is certain.

AR 11509 (emphasis added to portion omitted from Wyoming's brief). It is clear that, when the entire passage is read, that the issue was not prejudged and that litigation was anticipated from one side or the other "no matter what the outcome."

Further, Wyoming contends that the FWS's refusal to abandon the criticisms of the Wyoming Plan as set forth in the January 2004 letter and in other informal documents somehow proves that the FWS prejudged the petition to delist. Hence, in Wyoming's view, the FWS should have kept its concerns about the adequacy of the Wyoming Plan to itself until it actually rejected Wyoming's petition to delist. The law does not require this, nor should it. See e.g., Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1070, 1073-75 (9th Cir. 1996) (characterizing the FWS's informal advice on complying with the ESA as "desirable communication" that should

not be "stifled"). The FWS's concerns and criticism as set forth in January 2004 have largely proven to be correct; this fact does not render the reasoning arbitrary and capricious. Indeed, even assuming for the sake of argument that the FWS did prejudge the Wyoming Plan, its decision may be entitled to less deference but is not per se unlawful. See Davis v. Mineta, 302 F.3d 1104, 1112 (10th Cir. 2002) (holding that a prejudged conclusion diminishes the deference owed to the challenged decision).

II. The Court lacks jurisdiction over Wolf Coalition's NEPA Claim.

The Court should dismiss the State's and the Wolf Coalition's NEPA claims for lack of jurisdiction and because they are barred by the doctrine of issue preclusion. Paragraph 8 of the State's Petition for review of agency action alleges that the FWS violated NEPA by "expand[ing] the recovery area for wolves beyond the boundaries identified in the 1994 EIS." State Petition at ¶ 8. The State claims that FWS was required to prepare "a supplemental environmental impact statement ("SEIS") to address the impacts of the larger than expected wolf population or the impacts of the larger than anticipated recovery area." Id. In its motion to intervene, the Wolf Coalition states that it decided to intervene "to address the issues raised by the State of Wyoming" and to provide additional information as to how the supposed NEPA violations affect its members. Plfs. Mot. to Intervene at 6. In its opening brief, the Wolf Coalition states that an SEIS is necessary to evaluate the FWS' supposed demand that the State "protect a substantially higher number of wolves in a substantially expanded 'recovery area.'" Coalition Br. at 47.

This Court already addressed these arguments in its 2005 decision, Wyoming v. U.S. Dept. of the Interior, 360 F. Supp.2d 1214 (D. Wyo. 2005). Likely realizing the futility of raising this argument for the second time, the State has abandoned its NEPA argument. Inexplicably, the Wolf Coalition fails even to mention Wyoming I, which bars its claim. In Wyoming I this Court considered the Wolf Coalition's claim that the FWS was demanding that the State of Wyoming develop a plan to protect the gray wolf population outside the Yellowstone Recovery Area. Id. at 1236. The Court rejected the Wolf Coalition's attempt "to manipulate the

actions of the Federal Defendants into a NEPA claim. The only action taken by the Federal Defendants was to inform the State of Wyoming that the Wyoming Plan was insufficient, in their opinion, to sustain the recovered gray wolf population." Id. The court concluded that such an action was not major federal action as contemplated by NEPA. Id. at 1237. Finally, the Court found that the Supreme Court's decision in Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004) compelled the conclusion that once the plan reintroducing the wolves had been implemented, there was no remaining federal action and "the need for supplementation was at an end." Id. at 1238.

The doctrine of issue preclusion, or collateral estoppel, "bars a party from relitigating an issue once it has suffered an adverse determination on the issue, even if the issue arises when the party is pursuing or defending against a different claim." Park Lake Resources Ltd. Liability Co. v. United States Department of Agriculture, 378 F.3d 1132, 1136 (10th Cir. 2004). Issue preclusion applies when (1) the issues in both actions are identical; (2) the prior action was finally adjudicated on the merits; (3) the party against whom the doctrine is invoked was a party in the prior action and (4) the party had a "full and fair opportunity to litigate the issue in the prior action." Id. With regard to the second factor, there is an "important exception" in cases where the action is dismissed for lack of jurisdiction that "'preclude[s] relitigation of the issues determined in ruling on the jurisdiction question.'" Id., quoting Matosantos Comm. Corp. v. Applebee's Int'l Inc., 245 F.3d 1203, 1209 (10th Cir. 2001). Because the issues and parties are identical, and the Wolf Coalition had a full and fair opportunity to litigate this issue in Wyoming I, the Court should decline to rehear the Wolf Coalition's claim that the FWS violated NEPA.

The Wolf Coalition apparently seeks to avoid the preclusive effect of Wyoming I by casting its claim as a challenge to the FWS' decision on the petition to delist, but this argument fares no better. The record shows that their claim is identical to the issues they argued in the first wolf case. For example, in their 2005 reply brief, arguing that the FWS was required to prepare an SEIS, the Wolf Coalition argued

> The purpose of the FEIS was to determine the impact on the human environment of "reintroducing" the gray wolf into the Yellowstone Recovery Area. As part of that analysis, the Federal Defendants determined what geographic area of Wyoming would be impacted. The Federal Defendants also made certain assumptions regarding the impact that the gray wolves would have on livestock and other wildlife. Those depredation assumptions were obviously intertwined with the geographic area that was analyzed -- the bigger the geographic area in which the gray wolves would be protected, the greater the impact on livestock and other wildlife. The Federal Defendants have never analyzed the impact of expanding the protected area.

See 04-cv-0123J, Doc. No. 90, at 40. The Wolf Coalition's 2006 argument that the FWS violated NEPA lifts that paragraph virtually verbatim.[20] Coalition Br. at 49. Thus, while the Wolf Coalition has attempted to re-cast its claim as a challenge to final agency action by claiming that "the major federal actions" are the Respondents' rejection of the Wyoming Petition to delist and "decision to force Wyoming to be responsible for the entire recovered wolf population," Coalition Br. at 49, its arguments reveal that its aim is to reargue an issue already decided in Wyoming I. See Wyoming I, 360 F. Supp.2d at 1219, n.3 ("the gravamen of the Wolf Coalition's NEPA argument ... [is that] NEPA required the FWS to file a subsequent environmental impact statement to address the increased range of the gray wolf"). The Court

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[20] The 2006 brief merely changes "Federal Defendants" to "Respondents" and makes a couple of other minor editorial changes such as combining the first two sentences, changing "gray wolves" to "recovered wolf population" and adding the word "obviously" before "intertwined" in the penultimate sentence. Compare:

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

Coalition Br. at 49.

should reject this subterfuge, because the Wolf Coalition plainly seeks to re-argue issues already decided.

A. NEPA does not apply to the 12-Month Finding.

The Wolf Coalition's attempt to formulate its claim as a challenge to the 12-Month Finding fares no better because listing determinations made under the ESA are exempt from the procedural requirements of NEPA. NEPA requires that, "to the fullest extent possible" an agency must prepare an EIS for major federal actions significantly affecting the environment. 42 U.S.C. § 4332(2)(C). But, the Supreme Court has recognized "that where a clear and unavoidable conflict in statutory authority exists, NEPA must give way." Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 788 (1976). Courts have specifically recognized that listing determinations made under the ESA are exempt from NEPA. Pacific Legal Foundation v. Andrus, 657 F.2d 829, 836 (6th Cir. 1981) ("Pacific Legal"); Trout Unlimited v. Lohn, 2007 WL 1730090, *17 (W.D. Wash. 2007).

As described above, the Secretary applied the ESA listing factors in evaluating the State of Wyoming's petition to delist. In Pacific Legal, the Sixth Circuit held that NEPA did not apply to the FWS's listing determinations because the Secretary is statutorily precluded from considering the broad range of environmental impacts contemplated by NEPA as a basis for those determinations. The Pacific Legal court explained that a statutory conflict between NEPA and ESA limited FWS's discretion such that the filing of an impact statement would not serve the purposes of either NEPA or the ESA. Pacific Legal, 657 F.2d at 835. The FWS formally adopted this legal principle in 1983 when, on recommendation from the Counsel on Environmental Quality, it concluded that "[s]ection 4 listing actions are exempt from NEPA as a 'matter of law.'" See Preparation of Environmental Assessments for Listing Actions under the Endangered Species Act, 48 Fed. Reg. 49,244 (Oct. 25, 1983) (and describing 4(a) actions as "listings, delistings, reclassifications, and Critical Habitat designations"). Therefore, because the ESA constrains the agency's discretion to using only the best scientific and commercial data as

set for in 4(a)(1), and the "agency has no authority to consider environmental factors . . . [a]s far as the determination to list a species is concerned, preparing an impact statement is a waste of time." Pacific Legal, 657 F.2d at 836; see also Trout Unlimited, 2007 WL 1730090 at *13 (holding that "the statutory conflict found by the *Pacific Legal Foundation* Court is equally applicable in the present case.").

The Tenth Circuit's decision in Catron County Board of Commr's v. FWS, 75 F.3d 1429 (10th Cir. 1996), while not directly on point, is instructive. In that case, the court considered whether the Secretary was required to comply with NEPA in designating a critical habitat under the ESA. Id. at 1432-33. The court recognized that an agency need not comply with NEPA if there is either an "unavoidable conflict between the two statutes that renders compliance with both impossible" or the two statutes' "duplicative procedural requirements" renders "compliance with both superfluous." Id. at 1435. The court specifically cited Pacific Legal as an example of a court finding that "the particular action being undertaken is subject to rules and regulations that essentially duplicate the NEPA inquiry." Id. (parenthetically describing Pacific Legal as holding "NEPA conflicts with ESA provisions regarding listing of species as endangered or threatened"). However, the court rejected the Secretary's attempt to extend the holding in Pacific Legal to critical habitat designations. Id. at 1439. Significantly, the court distinguished between listing decisions, which it recognized must "'be based solely upon biological grounds and not upon consideration of economic or socioeconomic factors,'" id. (quoting 48 Fed. Reg. 49244-45), and critical habitat designations, which require that the Secretary consider the "'economic impact, [. . .] and any other relevant impact' of designating the habitat. . ." Id. at 1435, quoting 16 U.S.C. § 1533(b)(2). In the latter case, particularly given its conclusion that there were likely to be significant environmental impacts, the court concluded that NEPA applies. Id. at 1439. While the Tenth Circuit has not directly addressed the question of whether NEPA applies to listing decisions, such as the 12-month petition finding, given its recognition of Pacific Legal as an example of a situation where NEPA compliance was excused, we urge the Court to adopt it here.

Moreover, unlike the critical habitat designation decision, which broadly requires the agency to consider "any other relevant impact," NEPA's two core purposes would not be served by requiring that the Service prepare an EIS for listing decisions, which requires that the Secretary's decision be based on the factors enumerated in ESA § 4(a)(1).

> The NEPA EIS requirement serves two purposes. First, "[i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." Second, it "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."

Department of Transportation v. Public Citizen, 124 S.Ct. 2204, 2215-2216 (2004) (internal citations omitted). As to the first purpose, the preparation of an EIS would not assist the Service's decision-making process because, as discussed above, the Service has no authority to consider a broad range of environmental impacts in its listing decisions. See Pacific Legal, 657 F.2d at 835. Similarly with regard to the statute's second purpose, an opportunity for public comment on listing actions is already provided by virtue of the Administrative Procedure Act and § 4(b)(5) of the ESA. Additional input received via public comment that addresses the broader environmental impacts of a listing action would be of no use to the Service. Cf. Public Citizen, 124 S.Ct. at 2216 ("[H]ere, the 'larger audience' can have no impact on the [Federal Motor Carrier Safety Administration]'s decisionmaking, since, as just noted, FMCSA simply could not act on whatever input this 'larger audience' could provide."). For these reasons, Federal Defendants are entitled to summary judgment on Intervenors' argument that the FWS violated NEPA.

B. The 12-Month Finding is not "major federal action."

Even assuming, arguendo, that NEPA applies, the 12-Month Finding is not a "major federal action" under NEPA because it does not change the status quo. NEPA requires preparation of an environmental impact statement only when an agency proposes to undertake a

"major Federal action[ ] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). In turn, the term "major federal action" means "actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. Actions that do not change the status quo are not major federal actions. State of Utah v. Babbitt, 137 F.3d 1193, 1214 (10th Cir. 1998). Thus, in State of Utah, the Tenth Circuit dismissed for lack of standing the plaintiffs' challenge to a BLM inventory of lands, finding that the plaintiffs had no legally protected interest because the inventory did not affect the status quo, and therefore was no major federal action requiring preparation of an EIS. Id. Likewise, the 12-Month Finding does not change the status quo. Management of wolves in Wyoming will continue to be controlled under 50 C.F.R. § 17.84(i) and the Service's 1999 wolf control plan. Wyoming I, 360 F. Supp.2d at 1219. Accordingly, because Intervenors do not challenge major federal action, their claims must be dismissed.

III. Petitioners' "unreasonable delay" claim is moot and, in any event, the FWS made a final determination within a reasonable period of time.

On July 5, 2005, the FWS received Wyoming's petition to modify the 10(j) rules. Shortly thereafter, on July 15, 2005, Wyoming submitted its petition to delist. The FWS confirmed the receipt of the two petitions on August 17, 2005. AR 14066. Wyoming's 10(j) petition was made pursuant to the APA, 5 U.S.C. § 553, and considered pursuant to the Department of the Interior's regulations, 43 C.F.R. § 14. Id. On July 9, 2007, the FWS made a final determination on Wyoming's 10(j) petition. See Exhibit 1. The FWS also published a proposed modification to the 10(j) rules on July 6, 2007. 72 Fed. Reg. 36942. These recent regulatory actions have rendered Petitioners' "unreasonably delay" claims moot.

The exercise of judicial power under Article III of the Constitution depends on the existence of a case or controversy. See Preiser v. Newkirk, 422 U.S. 395, 401-03 (1975). An actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. Id. In light of the FWS's recent response to Wyoming's 10(j) petition, a controversy no

longer exist with regard to Petitioners' unreasonable delay claim. The July 9, 2007 response provides Petitioners all the relief to which they are entitled. Accordingly, Petitioners' claim that the FWS has "unlawfully withheld" or "unreasonably delayed" acting on the petition is moot. See; McClendon v. City of Albuquerque, 100 F.3d 863, 868 (10th Cir. 1996) (holding that government's actions rendered case moot).

In any event, any delay in acting on Wyoming's petition to modify the 10(j) rules was not unreasonable or otherwise unlawful. The United States Court of Appeals for the District of Columbia issued the leading decision on the issue of whether an agency has "unlawfully withheld" or "unreasonably delayed" acting in Telecommunications Research and Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984) ("TRAC"). Specifically, the D.C. Circuit set forth the following six-part TRAC factors for guiding courts in determining whether an agency's delay in completing a required action is so "unreasonable" as to warrant equitable relief:

> (1) the time agencies take to make decisions must be governed by a "rule of reason";
> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
> (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
> (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed'."

In re United Mine Workers, 190 F.3d 545, 549 (D.C. Cir. 1999) (quoting TRAC, at 80). Application of these factors here demonstrates that any delay in acting on Wyoming's petition was not "unreasonable."

As an initial matter, neither the APA nor the Department of Interior's regulations establish a mandatory duty to act on Wyoming's Petition by a date certain. Instead, the

Department of the Interior is committed to considering all petitions for rulemaking in a prompt manner. 43 C.F.R. 14.3. Despite Wyoming's arguments to the contrary, this regulation does not require an immediate final decision. Wyo. Br. at 15-17. Instead, the general commitment to promptly consider petitions affords the Secretary a great deal discretion in determining when it can make a final decision on a petition, particularly when this implicates how to allocate resources or set priorities. This is in stark contrast to the mandatory duty that the FWS was under to act on Wyoming's Petition to delist, which was subject to the ESA's requirement that an initial decision be made within 90 days to the maximum extent practicable and, if that initial decision is positive, a warranted finding within 12 months. 16 U.S.C. § 1533(b)(3).

Prior to completing work on Wyoming's 10(j) petition, the FWS chose to focus its resources on higher, competing priorities, including Wyoming's petition to delist. Although Wyoming disagreed with this allocation of resources, this did not give rise to an unreasonable delay claim. See Oil, Chemical & Atomic Workers Union v. Occupational Safety & Health Admin., 145 F.3d 120, 123-124 (3rd Cir. 1998) (rejecting a claim of unreasonable delay and noting that "[d]istilled to its essence, this petition . . . would have us intrude into the quintessential discretion of the Secretary of Labor to allocate OSHA's resources and set its priorities"). The FWS's ability to make a final determination on Wyoming 10(j) petition was "dependent on other priorities such as working on delisting the wolf population, wolf management activities in the field to reduce the risks of wolf-caused damage to private property in Wyoming, addressing litigation and rulemaking on other wolf related issues, other rulemaking efforts, and other emerging high-priority issues." AR 15637 (Draft Letter); See also supra, Statement of the Facts (discussing the numerous wolf-related administrative actions that FWS has initiated and completed since it received Wyoming's 10(j) petition). On September 6, 2006, the FWS sent Wyoming a letter explaining that, since it had completed its work on Wyoming's petition to delist the gray wolf, it was now turning its attention to Wyoming's petition to modify the 10(j) rules and that it hoped to complete its work by early 2007. AR 15698. Thus, this was

not a case where an administrative agency was idle while a petition for rulemaking remained pending. See Oil, Chemical & Atomic Workers, 145 F.3d at 124 (noting that the agency "had been far from idle" in the subject area). The FWS merely chose to focus on other rulemaking efforts -- including Wyoming's delisting petition -- prior to turning to the 10(j) petition. The FWS did not engage in "unreasonable delay." In any event, Petitioners' claim in this regard is moot and no remedy is required.

REMEDY

The Supreme Court has consistently held that, where the administrative record of an agency action does not support that action, if the agency has not considered all relevant factors, or if the court simply cannot evaluate the challenged action on the basis of the record before it, the proper course is to remand the decision to the agency for additional investigation or explanation. Camp v. Pitts, 411 U.S. 138, 142 (1973); Vermont Yankee Nuclear Power, 435 U.S. at 523-24, 548, 555; Florida Power & Light Co. v. Lorion, 470 U.S. 729, 745 (1985); Immigration and Naturalization Service v. Ventura, 537 U.S. 12, 16 (2002) (per curiam). In this case, should the Court determine that the Administrative Record is inadequate to support the12-Month Finding, the appropriate remedy is for the Court to remand the decision back to the FWS for further consideration and/or explanation. Olenhouse, 42 F.3d at 1575.

The Petitioners invite the Court to take the extraordinary step of dictating the outcome of decisionmaking on the Wyoming Plan and of future rulemaking. Wyo. Br. at 49-50; Coalition Br. at 50; Park County Br. at 16. However, as the Supreme Court has made clear, the scope of circumstances in which a court may order an executive agency to make a specific discretionary determination is extremely limited. See Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 333 (1976). Where a court identifies a need for further evidence, the proper procedure is a remand to the agency so that the agency can "exercise its administrative discretion in deciding how, in light of internal organizational considerations, it may best proceed to develop the needed evidence and how its prior decision should be modified in lights of such

evidence as [it] develops." Id. at 333-34.

> At least in the absence of substantial justification for doing otherwise, a reviewing court may not, after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency. Such a procedure clearly runs the risk of "propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency."

Id. (quoting SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)).[21] Petitioners in this case have not offered the Court the requisite "substantial justification" to diverge from the established practice of remanding the decision to the agency for further review.

This Court should also refrain from guiding or restricting the Service's decisionmaking on remand because it is a time-honored legal principle that agencies are presumed to act in accordance with the law and that they enjoy a presumption of regularity from the courts. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971) (agency decision is entitled to a presumption of regularity); United States v. Chemical Found., 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.") (citations omitted); National Tank Truck Carriers v. EPA, 907 F.2d 177, 185 (D.C. Cir. 1990). Accordingly, guided by this presumption of regularity, the Court should presume that the Service will act lawfully on remand.

CONCLUSION

For the reasons stated above, Federal Respondents respectfully request that Petitioners' petitions be dismissed and the Court enter judgment on behalf of Federal Respondents.

[21/] Courts have adhered to this doctrine in ESA cases. See Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1405-06 (9th Cir. 1995) (remanding to FWS for notice and comment and review of record to determine whether to list Bruneau Hot Springs snail as endangered); Northern Spotted Owl v. Lujan, 758 F. Supp. 621, 629 (W.D. Wash. 1991).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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