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ATTORNEYS FOR WOLF COALITION
Petitioners-Intervenors

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING,)	
)	CASE NO. 06-CV-245-J
Petitioner,)	
)	
BOARD OF COMMISSIONERS OF THE COUNTY)	
OF PARK,)	REPLY BRIEF IN
)	SUPPORT OF WOLF
Petitioner-Intervenor,)	COALITION’S REQUEST
)	FOR DECLARATORY
WYOMING WOOL GROWERS ASSOCIATION,)	JUDGMENT AND
et al., known as the “WOLF COALITION,”)	INJUNCTIVE RELIEF
)	
Petitioners-Intervenors,)	
)	
)	
vs.)	
)	
UNITED STATES DEPARTMENT)	
OF THE INTERIOR; UNITED STATES)	
FISH & WILDLIFE SERVICE; DIRK)	
KEMPTHORNE, in his official capacity)	
as the Secretary of the United States Department)	

of the Interior; H. DALE HALL, in his official)
capacity as Director of the United States Fish)
and Wildlife Service, and MITCH KING,)
in his official capacity as Region 6 Director of)
the United States Fish & Wildlife Service,)

Respondents,)

SIERRA CLUB, NATURAL RESOURCES DEFENSE)
COUNCIL, WYOMING OUTDOOR COUNCIL,)
DEFENDERS OF WILDLIFE, JACKSON HOLE)
CONSERVATION ALLIANCE, and BIODIVERSITY)
CONSERVATION ALLIANCE,)

Respondents-Intervenors,)

NATIONAL WILDLIFE FEDERATION, and)
GREATER YELLOWSTONE COALITION,)

Respondents-Intervenors.)

**REPLY BRIEF IN SUPPORT OF WOLF COALITION'S REQUEST FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

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SUMMARY OF ARGUMENT

The arguments made by the United States Fish and Wildlife Service (FWS), the Respondent-Intervenors Sierra Club, et. al (Sierra Club) and Respondent-Intervenors the National Wildlife Federation, et al. (Federation) (collectively referred to below as “Respondents”) conveniently avoid the fact that the best scientific and commercial data available supports the State of Wyoming’s “Petition to Revise the Listed Status of the Gray Wolf (*Canis Lupus*) by Establishing the Northern Rocky Mountain Distinct Population Segment and to Concurrently Remove the Gray Wolf in the Northern Rocky Mountain Distinct Population Segment from the List of Endangered and Threatened Species” (Wyoming Petition to Delist), and the Wyoming Wolf Management Plan (Wyoming Plan). The FWS violated the Endangered Species Act, 16 U.S.C. §§ 1531, et seq (ESA) in denying the Petition to Delist and rejected the Wyoming Plan based upon a “public relations standard” rather than the scientific findings of the wolf experts.

The FWS’s decision at issue here was not based on sound science and must be reversed. The Wyoming Plan provides the “adequate regulatory mechanism” for protecting a recovered gray wolf population. The FWS’s criticisms of the Wyoming Plan are refuted by its subsequent decision (issued within six months after denying Wyoming’s Petition to Delist) to move forward with delisting, and its recognition that the Wyoming Plan’s “predator” designation will not prevent protection of a gray wolf population at or above recovery levels.

The FWS also violated the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq (NEPA), when it based its decision to deny Wyoming’s Petition to Delist and to reject the Wyoming Plan upon a rationale that represents a fundamental shift in the wolf recovery and management program, a shift that increases the number of wolves that must be counted to be considered a “recovered population,” a shift that substantially expands the geographical area in which wolves must be protected, and a shift in the overall recovery goals for the wolf introduction and management efforts. The FWS was required to undertake an SEIS before it could so dramatically alter the wolf

introduction and management program in order to take a “hard look” at the impact that such changes would have on the quality of the human environment in Wyoming. It is also clear that the FWS was required to prepare an SEIS to address the substantial information that has been gathered showing that the original environmental analysis completed in 1994 was flawed and mischaracterized the impacts that would be realized if the Canadian gray wolf was introduced into the State.

The Administrative Record shows that the peer reviewers’ findings regarding the Wyoming Plan represent the best scientific and commercial data available as required by the ESA, 16 U.S.C. § 1533(b). Those independent wolf experts took into consideration the various concerns that the Respondents have raised here, and still concluded that the Wyoming Plan, while not perfect, was adequate to protect a wolf population at or above recovery levels. It is reasonable to assume that if the peer reviewers had concluded otherwise, the FWS and intervenors would be touting nothing but those opinions as the be-all and end-all of any discussion regarding whether the Wyoming Plan should be approved. When evaluating the persuasiveness, veracity, credibility and utility of the Respondents’ arguments, this Court should take into consideration the fact that, whenever a peer review supports their position on a particular issue, they have argued in fora throughout the United States that such peer reviews are dispositive of the issue at hand. While Respondents have proffered several excuses to explain away the fact that 91% of the independent wolf experts considered the Wyoming Plan to be adequate to protect a recovered wolf population, they have failed to show why such an overwhelming approval rating should not be recognized for what it is – the best scientific data available as to whether the Wyoming Plan meets each of the five delisting criteria found in the ESA.

Finally, the Court should recognize that there is no management plan, no delisting proposal, and no numerical or geographical distribution of wolves that will satisfy the Sierra Club and Federation Intervenors. The mission of these organizations is to fight every effort to delist or downlist a species, regardless of the success of the recovery efforts, and regardless of whether there is any real threat to its continued existence. The Federal Reporters are full of cases in which these

organizations, and others like them, have fought each and every reasonable effort to delist or downlist a species. The recovery goal for the gray wolf population in Wyoming, Idaho, and Montana is three-hundred (300) wolves evenly distributed between the three States. The FWS currently (under)estimates the gray wolf population at over 1300 in number, even taking into consideration an estimated twenty percent (20%) decline in pup survival in 2005 (caused by a suspected disease outbreak). The documented wolf population has increased an average of twenty-six percent (26%) annually between 1995 and 2005, meaning that every four (4) years the population has doubled. The Canadian gray wolves were introduced into Wyoming as an “experiment,” which experiment has been an overwhelming “success” in terms of wolf recovery. History has shown that these organizations will fight any effort to allow the States to manage the wolf population, regardless of the types of protections that are afforded, regardless of whether the recovery goals are met, and regardless of whether a recovered population will be maintained. The Federation’s and Sierra Club’s arguments should be evaluated within that context and with their litigious history in mind.

The State of Wyoming has refuted the Respondents’ legal arguments and their attempt to support the FWS’s decision to deny the Wyoming Petition to Delist and to reject the Wyoming Plan. Rather than repeat that analysis here, the Wolf Coalition hereby adopts the State’s Reply Brief by reference.

ARGUMENT

I. The FWS’s Denial of Wyoming’s Petition to Delist and Rejection of the Wyoming Plan as Set Forth in the 12-Month Finding is Not Based on Sound Science

The FWS 12-Month Finding on a Petition to Establish the Northern Rocky Mountain Gray Wolf Population (*Canis lupus*) as a Distinct Population Segment to Remove the Northern Rocky Mountain Gray Wolf Distinct Population Segment from the List of Endangered and Threatened Species, 71 Fed.Reg. 43410-43432 (August, 2006) (12-Month Finding), and its related denial of Wyoming’s Petition to Delist and rejection of the Wyoming Plan, were not based on the best scientific and commercial data available. The arguments made by the Respondents to the contrary

are refuted by the only scientific evidence in the record and the only science before this Court – the findings of the hand-picked FWS-declared expert peer reviewers who found that the Wyoming Plan will sustain and protect the wolf population at or above recovery levels. The FWS’s decision was not based on sound science. Instead that decision was based upon after-the-fact rationalizations, speculation, unrealistic and unreasonable assumptions, and infeasible hypotheticals regarding the data and Wyoming law. The FWS’s denial of Wyoming’s Petition to Delist and rejection of the Wyoming Plan was arbitrary, capricious, an abuse of discretion and in violation of the ESA because it was contrary to the best scientific and commercial data available, and not supported by substantial evidence. *See* Administrative Procedures Act, 5 U.S.C. § 701, et seq (APA).

The FWS improperly rejected the peer reviewers’ evaluations and findings regarding the Wyoming Plan. The peer reviews constituted the best scientific and commercial data available to the FWS. The peer reviewers approved the Wyoming Plan and the FWS’s rejection of their evaluations is contrary to sound science.

The FWS claims that it “conducted a thorough review of the available data (including the peer review responses) and performed its own independent assessment of the state management plans.” Federal Respondents’ Response Brief (FWS Brief) at 18. That “independent assessment,” however, as reflected in the Administrative Record, supports implementation of the Wyoming Plan, and shows that the FWS’s biologists have repeatedly recognized that such particulars as “predator” status and pack size will not prevent protection of a recovered wolf population. *See* Wolf Coalition Opening Brief and Appendix.

The FWS further claims that it rationally concluded that 1) “Wyoming’s management plan fails to adequately manage human-caused mortality”; and 2) “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 [Northern Rocky Mountain (NRM)] wolf population.” FWS Brief at 18. These contentions are nothing more than a deflection from the real issue at hand and do not stand up to scrutiny when compared with the

uncontradicted peer reviews.

A. The Wyoming Plan Provides an Adequate Regulatory Mechanism for Protecting a Recovered Wolf Population and Adequately Manages Human-Caused Mortality

Contrary to Respondents' theory, Wyoming was not required to develop a management plan that satisfied their every demand or met every criteria for some nebulous, unpublished, public relations or litigation-avoidance wish list. Wyoming was not tasked with developing a plan that was designed to allow wolves to expand throughout every corner of the State. Wyoming was not tasked with developing a plan that would sacrifice our other wildlife populations for the sole purpose of protecting an unlimited number of wolves in an unlimited geographical area. Wyoming was not required to develop a plan that would sacrifice our livestock industry in order to create a nursery to foster wolf propagation throughout the western United States. Wyoming was instead required to develop a management plan that was adequate to sustain a recovered wolf population, as that population was defined by the FWS:

Thirty breeding pairs of wolves (defined as an adult male and an adult female that raise at least 2 pups until December 31 of the year of their birth), comprising some +300 individuals in a metapopulation with some genetic exchanges between subpopulations, for three successive years.

2003 "Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Coterminous United States" (2003 Final Rule to Reclassify), 68 Fed. Reg. 15804; AR at 14902-14974 (quotation found at 15817-15818; AR at 14916-14917). Wyoming accomplished exactly what it was required to do by the ESA – it developed a Management Plan that, according to the expert wolf biologists, will protect a recovered wolf population as defined above. That should have been the end of the discussion. Because of the emotion surrounding wolf introduction, however, the FWS rejected the scientific evidence and focused upon how the "public" may view Wyoming's management program.

Respondents argue that the FWS properly and rationally concluded that the Wyoming Plan

fails to adequately manage human-caused mortality. The wolf experts, however, found otherwise, and the FWS produced no valid peer-reviewed scientific documentation to contradict those findings. On the contrary, in its 12-Month Finding, the FWS spent its time speculating about unsupported worst-case scenarios, and sought to support those speculative arguments with highly unrealistic hypotheticals.

Respondents argue that the following components justify the FWS's rejection of the Wyoming Plan: predator status and dual-classification, trophy game area boundaries and definition of pack size. Whether or not the Respondents like these particular components, however, is not the issue. The only question to be answered is whether, based upon the best scientific and commercial data available, the Wyoming Plan as a whole will protect a recovered wolf population. The wolf experts have concluded that it will.

1. Predator and Dual Classification

According to the Respondents, the FWS'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." FWS Brief at 20. The FWS further argues that the FWS was justified in rejecting the Wyoming Plan, "[b]ecause 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." *Id.* at 17.

Designating wolves as predators, however, does not subject them to unregulated take. The dual classification approach (designating wolves as predators in some areas and trophy game animals in others) adopted by Wyoming will not prevent the State from maintaining a wolf population at or above recovery levels. The Wyoming Plan includes a comprehensive program for monitoring wolves and for quick implementation of additional protections as necessary to ensure that the population does not dip below the recovery goals. The Wyoming Plan also contains a comprehensive program for identifying and responding to any decline in the population, and for

implementing whatever protections are necessary to reverse any such trends. The numerous failsafe measures included in the Wyoming Plan ensure that the predator designation in certain areas of Wyoming will not, and cannot, cause the wolf population to decline as alleged by the Respondents. These failsafe measures confirm that the wolves in Wyoming that make up the recovered population as defined by the FWS will never be subjected to an “unregulated take” – they cannot be. Those wolves will be provided all of the protections (if not more) that they currently enjoy, as the Wyoming Plan mandates such protections. It is only the wolves that are in excess of the recovery goals and that are located outside of Zone I (i.e., outside of the National Parks, Parkway and contiguous wilderness areas) that will be managed as predators. It is only those wolves – the wolves that the FWS has concluded are not essential to conserving the NRM population – that will carry the designation of “predator.”

Wolves will always be protected as trophy game animals within a large part of Wyoming (including within large swaths of federal land where wolves will continue to be protected by federal agencies), which designation prevents unregulated human-caused mortality and provides the necessary regulatory certainty to ensure that the wolf population does not decline below recovery goal levels. Wyoming has committed to, and will always be required to, maintain and protect a minimum number of wolves (7 packs) in areas outside of those federal lands, with the federal agencies being responsible for maintaining a particular numerical population within those areas subject to federal jurisdiction. Wyoming will control any human-caused mortality that would have the effect of causing the wolf population to decline below the recovery goals. Wyoming does not allow any wolves to be subjected to “unregulated take” to the extent that such wolves are part of the recovered population that Wyoming is required to maintain.

Respondents argue that, because wolves will be classified similarly to other predators (such as coyotes, jackrabbits, porcupines, raccoons, red fox, skunks and stray cats) under Wyoming’s predatory animal statutes (Wyo.Stat. § 23-1-101(a)(viii)), they will be eliminated from the State. Their argument being that predator status = extinction. This argument is absurd and should be seen

for what it is; an attempt to replace expert scientific analysis with fearmongering.

Coyotes, jackrabbits, porcupines, raccoons, skunks and stray cats are all currently listed as predators throughout all of Wyoming. Yet, these species continue to be maintained at healthy numbers and are not listed under the ESA. Considering all of the additional protections that Wyoming has agreed to afford to the wolf population, there is no reason to believe that its designation as a “predator” in only a portion of the State, will have any different result here, especially considering the fact that a substantial portion of the wolves in the State will be designated as trophy game animals.

According to the wolf experts, designating wolves as predators in certain areas of the State; designating them as trophy game animals within Yellowstone National Park (YNP), Grand Teton National Park (GTNP), the Rockefeller Memorial Parkway (Parkway), and the contiguous wilderness areas (Absaroka-Beartooth, North Absaroka, Washakie, Teton, Jeddediah Smith, Winegar Hole and Gros Ventre); and requiring Wyoming to manage for seven (7) packs of wolves outside of the National Parks, Parkway, and wilderness areas, provides the adequate regulatory mechanism for protecting a gray wolf population at or above recovery levels. The independent wolf experts do not equate predator status with extinction; they recognize that in order to protect a “recovered” population in Wyoming, Idaho, and Montana, it is critical that the wolves be managed and controlled in such a way as to account for other land uses and wildlife goals. They also recognize that the types of management and control techniques adopted by Wyoming will not prevent maintenance of a recovered population. Being classified as a “predatory animal” has not destroyed or endangered other species of animals that carry the same moniker. Such a designation has not resulted in “excessive human-caused mortality” for those species. There is no reason to believe that such a designation will create that problem here, especially considering the numerous safeguards that are in place under both Federal and State law.

Predator status does not equate with extinction. Instead, predator status equates to active management and control. The predator classification as designed and implemented by the Wyoming

Plan does not, and cannot, cause extinction of the wolf population in Wyoming as the Plan itself precludes such an event from occurring. The predator designation merely allows the use of those types of control techniques that are actually effective in numerically and geographically managing the wolf population. Such an approach is necessary to ensure that the State of Wyoming can simultaneously pursue other wildlife objectives, and protect the livestock industry.

2. Trophy Game Animal Boundaries

According to the wolf experts, the area within which wolves are designated as “trophy game” under the Wyoming Plan is sufficiently large and provides sufficient habitat to sustain and protect a recovered wolf population. The wolf experts also concluded that designating wolves as predators in the remainder of the State will not prevent the maintenance and protection of a recovered wolf population. Should there be any threat that the wolf population would decline below recovery levels, the Wyoming Plan expands the trophy game area and provides additional protections as necessary. That geographic expansion and the added protections cannot be lifted or altered until the cause of the decline is identified and addressed. Wyoming Plan at 11. In other words, the wolves can again be designated as “predators” in the expanded geographic area only after the conditions that led to the decline have changed sufficiently to ensure that the recovered wolf population is protected. While the FWS has chosen to ignore those facts, it has utterly failed to produce anything in the Administrative Record that shows otherwise.

The Respondents’ demand for an expansion of the trophy game area should be seen for what it is – an effort to force Wyoming to protect a limitless wolf population throughout the State, despite the specifics of the Recovery Plan, regardless of the promised “zone management,” and regardless of whether Wyoming is protecting the wolf population at or above recovery levels.

3. Definition of “Pack”

The Wyoming Plan’s definition of “pack” is adequate to protect the wolf population in the State at or above recovery levels. Wyoming’s definition of a “pack” as five (5) or more wolves traveling together assures that there will be more than ten (10) breeding pairs present in the State

within the required fifteen (15) packs. This particular criticism of the Wyoming Plan represents the FWS's efforts to bolster an insupportable decision and should be seen for the red herring that it is.

The FWS's efforts to force Wyoming to sustain a much larger population by fabricating an issue over the definition of a "pack," exposes the Respondents' agenda, and shows that the debate is not about whether the Wyoming Plan is adequate to protect the wolf population at or above recovery levels, but whether Wyoming can be forced to protect an unlimited and unmanageable wolf population regardless of whether the science supports such an approach and despite the repeated assurances that Wyoming would be allowed to control the wolf population both numerically and geographically.

B. The Wyoming Plan can be Implemented Under Wyoming Law

Respondents next argue that the Wyoming Plan cannot be implemented under State law. Those arguments, however, are based on misconceptions of the Wyoming Plan. The Wyoming Attorney General's Office has refuted the Respondents' arguments and has concluded that the Wyoming Plan is consistent with State law and can be implemented under the existing statutory scheme. Respondents once again ignore the science at hand, and instead speculate as to how the Wyoming law "could be" interpreted under unlikely scenarios.

II. **The Wyoming Plan Must be Evaluated as a Comprehensive Management Program, the Sole Purpose of which is to Protect a Recovered Wolf Population**

The Respondents have attempted to divert attention from the primary question at hand – whether the State of Wyoming has adopted an adequate regulatory mechanism to protect a wolf population that meets or exceeds the recovery goals – by carving out and criticizing individual components of the Wyoming Plan. Respondents contend that the FWS was justified in rejecting the Wyoming Plan because certain components are controversial and could possibly render it ineffective in sustaining a recovered wolf population.

The peer reviewers recognized that the Wyoming Plan represents a comprehensive management program, with each component making up only one part of the overall approach. The

wolf experts also knew that the Wyoming Plan must be evaluated within that broader context and with an understanding that the “predator” designation, definition of “pack,” and the geographic area of protection were only three of those components. Other components include, but are not limited to, large areas of federal lands within which the wolves will always be protected as trophy game animals, a comprehensive monitoring program that would allow detection of any problems before overall population numbers could be affected, Wyoming’s assurances that it would protect a recovered population, and the necessary authority and ability to take the steps necessary to meet or exceed the recovery goals. The wolf experts concluded that the entire Wyoming Plan provided the protections that were necessary to sustain wolf recovery and to prevent excessive human-caused mortality.

It is apparent that the Respondents have also recognized that the Wyoming Plan’s comprehensive guarantees and assurances meet every regulatory criteria necessary for moving forward with delisting. Seeking to sidestep that issue, and in order to justify rejection of the Wyoming Plan, the Respondents have intentionally refused to evaluate it as a comprehensive management program that is intended to be implemented as such. The FWS, however, cannot arbitrarily dissect and then reject a program that has been designed and created to function as a coherent “whole” merely because it dislikes one or two individual components, especially when such individual components do not, and cannot, prevent the entire program from functioning as intended. If the program works and passes scientific muster in terms of meeting the goal in question, the FWS cannot reject it merely because it includes components that the FWS views as being inimical to its public relations program.

The Wyoming Plan can be likened to a Cadillac – the motor runs perfectly yet the Respondents waste their time (and Wyoming’s wildlife and livestock in the process) arguing that the window crank is in the wrong place. The location of the window crank has no effect whatsoever on the ability of Wyoming’s Cadillac to, among other things, operate as a motor vehicle, protect its passengers, and protect other wildlife species as it passes by. It is absurd to argue otherwise. It is

equally absurd for the FWS to argue that Wyoming was required to build a military tank to protect the wolves, despite the fact that the Cadillac as constructed meets the specifications of the recovery goals.

III. The FWS Acknowledges that Designating Wolves as Predators in Certain Areas of the State will not Prevent Wyoming from Protecting a Recovered Wolf Population

On February 8, 2007, the FWS published a Federal Register notice proposing to designate the Northern Rocky Mountain Distinct Population Segment (DPS) and to delist the gray wolf in Idaho, Montana and portions of Wyoming. In that notice, the FWS reported as follows: “[a]ny gray wolves in the remainder of Wyoming outside the National Parks and those portions of Washington, Oregon, and Utah in the NRM DPS, are not essential to conserving the NRM wolf population and these areas do not constitute a significant portion of the range in the DPS. Therefore these areas will not remain listed.” February 8, 2007 Proposed Rule Designating the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and Removing the Distinct Population Segment from the Federal list of Endangered and Threatened Wildlife (2007 Proposed Rule to Delist), 72 Fed. Reg. 6106 (which Proposed Rule is attached in its entirety as Exhibit B to the Wolf Coalition’s Opening Brief).

The reasoning set forth in the FWS’s 2007 Proposed Rule contradicts the FWS’s decision to deny Wyoming’s Petition to Delist and its rejection of the Wyoming Plan. That 2007 Proposed Rule further confirms that the Wyoming Plan’s predator designation and definition of “pack” will not destroy the wolf population in Wyoming.

The Federation argues, without scientific support, that “the trophy game areas in National Parks and adjacent wilderness areas alone are insufficient to overcome unregulated human killing in predator areas.” Federation Brief at 21. The FWS argues, again without scientific support, that “the importance of healthy packs outside of the current “trophy game” area cannot be overemphasized.” FWS Brief at 22. The FWS, however, in its 2007 Proposed Rule to Delist the NRM DPS concluded that the gray wolves “in the remainder of Wyoming outside the National Park

. . . are not essential to conserving the NRM wolf population and these areas do not constitute a significant portion of the range in the DPS.” 2007 Proposed Rule to Delist. The FWS then concluded that these areas should not remain listed. Respondents’ contrary arguments are refuted by the FWS’s own decision.

IV. This Court has the Jurisdiction to Hear the NEPA Claim

This Court has jurisdiction to hear the Wolf Coalition’s and State’s claims brought pursuant to the National Environmental Policy Act, which claims are directed, in part, to the FWS’s August, 2006 12-Month Finding. The FWS, in denying the Wyoming Petition to Delist and in rejecting the Wyoming Plan, made two demands that fundamentally changed the nature of the recovery and management efforts associated with protecting the Canadian gray wolf population that was introduced into our State: (1) it increased the number of wolves that would be considered a “recovered population”; and (2) it increased the geographic area within which Wyoming is required to protect the wolves. The FWS’s actions in that regard are subject to NEPA and the SEIS requirements.

Under the Council Environmental Quality (CEQ) regulations, agencies

[s]hall prepare supplements to either draft or final environmental impact statements if:

- (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
- (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action *or its impacts*. (Emphasis added).

40 C.F.R. § 1502.9(c)(1). (Emphasis added). By definition, these SEIS requirements apply to “new circumstances or information relevant to environmental concerns and bearing” on the impact of a particular action. The FWS’s 12-Month Finding represents “significant new circumstances or information” bearing on the impacts of the introduced wolf population, especially as the FWS requires Wyoming to “introduce” the wolves throughout the State.

NEPA requires the FWS to undertake the appropriate environmental analysis of any “major

Federal actions significantly affecting the quality of the human environment. . . .” 42 U.S.C. § 42-4332(C). The FWS argues that it is not required to comply with NEPA when implementing the ESA. That argument, however, has no applicability here. In this case Congress specifically ordered the FWS to undertake a full NEPA analysis before introducing the Canadian gray wolf into YNP. *See* Final Rule for the “Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana.” 59 Fed. Reg. 60252, 60253 (1994 Final Rule), attached hereto as Exhibit A.

The FWS’s decision in its 12-Month Finding and rejection of the Wyoming Plan was done, in part, to force “introduction” of the gray wolf into areas of Wyoming that have never been evaluated pursuant to the environmental impact analysis process. If the FWS was required to comply with NEPA in order to introduce wolves into a limited area of Wyoming, it should be required to supplement that analysis before it is allowed to introduce them everywhere else. The FWS’s decision also substantially modified the number of wolves that must be considered a “recovered” population. In other words, the FWS’s 12-Month Finding represents an entirely new “major Federal action” that will significantly affect the quality of the human environment in Wyoming.

The Wolf Coalition has provided in its Opening Brief an extensive description of such things as the gray wolf recovery program, zone management, and recovery goals as defined by both the 1987 Recovery Plan, the 1994 Final Rule, and the 1994 Final Environmental Impact Statement (FEIS). There is no need to repeat that discussion here. In summary, the NEPA analysis undertaken through the FEIS contemplated that a limited number of wolves would be protected within a limited geographical area. The NEPA-required “hard look” that was undertaken by the FWS to evaluate the impact that a recovered wolf population would have on the “quality of the human environment” within Wyoming was inextricably intertwined with the number of wolves that would be in the State, along with the geographic area within which they would be protected. For example, the purpose of adopting and implementing a “zone management” approach for the wolf population was in recognition of the fact that much of Wyoming was “undesirable” for wolf presence and that such

areas were not essential for conserving a recovered wolf population. That much of Wyoming remains “not essential” to conserving the NRM DPS was confirmed yet again as recently as February, 2007. *See* 2007 Proposed Rule to Delist.

Because the FEIS analysis was fundamentally dependent upon the numerical definition of a “recovered” wolf population, and the geographic area within Wyoming that would be impacted by the wolves, the FWS cannot change either of those factors without triggering the SEIS requirements as described above. NEPA requires the FWS to take the requisite “hard look” before it may unilaterally change the recovery goals or change the definition of a “recovered” population. NEPA requires the FWS to take the requisite “hard look” before it may unilaterally expand “Zone I” to include geographic areas that have never been evaluated in terms of their suitability as wolf habitat, or the impact that wolf expansion would have on the existing land, livestock and wildlife uses in those areas. The FWS is not allowed to do by subterfuge and gamesmanship what it is prohibited from doing outright. In short, NEPA required the FWS to perform an SEIS analysis at the time that it made substantial changes in the wolf introduction/management program or at the time that there were significant new circumstances or information relevant to environmental concerns and bearing on the *impacts* of the wolf introduction/management program.

Both of these SEIS criteria were met at the time that the FWS denied the Wyoming Petition to Delist and when it rejected the Wyoming Plan. By rejecting Wyoming’s definition of “pack,” the FWS has changed the recovery criteria and increased the number of wolves that must be tolerated. That turn of events represents a substantial change in the recovery and wolf management program, which change was never evaluated in the FEIS. By increasing the numerical goal for wolf “recovery,” the FWS has also changed the *impact* of the wolf introduction program. The same can be said for the FWS’s decision to demand that all of Wyoming be subject to wolf dispersal. By basing its decision to reject the Wyoming Plan on the “predator” designation throughout Wyoming, including in those areas that are “not essential” to conserving the NRM DPS, and substantially limiting the control and management techniques available to the State (by insisting that the wolves

be protected as trophy game animals everywhere), the FWS has substantially altered the situation that was evaluated in the FEIS, yet has refused to take the requisite “hard look,” of the impact of that decision as required by NEPA. The FWS has never evaluated the vast majority of Wyoming in terms of suitability for wolf propagation and dispersal, either from the standpoint of the wolf itself or from the standpoint of the impact that such dispersal would have on existing uses (such as livestock production, wildlife management, the safety of rural inhabitants, etc.).

The FWS violated NEPA by demanding that Wyoming protect a larger wolf population than contemplated in the FEIS. The FWS violated NEPA by demanding that Wyoming manage the wolf population as trophy game animals throughout the State and by failing to evaluate the impact of such a demand.

The current wolf population in Wyoming far exceeds the numbers contemplated in the 1994 FEIS. The FEIS failed to provide a detailed, credible analysis of reasonable, foreseeable impacts of a “recovered” wolf population. Specifically, the FEIS analysis of long-term impacts of a recovered wolf population was deceptively conservative and did not analyze impacts of introducing a non-native species into a highly altered ecosystem. The knowledge that has been gained over the last thirteen years confirms that the original FEIS was wholly inadequate to analyze the impact that the introduction program would have on the quality of the human environment. This new information must be analyzed in an SEIS as required by the non-discretionary CEQ regulations as it constitutes significant new circumstances or information relevant to environmental concerns and bearing on the *impacts* of the wolf introduction, management, and recovery program. *See Airport Neighbors Alliance, Inc. v. United States*, 90F.3d 426 (10th Cir. 1996).

The FWS has refused to prepare an SEIS to evaluate the impacts of a larger-than-expected wolf population and a larger-than-previously-demanded recovery area. The FWS’s failure to prepare an SEIS to address these impacts is arbitrary and capricious, contrary to NEPA, and not in accordance with law. The remedy sought by Petitioners is not overbroad and is warranted under the circumstances.

Finally, the Respondents argue that the Wolf Coalition's and State's NEPA claim is barred by issue preclusion. In doing so, they ignore the fact that their arguments challenging the previous lawsuit filed by the Wolf Coalition and the State (addressed by this Court in *Wyoming v. U.S. Department of Interior*, 360 F.Supp.2d 1214(D.Wyo. 2005)), were based upon their claim that there was no "final agency action" or "proposed action" subject to the NEPA requirements. That was reflected by the Tenth Circuit Court of Appeals, who refused to express any opinion on the merits of the NEPA claim until such final agency action had occurred. *State of Wyoming v. U.S. Department of Interior*, 442 F.3d 1262, 1264-1265 (10th Cir. 2006). That is not the circumstance now. The FWS's 12-Month Finding, most specifically the basis for its denial of the Wyoming Petition to Delist and rejection of the Wyoming Plan, provides the foundation for the NEPA claim asserted here. The Wolf Coalition has relied upon language similar to arguments that it previously made because the FWS continues to flaunt the requirements of NEPA, and insists upon pursuing a strategy that is subject to the SEIS requirements.

The FWS's refusal to perform an SEIS was arbitrary, capricious, an abuse of discretion and in violation of NEPA and the CEQ Regulations. *See* APA, 5 U.S.C. § 701, et seq.

CONCLUSION

The FWS violated the ESA and the APA by denying Wyoming's Petition to Delist and by rejecting the Wyoming Plan based upon the "adequate regulatory mechanism" criteria of the ESA. The FWS has consistently violated NEPA by refusing to undertake a supplemental environmental impact analysis.

RESPECTFULLY SUBMITTED this 25th day of July, 2007

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 25, 2007, a true and correct copy of the foregoing **REPLY BRIEF IN SUPPORT OF WOLF COALITION'S REQUEST FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**, was served upon the following via the Electronic Case Filing system of the United States District Court for the District of Wyoming.

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