

05-8026, 05-8027, 05-8035  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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STATE OF WYOMING, WYOMING WOOL GROWERS, et al.,  
and the COUNTY OF PARK  
Plaintiffs/Appellants

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.  
Defendants/Appellees,  
and  
GREATER YELLOWSTONE COALITION, et al.  
Defendants-Intervenors/Appellees

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Appeal from the United States District Court for the District of Wyoming  
The Honorable Alan B. Johnson, District Court Judge  
D.C. No.'s 04-CV-0123-J and 04-CV-0253-J (Consolidated)

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**MOTION TO STRIKE OF APPELLANTS WYOMING  
WOOL GROWERS, ET AL. (WOLF COALITION)**

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Harriet M. Hageman  
Kara Brighton  
HAGEMAN & BRIGHTON, P.C.  
1822 Warren Avenue  
Cheyenne, Wyoming 82001  
Telephone: (307) 635-4888  
ATTORNEYS FOR APPELLANTS  
WYOMING WOOL GROWERS, ET AL.,  
(WOLF COALITION)

Plaintiff/Appellants, Wyoming Wool Grower's, et al., (Wolf Coalition), by and through their attorneys, Hageman & Brighton, P.C., hereby move this Court for an Order striking all references to materials outside of the Administrative Record that the Intervenor-Appellees Sierra Club and Natural Resources Defense Council (NRDC) included in their Response Brief and Supplemental Appendix. In support of this Motion the Wolf Coalition states as follows:

1. Pursuant to 10<sup>th</sup> Cir. R. 27.3, Counsel for the Wolf Coalition conferred with Attorney Jim Davis, who stated that Intervenor Park County, Wyoming supports this motion. Counsel for the Wolf Coalition also conferred with David C. Shilton, who stated that the Federal Defendants take no position on the current motion. Jack Tuholske (representing intervenors Greater Yellowstone Coalition, et al) and Douglas L. Honnold (representing intervenors Sierra Club and the NRDC) oppose the Wolf Coalition's motion to strike. Counsel was unable to make contact Attorney Jay Jerde, who represents the State of Wyoming.

2. Intervenor Sierra Club and NRDC have included in their Response Brief arguments and references that are based upon information that is outside of the Administrative Record that is currently before this Court. They have also filed a "Supplemental Appendix" of select pages from the Wyoming Game and Fish Department's 2004 Annual Report, which was published more than six (6) months

after the Federal Defendants issued their final decision on January 13, 2004 rejecting the Wyoming Gray Wolf Management Plan (the subject of this appeal). They have not filed a motion to supplement the Administrative Record.

3. Their reliance upon extra-record information, summarized below, is improper and all such information, references and citations should be stricken:

- \* Page 13, first full paragraph: Fish and Wildlife Service website and related quoted statement;
- \* Page 15, full paragraph: website and related information (two separate website references);
- \* Page 26, fn. 8: website and related information and references to “WGFD’s 2004 Annual Report” (Supplemental Appendix);<sup>1</sup>
- \* Page 36, incomplete paragraph near the top: website.

4. The extra-record information and references included in the Sierra Club’s and NRDC’s Response Brief and Supplemental Appendix should be stricken as violating the scope of review provision of the Administrative Procedures Act, which requires

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<sup>1</sup> Intervenor Sierra Club and NRDC cite to the Aplt’s App. Vol. 6 at 1653 as a reference for the “WGFD’s 2004 Annual Report. The referenced page from the Appellants’ Joint Appendix, however, is from the State of Wyoming’s final Gray Wolf Management Plan, which was published in 2003. The 2004 Annual Report was not published until after the end of 2004, which was several months after the Federal Defendants produced the Administrative Record that is the subject of this appeal.

that judicial review of agency action be generally limited to the Administrative Record.

5. As explained by this Court in *Custer County Action Association v. Garvey*, 256 F.3d 1024, 1028, fn 1 (10<sup>th</sup> Cir. 2001),

Judicial review of an agency decision is generally limited to review of the administrative record. *See Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331, 96 S.Ct. 579, 46 L.Ed.2d 533 (1976); *accord Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426, 433 n. 7 (10<sup>th</sup> Cir. 1996). The circumstances which warrant consideration of extra-record materials are 'extremely limited.' *American Mining Cong. v. Thomas*, 772 F.2d 617, 626 (10<sup>th</sup> Cir. 1985) (listing possible justification as: (1) the agency action is not adequately explained and cannot be reviewed properly without considering the cited materials; (2) the record is deficient because the agency ignored relevant factors it should have considered in making its decision; (3) the agency considered factors that were left out of the formal record; (4) the case is so complex and the record so unclear that the reviewing court needs more evidence to enable it to understand the issues; and (5) evidence coming into existence after the agency acted demonstrates the actions were right or wrong), *cert denied*, 476 U.S. 1158, 106 S.Ct. 2276, 90 L.Ed.2d 718 (1986).

6. The United States Supreme Court has described the scope of review as follows:

[O]rdinarily review of administrative decisions is to be confined to consideration of the decision of the agency . . . and of the evidence on which it was based. (Citation and internal quotations omitted). [T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court. (Citation and internal quotations omitted). If the decision of the agency is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded . . . for further consideration." (Citation and internal quotations omitted). Clearly it is this mode of review that is contemplated by the statute providing for

judicial review of Commission decisions, § 19(b) of the Act, 15 U.S.C. § 717r(b).

*Federal Power Commission v. Transcontinental Gas Pipe Line Corporation*, 423 U.S., 326, 331, 96 S.Ct. 579, 46 L.Ed.2d 533 (1976).

7. This Court reached a similar decision in *Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426, 433 fn. 7 (10<sup>th</sup> Cir. 1996), which involved questions regarding the adequacy of an analysis performed under the National Environmental Policy Act.

8. The Sierra Club's and NRDC's attempt to expand the Administrative Record by filing a Supplemental Appendix and referencing the Court to website information is improper. The Sierra Club and NRDC have never received permission to supplement the Administrative Record with the information contained in their Supplemental Appendix. They have also failed to obtain permission to submit the electronic extra-record information, and would not be entitled to simply attach such information to their Response Brief. They cannot circumvent that limitation by quoting from and citing to the website where the same information can be found.

9. The Sierra Club and NRDC have made no effort to justify their reliance upon, or citation to, information that is outside of the Administrative Record. They have apparently assumed that, because the information is found on a website, it is subject to review by this Court. That assumption is legally indefensible. Rather than being

benign, their references to various websites is especially troubling considering the fact that such sources expand the scope of the Administrative Record to the point of infinity, with no limit to the amount of information that can be posted and that could be reviewed by the Court.

10. The information included in the Supplemental Appendix and that is available on the identified websites does not become part of the Administrative Record merely because it was developed and compiled by the Federal Defendants or some other agency.<sup>2</sup> Such information does not become subject to inclusion in the Administrative

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<sup>2</sup> The Wolf Coalition disputes the accuracy of the extra-record information and the purpose for which the Sierra Club and NRDC are using it. The Wolf Coalition's "failure to manage" claim is based, in part, upon the Federal Defendants' refusal to accurately identify and to appropriately respond to wolf kills. As such, the information presented by the Sierra Club and NRDC raises questions of fact. Those questions of fact cannot be addressed or resolved in the context of this appeal.

It is also important to note that the Federal Defendants stated during the November 17, 2004 hearing on the Wolf Coalition's Motion to Consolidate that they have not yet compiled or produced the Administrative Record related to the "failure to manage" claims. "[I]t is correct that the Defendants had read the State of Wyoming's Complaint more narrowly. And we do actually have an extensive record that we would need to compile on livestock depredation issues, as well as an extensive record that would need to be compiled for the NEPA claim." Aplt.App.Vol. 2 at 477-478. It would be patently unfair to allow the Sierra Club and NRDC to slip into the Administrative Record information that they argue supports denying the Wolf Coalition the opportunity to pursue their failure to manage claim, while at the same time argue that the Wolf Coalition should be prevented from presenting evidence to the contrary.

Record merely because it can be found at an electronic location, the address for which begins with “www” or “http”. Citing to a string of letters does not expand the Administrative Record that is before this Court to include any online document that may somehow relate to wolf introduction, management or control. Access to the internet does not change the fundamental rules regarding judicial review of agency action. Access to the internet does not expand the scope of review to include whatever information may be found on a particular (often self-serving) website.

11. The Administrative Record is comprised of the information provided by the Federal Defendants. The Appellants filed a copy of that Administrative Record with the Court. The scope of review of this action does not include “surfing the web” as suggested by the Sierra Club and NRDC. These Intervenors must be precluded from unilaterally expanding that Record, especially when they have utterly failed to justify their attempt to doing so.

WHEREFORE, the Wolf Coalition respectfully requests that this Court strike the Sierra Club’s and NRDC’s Supplemental Appendix, as well as all references and citations to, and reliance upon, electronic information that is outside of the Administrative Record. The Wolf Coalition also respectfully requests that the Court enter such other and further relief as is appropriate under the circumstances.

Dated this 8<sup>th</sup> day of September, 2005.

WYOMING WOLF COALITION

\_\_\_\_\_/s/\_\_\_\_\_  
Harriet M. Hageman  
Kara Brighton  
HAGEMAN & BRIGHTON, P.C.  
1822 Warren Avenue  
Cheyenne, Wyoming 82001  
Telephone: (307) 635-4888  
Facsimile: (307) 632-5111  
[hhageman@hblawoffice.com](mailto:hhageman@hblawoffice.com)

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that (1) no privacy redactions are required. Every document submitted in Digital Form and scanned PDF format is an exact copy of the written document filed with the Court and served on the parties. I further certify that the digital submissions have been scanned with the most recent virus scanning program (Norton Antivirus, System Works Professional 2004; most recent update September 8, 2005) and, according to the program, are free of viruses.

\_\_\_\_\_/s/\_\_\_\_\_  
Harriet M. Hageman



CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8<sup>th</sup> day of September, 2005, a true and correct copy of the **MOTION TO STRIKE OF APPELLANTS WYOMING WOOL GROWERS, ET AL., (WOLF COALITION)**, was served upon the Clerk of Court and the following Parties as indicated.

Clerk of the U.S. Court of Appeals	<input type="checkbox"/> U.S. Mail, Postage Prepaid
Tenth Judicial Circuit	<input type="checkbox"/> Hand Delivery
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1823 Stout Street	<input type="checkbox"/> Facsimile: _____
Denver, Colorado 80257	<input checked="" type="checkbox"/> Other: <u>Electronic Mail</u> <a href="mailto:esubmission@ca10.uscourts.gov">esubmission@ca10.uscourts.gov</a>

David C. Shilton	<input type="checkbox"/> U.S. Mail, Postage Prepaid
U.S. Department of Justice	<input type="checkbox"/> Hand Delivery
Appellate Section - ENRD	<input checked="" type="checkbox"/> Federal Express
PHB Mail Room 2121	<input type="checkbox"/> Facsimile: _____
601 D Street NW	<input checked="" type="checkbox"/> Other: <u>Electronic Mail</u> <a href="mailto:David.Shilton@usdoj.gov">David.Shilton@usdoj.gov</a>
Washington, D.C. 20004	

Patrick J. Crank	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid
Jay Jerde	<input type="checkbox"/> Hand Delivery
Wyoming Attorney General's Office	<input type="checkbox"/> Federal Express
123 Capitol Building	<input type="checkbox"/> Facsimile: _____
Cheyenne, Wyoming 82002	<input checked="" type="checkbox"/> Other: <u>Electronic Mail</u> <a href="mailto:jjerde@state.wy.us">jjerde@state.wy.us</a>

Bryan A. Skoric	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid
James F. Davis	<input type="checkbox"/> Hand Delivery
Park County Attorney's Office	<input type="checkbox"/> Federal Express
1002 Sheridan Avenue	<input type="checkbox"/> Facsimile: _____
Cody, Wyoming 82414	<input checked="" type="checkbox"/> Other: <u>Electronic Mail</u> <a href="mailto:jdavis@parkcounty.us">jdavis@parkcounty.us</a>

Thomas M. France  
National Wildlife Federation  
240 N. Higgins, Ste 2  
Missoula, Montana 59802

U.S. Mail, Postage Prepaid  
 Hand Delivery  
 Federal Express  
 Facsimile: \_\_\_\_\_  
 Other: Electronic Mail  
[france@nwf.org](mailto:france@nwf.org)

Jack Tuholske  
Tuholske Law Office  
Box 7458  
Missoula, Montana 59897

U.S. Mail, Postage Prepaid  
 Hand Delivery  
 Federal Express  
 Facsimile: \_\_\_\_\_  
 Other: Electronic Mail  
[tuholske@centric.net](mailto:tuholske@centric.net)

Thomas F. Darin  
P.O. Box 2728  
Jackson, Wyoming 83001

U.S. Mail, Postage Prepaid  
 Hand Delivery  
 Federal Express  
 Facsimile: \_\_\_\_\_  
 Other: Electronic Mail  
[tom@jhalliance.org](mailto:tom@jhalliance.org)

Douglas L. Honnold  
Abigail M. Dillen  
Mark W. Poe  
Earthjustice  
209 South Willson Avenue  
Bozeman, Montana 59715

U.S. Mail, Postage Prepaid  
 Hand Delivery  
 Federal Express  
 Facsimile: \_\_\_\_\_  
 Other: Electronic Mail  
[dhonnold@earthjustice.org](mailto:dhonnold@earthjustice.org)

Timothy C. Kingston  
Graves Miller & Kingston  
408 West 23<sup>rd</sup> Street  
Cheyenne, Wyoming 82001

U.S. Mail, Postage Prepaid  
 Hand Delivery  
 Federal Express  
 Facsimile: \_\_\_\_\_  
 Other: Electronic Mail  
[kingston@rockymtnlaw.com](mailto:kingston@rockymtnlaw.com)

\_\_\_\_\_/s/\_\_\_\_\_  
Harriet M. Hageman