

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

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

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)

**REPLY BRIEF OF APPELLANTS WYOMING
WOOL GROWERS, ET AL., (WOLF COALITION)**

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ARGUMENT

The District Court committed reversible error by dismissing the Wolf Coalition's lawsuit and the Defendants/Appellees' arguments to the contrary are factually and legally insupportable.¹

I. THE FEDERAL AGENCIES' REJECTION OF THE WYOMING PLAN WAS FINAL AGENCY ACTION

The Fish and Wildlife Service's (FWS) January 13, 2004 letter (Aplt.App.Vol. 7 at 1955-1956) rejecting the Wyoming Gray Wolf Management Plan (Wyoming Plan) was final agency action subject to judicial review. The arguments to the contrary are refuted by the history of wolf introduction and recovery; the Federal Agencies' (Agencies) actions and decisions leading to issuance of the January 13th letter; the purpose for, and development of, the Wyoming Plan; the Agencies' order that Wyoming modify its Management Plan, including a description of the exact manner in which Wyoming was required to do so; and the Agencies' refusal to propose to delist until Wyoming complies with their demands.²

¹ The Wolf Coalition does not intend to repeat the information and analysis included in the Appellant State of Wyoming's Reply Brief. The Wolf Coalition hereby adopts by reference, as though fully set forth herein, the State's Reply Brief in its entirety.

² The Defendants rely upon the State of Wyoming's recently-filed petition to delist to argue that the Agencies' decision to reject the Wyoming Plan was not final agency action. Their argument is baseless. First, the Defendants cannot change

The Agencies themselves designated rejection of the Wyoming Plan as the “consummation of the agency’s decisionmaking process,” the decision by which they determined the rights and obligations of Wyoming (and its citizens), and the decision from which legal consequences flowed (*see Bennett v. Spear*, 520 U.S. 154, 177-178, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997)). The final agency action at issue here was the Agencies’ decision to reject the Wyoming Plan, and their refusal to consider changing the status of the wolf population in Wyoming. That decision is subject to judicial review.

It is not the final decision to delist that is the only action that triggers judicial review under the Administrative Procedures Act (APA). The Defendants’ arguments to that effect are illogical for the simple reason that the Agencies’ rejection of the Wyoming Plan was entered for the purpose of preventing the delisting process from moving forward. The Endangered Species Act (ESA) provides for judicial review of a final decision that prevents that process from proceeding. *See* 16 U.S.C. §(b)(3)(B) and (C)(ii). The Agencies’ decision to stop the delisting process was made in violation

either the nature or the impact of the January 13, 2004 letter by relying upon an action that was pursued 1 ½ years after the fact. The Agencies’ decision was final as of January 13, 2004; it was not converted to an interlocutory decision simply because the State subsequently decided to take a different approach. Second, the Wolf Coalition did not file a petition to delist because it was not necessary to do so. The Wolf Coalition is entitled to obtain a decision about the unlawfulness of the January 13, 2004 letter.

of 16 U.S.C. §1533(a), (b) and (c), which require the Agencies to make their decisions based upon the “best scientific and commercial data available.” The Agencies violated that standard when they tied delisting to Wyoming’s compliance with demands that were neither biologically based nor supported by the scientific analysis. That unlawful decision is subject to judicial review under the *Bennett v. Spear* standard and pursuant to the standard described in *Sabella v. United States*, 863 F.Supp.1, 3 (D. D.C. 1994):

By enacting a provision permitting judicial review of ‘final agency action’ for which there is no other adequate remedy in a court, Congress intended to cover a broad spectrum of administrative actions, and the Supreme Court has reaffirmed that intent by holding that the Administrative Procedure Act’s generous review provisions must be given a hospitable interpretation. (Citations omitted). Judges reviewing administrative actions must interpret the ‘finality’ element in a flexible and pragmatic way. (Citation omitted). ... *A court must decide whether the agency’s position is definitive and whether it has a direct and immediate effect on the day-to-day business of the parties challenging the action.* (Citation omitted). ...The Court must distinguish a tentative agency position from a situation *where the agency views its deliberative process as sufficiently final to demand compliance with its announced position.* (Citation omitted) (emphasis added).

A. Timeline of Events

The table set forth below summarizes the events³ leading up to and following

³ This Table is not intended to identify every historical event, but to establish the fact that the Agencies designated the rejection of the Wyoming Plan as the consummation of its decision-making process, it being the point in time when the parties would either proceed to delisting or the status of the wolves

the Agencies' introduction of wolves into Wyoming. This timeline establishes that the Agencies and the States developed the management plans for the sole purpose of delisting the Northern Rocky Mountain wolf population. The table shows that the Agencies identified approval or rejection of the State management plans as the final cog in the wheel to either propose or refuse to propose delisting. In sum, it was the Agencies that identified the approval or rejection of the management plans as "final agency action." The Defendants' desire to avoid judicial review of its rejection of the Wyoming Plan does not change the fundamental nature or finality of that decision.

This table also shows that the Agencies changed positions regarding whether the Wyoming Plan provided the adequate regulatory mechanism to protect the wolf population at or above recovery levels. While the Agencies expressed concern regarding Wyoming's decision to designate the wolves as "predators" outside of the designated recovery area, the Agencies ultimately concluded that the Wyoming Plan met the biological needs of a recovered population of wolves. The Agencies' concerns focused upon whether the designated "trophy game animal" geographic area was large enough – not the predator designation per se. "Wolves will need legal protection from unregulated human mortalities under State law in an area at least as

would remain the same, thereby determining the ultimate rights and obligations of the parties in terms of wolf management.

extensive as they currently occupy to maintain the population above recovery levels.” Aplt.App.Vol. 6 at 1478. Wyoming responded to the Agencies’ concerns and expanded the geographic range of the “trophy game” status. *See* Final Wyoming Plan, Aplt.App.Vol. 6 at 1646. The FWS’s January 13th letter represents a 180 degree shift in policy.

DATE	EVENT	PURPOSE	APP⁴
8/3/87	Northern Rocky Mountain Recovery Plan	Outlined steps for the recovery of gray wolf (<i>Canis lupus</i>) population in the Northern Rocky Mountains; identified geographic confines of recovery area and the areas in which wolf recovery would and would not be promoted; identified management and control techniques to minimize and/or prevent livestock and wildlife kills; adopted zone management.	Vol.9: 2344 - 2471
4/14/94	Final Environmental Impact Statement (FEIS)	Analyzed the impacts of wolf introduction, recovery, and management <i>in and around Yellowstone National Park</i> ; defined “wolf viability and recovery”; identified geographic area that would be impacted by wolves; adopted zone management; evaluated impact of wolves assuming the use of effective management techniques.	Vol.9: 2510 - 2538

⁴ “APP” refers to the Appellants’ Joint Appendix filed with the Tenth Circuit Court of Appeals on June 20, 2005.

11/22/94	Final Rule - Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park	Adopted to “reestablish a viable wolf population in the Yellowstone area. . . .” designated wolves in Wyoming as “nonessential experimental,” to provide for aggressive management and control; described “an effective control program that minimizes livestock losses due to wolves.” App. at 2547.	Vol.9: 2539 - 2553
11/22/94	50 C.F.R §1784 promulgated	Described management and control techniques to minimize livestock losses; identifies the Yellowstone Management Area and the nonessential experimental population area (which are not the same).	Vol.9: 2551 - 2553
7/16/02	FWS letter to Wyoming – Describes purpose of the State plans, significance of peer reviews, and delisting conditions	“The Service did not propose to delist wolves in the Midwest [in 1999] because the State of Minnesota did not have a State wolf management plan. Minnesota completed its wolf plan this year. The peer review indicated the plan would enhance the conservation of the wolf population and the Service moved forward with a delisting proposal. <i>This same set of conditions apply to the wolf population in the northern Rocky Mountains.</i> ” APP. at 1472.	Vol.6: 1472-1475

	<p>7/16/02 Letter to Wyoming Cont.</p>	<p>“The Service <i>will</i> propose to delist the wolf population when recovery is reached and the service can be assured that State management of wolves by Montana, Idaho, and Wyoming will prevent human-caused mortality from reducing the wolf population so it becomes threatened or endangered again. <i>During the public comment period on our delisting proposal, the public will be able to see how the States intend to manage wolves if the Act’s protections are removed.</i>” <i>Id.</i> (Emphasis added).</p> <p>Identified State management plans as final step for delisting to proceed. <i>Id.</i> at 1474. The States are required to have approved plans, funding and a State law to allow implementation of the plans. “<i>These are the only requirements that the Act requires of the States for the Service to propose delisting.</i>” The Service intends to have independent peer review of the State plans in addition to public review during the delisting process. <i>It is possible that if peer review indicates that a State wolf management plan will not conserve the wolf population above viable levels, the State would be required to modify its plan to address these shortcomings.</i> (Emphasis added). App. at 1474.</p> <p>“[I]t appears that the Service’s proposal to delist will depend solely on the successful completion of Wyoming’s efforts. <i>Id.</i> at 1475.</p>	
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9/11/02	Letter from Wyoming Game & Fish Dept. Describing Wyoming Plan	Identified geographic area in which wolves would be designated as “trophy game animals” (Yellowstone and Grand Teton National Parks, Bridger-Teton and Shoshone Nat’l. Forests) – approximately 5.1 million acres.	Vol.6: 1481 - 1482
9/26/02	Letter from FWS to Wyoming	<p>“”[W]e believe the proposal to classify wolves as ‘trophy game animals within the Yellowstone and Grand Teton National Parks, and the wilderness areas of the Bridger-Teton and Shoshone National Forests,’ would not provide for a secure or large enough area to maintain the wolf population to proceed with delisting.” APP. at 1478.</p> <p>“Wolves will need legal protection from unregulated human mortalities under State law <i>in an area at least as extensive as they currently occupy to maintain the population above recovery levels.</i>” <i>Id.</i> (Emphasis added).</p> <p>“[T]wo things must happen before the service can propose delisting: 1) the wolf population must achieve recovery. . . ; and 2) regulatory mechanisms must be adequate to protect the species from becoming threatened or endangered again.” <i>Id.</i> at 1479.</p>	Vol.6: 1477 - 1480
11/02	Draft Wyoming Plan	Designated wolves as “trophy game animals” in the National Parks, National Elk Refuge, and the wilderness areas of the Shoshone and Bridger-Teton National Forests. App. at 1564-1565.	Vol.6: 1562 - 1598

12/2/02	Letter from FWS to Wyoming re: Comments on 11/02 Draft Wyoming Plan	<p>“If wolves were only protected from unregulated human-caused mortality within Yellowstone and Grand Teton National Parks and a few areas of adjacent designated wilderness, the Service can not be assured that the Greater Yellowstone Area portion of the northern Rocky Mountain wolf population would not decline to the point that the wolf population becomes threatened again.” APP. at 1502-1503.</p> <p>“Other than the dual status management recommendation, I generally thought the draft wolf plan was biologically sound but some further clarification on a few points might be helpful.” <i>Id.</i> at 1503.</p> <p>The FWS did not raise any concerns re: the definition of “pack” nor the number of packs that Wyoming had committed to protecting.</p>	Vol.6: 1502 - 1505
12/19/02	Letter from FWS to Wyoming re: dual status	<p><i>“It appears that based on what we know now about the dual status proposal, this has the potential for working, provided the area where wolves are classified as trophy game animals is of sufficient size to preclude the relisting of the wolf once they are delisted. ... As described in your draft management plan, the size of that area is not large enough.”</i> APP. at 1524 (emphasis added).</p> <p>The draft plan that was current as of 12/19/02 was dated November, 2002.</p>	Vol.6: 1522 - 1524, 1562-1598

2/14/03	Letter from FWS to Wyoming Senator Thomas	“When making a determination that adequate regulatory mechanisms are in place that will maintain the population above recovery levels, we must be able to determine tht wolves are provided legal protection by the State from unregulated human mortalities in an area at least as extensive as they currently occupy.” App. at 1695.	Vol.6: 1695- 1696
2/21/03	Letter from FWS to Wyoming Governor	Set forth same information as included in the 2/14/02 letter to Senator Craig Thomas. “Management authority is needed to provide protections for wolves beyond National Parks and National Forest wilderness area and to allow flexibility to adapt protections to changing circumstances. <i>The Service has determined that the current draft legislative provisions regarding management authorities and maintenance of 15 wolf packs in Wyoming (8 inside National Parks and 7 outside) should satisfy this requirement.</i> ” <i>Id.</i> (Emphasis added).	Vol.6: 1703 - 1704
4/1/03	Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife – published the results of the status review	Adopted FEIS definition of wolf population viability and recovery – “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 exchange between subpopulations, for three successive years.”	Vol.9: 2270 - 2342

	4/1/03 Letter Cont.	<p>Described the Agencies’ status review that was conducted for the purpose of analyzing the five (5) required ESA factors (16 U.S.C. §1533(a)) to determine whether the status of the wolves should be changed pursuant to 16 U.S.C. §1533(c).</p> <p>In 2005, when granting to the States of Idaho and Montana additional management authority, the Agencies described the results of their status review as follows:</p> <p>“A status review of the species’ listing status has determined that the species could be delisted once a State wolf management plan has been approved by the Service for Montana, Idaho, and Wyoming.” APP. at 2493.</p>	
5/5/03	Letter from FWS to President of Wyoming Senate	<p>“The Service has also announced its intention to delist wolves in the Western DPS as soon as Idaho, Montana, and Wyoming have developed management plans that ensure the long-term conservation of wolves as required by the Endangered Species Act.” APP. at 1739.</p>	Vol.7: 1739 - 1740
5/14/03	Letter from FWS to Wyoming	<p>“Delisting could be proposed in 2003, but only after all three states finalize appropriate state wolf management plans and regulations which will ensure a continued viable wolf population after the species is delisted.” App. at 1741.</p>	Vol.7: 1741 - 1472

<p>5/30/03</p>	<p>Letter from FWS to Wyoming regarding the definition of a “pack”</p>	<p>“Wyoming’s state wolf management plan will be judged on its overall ability to demonstrate the long-term conservation of a viable and recovered wolf population in Wyoming.” APP at 1748.</p> <p>“I realize the Wyoming law definition of a wolf pack is 5 wolves but at this time it is uncertain if that is a conflict or problem, but I doubt it.” <i>Id.</i> at 1749.</p> <p>“The message is that we are using the best science to address this issue, are working closely with Wyoming, and even if the recommendation came out as 6 wolves equals one breeding pair, the current Wyoming law directing a minimum of 15 packs [defined as 5 or more wolves traveling together, with at least 7 outside the parts] was still likely to be above the 10 breeding pairs needed to prevent listing wolves again.” <i>Id.</i> at 1750.</p> <p>“I don’t see this as a big deal regarding the Wyoming law and this issue alone certainly wouldn’t decide whether the Wyoming law/plan is adequate or not. The Wyoming definition of a pack [assuming what the final analysis shows] could mean that Wyoming would have a minimum of 15 packs [defined as 5 wolves traveling together in winter] which would equal [0.8 x 15] 12 breeding pairs. This is still above the ‘minimum’” <i>Id.</i></p>	<p>Vol.7: 1748 - 1750</p>
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<p>6/20/03 and 6/26/03</p>	<p>Letters from FWS to "Colleagues" and Predator Conservation Alliance</p>	<p>"After Montana, Idaho, and Wyoming have all completed their State wolf management plans, the Service <u>may</u> forward those plans for independent peer review. The Service, itself, must first determine that they are likely to maintain a delisted wolf population above levels that would cause a wolf population in the western DPS to become listed again under the Endangered Species Act. If we believe that those plans are adequate, we will then forward them to a group of scientists, which we select, for independent professional peer review. If that peer review determines that in combination those State laws will conserve a recovered wolf population throughout the western DPS, then the Service will develop a delisting proposal. That proposal will include the results of the peer review and will be available for further professional and public review as required by the procedures of the Endangered Species Act."</p>	<p>Vol.7: 1757</p>
<p>7/2/03</p>	<p>Letter from FWS to Wyoming</p>	<p>"The plan appears to contain enough area and adequate wolf management policies for Wyoming Game and Fish Department to reasonably conserve a recovered wolf population in Wyoming." APP. at 1793.</p> <p>"The wolf management strategy outlined in this plan generally appears adequate. Given the level of controversy in Wyoming and the buffer that wolves in Yellowstone National Park provide for overall wolf management in Wyoming, we believe the plan walks that fine line between local tolerance and national interest." <i>Id.</i></p>	<p>Vol.7: 1791 - 1797</p>

	<p>7/2/03 Letter Cont.</p>	<p>“Wyoming should commit to maintaining 15 or more packs in Wyoming, so if wolf numbers in the Parks drop below 8 packs, Wyoming will have more than 7 packs outside the Parks. The plan currently recognizes and provides for this.” <i>Id.</i></p> <p>“The Service supports the flexibility in the definition of a wolf pack as recommended in the plan.” <i>Id.</i> at 1794.</p> <p>“At this time, it does not appear that the state definition of pack under state law [assumed to mean 5 wolves traveling together in winter] is going to be in major conflict with any new potentially new [sic] definition for a recovered wolf population. ... State law may be inconsistent with the final determination of the post-delisting monitoring criteria but at this time it does not appear any differences are biologically significant enough to jeopardize delisting.” <i>Id.</i></p> <p>“All Wilderness areas adjacent to the Yellowstone <u>and</u> Grand Teton National Parks must be included in any initial wolf trophy game area designation. <i>The Service supports an area, as [sic] least as large as the one described in the state wolf plan, that would include Yellowstone National Park, Grand Teton National Park, the Parkway, and the North Absaroka, Washakie, Teton, Jedediah Smith, Winegar Hole, and Gros Ventre Wilderness areas.</i>” <i>Id.</i> (Emphasis added).</p>	
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07/03	Final Wyoming Plan	Designates wolves as “trophy game animals” in the <i>National Parks, Parkway, and contiguous wilderness areas (Absoraka-Beartooth, North Absaroka, Washakie, Teton, Jedediah Smith, Wiinegar Hole, and Gros Ventre)</i> .	Vol.6: 1643 - 1685
1/13/04	Letter from FWS to Wyoming	<p>“If Wyoming addresses each of the [listed] concerns, the Service intends to proceed with the proposed delisting process for the gray wolf in the Western Distinct Population Segment.</p> <ol style="list-style-type: none"> 1. The ‘predatory animal status for wolves <i>must</i> be changed. ... 2. The Wyoming state law <i>must</i> clearly commit to managing for at least 15 wolf packs in Wyoming. ... 3. The Wyoming definition of pack <i>must</i> be consistent among the three states and should be biologically based. ...” (Emphasis added). 	Vol.7: 1955 - 1956

The Agencies’ decision to reject the Wyoming Plan was not made in a historical, factual, or procedural vacuum. That decision was entered at the conclusion of a comprehensive process that had one purpose – to delist the wolf. Every action that led to January 13, 2004 was undertaken in order for the Agencies to propose to change the status of the wolf. When the Agencies rejected the Wyoming Plan they

stopped the delisting process and foreclosed Wyoming from managing the wolves pursuant to a plan of action that the experts concluded would protect the population at or above recovery levels. While the expert's analyses, findings and conclusions may not have satisfied the Agencies' public relations concerns, they did satisfy the ESA, and the mandate that listing/delisting decisions be made "solely on the basis of the best scientific and commercial data available." 16 U.S.C. §1533(b).

The table also establishes that, despite working with the States in a myriad of ways over many years to develop the management plans, the Agencies never mentioned that the States would be required to file a petition to delist pursuant to 16 U.S.C. §1533(b)(3). The Agencies never raised the petition process as a requirement. The Agencies' message stayed the same throughout – they would propose to delist the wolf population after the management plans were approved. They were required to evaluate the management plans based upon the ESA criteria. The Agencies violated the ESA when they evaluated and rejected the Wyoming Plan based upon public relations and litigation concerns. The Wolf Coalition is entitled to judicial review of that decision.

B. Status Review of Wolves

The purpose of the Agencies' status review is obvious – to determine whether the wolf population is either "endangered" or "threatened" as those terms are defined

by the ESA. Whether the wolves are endangered or threatened is determined by reference to the recovery goals (which are related to the five criteria set forth in 16 U.S.C. §1533(a)). To make that determination, the Agencies undertake a status review, either in response to a petition to delist or as part of the status review required by 16 U.S.C. §1533(c). In either case, the purpose remains the same. Significantly, the Agencies' legal obligations remain the same as well – if the status review undertaken pursuant to either §1533(b)(3)(A) (petition to delist) or pursuant to §1533(c) (FWS status review) establishes that the status of a listed species has changed, the Agencies are required to propose a course of action (list, delist, upgrade or downgrade). The ESA does not require (nor allows) the Agencies to demand a redundant and unnecessary status review to determine the status of a species for which the status is already known.

In this case, once the Agencies' status review established that the wolf population had met and exceeded all recovery goals, and the five delisting criteria were met, they were obligated to propose delisting. It is indisputable that four of the five delisting criteria have been met. The fifth criteria – whether the management plans provide an adequate regulatory mechanism for protecting wolves above recovery levels (16 U.S.C. § 1533(a)(1)(D)) - was the only remaining issue. The best scientific and commercial data available established that the final criteria was also

met. The Agencies' rejection of that scientific analysis has landed the parties before this Court to determine whether they had the statutory authority to reject the scientific analysis based upon other factors. The question is whether the Agencies have the statutory authority to make a final decision regarding whether to propose to change the status of the wolf based upon non-biological and non-scientific factors.

The status of the wolf population is not in question. It has far exceeded the recovery goals. The Agencies' wolf introduction and recovery project has been unequivocally successful as judged by the exploding wolf population and expansion of its range. The wolf recovery effort has been so successful that the Agencies have now concluded that the population has become destabilized and must be culled:

At the end of 2002, nearly all of the most suitable wolf habitat in the northern Rocky Mountains of Montana, Idaho, and Wyoming was occupied by resident wolf packs. As the wolf population continues to expand, wolves will increasingly attempt to settle in areas intensively used for livestock production, a higher percentage of those wolves likely will become involved in conflicts with livestock, and a higher percentage will need to be removed. For the wolf population to become stabilized, human-caused mortality would have to remove 30 percent or more of the wolf population annually.

(Aplt.App.Vol. 9 at 2323).

The import of the foregoing is obvious. The Defendants are arguing that Wyoming is required to file a petition to delist for the Agencies to undertake a long, arduous, and expensive status review to determine whether the wolf population is

“endangered” or “threatened” as defined by the ESA. That determination, however, has already been made. To undertake yet another status review (this time in response to a petition to delist) is not only redundant, but does not, cannot, and will not change the current situation, thereby confirming the finality of the FWS’s January 13, 2004 letter. It also establishes the futility of the petition process.

The Agencies have concluded that wolf population has exceeded recovery goals. The scientific data establishes that the Wyoming Plan provides the necessary protections to maintain the wolf population above recovery levels. It is absurd to argue that the process leading to those findings, as well as the findings themselves, are meaningless because Wyoming did not file a petition to delist under 16 U.S.C. § 1533(b)(3). Such an argument carries even less weight considering the fact that it was the Agencies that identified the approval or rejection of the management plans as the “consummation of the agency’s decision making process” regarding whether to propose to delist.

When rejecting the Wyoming Plan the Agencies unlawfully ignored the expert analysis and conclusions, ordered Wyoming to rewrite its Statutes and Management Plan to address political rather than biological concerns, and refused to propose delisting until Wyoming capitulated to their demands. These decisions were arbitrary, capricious, an abuse of discretion, and not in accordance with the ESA, in excess of

statutory jurisdiction, authority, and limitation and done without observance of the proper procedure as required by the ESA. 5 U.S.C. § 706(2)(C) and (D). To find otherwise would be to conclude that the Agencies can ignore the plain language of the ESA in order to elevate political concerns over scientific fact.

C. The ESA Provides for Judicial Review of the Agencies' Decision

According to 16 U.S.C. § 1533(b)(3)(B) and (C)(ii), the FWS's refusal to propose the listing or delisting of a species is subject to judicial review. That is the "consummation of the decision making process," and the point in time when rights or obligations are determined or from which legal consequences flow. *See Bennett v. Spear*. That same rationale applies whether the decision is made in response to a petition to delist or whether it is made following a status review conducted pursuant to 16 U.S.C. § 1533(c) – the purpose of both procedures being to determine whether the species is either "threatened" or "endangered" as defined by the ESA. Significantly, 16 U.S.C. § 1533(c) requires that the status review process conform to 16 U.S.C. § 1533(a) and (b): "Each determination under subparagraph (B) [to remove a species from the list, to change the status of a species from endangered to threatened, or to change the status of a species from threatened to endangered] *shall* be made in accordance with the provisions of subsections (a) and (b) of this section." (Emphasis added). In relevant part, subsection (a) describes the criteria for determining whether

a species is threatened or endangered. In relevant part, subsection (b) requires the FWS to make its listing/delisting decisions based upon the best scientific and commercial data available, describes the petition process, and states that “negative” findings (to refuse to propose listing or delisting) are subject to judicial review.

Pursuant to the explicit terms of 16 U.S.C. § 1533(c), the FWS must determine the status of a particular species based upon the criteria listed in subsection (a). The FWS must also make all status review determinations based upon the best scientific and commercial data available as required by subsection (b)(1)(A). Any “negative finding” by the FWS following completion of its status review is subject to judicial review pursuant subsection (b)(3)(C) in the same manner that a negative finding in response to a petition to list or delist is subject to judicial review. The Agencies violate the ESA (specifically § 1533(a) and (c)) when they refuse to change that status of a species based upon criteria other than those set forth in subsection (a). The Agencies violate the ESA (specifically § 1533(b) and (c)) when they evaluate the status of a species based upon something “other than the best scientific and commercial data available.” The FWS’s violation of 16 U.S.C. § 1533(a), (b), or (c) are all subject to judicial review.

D. Conclusion

In this case the Agencies based their decision to reject the Wyoming Plan and

to refuse to propose changing the status of the wolf population (to remove it from the list) in violation of 16 U.S.C. § 1533(a), (b) and (c). The Agencies have ordered Wyoming to amend its State law and Management Plan in exchange for an agreement to propose delisting. That unbending position confirms and underscores the finality of the January 13, 2004 letter and the futility of a petition to delist. The Agencies have announced that Wyoming could file 1000 petitions to delist and they will refuse to propose to delist so long as the gray wolf is designated as a “predator” in those areas of the State that are unsuitable for wolf propagation.

II. THE AGENCIES VIOLATED THE ESA WHEN THEY REJECTED THE WYOMING PLAN

The Wolf Coalition and the State have provided extensive information to show that the Agencies violated the ESA and the APA when they rejected the Wyoming Plan. The entire Administrative Record is before this Court. The facts and legal standards cannot be disputed:

- * The Agencies were required to review the status of the gray wolf population and the delisting criteria based upon the best scientific and commercial data available.
- * The Agencies concluded that the wolf population had exceeded the recovery goals and that the delisting process should proceed.
- * The Wyoming Plan was developed and adopted for the purpose of

providing the adequate regulatory mechanism for protecting the gray wolf population above recovery levels.

- * The Agencies concluded that four of the five delisting criteria were satisfied, with the entire delisting process hinging on whether the Wyoming Plan would prevent the population from becoming endangered or threatened.
- * The Agencies first concluded that the Wyoming Plan provided the necessary protections and submitted such Plan for independent scientific peer review.
- * The peer reviewers concluded that the Wyoming Plan, in conjunction with the Montana and Idaho Plans, was biologically sound and provided the adequate regulatory mechanism for preventing the wolf population from becoming endangered or threatened.
- * The peer reviews are the best scientific and commercial data available.

Wyoming was required to develop and adopt a management plan to protect a recovered wolf population as defined. Wyoming was not required to develop and adopt a management plan that meets the public relations concerns or litigation-aversion tactics of the Agencies. Wyoming was not required to develop and adopt a management plan to protect an ever-increasing population of wolves. Wyoming was

not required to develop and adopt a management plan to protect wolves in those areas of the State that are undesirable for wolf propagation. Wyoming was not required to develop and adopt a management plan that elevates the needs of the wolf population over and above every other consideration in the State, including protection of wildlife resources and the livestock industry.

The wolf recovery and management program was designed to strike a balance between various competing interests. Wyoming has agreed to protect the wolf population. The Agencies' demand that Wyoming compromise other interests to provide broader protections for the purpose of encouraging colonization in those areas of Wyoming that have never been evaluated for that purpose was arbitrary, capricious, an abuse of discretion, and not in accordance with the ESA, was in excess of statutory jurisdiction, authority, and limitation and was done without observance of the proper procedure as required by the ESA. 5 U.S.C. § 706(2)(C) and (D).

III. THE AGENCIES WERE REQUIRED TO APPROVE THE WYOMING PLAN AND ARE REQUIRED TO MANAGE AND CONTROL THE WOLF POPULATION

The members of the Wolf Coalition are on the front line of the Agencies' decision to introduce gray wolves into Wyoming and their subsequent refusal to effectively management and control them. They have watched their cattle and sheep attempt to return to their feet after they have had their intestines pulled out by a

playful pack of wolves. They have observed the aftermath of a battle between a mother cow trying to protect her calf, and the wolves who were determined to kill it. They have seen the hind quarters eaten out of a cow while she was still alive. They have seen sheep killed by the dozens and left scattered on the ground, providing no benefit to the rancher and no sustenance for the wolves, other than the joy of the kill. They have watched their livelihoods dry up each passing year as the elk, moose, and bighorn sheep populations continue to dwindle. They are the communities that watch as the hunting season is shortened on a yearly basis and their store fronts are closed. They are the individuals who expend great efforts to foster and support a world-class trophy game population.

In short, the Wolf Coalition members represent those citizens that the Recovery Plan, the FEIS, and the Final Rule were designed to protect. Their protection was defined by the Recovery Plan and the FEIS as being “critical” to the success of the wolf recovery efforts. The Agencies promised to protect these citizens by adopting and implementing an “effective” management and control program to address the impacts of a recovery program that was dictated by out-of-State interests. The Recovery Plan and the FEIS were part and parcel of the Final Rule – those documents made it possible to introduce the gray wolf into Wyoming.

The Wolf Coalition seeks nothing more than the opportunity to show that the

Agencies have not developed or implemented an effective management program. To show that the Agencies unleashed a dangerous predator into the State and have since abdicated their responsibilities to effectively manage it. The Supreme Court in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004), did not intend to provide the Agencies with a shield by which they can avoid all responsibility for their unlawful decisions.

The members of the Wolf Coalition, having been forced to tolerate the wolf population at the behest of people who never have and never will be affected, seek nothing more than the opportunity to show that the Agencies are violating that law when they refuse to stop the killing. They seek nothing more than the opportunity to show that the Agencies abused their authority and obligations under the ESA and are violating the law.

IV. THE DISTRICT COURT IMPROPERLY DISMISSED THE WOLF COALITION'S CLAIM BROUGHT PURSUANT TO NEPA

The District Court improperly dismissed the Wolf Coalition's claim that the Agencies are required to issue a Supplemental Environmental Impact Statement (SEIS) pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332; 43 C.F.R. § 1502.9. The January 13, 2004 letter, as described above, was final agency action. That letter reflects a dramatic shift in the entire wolf recovery and management program. The stated purpose of the January 13th letter was to order

Wyoming to adopt a Plan to protect wolves outside of the recovery area, and outside of the geographic area analyzed in the FEIS.

According to the FEIS, “[r]eintroduction would result in wolf population recovery (10 breeding pairs, about 100 wolves/area for 3 successive years) *in and around Yellowstone National Park* and in central Idaho by 2002. *Only the establishment of wolves in these 2 areas is the subject of this proposal.* Aplt.App.Vol. 6 at 1459 (emphasis added). The January 13th letter orders Wyoming to protect the wolf population in areas that have never been considered or analyzed as wolf habitat. Whether the Agencies’ mandate is issued as a letter or another form is irrelevant, the effect is the same – a concerted expansion of the wolf population into those areas of Wyoming that are, by definition, “undesirable” for wolf propagation. *Id.* at 2411.

The Agencies’ issued the January 13, 2004 letter to carry out their decision to force expansion of the wolf population outside of the recovery area (Zone I). That intent was described in the process leading up to that decision. For example, on September 26, 2002 and in December, 2002, the FWS attempted to describe the purpose for dispersing the population throughout a larger area than previously considered. *See* Aplt.App.Vol. 6 at 1479, 1504.

The Agencies’ proposal to introduce wolves into Yellowstone National Park (YNP) required them to prepare an Environmental Impact Statement (EIS). Their

decision to “introduce” them into the remainder of the State, including the population centers, on privately owned land, in areas used extensively by hikers and outdoor enthusiasts, and near schools requires the same type of scrutiny.

The Agencies have not prepared the necessary EIS to determine what impact the wolves would have on the larger human environment. For example, the Agencies have never analyzed the impact that a protected wolf population would have on other wildlife species and on livestock outside of those borders carefully identified in the FEIS. Because the Agencies have decided that wolves must be protected in a larger geographic environment, they are required to supplement the 1994 FEIS to evaluate the impact that such actions would have.

In sum, the Recovery Plan, FEIS and Final Rule identified the geographic area for wolf introduction, recovery, and impact. The Wyoming Plan protects the wolves in an area larger than the geographic area analyzed in those NEPA documents. The Agencies rejected the Wyoming Plan because it did not protect wolves in the remainder of the State. The Agencies are proposing to expand the geographic spread of the wolf population throughout the State. The Agencies have never analyzed the impact of doing so.

The Agencies have two choices. They can live within the confines of the current FEIS and evaluate the Wyoming Plan accordingly. Pursuant to the FEIS, there

is no question that the area in which the wolves are designated as trophy game animals is sufficient. Alternatively, the Agencies can pursue their proposal to protect wolves throughout Wyoming, in which event they must prepare an SEIS to determine the impact of “introducing” them outside of the recovery area. The Agencies cannot, however, have it both ways. They cannot argue that no SEIS is required, while at the same time demand that Wyoming protect wolves as they roam from Yellowstone National Park to Cheyenne, Wyoming.

The Agencies considered five (5) alternatives in the FEIS. One alternative recommended that wolves be allowed to naturally migrate from Canada and northern Montana into the Park, in which event they would be provided with the full ESA protections afforded to an endangered species. The preferred alternative that was adopted recommended the introduction of wolves as a “nonessential experimental population” pursuant to the ESA’s 10(j) Rules (16 U.S.C. § 1539(j)).

The purpose of the preferred alternative was to introduce wolves into YNP, establish and define a recovery area, define the recovery goals, and adopt zone management (as described in the Recovery Plan), all for the purpose of introducing Canadian gray wolves into YNP, rather to allow them to naturally migrate into the Park. If the Agencies had instead adopted the alternative that allowed for natural migration of wolves, those wolves would be protected as endangered throughout the

State. The Agencies did not adopt that proposal. They adopted the alternative that, by its terms limited the number of wolves that the Wyoming citizens would be required to protect, that limited the geographic area within which those protections would have to be provided, and that (allegedly) limited the impact that those wolves would have.

The Agencies are now demanding all of the protections that were afforded by the natural migration alternative. NEPA, however, simply does not provide for such a bizarre turn of events. The Agencies chose their alternative and must live with it. If they seek to change it, by demanding protections outside of the recovery area (outside of the area analyzed in the FEIS), they must prepare an SEIS to evaluate the impact of doing so.

CONCLUSION

The District Court committed reversible error by finding that the Agencies' rejection of the Wyoming Plan was not "final agency action." The Agencies violated the ESA when they rejected the Wyoming Plan. The District Court committed reversible error by dismissing the Wolf Coalition's "failure to manage" and NEPA claims.

Dated this 2nd day of September, 2005.

WYOMING WOLF COALITION

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CERTIFICATE OF COMPLIANCE - WORD LIMIT

As required by Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief is proportionately spaced, contains 6992 words, and complies with the type/volume specifications of Fed.R.App.P. 32(a)(7)(B). I relied upon my word processor, Wordperfect 11, to obtain the count.

_____/s/_____
Harriet M. Hageman

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 2, 2005) and, according to the program, are free of viruses.

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Harriet M. Hageman

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of September, 2005, a true and correct copy of the **REPLY BRIEF OF APPELLANTS WYOMING WOOL GROWERS, ET AL., (WOLF COALITION)**, was served upon the Clerk of Court and the following Parties as indicated.

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