ORAL ARGUMENT IS REQUESTED

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.,
Defendant-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)

_____

RESPONSE BRIEF OF INTERVENOR-APPELLEES SIERRA CLUB AND NATURAL RESOURCES DEFENSE COUNCIL

_____

Douglas L. Honnold
Abigail Dillen
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Intervenor-Appellees Sierra Club and Natural Resources Defense Council hereby disclose that they are non-profit organizations without parent corporations or shareholders of any kind.

s/ DOUGLAS L. HONNOLD
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STATEMENT OF RELATED CASES

There are no prior or related appeals in this matter.

STATEMENT OF JURISDICTION

(a) The district court had jurisdiction to determine its own subject matter jurisdiction. See United States v. United Mine Workers, 330 U.S. 258, 292 n.57 (1947)); Pritchett v. Office Depot, Inc., 404 F.3d 1232, 1234 (10th Cir. 2005). As set forth in the Argument, infra, the district court properly dismissed Plaintiffs' legal claims for lack of subject matter jurisdiction.

(b) This Court has jurisdiction over appeals from the district court's final dismissal order pursuant to 28 U.S.C. § 1291.

(c) The district court issued its Corrected Memorandum Opinion and Order on March 23, 2005. Appellant State of Wyoming timely filed its Notice of Appeal on March 25, 2005; Appellants Wyoming Wool Growers, et al. (collectively "Wolf Coalition") timely filed their Notice of Appeal on April 7, 2005, and Appellants Timothy J Morrison, et al. (collectively "Park County Commissioners") timely filed their Notice of Appeal on April 14, 2005.

(d) These appeals arise from a final district court order disposing of all of the parties' claims.

STATEMENT OF THE ISSUES

I. Whether the district court properly dismissed appellants' claims seeking to compel federal approval of Wyoming's wolf management plan for purposes of removing Rocky Mountain gray wolves from the federal list of

threatened and endangered species given that the U.S. Fish and Wildlife Service ("FWS") has not even begun the statutory process for wolf "delisting" under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq.

II. Whether the district court properly dismissed appellants' claims challenging ongoing federal wolf management and FWS' discretionary implementation of wolf control measures.

III. Whether the district court properly dismissed appellants' claims alleging that FWS' preliminary assessment of Wyoming's wolf management plan requires additional environmental analysis under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq.

IV. Whether the district court properly denied appellants' claims alleging that FWS violated the Guarantee Clause and the Tenth Amendment of the U.S. Constitution in its preliminary assessment of the Wyoming wolf plan.

STATEMENT OF THE CASE

These appeals center around a January 2004 letter advising the State of Wyoming that FWS is unwilling to make a discretionary proposal to remove gray wolves in the Northern Rocky Mountains from the federal list of threatened and endangered species unless Wyoming makes changes to the state plan that would govern wolf management after delisting. See Aplt. App. Vol. 8

at 1955-56.[1] Appellants Wyoming and the Wolf Coalition challenged FWS' letter in the U.S. District Court for the District of Wyoming, see id. Vol. 1 at 21, 23, 188, and the district court dismissed appellants' claims on grounds that they had failed to challenge any final agency action by FWS. See id. Vol. 5 at 1226. Given that FWS had not yet begun the formal statutory process for delisting the wolf, the district court stressed that appellants' premature challenge "circumvent[ed] important safeguards, such as 'best science available,' timetables for agency action, and judicial review" that are part of the ESA's mandatory process for listing and delisting species. Id. Vol. 5 at 1221-22; see Part A of the Statement Of Facts, infra (discussing ESA petition process in detail).

A. The Ongoing Petition Process

Since the filing of these appeals, Wyoming has availed itself of the ESA's petition process, and its petition to delist gray wolves in the Northern Rockies is now under review by FWS. Thus, in keeping with the ESA's "timetables for agency action," appellants will receive, within the coming year, a final delisting decision that will moot the issues raised in these appeals. See id. Vol. 5 at 1221.

[1] "Aplts. App." as used herein refers to the Appendix filed jointly by Appellants. Citations are to volume and page number.

B. Proceedings In The District Court

In the U.S. District Court for the District of Wyoming, the State of Wyoming and the Wolf Coalition filed two separate cases with overlapping legal claims. On June 22, 2004, Wyoming filed its first amended complaint challenging the January 2004 letter under the ESA, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, and the Tenth Amendment and Guarantee Clause of the U.S. Constitution. See id. Vol. 1 at 20-23. Wyoming further challenged FWS' ongoing management of the gray wolf population in the Northern Rockies. See id. Vol. 1 at 52-53. By way of relief, Wyoming requested a court order directing FWS to approve the State's management plan; and publish a proposed rule to delist Western gray wolves. See id. Vol. 1 at 62-63.

On July 26, 2005, the district court granted intervention to plaintiff-intervenor-appellants Timothy J. Morrison, Marie A. Fontaine, and Tim A. French in their official capacity as county commissioners of Park County, Wyoming. See id. Vol. 1 at 8. On August 5, 2005, the district court granted intervention to defendant-intervenor-appellees Greater Yellowstone Coalition, et al. See id. Vol. 1 at 10.

On September 21, 2004, the Wolf Coalition filed its companion suit challenging FWS' January 14, 2004 letter and ongoing wolf management under

the ESA, the APA, and NEPA. See id. Vol. 1 at 245-59. On November 8, 2004, the district court granted intervention in the Wolf Coalition's case to defendant-intervenor-appellees Sierra Club and Natural Resources Defense Council. See Supplemental Appendix of Intervenor-Appellees Sierra Club and Natural Resources Defense Council ("Supp. App.") at 1-2.

The district court consolidated Wyoming and the Wolf Coalition's cases on November 22, 2004. See Aplts. App. Vol. 1 at 12-13. On March 23, 2005, the district court dismissed all of the plaintiffs' ESA, APA, and NEPA claims for lack of subject matter jurisdiction, and further denied Wyoming's constitutional claims on the merits. See id. Vol. 5 at 1259-60.

STATEMENT OF FACTS

In these appeals, Wyoming and the Wolf Coalition are attempting to secure state authority to allow unregulated killing of wolves throughout the majority of their current range in Wyoming. Gray wolves were entirely exterminated in the American West by the 1930s, but were reintroduced into Yellowstone National Park and central Idaho by FWS in 1996. See Final Rule, 68 Fed. Reg. 15,804, 15,815 (Apr. 1, 2003); see generally Wyoming Farm Bureau Fed'n v. Babbitt, 199 F.3d 122 (10th Cir. 2000). Reintroduced wolves are now making a remarkable comeback in the Northern Rockies, see 68 Fed. Reg. at 15,815-16, and in light of the past decade's recovery gains, FWS has

begun to consider delisting wolves in Montana, Idaho, and Wyoming. See Advance notice of proposed rulemaking, 68 Fed. Reg. 15,879 (Apr. 1, 2003). Further, the State of Wyoming has recently submitted a petition that will force FWS to make a final delisting decision. See http://wyoming.gov/governor/policies/documents/signeddelistpetition07.13.05.pdf. (last checked August 8, 2005). Yet without waiting for the petition process to play out as the ESA requires, appellants seek judicial pre-approval of Wyoming's management plan for purposes of wolf delisting.

A. The Delisting Process Under The ESA

Section 4 of the ESA, 16 U.S.C. § 1533, governs both listing of threatened and endangered species and delisting of recovered species that are no longer in any foreseeable danger of extinction. See 16 U.S.C. § 1532(6) (defining "endangered species" to mean "any species which is in danger of extinction throughout all or a significant portion of its range"); id. § 1532(20) (defining "threatened species" to mean "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range").

Before FWS can delist any species,[2] the agency must undertake Federal Register notice-and-comment rulemaking that culminates in a comprehensive regulatory finding that the species is no longer threatened or endangered due to any one of the following five factors:

A) the present or threatened destruction, modification, or curtailment of its habitat or range;
B) overutilization for commercial, recreational, scientific, or educational purposes;
C) disease or predation;
D) the inadequacy of existing regulatory mechanisms; or
E) other natural or manmade factors affecting its continued existence.

Id. § 1533(a)(1). In making this statutory finding, FWS must rely "solely on the best scientific and commercial data available to [the agency] after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State … to protect such species." Id. § 1533(a)(2). FWS has discretion to initiate this ESA § 4 rulemaking process sua sponte by

[2] The U.S. Secretary of Interior has delegated authority to FWS to administer the ESA with respect to wolves and other terrestrial species.

publishing a listing or delisting proposal in the Federal Register.[3]

Alternatively, the ESA allows "any interested person" to file a listing or delisting petition that compels a timely ESA § 4 finding from FWS. See 16 U.S.C. § 1533(b)(3). "To the maximum extent practicable, within 90 days after receiving a petition," FWS must "make a finding whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted." Id. at § 1533(b)(3)(A). If FWS issues a positive 90-day finding on the petition, it must "promptly commence a review of the status of the species concerned." Id. Then, within 12 months, FWS must make a finding that the petitioned action is either: (1) "not warranted;" (2) "warranted," in which case the agency must promptly publish a "proposed regulation to implement the action;" or (3) "warranted, but that the immediate proposal and timely promulgation of a regulation implementing the petitioned action . . . is precluded by other pending [listing] proposals" of a higher priority. Id. § 1533(b)(3)(B)(i)-(iii).

[3] For instance, a sua sponte delisting proposal might be prompted by the "status review" of all listed species that FWS is required to undertake every five years in order to identify potential candidates for a change in listing status — i.e. delisting, down-listing from endangered to threatened status, or up-listing from threatened to endangered status. See 16 U.S.C. § 1533(c)(2). Crucially, no matter what prompts FWS to propose a change in listing status — whether it is a 5-year status review or a citizen petition — the reclassification can be accomplished only through an ESA § 4 notice-and-comment rulemaking process that results in a comprehensive finding addressing all five statutory listing factors. See id. § 1533(a),(b),(c).

If FWS denies a petition based on either a 90-day or 12-month finding, the "negative finding . . . shall be subject to judicial review." Id. § 1533(b)(3)(C)(ii). Further, in cases where a State is the petitioner, FWS is under a special obligation to disclose its reasons for rejecting the petition to the State. Thus, the Act provides that FWS "shall submit to the State agency a written justification for [its] failure to adopt regulations consistent with the agency's comments or petition." Id. § 1533(i).

Alternatively, if FWS makes a positive 12-month finding based on all five statutory factors, it must undertake a formal rule-making process to change the listing status of the species, or explain why it cannot do so due to funding constraints. See id. §§ 1533(b)(3)(D)(ii)(5), (6). This rulemaking process ensures adequate notice and opportunity for comment on all listing and delisting proposals. FWS must provide general notice to the public by publishing its proposed rule in the Federal Register and newspapers in areas where the species is believed to occur, and the agency must directly contact affected States and relevant professional scientific organizations to invite their comments. See id. § 1533(b)(3)(D)(ii)(5). In addition, the agency must promptly hold a public hearing on its proposed rule if anyone requests a hearing within 45 days of the general notice publication in the Federal Register. See id. § 1533(b)(3)(D)(ii)(5)(E). Within one year of its general notice publication, FWS

must take definitive action on its proposed rule, and this action, whatever it may be, is expressly subject to judicial review. See id. § 1533(b)(3)(D)(ii)(6)(A).

In short, the ESA gives "any person" including the State of Wyoming, members of the Wolf Coalition, and Park County commissioners, the power to petition for delisting and thus, to compel an expeditious agency response that is subject to judicial review on the basis of a record that addresses all of the relevant listing factors identified by Congress. As the district court explained, the ESA's "statutory mechanisms, namely the petition process" operate to "create a reviewable record," to engender "choices under hard deadlines set by Congress," and to "trigger[] the 'best science available' mandate." Aplts. App. Vol. 5 at 1258. In this way, "[t]he petition process strikes a delicate balance between judicial review, agency expertise, and the public's right to a healthy, sustainable eco-system which fosters biological diversity." Id. at 1221.

B. Previous FWS Groundwork For Delisting

While FWS has announced that the Northern Rocky Mountain wolf population is meeting numerical recovery goals, FWS has not begun the above-described statutory process that Congress prescribed for delisting a species: FWS has never published a draft rule proposing to delist wolves in the Federal Register; FWS has never received or reviewed comments from the general public and independent scientists on a concrete delisting proposal; and FWS has

never made a conclusive determination that the Northern Rocky Mountain wolf population is no longer imperiled based on a comprehensive review of all five of the ESA's listing criteria.

Aside from its ongoing review of Wyoming's delisting petition, the only initial step that FWS has taken toward a delisting proposal is to request that states develop wolf management plans. Before FWS can delist wolves, FWS must ultimately determine in the context of a § 4 rulemaking process that "existing regulatory mechanisms," including state management plans, will provide an adequate safety net for wolves once the ESA's protections are withdrawn. 16 U.S.C. § 1533(a)(1)(D) (emphasis added). Thus, in an effort to lay the groundwork for a viable delisting proposal, FWS, in 2002, began working with the States of Wyoming, Montana, and Idaho to develop wolf management plans that "demonstrate how [the states] would manage wolves if the Act no longer protected them from excessive human-caused mortality." Aplts. App. Vol. 9 at 2502.

1. The Wyoming Plan and Implementing Legislation

When the Wyoming Game and Fish Department ("WGFD") began developing the requested plan in 2002, Wyoming's management approach immediately raised serious concerns for FWS because it hinges on "dual-classification" of wolves. Id. Vol. 6 at 1246. In Yellowstone and Grand Teton

National Parks and neighboring Forest Service wilderness areas, wolves would be classified as "trophy game," meaning that wolves would be fully protected in the National Parks and subject to regulated hunting in wilderness areas. See id. Throughout the rest of Wyoming, wolves would be classified as "predators," subject to virtually unregulated killing. See id. This "predator" classification would allow anyone, at any time, to bait, poison, trap, and shoot wolves, to dynamite and suffocate wolf pups in their dens, to hunt wolves down in airplanes, with motor vehicles, and with bright lights at night — in short, to aggressively exterminate a recovering species as a pest. See Wyo. Stat. § 23-3-203 (providing that "[p]redatory animals … may be taken without a license in any manner and at any time").[4]

As Wyoming acknowledges, predator classification would apply to wolves across 90 percent of their current range in Wyoming outside of Yellowstone and Grand Teton National Parks. See Aplts. App. Vol. 6 at 1663. Since only four of Wyoming's wolf packs live entirely within Park boundaries,

[4] The only legal limitations on killing wolves classified as predators would be as follows: (1) anyone seeking to kill wolves from an aircraft would need to pay a nominal fee for an aerial hunting permit, see Wyo. Stat. § 11-6-105; (2) hunting or killing wolves from public highways would be illegal, see Wyo. Stat. § 23-3-205(a); and (3) the Game and Fish Commission would retain discretion to promulgate rules governing the use of traps and snares to kill wolves if it ever decided that such measures were appropriate. See Wyo. Stat. § 23-3-304(a).

see id. Vol. 9 at 2505, this means that the vast majority of wolves in Wyoming would be managed — and likely killed — as predators.

The single greatest threat to wolves is people who kill them. Historically, "wolves were hunted and killed with more passion and zeal than any other animal in U.S. history." U.S. Fish and Wildlife Service, Gray Wolf, http://training.fws.gov/library/Pubs/graywolf.pdf. (last checked August 8, 2005). "Poisons, trapping, and shooting — spurred by Federal, state and local government bounties — resulted in the extirpation of this once widespread species from more than 95 percent of its range" in the lower-48 states. See 68 Fed. Reg. at 15,805.

Unfortunately, the same human attitudes that led to widespread wolf extermination still persist today. For instance, in Wyoming, the Fremont County Commission is one of several County Commissions that has enacted a resolution "identify[ing] wolves as 'unacceptable species' which are prohibited within the boundaries of Fremont County." Aplts. App. Vol. 6 at 1669-1700. Against this backdrop of enduring human hostility, FWS has repeatedly stressed that "excessive human persecution" is the single most important issue that "must be addressed for [wolves] to be delisted once recovery is achieved." Id. Vol. 6 at 1472; see also id. Vol. 6 at 1503, 1517; 68 Fed. Reg. at 15,827.

Nevertheless, Wyoming has remained steadfast in its determination to manage wolves as predators subject to unregulated killing. In March 2003, the Wyoming legislature passed House Bill 229 to govern management of gray wolves, and in July 2003, WGFD released its final "Wyoming Gray Wolf Management Plan." See Wyo. Stat. § 23-1-304; Aplts. App. Vol. 6 at 1643-85. Notwithstanding the objections made by staff at FWS and the U.S. Department of Interior, see Aplts. App. Vol. 6 at 1473, 1502-3, 1517, Vol. 7. at 1792-97, Wyoming established a "dual-classification" system that would manage the majority of wolves currently living in Wyoming as predators. Id. Vol. 6 at 1246.

2. FWS' Response To Wyoming's Final Plan

Due to concerns that wolves in Wyoming would not receive sufficient protection if the ESA's protections were removed, FWS has been unwilling to publish a regulatory delisting proposal sua sponte. On January 13, 2004, FWS informed WGFD that "delisting cannot be proposed at this time" because "[t]he unregulated harvest, inadequate monitoring plan, and unit boundaries proposed by the state's management plan do not provide sufficient management controls to assure the Service that the wolf population will remain above recovery levels," and because Wyoming state law does not "clearly commit to

managing for at least 15 wolf packs in Wyoming." Id. Vol. 7 at 1955-56.[5] Accordingly, FWS advised WGFD that it would "proceed with the proposed delisting process for the gray wolf" only if Wyoming were willing to address FWS' concerns in cooperation with the agency. Id. Vol. 7 at 1955.

In the meantime, FWS continues to manage wolves in Wyoming pursuant to the regulations governing the wolf reintroduction program. See 50 C.F.R. § 17.84(i). In keeping with these regulations, FWS consistently employs both non-lethal and lethal wolf control measures to resolve the sporadic wolf-livestock conflicts that have been reported over the past nine years. See http://westerngraywolf.fws.gov/annualrpt04/FINAL%20Table%205b_acc.Pdf (reporting wolf depredation and control statistics from 1987 through 2004, including "lethal removal" of 29 wolves in Wyoming in 2004) (last checked August 8, 2005). This year to date, FWS reports killing 28 wolves in the Greater Yellowstone Area including at least 16 wolves in Wyoming to resolve such conflicts. See http://westerngraywolf.fws.gov (weekly "Gray Wolf Recovery Status Reports").

[5] FWS also specified that "[t]he Wyoming definition of a [wolf] pack must be consistent among the three states and should be biologically based" to insure the inclusion of "at least one breeding pair." Aplts. App. Vol. 7 at 1955-56. At this time, the states have not settled on a consistent "pack" definition.

C. The District Court's Decision

Shortly after FWS announced its unwillingness to proceed with a wolf delisting proposal, Wyoming filed suit in the District of Wyoming, challenging both the January 2004 letter and an alleged failure by FWS to properly manage wolves. Aplts. App. Vol. 1 at 50-61.

The district court dismissed all of appellants' claims brought pursuant to the APA, and further denied Wyoming's constitutional claims on the merits. Id. Vol. 5 at 1192-1260 ("Op.").[6] The district court held, inter alia, that FWS' January 2004 letter "does not rise to the level of decision making that is contemplated by the APA, and is not reviewable as final agency action." Id. Vol. 5 at 1226, Op. at 35. With regard to ongoing wolf management, the district court held that appellants' "complaints are broad programmatic attacks on how the Federal Defendants are exercising their discretionary authority," and that "[t]his type of claim is not cognizable under the APA." Id. Vol. 5 at 1234-35, Op. at 43-44. The district court also dismissed the Wolf Coalition's NEPA claim on grounds that ongoing implementation of the wolf recovery program in the Northern Rockies is not subject to NEPA's supplemental environmental analysis requirements. See Id. Vol. 5 at 1237, 1241-42, Op. at 46, 50-51.

[6] For the Court's convenience, Intervenor-Appellees cite to the district court's memorandum opinion using both the bate-stamped page numbers in the Appellants' Appendix and the internal page numbers in the original opinion, which is reprinted in the addendums to Appellants' opening briefs.

Finally, the district court held that "the challenged actions of the Federal Defendants are consistent with the powers delegated to them by Congress through the ESA via the Commerce Clause, and these actions do not invade any province of Wyoming's state sovereignty reserved by the Tenth Amendment." Id. Vol. 5 at 1257, Op. at 66.

D. Wyoming's Delisting Petition

On July 13, 2005, three weeks after filing its opening brief in this Court, Wyoming submitted a petition to FWS to delist the Rocky Mountain population of gray wolves. See http://wyoming.gov/governor/policies/ documents/ signeddelistpetition07.13.05.pdf. Now, FWS must review the petition, and within 90 days of receipt, it must make a 90-day finding as to whether there is "substantial scientific or commercial information indicating that the petitioned action may be warranted." 16 U.S.C. § 1533(b)(3)(A). If FWS issues a negative 90-day finding, Wyoming will be able to challenge that finding in federal court. See id. § 1533(b)(3)(C)(ii). If FWS issues a positive 90-day finding, FWS will publish that finding in the Federal Register, "promptly commence a review of the status of the species," and, within one year, publish a 12-month finding whether delisting is "warranted." Id. §§ 1533(b)(3)(A),(B). If FWS finds either that the petitioned action is "not warranted" or "warranted but precluded" by funding constraints, Wyoming may challenge that negative

finding in federal court. Alternatively, if FWS issues a positive 12-month finding, it will be required to commence the ESA's § 4 rulemaking process by publishing a proposed delisting rule — precisely the action that appellants were seeking to compel in the district court.

No matter how the ongoing petition process plays out, Wyoming will be able to obtain judicial review of a final agency decision based on a comprehensive record that addresses the full array of current threats to wolves in the Northern Rockies and the adequacy of all existing federal, state, and local regulatory mechanisms, including Wyoming's wolf management plan, to address those threats.

SUMMARY OF THE ARGUMENT

Before filing suit in the district court and bringing these appeals, appellants never availed themselves of the ESA's petition process. Instead, they pressed forward with litigation aimed at forcing approval of the Wyoming plan outside of the statutory process. However, under the ESA, Wyoming cannot obtain final approval of its wolf plan until FWS completes the ESA's mandatory delisting process — that is, until after FWS has published a proposed delisting rule, followed notice-and comment procedures, and issued a final delisting rule that includes a determination that wolves are no longer

imperiled based on a comprehensive, integrated review of the five statutory listing factors.

Wyoming's interest in managing wolves as predators cannot trump this statutory framework. If appellants want to obtain a final delisting determination on the Wyoming wolf plan, the ESA affords a remedy. Wyoming has availed itself of that remedy by submitting a delisting petition. The ESA demands a timely response from FWS this coming October. See 16 U.S.C. § 1533(b)(3),(i). Until then, there is no final agency action by FWS that is subject to challenge. The district court properly dismissed appellants' claims challenging the January 2004 letter.

Further, the district court properly dismissed appellants' claims challenging ongoing management of the Wyoming wolf population. Appellants have never identified any discrete, non-discretionary "control" action that FWS has failed to take under the ESA or its implementing regulations, or any final agency action that requires supplemental environmental analysis under NEPA.

Finally, the district court correctly rejected appellants' claims that FWS' January 2004 letter violates the Guarantee Clause and Tenth Amendment of the Constitution. Imposing conditions on approval of Wyoming's wolf management plan was a legitimate exercise of FWS' authority under the ESA via the Commerce Clause. Because Wyoming is

free to reject FWS' conditions and allow federal preemption of wolf management to continue, the challenged letter in no way commandeers the State's legislature, much less endangers its republican form of government.

Finally, even if Plaintiffs' claims challenging rejection of the Wyoming wolf plan were properly before this Court — which they are not — they fail on the merits. FWS offered a compelling justification for declining to approve the Wyoming plan: Wyoming commits to maintaining too few wolf packs at the same time it permits killing of too many wolves. In rejecting the Wyoming plan, FWS properly exercised its expertise in managing wolves in the Northern Rockies.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED APPELLANTS' CLAIMS CHALLENGING FWS' LETTER

The district court properly dismissed appellants' claims challenging FWS' January 2004 letter under both § 706(2) and § 706(1) of the APA. On the one hand, appellants allege that the letter is "final agency action" that is arbitrary, capricious, an abuse of discretion and contrary to the ESA in violation of 5 U.S.C. § 706(2). See Appellant State of Wyoming's Opening Brief ("Wyo. Br.") at 21-31; Brief of Appellants Wyoming Wool Growers, et al. ("Coalition Br.") at 26-40. On the other hand, they argue — and not in the alternative — that the very same letter represents "agency action unlawfully withheld or

unreasonably delayed" in violation of the APA, 5 U.S.C. § 706(1). See Wyo. Br. at 31-43; "Coalition Br." at 40-45. Under either theory, appellants fail to properly invoke the jurisdiction of the federal courts.

A. Standard of Review

This Court "review[s] de novo a district court's dismissal for lack of subject matter jurisdiction." Algin v. Lucero, 87 F.3d 401, 403 (10th Cir. 1996).

B. Appellants Fail To Challenge Any Final Agency Action Under APA § 706(2)

The district court properly dismissed appellants' § 706(2) claims for failure "to show that the January 13, 2004 letter constituted final agency action." Aplts. App. Vol. 5 at 1226, Op. at 35. The challenged two-page letter, which states FWS' unwillingness to make a discretionary proposal that would merely initiate a notice-and-comment rulemaking process, is the very sort of "preliminary … or intermediate agency action" that is not yet subject to APA review. 5 U.S.C. § 704 (defining "actions reviewable"). Indeed, review of FWS' letter would undermine the APA's policy of preventing judicial interference with an unfolding agency decision-making process — in this case, the wolf delisting process, which involves many other issues besides the sufficiency of Wyoming's plan.

In determining whether an agency action is "final" under the APA, this Court "examines [1] whether its impact is direct and immediate, [2] whether the action marks the consummation of the agency's decision making process, and [3] whether the action is one by which rights or obligations have been determined, or from which legal consequences will flow." Gordon v. Norton, 322 F.3d 1213, 1220 (10th Cir. 2003) (internal citations and quotations omitted). FWS' letter does not satisfy any of these criteria.

1. The January 2004 Letter Did Not Have Any "Direct And Immediate" Impact

FWS' January 2004 letter did not cause any "direct and immediate" impacts. Id. Appellants' very complaint in these cases is that wolf management remains unchanged in Wyoming. Moreover, under the ESA, the January letter could not possibly have direct and immediate impacts because the only legal way to change wolf management is through a notice-and-comment rulemaking process. Thus, even if FWS had sent a letter expressing unqualified enthusiasm for the Wyoming plan, the wolf's current status in Wyoming would remain unchanged. FWS would not be under any obligation to propose delisting, much less immediately. Moreover, even if FWS were to publish a proposed delisting rule, it is entirely speculative whether the rulemaking process would result in a final rule to delist wolves and convey management

authority to Wyoming under its current wolf plan. After receiving comments and reviewing all of the relevant data, FWS could very well conclude that delisting is not appropriate at this time. In short, the January 2004 letter stating the agency's views on a potential delisting proposal had no practical effect. See FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 243 (1980) (finding no final agency action where challenged agency letter had no "practical effect").

Nevertheless, Wyoming argues that the January 2004 letter's "rejection of the Wyoming Plan as written has directly affected Wyoming in at least three ways:" (1) FWS has "indefinitely delayed the delisting of the gray wolf in Wyoming;" (2) "Wyoming is being subjected to different management guidelines than the guidelines being used in Idaho and Montana;" and (3) Wyoming's agricultural industry and "other wildlife resources … are being irreparably damaged by the overpopulation of wolves." See Wyo. Br. at 27; see also Coalition Br. at 34-35. None of these alleged impacts was caused by the challenged FWS letter.

First, FWS' letter has not caused any "indefinite" delays in wolf delisting. Under the ESA, any "interested person" can jump-start the delisting process by submitting a delisting petition to FWS, as Wyoming recently has done. 16 U.S.C. § 1533(b)(3)(A). Had appellants availed themselves of their statutory rights rather than rushing straight to court, they could have obtained a

final delisting decision by now. Understandably, the district court was "at a loss to explain the actions of the State of Wyoming" given that the ESA's "statutory mechanisms, namely the petition process, are in place for the State to create a reviewable record [and] [t]his action, if it had been taken would have forced the Federal Defendants to make choices under hard deadlines set by Congress." Aplts. App. Vol. 5 at 1258, Op. at 67. Because the ESA affords appellants an adequate remedy to prevent "indefinite delays" in the delisting process, appellants cannot establish that they are suffering direct and immediate impacts as a result of the challenged letter. See APA, 5 U.S.C. § 704 (limiting judicial review to "final agency action for which there is no other adequate remedy in a court") (emphasis added); Mobil Exploration & Producing U.S., Inc. v. Dep't of Interior, 180 F.3d 1192, 1199-1200 (10th Cir. 1999) (affirming dismissal of APA claims where underlying statute provided plaintiffs with "opportunities to assert their rights and arguments in a [future] action" thereby

"provid[ing] Plaintiffs with an adequate legal remedy or remedies").[7]

Second, FWS' letter did not deprive Wyoming of management authorities conveyed to Montana and Idaho. Nearly a year after FWS sent the challenged letter, the "management guidelines" cited by Wyoming and the Wolf Coalition were established in a separate rulemaking. See Final Rule, 70 Fed. Reg. 1,286 (Jan. 6, 2005) ("2005 Rule"). That rule created a new regulatory framework for managing the experimental non-essential wolf populations in the Northern Rockies, and defined a new role for "approved" state plans that did not yet exist when the January 2004 letter was sent. If Wyoming wants wolf management in Wyoming to proceed under the new ESA § 10(j) regulations

[7] Prior to the recent filing of Wyoming's petition, the delisting process was stalled regardless of the January 2004 letter. In Defenders of Wildlife v. Sec'y, U.S. Dep't of Interior, 354 F. Supp. 2d 1156 (D. Or. 2004), the U.S. District Court for the District of Oregon invalidated a 2003 rule that divided wolves in the lower-48 states into three distinct population segments ("DPSs") and simultaneously down-listed to "threatened" status wolves that had previously been classified as "endangered" in the newly created Western DPS and Eastern DPS. The Court found that both the Western DPS, which encompassed Montana, Idaho, Wyoming, Washington, Oregon, California, Nevada, and northern Colorado and Utah, and the Eastern DPS were arbitrarily sweeping in their geographic scope and that FWS illegally down-listed wolves throughout the entire expanse of each DPS solely on the strength of "core" populations in the Rocky Mountains and Western Great Lakes respectively. See id. at 1170-73. Accordingly, the court struck down the Western DPS that previously had been under consideration for delisting by FWS. The Oregon court's decision is now on appeal in the Ninth Circuit, and briefing is scheduled to begin in November, 2005. See Defenders of Wildlife v. Norton, No. 05-35691 (9th Cir.) (filed July 13, 2005). Unless and until FWS obtains a reversal of the Oregon court's decision on appeal or designates a valid Western DPS, there is no designated wolf population to propose for delisting.

that now apply in Montana and Idaho, its complaint is not with the January 2004 letter, which never contemplated changes in the existing ESA § 10(j) regulations, but rather with the rulemaking process for the 2005 Rule.

Finally, FWS' letter did not create an "overpopulation of wolves" that allegedly is "irreparably damaging" Wyoming's agricultural industry and "other wildlife resources." Wyo. Br. at 27. [8] Even if FWS had endorsed Wyoming's plan without reservation, the current status of the wolf population would not have changed until completion of a notice-and-comment rule-making process to delist. As the district court found, this argument "suffer[s] from the same causation problem … namely that the letter did not create the … consequence complained of." Aplts. App. Vol. 5 at Op. at 34.

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[8] In any event, Appellants greatly overstate the impact of wolves in Wyoming. The Wyoming Game and Fish Department ("WGFD") reports that "livestock losses to wolves are minimal industry-wide." Aplts. App. Vol. 6 at 1653; see also National Agricultural Statistics Service, U.S. Department of Agriculture, Sheep Losses To All Causes 2004 http://www.nass.usda.gov/wy/internet/livestock/sheep.pdf (reporting that wolves represent the very lowest (.4%) known mortality cause for sheep and lambs in Wyoming, well below weather, disease, poison, and other predators such as coyotes and eagles) (last checked August 8, 2005). Similarly, WGFD's 2004 Annual Report does not disclose any unacceptable wolf impacts on ungulates including elk, which account for the overwhelming majority of wolf kills (85%) in the Greater Yellowstone Area. See Aplts. App. Vol. 6 at 1653; Supp. App. at 9. On the contrary, the Department "continues to manage for a reduction in Wyoming's elk population;" hunter success and harvest levels have remained stable since 1999; and license revenues were up by more than $1 million this past year. Supp. App. at 9, 12.

2. The January 2004 Letter Does Not Mark The Consummation of FWS' Decision-Making Process

Appellants further fail to demonstrate that the January 2004 letter marks the consummation of any FWS decision-making process. Final rejection or approval of the Wyoming plan can occur only upon completion of the statutory delisting process prescribed by Congress in the ESA — either with a negative 90-day or 12-month finding that rejects Wyoming's delisting petition or with a final delisting determination that results from a Federal Register notice-and-comment rulemaking process. As FWS has made clear, "delisting the gray wolf will involve an independent scientific review as well as a public review and comment of all aspects of the delisting, including a review of the State's management plan, particularly any regulatory mechanisms." Aplts. App. Vol. 7 at 1692 (emphasis added).

Wyoming itself has now commenced the ESA's statutory delisting process with its submission of a delisting petition. Because "further administrative action is forthcoming … nothing that the FWS has done (or refused to do) to date can be deemed the 'consummation' of its decisionmaking process." National Parks Conservation Association v. Norton, 324 F.3d 1229, 1238 (11th Cir. 2003) (finding no "final agency action" where agency was "actively engaged in planning" and "ha[d] set an anticipated date for resolving" its process). Where, as here, there are several steps that must precede any

conclusive agency determination, the APA's finality requirements are not satisfied. See Mobil Exploration & Producing, U.S., Inc. v. Dept. of Interior, 180 F.3d at 1198 (finding no "final agency action" where agency letter "served only to initiate further proceedings" by which the agency could make a "conclusive" determination) (quoting the Supreme Court's decision in FTC v. Standard Oil Co. of Cal., 449 U.S. at 241-43); City of San Diego v. Whitman, 242 F.3d 1097, 1098, 1101-102 (9th Cir. 2001) (finding no "final agency action" where EPA sent letter stating its intent to apply provisions of the Ocean Pollution Reduction Act to the city's permit application because there were several administrative steps to be taken before the permit application, once filed, would be conclusively approved or denied); Gordon v. Norton, 322 F.3d at 1221 (finding no "final agency action" where FWS declined to confirm wolf kills because future wolf control decisions would depend on multi-factor analysis in which confirmation of kills was only one factor); Center For Biological Diversity v. Veneman, 335 F.3d 849, 853 (9th Cir. 2003) (holding that report identifying rivers that were both eligible and ineligible for classification as "Wild and Scenic Rivers" was not final agency action because ultimate designation of Wild and Scenic Rivers would require additional steps).

In keeping with the explicit provisions set forth in § 4 of the ESA, FWS will issue a final decision on Wyoming's delisting petition, and that decision,

not the January 2004 letter, will mark the consummation of FWS' decision-making process. Nevertheless, appellants assert that the January 2004 letter was the last step of a delisting "status review" that was allegedly begun in 2003. See Wyo. Br. at 25-26; Coalition Br. at 28-32. This argument fails even on its own terms because the ESA § 4 process never culminates with a "status review."[9] As discussed above, the ESA § 4 process for listing and delisting species culminates either with a negative 90-day or 12-month finding or with a final delisting determination that follows notice-and comment rulemaking.

Further, appellants wrongly conflate the 2003 rulemaking process to reclassify endangered wolves as "threatened" with the statutory process to delist wolves. See Wyo. Br. at 25; Coalition Br. at 28. FWS' assessment in 2003 that endangered wolves outside of Wyoming should be down-listed to

[9] A "status review" is required every five years under the ESA. It is a relatively cursory screening process in which FWS considers the recovery progress of all listed species in order to identify whether any species may be in need of reclassification under the Act. See 16 U.S.C. § 1533(c)(2). Based on this 5-year "status review," FWS may initiate the ESA § 4 rulemaking process to make a conclusive determination regarding down-listing, up-listing, or delisting. See id. (providing that all determinations flowing from a 5-year status review "shall be made in accordance with the provisions of subsections (a) and (b) of this section [4]" setting forth the five listing and delisting criteria and setting forth process for making final determinations). The only other type of "review" prescribed by the ESA is the "review of the status of the species" that FWS must undertake if it makes a positive 90-day finding on a petition. See 16 U.S.C. § 1533(b)(3)(A). Like the 5-year "status review," this review provides the information that FWS must assess in rendering a final listing determination under ESA § 4, but it does not, in itself, constitute final agency action.

threatened status cannot substitute for an assessment that wolves throughout the Northern Rockies, including reintroduced Wyoming wolves, should be denied any ESA protection whatsoever. Crucially, the 2003 Rule left the legal status of reintroduced wolves in the Northern Rockies, including Wyoming, unchanged. See 68 Fed. Reg. at 15,804 (explaining that current experimental population designations, including the relevant designation for wolves in Wyoming, are "retained and are not affected by this rule"). Because FWS was not proposing to disturb existing ESA protections for wolves in the Northern Rockies, the agency never considered the effects of withdrawing the ESA's protections — for instance, whether wolves would be imperiled by habitat destruction, or predation by humans, or the absence of adequate regulatory mechanisms, particularly in Wyoming, in the event of delisting. See, e.g., id. at 15,851 (concluding that "[t]he previous special management regulations will continue to apply to the two nonessential experimental populations in the Northern U.S. Rocky Mountains. Therefore we do not expect wolf mortality rates to change significantly as a result") (citations omitted).

Thus, it is simply not the case, as appellants insist, that FWS "already had determined that four of the five listing criteria were satisfied" and that "Federal Defendants reviewed the [Wyoming] plan as part of a delisting status review." Wyo. Br. at 25; see also Coalition Br. at 8-10, 28-32. In the absence of a 90-

day finding, 12-month finding, or final delisting determination made after notice-and comment rulemaking, appellants cannot point to any action by FWS that marks the consummation of the agency's decision-making process on the Wyoming plan. See id.

3. Legal Consequences Do Not Flow From The January 2004 Letter

Lastly, the challenged letter did not finally determine any "rights or obligations" or otherwise result in "legal consequences" for the State of Wyoming. Gordon v. Norton, 322 F.3d at 1220. Because the letter merely "gave notice that … [the agency] was not willing to promulgate a proposal" and did not "impose[] new requirements" on Wyoming, it does not satisfy the "legal consequences" prong of the finality test. General Motors Corp. v. E.P.A., 363 F.3d 442, 450-452 (D.C. Cir. 2004) (preliminary enforcement statements made as part of "an informal agency-industry dialogue" did not constitute "final agency action" because they "finally determine[d] no rights or obligations of involved parties"). Nevertheless, appellants argue that the January 2004 letter has legal consequences because it: delays delisting; subjects Wyoming to a different management regime than Montana and Idaho; and requires amendment of the Wyoming wolf plan and implementing legislation. See Wyo. Br. at 29-30; Coalition Br. at 33-36. However, as discussed above, FWS' letter is not responsible for delays in the delisting process or for establishing the new

management regime applicable to Montana and Wyoming. Moreover, nothing in the challenged letter requires legislative or executive action on the part of Wyoming. After receiving FWS' letter, Wyoming retained the option either to do nothing and allow federal management of wolves to continue, or to use the ESA's petition process to compel a final listing determination without making any changes to its management plan and implementing legislation. Thus, the January 2004 letter never "imposed new requirements" on Wyoming. See General Motors Corp. v. E.P.A., 363 F.3d at 450-452.

Wyoming recently has submitted a delisting petition. FWS must now determine the State's "rights and obligations" with regard to the Wyoming wolf management plan as it currently stands. Gordon v. Norton, 322 F.3d at 1220. In the meantime, appellants cannot seek judicial review of the January 2004 letter. Where, as here, "judicial intervention [would] lead[] to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary," this Court "has cautioned against finding finality." Sierra Club v. Yeutter, 911 F.2d 1405, 1417 (10th Cir. 1990) (quoting FTC v. Standard Oil Co., 449 U.S. at 242). As the district court correctly concluded, appellants "cannot create a defacto petition process that ignores the legislative mandates found in the ESA. This attempt circumvents important safeguards, such as "'best available science,' timetables for agency

action, and judicial review." Aplts. App. Vol. 5 at 1221-22, Op. at 30-31.[10]

C. Appellants Failed To Exhaust Their Administrative Remedies

Even if the January 2004 letter were "final agency action" and even if appellants' claims challenging the letter were ripe — neither of which is the case — appellants' claims must be dismissed for failure to exhaust administrative remedies. "Exhaustion serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency," and therefore, "[e]xhaustion concerns apply with special force when the action under review involves exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise." United Tribe of Shawnee Indians v. United States, 253 F.3d 543, 550 (10th Cir. 2001) (quoting McCarthy v. Madigan, 503 U.S. 140, 145 (1992)).

[10] Because appellants have failed to identify any "final agency action" under the APA, they also fail to satisfy constitutional ripeness requirements. See Ash Creek Mining Co. v. Lujan, 934 F.2d 240, 241 (10th Cir. 1991) ("The doctrine of ripeness prevents federal courts from interfering with the actions of administrative agencies except when a specific 'final agency action' has an actual or immediately threatened effect.") (quoting Lujan v. Natl. Wildlife Fed'n, 497 U.S. 871, 894 (1990)); see also Coalition For Sustainable Resources v. U.S. Forest Serv., 259 F.3d 1244,1253 (10th Cir. 2001) (requiring dismissal on ripeness grounds where "judicial involvement" would thwart "effective administration" of statutory duties: agency "with its special expertise, should be allowed a first chance to balance the competing interests at stake and choose a course of action"). Id.

In this case, where appellants are seeking judicial review before they have received a final disposition on Wyoming's delisting petition, "exhaustion concerns apply with special force" because FWS is now in the midst of a process that depends upon the application of the agency's "special expertise." Id. The Tenth Circuit's decision in Shawnee Indians and a similar decision by the D.C. Circuit in James v. United States Dep't of Health and Human Services, 824 F.2d 1132 (D.C. Cir. 1987), are illustrative. In both cases, Native American tribes sought a declaration of their status as federally recognized tribes and a court order directing the Bureau of Indian Affairs ("BIA") to include them on its list of recognized tribes. In both cases, the Courts granted a motion to dismiss on grounds that the tribes had failed to apply for recognition under the BIA's rules and regulations. As the courts explained, the determination regarding federal recognition of the tribe "should be made in the first instance by the Department of the Interior …The purpose of the regulatory scheme set up by the Secretary of Interior is to determine which Indian groups exist as tribes. That purpose would be frustrated if the Judicial Branch made initial determinations of whether groups have been recognized previously or whether conditions for recognition currently exist." Shawnee Indians, 253 F.3d at 551 (quoting James, 824 F.2d at 1137) (internal citations omitted).

Here, the determination whether delisting can go forward without any changes in the Wyoming wolf plan also must "be made in the first instance by the Department of Interior" in response to a delisting petition. A preemptive judicial ruling on one piece of the delisting puzzle before FWS has the opportunity to put all the puzzle pieces together with a comprehensive ESA § 4 determination would frustrate the central purpose of the ESA's delisting process.

Moreover, as in Shawnee Indians, exhaustion is necessary to produce the "useful record" that will be essential to "subsequent judicial consideration." Id. Before wolves can be delisted in the Northern Rockies, FWS will have to address several issues that the agency has not yet considered. For instance, FWS must determine whether habitat protections are in place on private, state, and federal lands to ensure that recovery objectives for "connectivity" between the three wolf populations in Montana, Yellowstone, and Idaho are met. Aplts. App. Vol. 7 at 1914. This will entail consideration of state land-use provisions and federal public lands laws, including regulatory changes such as the recent repeal of species viability standards under the National Forest Management Act, see Final Rule, 70 Fed. Reg. 1,023 (Jan. 5, 2000), and withdrawal of National Forest roadless area protections. See Final Rule, 70 Fed. Reg. 25,653 (May 13, 2005). It will be necessary to consider "disease related problems" given that

"some diseases (rabies, canine-parvo, canine distemper, and mange) have affected wolf population dynamics in some areas" and could have serious consequences for wolves "managed near the delisting threshold," as in the Wyoming plan. Aplts. App. Vol. 7 at 1908; see also http://westerngraywolf.fws/gov/wk07232004.htm (Recovery Status Report from 7/10-23/2004 reporting that mange already had been "discovered in several packs north, east, and west of the Park" and that the first documented case had likely been discovered within Yellowstone National Park boundaries). It will be necessary to consider whether any of the three state plans are actually funded.

Depending on the answer to these and many other questions, FWS may determine that Wyoming's plan must be strengthened to afford wolves adequate protection, or FWS may determine that some previously rejected aspects of the Wyoming plan are sufficient. Ultimately, however, the issues raised by appellants cannot be resolved by a reviewing court until FWS has created a record that details its analysis of all of the current threats to wolves and all of the existing regulatory mechanisms to address those threats, including, most obviously, the Idaho and Montana wolf management plans, which are not before this court. In the meantime, there is no "reviewable record" because appellants failed to abide by the ESA's § 4 delisting process. Aplts. App. Vol. 5 at 1258, Op. at 67.

Wyoming and the Wolf Coalition should not be permitted to "bypass the regulatory framework" that the ESA provides for assessing the adequacy of regulatory mechanisms. Shawnee Indians, 253 F.3d at 550. The district court found correctly that the ESA's "statutory requirements are not mere bureaucratic hoops to jump through, but rather are the state will of Congress, and the people, and as such should be adhered to with great care." Aplts. App. Vol. 5 at 1258, Op. at 67.

D. Appellants' APA 706(1) Claims Do Not Allege A Failure To Take Discrete Agency Action That Was Legally Required Under The ESA

Appellants also style their challenge to the substance of the January 2004 letter as a challenge to agency inaction under § 706(1) of the APA. Thus, they claim that FWS unlawfully withheld agency action in allegedly failing to base the January 2004 letter on the best available scientific data. See Wyo. Br. at 48-49; Coalition Br. at 45-47. This claim fails because: (1) appellants do not challenge agency action unlawfully withheld as the APA, 5 U.S.C. § 706(1) contemplates; and (2) the January 2004 letter was not subject to the ESA's "best available science" requirements.

First, Appellants wrongly invoke APA § 706(1). The Supreme Court has recently held that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take discrete agency action that it is required to

take." Norton v. Southern Utah Wilderness Alliance, 524 U.S. 55, 124 S.Ct. 2373, 2379 (2004) ("SUWA") (emphasis in original). Here, appellants do not allege that FWS withheld any "discrete" action that it was required to take under the ESA. The ESA's "best available science" provision is not a free-standing statutory obligation to act; rather, it governs the manner in which FWS takes specified actions to list or delist species under ESA § 4. See 16 U.S.C. § 1533(b)(1)(A) (providing that FWS "shall make [listing] determinations … solely on the basis of the best scientific and commercial data available"). Thus, an alleged violation of § 1533(b)(1)(A) is properly framed as a § 706(2) claim challenging agency action that is contrary to the ESA, not a § 706(1) claim for failure to take required action. Because appellants do not allege that FWS unlawfully withheld a required "action," their § 706(1) claims necessarily fail.

Second, the ESA's "best available science requirement" requirement applies exclusively to listing and delisting determinations made pursuant to ESA § 4, not to agency letters such as the January 2004 letter challenged here. See 16 U.S.C. § 1533(b)(1)(A). Because FWS was under no obligation to base its correspondence with Wyoming solely on the best scientific data, the district court correctly dismissed appellants' § 706(1) claims on grounds that the "best available science mandate" did not "attach" to the challenged letter. Aplts. App. Vol. 5 at 1231, Op. at 40.

E. The Wolf Coalition's NEPA Claim Fails Because The January 2004 Letter Is Not Final Agency Action That Triggers Environmental Analysis Requirements

The district court also correctly dismissed the Wolf Coalition's claim alleging that FWS violated NEPA in failing to prepare an Environmental Impact Statement for the January 2004 letter.

According to the Wolf Coalition, FWS' letter "represents a major modification to wolf management" that "force[s] the geographic expansion of wolves throughout Wyoming," thereby triggering NEPA's environmental analysis requirements. Coalition Br. at 56. This claim fails for the same reason that Appellants' other APA claims fail: the January 2004 letter does not constitute final agency action. "Because NEPA does not provide for a private right of action, plaintiffs rely on the judicial review provisions of the APA" and "must therefore satisfy the 'statutory standing' requirements of the APA." Colorado Farm Bureau Fed'n v. U.S. Forest Serv., 220 F.3d 1171, 1173 (10th Cir. 2000). As this Court has explained, litigants cannot establish "statutory standing to bring th[eir] claim under the APA" when "they have failed to meet their burden of identifying a final agency action." Id. at 1174 (dismissing NEPA claims because challenged U.S. Forest Service involvement in the planning process to introduce lynx into Colorado was not "final agency

action").[11] Here, the Wolf Coalition's NEPA claim fails to target a "final agency action" and thus was properly dismissed.

II. THE DISTRICT COURT PROPERLY DISMISSED APPELLANTS' CLAIMS CHALLENGING ONGOING WOLF MANAGEMENT

The district court also properly dismissed appellants' claims that FWS has failed to control the Wyoming wolf population in violation of the ESA and the APA. Both Wyoming and the Wolf Coalition argue that wolves are unacceptably impacting livestock and wild ungulate populations in Wyoming and that FWS is required to address these impacts. However, appellants do not identify any required action that FWS has failed to take. See Wyo. Br. at 49-50; Coalition Br. at 49-51. Nor do they cite to any statutory or regulatory provision that requires FWS to undertake wolf control measures such as wolf killing or relocation. Review of the alleged failure to act is therefore unavailable under the APA.

A. Appellants Fail To Identify Any Discrete, Required Wolf Management Action That FWS Has Failed To Take

Appellants fail to make cognizable wolf management claims under APA § 706(1) because, once again, they fail to "assert[] that an agency failed to take

[11] The Wolf Coalition argues that the district court could not dispose of its NEPA claim "in a factual vacuum under Rule 12." Coalition Br. at 55. However, "[w]hether federal conduct constitutes final agency action within the meaning of the APA is a legal question." Colorado Farm Bureau Fed'n, 22 F.3d at 1173.

discrete agency action that it is required to take." SUWA, 542 U.S. 55, 124 S.Ct. at 2379.

As the district court correctly stated, "a review of the relevant regulations clearly demonstrates that [FWS] [is] not mandated to control wolf depredations." Aplts. App. Vol. 5 at 1232, Op. at 41. The regulations governing management of experimental wolf populations in the Northern Rockies provide that FWS "may promptly remove (place in captivity or kill) any wolf the Service or agency authorized by the Service determines to present a threat to human life or safety." 50 C.F.R. § 17.84(i)(3)(v). Similarly, FWS "may take wolves that are determined to be "problem" wolves;" id. § 17.84(i)(3)(vii); the "Service or other Federal, State, or tribal personnel may receive written authorization from the Service to take animals under special circumstances," id. § 17.84(i)(3)(ix); and "any employee or agency of the Service or appropriate Federal, State, or tribal agency … when acting in the course of official duties, may take a wolf from the wild …." Id. § 17.84(i)(3)(xi) (emphasis added). Thus, the wolf control authority granted to FWS is "discretionary in nature." Aplts. App. Vol. 5 at 1234, Op. at 43. Because FWS is not "under a discrete, non-ministerial duty to control depredations," the district court correctly dismissed appellants' management claims pursuant to the Supreme Court's decision in SUWA. Id. Vol. 5 at 1233-

34, Op. at 42-43. As the district court found, appellants' "complaints are broad programmatic attacks on how Federal [Appellees] are exercising their discretionary authority," and "[t]his type of claim is not cognizable under the APA." Id. Vol. 5 at 1233, Op. at 42 (citing SUWA, 124 S.Ct at 2379-80).

B. Appellants' Wolf Management Claims Are Unripe

Appellants allege for the first time in these appeals that FWS has failed to fulfill a mandatory duty to control confirmed "problem wolves" under 50 C.F.R. § 17.84(i)(3)(vii). See Wyo. Br. at 49-50; see also Coalition Br. at 49-50. However, even if appellants had alleged facts relating to "problem wolves" in their complaints — which they did not — and even if the relevant regulatory provision were not "couch[ed] in discretionary language," as Wyoming concedes it is, Wyo. Br. at 49, appellants' wolf management claims still would be unripe under the this Circuit's holding in Gordon v. Norton, 322 F. 3d at 1219-22.

In Gordon, ranchers brought suit challenging FWS' failure to confirm wolf kills and remove problem wolves from their ranch. This Court dismissed the case as unripe because FWS had yet to reach a final decision regarding the wolves, which were still being monitored by the agency. See id. (reasoning that "exercising jurisdiction over this case before FWS has formulated a definitive course of action will only undermine [wolf recovery] efforts"). Here, the

respective complaints filed by Wyoming and the Wolf Coalition do not even allege that appellants have requested specific wolf control actions by FWS, much less that FWS has failed to respond to those requests. Thus, the considerations weighing in favor of dismissal are even more powerful here than in Gordon. This Court should affirm the district court's dismissal accordingly.

III. THE DISTRICT COURT PROPERLY DENIED WYOMING'S CONSTITUTIONAL CLAIMS ON THE MERITS

Finally, the district court properly denied Wyoming's constitutional claims on the merits. This Court reviews de novo the district court's summary judgment rulings, including its "federal constitutional legal conclusions." Blue Circle Cement, Inc. v. Bd. of County Com'rs of County of Rogers, 27 F.3d 1499, 1503 (10th Cir. 2004).

In support of its arguments that the January 2004 letter "usurp[s] the state legislative process" and "pose[s] a realistic risk of altering the 'form' and 'method of functioning' of Wyoming's government," Wyo. Br. at 47-48, Wyoming relies exclusively on the Supreme Court's decision in New York v. United States, 505 U.S. 144 (1992). However, these arguments fail under the "analytical framework" set forth in New York. Aplts. App. Vol. 5 at 1250, Op. at 59. As the district court correctly concluded, Federal Appellees "have offered the State a permissible quid pro quo, namely that Wyoming establish a wolf management plan that comports with the ESA, or the Federal Defendants

through the ESA will continue to pre-empt Wyoming's regulation of the gray wolf." Id. As "this is exactly the type of encouragement deemed permissible by the Supreme Court in New York," the district court properly ruled that Wyoming's constitutional claims were meritless. Aplts. App. Vol. 5 at 1250, Op. at 59 (citing New York, 595 U.S. at 168).

IV. APPELLANTS' CLAIMS CHALLENGING REJECTION OF THE WYOMING WOLF PLAN ARE MERITLESS

Appellants devote substantial space to the merits of the claims that were dismissed in the district court, asserting that this Court "may consider issues that were not considered below." Wyo. Br. at 31 n.3. However, "it is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." Singleton v. Wulff, 428 U.S. 106, 120 (1976). Given space constraints and the many jurisdictional issues on appeal, this Court should apply the general rule and remand to the district court if it determines — which it should not — that any of appellants' claims were dismissed in error.

However, in an abundance of caution, Sierra Club and Natural Resources Defense Council address appellants' arguments on the merits as follows.

A. Standard Of Review

Actions taken by FWS pursuant to the ESA are reviewed pursuant to APA § 706. See Gordon v. Norton, 322 F. 3d at 1219. Under the APA,

reviewing courts may set aside agency action only when it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). So long as FWS has "considered the relevant factors and articulated a rational connection between the facts found and the choices made," the Court must uphold the agency's decisions. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 105 (1983).

B. FWS' January 2004 Letter Was Not Arbitrary and Capricious

FWS properly declined to endorse the wolf management regime developed by Wyoming. The State will not prohibit indiscriminate human killing of wolves outside of western Wyoming's National Parks and federally designated wilderness areas, and will not commit to maintaining a viable number of wolf packs in Wyoming.

1. Relevant Factual Background

Human-caused mortality poses the single greatest threat to wolves in the Northern Rockies, see, e.g. Aplts. App. Vol. 6 at 1472, 1503, 1517, and Yellowstone and Grand Teton National Parks do not, in themselves, provide sufficient refuge from human killing to support Wyoming's share of a recovered wolf population. See id. Vol. 6 at 1473, 1478, 1504, 1506-16, Vol. 7 at 1791, Vol. 9 at 2502-2505. Thus, over the two years that Wyoming developed its management plan and implementing legislation, FWS consistently

advised the State that it would need to protect wolves as trophy game, subject to regulated fair-chase hunting, in "an area much larger" than Yellowstone and Grand Teton National Parks in order to sustain a recovered wolf population. Id. Vol. 6 at 1473. In order to sustain the wolf population at recovery levels, FWS also made clear that Wyoming would need to commit to maintaining 15 wolf packs in the State, with 7 of those packs outside of the Parks. See e.g., id. Vol. 6 at 1691, Vol. 7 at 1949, Vol. 9 at 2504.

Despite this guidance from FWS, Wyoming remained wedded to predator classification for wolves across nearly all of their current Wyoming range outside of the National Parks. In an effort to accommodate the State without jeopardizing wolf recovery, Wolf Recovery Coordinator Ed Bangs eventually suggested that a dual-classification system could work if the state's more protective trophy game area were expanded to include the areas where wolves are living outside the Parks, and if the expansion were made permanent. See id. Vol. 7 at 1792, 1794-96. Whereas Wyoming had adopted provisions for fluctuating trophy game boundaries depending on the number of wolf packs in the State, Mr. Bangs cautioned that:

> Switching back and forth would be a regulatory, management, and enforcement nightmare, would result in endless flip-flopping, and widespread public confusion. More seriously it creates an environment whereby the wolf population is much more likely to slip below acceptable levels and trigger relisting.

Id. Vol. 7 at 1794; see also id. Vol. 7 at 1791 ("the switch from predatory animal to trophy game status should happen once"); Vol. 9 at 2506 (same). For this reason, Mr. Bangs once again urged Wyoming to abandon predator classification for wolves in favor of the same trophy game classification applicable to black bears and mountain lions in Wyoming. See id. Vol. 6 at 1796-97.

Over FWS' objections, Wyoming settled on a dual-classification scheme that does not incorporate either one of the two recommendations that FWS deemed essential to maintaining wolves at recovery levels. First, Wyoming failed to establish trophy game boundaries that afford wolves sufficient protection outside of National Parks and wilderness areas.[12] Second, Wyoming failed to commit to maintaining 7 packs outside the Parks and a total of 15 packs statewide. The state management plan incorporates this goal, but the wolf statute actually passed by the State legislature does not. Instead, Wyoming law authorizes WGFD to manage for no more than 7 wolf packs

[12] Wyoming's management regime provides only for a temporary expansion in trophy game boundaries when the number of packs outside the parks falls below 7 and there are fewer than 15 wolf packs in the State. See Wyo. Stat. § 23-1-304. As FWS made clear in its comments on the draft final plan, the practical difficulties of enforcing shifting boundaries make them inherently ineffective, and the 7-pack trigger would not provide wolves with needed protections until after they had declined well below recovery levels. See Aplts. App. Vol. 7 at 1794; see also id. Vol. 9 at 2505. Not surprisingly, FWS was unwilling to endorse a management regime that makes protective measures unavailable until the wolf population has plummeted below recovery levels.

outside the Parks. Even if wolves decline in the National Parks and the total number of Wyoming wolf packs falls below 15, WGFD is not permitted to manage for more than 7 wolf packs outside the Parks. By the same token, if the number of packs outside the Parks falls below 7, WGFD cannot take any protective action so long as there are still 15 packs statewide. In short, Wyoming cannot, under its current laws, provide any assurance that it will contribute its share of a recovered tri-state wolf population by maintaining 15 packs overall and 7 packs outside the Parks ("the 15 and 7 pack objective"). See Wyo. Stat. § 23-1-304; Aplts. App. Vol. 9 at 2504.

In light of Wyoming's failure to expand its trophy game area and commit to the 15 and 7 pack objective, FWS sent the challenged January 2004 letter declining to endorse the plan and implementing legislation. FWS' concerns with Wyoming's management regime should have come as no surprise to the State. The January 2004 letter followed on the heels of at least seven previous letters to various state officials and countless verbal communications with WGFD staff, in which FWS repeatedly explained its biological concerns regarding predator classification and the critical importance of maintaining 15 Wyoming wolf packs overall and 7 packs outside the Parks.

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

The record amply supports FWS' objections to the Wyoming management scheme, which amounts to a lethal prescription for the majority of the Wyoming wolf population that wanders out of the National Parks and surrounding wilderness areas. Nevertheless, appellants maintain that FWS improperly "demanded the changes to the Wyoming Plan and [implementing legislation] based upon litigation concerns and political concerns." Wyo. Br. at 32; see also Coalition Br. at 41.

This argument fails both as a matter of law and as a matter of fact. Legally, nothing in the ESA prevents Interior Department officials and FWS staff from considering the legal and political implications of their actions during the planning process, so long as they base their ultimate listing determinations solely on "the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). As appellants are not challenging an ESA § 4 listing determination that is subject to the "best available science" requirements, the agency's recognition that the controversial issue of wolf delisting is highly politicized and subject to litigation does not establish a legal violation. As the district court found, appellants cannot "force the Federal Defendants to apply the 'best available science' to actions that are not within the ESA's statutory scheme." Aplts. App. Vol. 5 at 1229, Op. at 38.

In any case, the January 2004 letter was motivated not by "political considerations and fear of litigation by conservation groups," Wyo. Br. at 31, but rather by the biological concern that classifying wolves as predators in 90 percent of their current range outside the National Parks would result in excessive killing. Nothing that was said by agency officials in the course of the Wyoming planning process belies this fundamental concern.

Wyoming cites to a letter from Assistant Secretary Manson stating that "we want to do as much as we can to ensure that a decision to delist wolves will be sustainable in the event of litigation and subsequent judicial scrutiny." Wy. Br. at 29 (citing Aplts. App. Vol. 7 at 1739). However, far from establishing a legal violation, this statement only affirms that FWS was seeking to ensure that a delisting proposal would actually comply with the ESA and therefore be legally sustainable. See id. Vol. 7 at 1793 ("The Service will not propose delisting if it believes its decisions aren't clearly supported by sound science or do not satisfy its legal responsibilities under the ESA.").

Appellants also cite to various comments by Recovery Coordinator Ed Bangs, who acknowledged that a dual-classification system was not inherently unworkable. See Wyo. Br. at 33-34. However, Wyoming omits to mention Mr. Bangs' insistence that Wyoming would need to permanently expand its trophy game area to protect wolves that are currently using areas outside of the

National Parks. See id. Vol. 7 at 1791, Vol. 9 at 2506; see also id. Vol. 3 at 754 (stating that predator status "was a public relations problem, but biologically it was fine if WY managed for a wolf population in the GYA [Greater Yellowstone Area]" — not just the National Parks) (emphasis added to highlight the language omitted in Wyo. Br. at 33). The fact that FWS was willing to contemplate predator status for wolves in a limited geographic area illustrates that FWS was not worried about the word "predator" appearing in Wyoming's plan, as appellants suggest. Rather, the agency was justly concerned about unregulated killing of wolves in areas that are essential to supporting a recovered population. See id. Vol. 7 at 1796-97 (explaining practical and biological advantages of classifying wolves as trophy game rather than predators).

3. FWS Did Not Arbitrarily Change Its Position On The Wyoming Plan

Appellants further argue that FWS changed its position regarding the adequacy of the Wyoming plan, and that "a sudden and unexplained change in an agency's position is arbitrary and capricious" under the Supreme Court's holding in Smiley v. Citibank, 517 U.S. 735, 741-42 (1996). However, as Smiley makes clear, there can be no APA violation where nothing "which can accurately be described as a change of official agency position has occurred." Id. at 743 (emphasis added). Here, appellants allege that the January 2004 letter

represents a change in position from comments made by staff at FWS and the U.S. Department of Interior in the course of ongoing talks regarding development of the Wyoming wolf management plan and its companion legislation. See Wyo. Br. at 39-42; Coalition Br. at 42. Yet such "informal" comments in the context of an ongoing dialogue hardly rise to the level of an "official agency position." Id.

Notably, the guidance provided by Federal Appellees throughout the planning process was remarkably consistent. Recovery Coordinator Bangs repeatedly emphasized that predator classification would provide insufficient protection for wolves in Wyoming absent a permanent expansion of the State's trophy game area. See Aplts. App. Vol. 7 at 1791, Vol. 9 at 2506. Given that Wyoming never adopted FWS' suggestion for permanent expansion of the trophy game area, the January 2004 letter merely reiterated FWS' longstanding concerns with predator status.

Similarly, as appellants concede, staff at FWS and the Interior Department repeatedly stressed that the 15 and 7 pack objective contained in the Wyoming management plan was an essential prerequisite to any delisting proposal. See Wyo. Br. at 40-41; Coalition Br. at 42. Thus, when the Wyoming Legislature passed a statute that gave WGFD authority to manage for no more than 7 wolf packs, thereby failing to make good on the management

plan's commitments, FWS followed through on its earlier comments and declined to propose delisting. Far from a sudden, unexplained change in position, the January 2004 letter was a restatement of concerns FWS had expressed from the beginning of the planning process.

4. FWS Did Not Ignore The Best Available Scientific Data

Appellants finally argue that FWS failed to base its assessment of the Wyoming plan on responses to a questionnaire sent by Recovery Coordinator Bangs to colleagues with varying levels of experience managing wolves. According to appellants, the informally written responses to this questionnaire represent the best and, indeed, the only available scientific data available to inform FWS' opinion of the Wyoming plan. This is wrong.

First, as discussed supra in Part I.D., FWS was not under any obligation to rely solely on the best available scientific data in drafting the January 2004 letter, because the letter is not an ESA § 4 listing determination. Second, even if the best available science mandate were applicable in this case, in determining the adequacy of regulatory mechanisms, FWS must consider not only scientific data bearing on the biological soundness of management objectives, but also non-scientific issues such as legal enforceability and availability of funding in order to determine whether management objectives will actually be achieved. See, e.g. Oregon Natural Resources Council v.

Daley, 6 F.Supp. 2d 1139, 1154 (D. Or. 1998) (requiring that regulatory mechanisms not be voluntary); Center for Biological Diversity v. Morganweck, 351 F. Supp. 2d 1137, 1141 (D. Colo. 2004) (in assessing the adequacy of existing regulatory mechanisms, FWS could not rely on conservation agreement that was not binding and had no assured funding); Federation of Fly Fishers v. Daley, 131 F. Supp. 2d 1158, 1167-69 (N.D. Cal. 2000) (holding that FWS arbitrarily relied on voluntary measures promised by states despite its finding that previous efforts had been under-funded and ineffective).

Finally, the informal responses to FWS' questionnaire do not provide the only, much less the best, scientific data available to inform FWS' delisting decision. FWS has at its disposal nearly a decade's worth of monitoring data on wolves in the Northern Rockies, as well as many peer-reviewed and published papers on wolves inside and outside of the region. Moreover, the agency's own assessments based on its wealth of experience managing wolves in the Northern Rockies necessarily carry at least as much weight as informal feedback from other wildlife managers without the same relevant professional experience. See, e.g. Custer County Action Ass'n v. Garvey, 256 F.3d 1024, 1036 (10th Cir. 2001) ("agencies are entitled to rely on their own experts so long as their decisions are not arbitrary and capricious").

Moreover, the questionnaire respondents echoed many of FWS' concerns. Several respondents noted serious problems with the Wyoming Plan, especially with predator status, and nearly all of the respondents were worried about inadequate funding. See, e.g. Aplts. App. Vol. 7 at 1882, 1886, 1896, 1908, 1910, 1916, 1923, 1926, 1928, 1929, 1932. Moreover, none of the respondents appeared to be aware that the Wyoming wolf management statute, contrary to the wolf management plan, does not commit to maintaining a total of 15 wolf packs overall and 7 packs outside the Parks. Thus, to the extent that respondents endorsed Wyoming's management scheme based on the 15 and 7 pack objective, they were operating under a critical misapprehension.

CONCLUSION

For all of the reasons set forth above, Intervenor-Appellees Sierra Club and Natural Resources Defense Council respectfully request that this Court affirm the decision below.

Respectfully submitted on this 8th day of August, 2005,

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Wyoming Statutes

WYOMING STATUTES 1977
TITLE 11. AGRICULTURE, LIVESTOCK AND OTHER ANIMALS.
CHAPTER 6. PREDATORY ANIMALS.
ARTICLE 1. CONTROL GENERALLY.

§ 11-6-105 Issuance of aerial hunting permits authorized.

The department may issue permits for the aerial hunting of rodents and predators to any person for the protection of livestock, domesticated animals or human life, upon a showing that the person or their designated pilot, along with the aircraft to be utilized in the aerial hunting, have been licensed and qualified in accordance with the requirements of the Wyoming aeronautics commission. The department shall furnish to the game and fish department a list of the names and addresses of the persons to whom they have issued aerial permits. The department may predicate the issuance or retention of such permits upon the recipients' full and prompt disclosure of information as the department may request for submission to the authorities designated in accordance with section 13 of the Fish and Wildlife Act of 1956 or its successor. The department shall collect a fee from each person who has any aircraft permitted under this section on or before April 1 of each year in the amount authorized by W.S. 11-1-104.

(Laws 1973, ch. 63, § 1; W.S. 1957, § 11-78.1; Laws 1978, ch. 32, § 1; 1993, ch. 135, § 2.)

<General Materials (GM) - References, Annotations, or Tables>

NOTES, REFERENCES, AND ANNOTATIONS

Cross references. -- As to aeronautics commission, see § 10-3-101.As to game and fish department, see § 23-1-401 et seq.

Fish and Wildlife Act. --

Section 13 of the federal Fish and Wildlife Act of 1956, referred to in the next-to-last sentence, appears as 16 U.S.C. § 742j-1.

W. S. 1977 § 11-6-105, **WY ST § 11-6-105**

Current through the 2004 special session (57th Legislature)

END OF DOCUMENT

§ 23-1-304 Classification of gray wolves.

(a) The commission shall determine the classification of gray wolves as provided in this section. In making this classification the commission shall rely upon information provided by department personnel and shall consult with the Wyoming animal damage management board created by W.S. 11-6-303 and the director of the Wyoming department of agriculture, and consider any additional information provided by that board and by that director.

(b) The department shall provide to the commission at least a quarterly monitoring report on the number of gray wolf packs within this state and their general location. Within thirty (30) days of receiving a department report the commission shall at a public meeting:

(i) Determine if there are less than seven (7) packs of gray wolves located in this state and primarily outside of Yellowstone National Park, Grand Teton National Park and John D. Rockefeller, Jr. Memorial Parkway and less than fifteen (15) packs within this state, including Yellowstone National Park, Grand Teton National Park and John D. Rockefeller, Jr. Memorial Parkway. If such a determination is made:

(A) The commission shall adopt rules and regulations to classify the gray wolf as a trophy game animal and prohibit the taking of gray wolves except as provided by W.S. 23-3-115(c), within that area of the state the commission determines is necessary to reasonably ensure seven (7) packs of gray wolves are located in this state and primarily outside of Yellowstone National Park, Grand Teton National Park and John D. Rockefeller, Jr. Memorial Parkway at the end of the current calendar year;

(B) At any time that gray wolves are classified as trophy game animals outside of any area specified in W.S. 23-1-101(a)(xii)(B)(I), the commission shall:

(I) Meet in public not less than once every ninety (90) days to review the classification and determine the need for its continuance;

(II) In consultation with the director of the Wyoming department of agriculture, upon receipt of information from the department of agriculture, consider the reclassification of wolves in all or a portion of such area at the commission's next scheduled meeting, or at an earlier meeting of the commission as the commission deems desirable or necessary.

(ii) Maintain the classification of gray wolves as a predatory animal and trophy game animal as specified in W.S. 23-1-101(a)(viii) and (xii)(B)(I), if it determines there were at least seven (7) packs of gray wolves located in this state and primarily outside of Yellowstone National Park, Grand Teton National Park and John D. Rockefeller, Jr. Memorial Parkway or at least fifteen (15) packs within this state, including Yellowstone National Park, Grand Teton National Park and John D. Rockefeller, Jr. Memorial Parkway as of the end of the preceding calendar quarter.

(c) For purposes of this section "pack" means five (5) or more gray wolves traveling together. If a group of gray wolves consists of more than ten (10) animals known to be traveling together, the commission may, at its discretion, recognize the number of packs within such a group to be equal to the number of reproductively mature females bearing young found within that group of wolves.

(d) The department shall institute and maintain an active program of population monitoring statewide. In all areas of the state, except where otherwise provided,

any person who harvests a wolf shall notify the department where the harvest occurred within ten (10) days. Any information regarding the number or nature of wolves legally harvested within the state of Wyoming shall only be released in its aggregate form and no information of a private or confidential nature shall be released without the written consent of the person to whom the information may refer. Information identifying any person legally harvesting a wolf within this state is solely for the use of the department or appropriate law enforcement offices and is not a public record for purposes of W.S. 16- 4-201 through 16-4-205.

(e) The department shall actively monitor big game animal herd populations statewide to determine whether and to what extent the gray wolf is negatively impacting big game animal herds, and thereby hunting opportunities. To the extent permitted by this title, the department shall manage the gray wolf population as necessary to ensure the long-term health and viability of any big game animal herd that is being threatened in this state.

(f) This section shall apply from and after the date gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming as provided by W.S. 23-1-108.

(Laws 2003, ch. 115, § 1.)

<General Materials (GM) - References, Annotations, or Tables>

NOTES, REFERENCES, AND ANNOTATIONS

Prospective operation. --

Laws 2003, ch. 115, § 3, directs that nothing in the act is to prohibit the ownership of a wolf hybrid if the animal was owned before the effective date of the act by a person then residing in the state.

Legislative intent. --

Laws 2003, ch. 115, § 4, provides:

"(a) It is the purpose of this act, unless the introduction of the gray wolf into Wyoming is determined by lawful authorities not to have been in accordance with federal law, to provide appropriate state management and control of gray wolves in order to facilitate the removal of the gray wolf from its listing as an experimental nonessential population, endangered species or threatened species in Wyoming and to prevent future listing of the gray wolf as an experimental nonessential population, endangered species or threatened species.

"(b) In providing appropriate state management and control of gray wolves, the state acknowledges the need to fill the current vacuum of management of this species within the state. The state retains all rights to investigate and, if determined by state officials to be appropriate, take legal actions against the federal government relating to the introduction of the gray wolf into the boundaries of this state.

"(c) In order to accomplish the purposes of this act, the game and fish commission shall enter into a memorandum of understanding with appropriate federal agencies under which the commission and federal agencies shall endeavor to manage the prey base for gray wolves in a manner to maintain a sufficient prey base in Yellowstone National Park, Grand Teton National Park and John D. Rockefeller, Jr. Memorial Parkway within the state for at least eight (8) packs of wolves. The game and fish commission shall endeavor to manage big game populations providing a prey base for seven (7) packs of gray wolves in all other areas of the state in such a manner as to mitigate to the greatest extent possible, adverse effects on opportunities for licensed hunters to take big game.

"(d) The game and fish commission shall report to the joint travel, recreation,

wildlife and cultural resources interim committee not later than September 1, 2003, regarding the implementation of this act."

Effective dates. -- Laws 2003, ch. 115, § 5, makes the act effective immediately upon the completion of all acts necessary for a bill to become law as provided by art. 4, § 8, Wyo. Const. Approved March 4, 2003.

W. S. 1977 § 23-1-304, **WY ST** § **23-1-304**

Current through the 2004 special session (57th Legislature)

END OF DOCUMENT

WYOMING STATUTES 1977
TITLE 23. GAME AND FISH.
CHAPTER 3. GENERAL REGULATORY PROVISIONS.
ARTICLE 2. FISH PROVISIONS.

§ 23-3-203 Placing obstruction to fish across stream or lake without consent of chief fish warden prohibited; erection of fishways.

(a) No person shall erect or place, or cause to be erected or placed, any net, trotline, or any similar obstruction across any river, creek, pond, or lake so as to prevent the free passage of the fish up, down, or through the water except with the consent and under the direction of the chief fish warden.

(b) The commission may erect or cause to be erected and maintained fishways or ladders on any dam or other structures across any stream of the state, when a fishway or ladder is necessary for the uninterrupted passage of fish up and down the stream.

(c) Violation of this section constitutes a 10th degree misdemeanor.

(Laws 1941, ch. 81, § 1; C.S. 1945, § 47-509; W.S. 1957, § 23-116; Laws 1973, ch. 249, § 1; Rev. W.S. 1957, § 23.1-72.)

<General Materials (GM) - References, Annotations, or Tables>

NOTES, REFERENCES, AND ANNOTATIONS

Cross references. -- As to construction of devices to prevent fish from entering irrigation works or reservoirs, see § 41-5-106.

W. S. 1977 § 23-3-203, **WY ST § 23-3-203**

Current through the 2004 special session (57th Legislature)

END OF DOCUMENT

WYOMING STATUTES 1977
TITLE 23. GAME AND FISH.
CHAPTER 3. GENERAL REGULATORY PROVISIONS.
ARTICLE 2. FISH PROVISIONS.

§ 23-3-205 Shipment of fish; game tags; when required.

(a) No person shall ship or transport or receive for shipment or transportation any game fish either within or without the state except as provided in subsection (b).

(b) Any person lawfully taking any game fish in this state may ship not to exceed one (1) limit in a single container no oftener than once a week if a Wyoming interstate game tag is affixed to the container. No interstate game tag is required for the transportation of one (1) limit of fish in the possession of a properly licensed fisherman.

(c) Violation of this section constitutes an 11th degree misdemeanor.

(Laws 1939, ch. 65, § 82; C.S. 1945, § 47-521; W.S. 1957, § 23-114; Laws 1969, ch. 141, § 2; 1973, ch. 249, § 1; Rev. W.S. 1957, § 23.1-74.)

<General Materials (GM) - References, Annotations, or Tables>

W. S. 1977 § 23-3-205, **WY ST § 23-3-205**

Current through the 2004 special session (57th Legislature)

END OF DOCUMENT

WYOMING STATUTES 1977
TITLE 23. GAME AND FISH.
CHAPTER 3. GENERAL REGULATORY PROVISIONS.
ARTICLE 3. WILDLIFE PROVISIONS.

§ 23-3-304 Certain trapping devices unlawful; game for bait prohibited; baiting big game animals prohibited; penalties.

(a) No person shall take or wound any game animal, game bird, or game fish by use of any pit, pitfall, net, trap, deadfall, poison, or other similar device except as otherwise provided. From and after the date gray wolves are removed from the list of experimental nonessential population, endangered species or threatened species in Wyoming as provided by W.S. 23-1-108, gray wolves may be taken with a trap or snare only as allowed by and in accordance with rules and regulations of the commission.

(b) No person shall take a game animal, game bird, or game fish, and use any parts thereof, for bait to trap or poison any wildlife of Wyoming.

(c) Violation of subsections (a) and (b) of this section constitutes a 3rd degree misdemeanor.

(d) No person shall place any bait for the purpose of taking a big game animal nor shall any person knowingly take a big game animal by the use of any bait that has been deposited, placed, distributed or scattered in a manner to constitute a lure, attraction or enticement to, on or over the area where any hunter is taking big game animals. Nothing in this subsection shall:

(i) Apply to normal or accepted agricultural management practices;

(ii) Prohibit taking big game animals over stored and standing crops, salt, mineral or other feed scattered solely as a result of normal and accepted agricultural practices;

(iii) Apply to the placement, distribution, depositing or scattering of bait, as approved by the game and fish commission, for the taking of big game animals by any legally blind person or person confined to a wheelchair.

(e) As used in subsection (d) of this section, "bait" means the direct or indirect placing, exposing, depositing, distributing or scattering of salt, hay, grain, fruit, nuts or chemical, mineral or other feed as an attraction or enticement for big game animals, regardless of the kind and quantity. A chemical used as an attractant or mask rather than for consumption shall not be considered "bait".

(f) A violation of subsection (d) of the section constitutes a 5th degree misdemeanor.

(Laws 1921, ch. 83, § 61; 1929, ch. 93, § 19; R.S. 1931, § 49-164; C.S. 1945, § 47-520; W.S. 1957, § 23-99; Laws 1967, ch. 168, § 1; 1973, ch. 249, § 1; Rev. W.S. 1957, § 23.1-78; Laws 2001, ch. 27, § 1; 2003, ch. 115, § 2.)

<General Materials (GM) - References, Annotations, or Tables>

W. S. 1977 § 23-3-304, **WY ST § 23-3-304**

Current through the 2004 special session (57th Legislature)

END OF DOCUMENT

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing Intervenor-Appellees' Response Brief complies with the type-volume limitation of Rule 32(a)(7)(B) because this brief contains 12,564 words.

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INTERVENOR-APPELLEES STATEMENT OF REASONS FOR REQUESTING ORAL ARGUMENT

Pursuant to Circuit Rule 28.2(C)(4), Intervenor-Appellees Sierra Club and Natural Resources Defense Council request oral argument to assist the Court in resolving the many issues raised by Appellants Wyoming and the Wyoming Wool Growers, et al. These consolidated appeals relate to wolf recovery in Wyoming, an issue of significant public interest. In addition, oral argument may assist the Court in distilling the numerous arguments made in extensive briefing by multiple parties in these appeals.

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 identical in substance to the written submission. I further certify that the digital submissions have been scanned with the most recent virus scanning program (Symantec Antivirus 2004, Full Version 9.0.0.338; most recent update 08/03/05) and according to the program, are free of viruses.

s/ YuJin Cho

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 2005, I caused a copy of the foregoing Intervenor-Appellees Sierra Club and Natural Resources Defense Council's Response Brief and the Supplemental Appendix to be served via electronic mail and by United States First Class Mail, postage prepaid, upon the following:

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