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ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

September 20, 2005

Patrick J. Fisher  
Clerk of the Court  
U.S. Court of Appeals  
for the Tenth Circuit  
Byron White United States Courthouse  
1823 Stout Street  
Denver, CO 80257

Re: State of Wyoming, et al. v. U.S. Department of the Interior, et al, Case Nos. 05-8026,  
05-8027, 05-8035

Dear Mr. Fisher,

Enclosed for filing in the above-referenced case please find an original plus four copies of the Intervenor-Appellees' Opposition to Motion to Strike. Also enclosed is an additional copy of the foregoing document to be file-stamped and returned in the enclosed self-addressed, stamped envelope.

Thank you for your assistance. Please call me at (406) 586-9699 with any questions.

Sincerely yours,

Yu Jin Cho

enclosures

05-8026, 05-8027, 05-8035

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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

*Plaintiffs-Appellants,*

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

*Defendants-Appellees,*

and

GREATER YELLOWSTONE COALITION, et al.,

*Defendant-Intervenors-Appellees.*

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Appeal from the United States District Court for the District of Wyoming  
The Honorable Alan B. Johnson, District Court Judge  
D.C. Nos. 04-CV-0123-J and 04-CV-0253-J (Consolidated)

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**INTERVENOR-APPELLEES' OPPOSITION TO MOTION TO STRIKE**

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There is no basis for striking any factual reference in the Response Brief filed by Sierra Club and Natural Resources Defense Council (collectively “Sierra Club”). Appellants Wyoming Wool Growers, et al. (“Wolf Coalition”) challenge Sierra Club’s citations to recent data on wolf and game populations compiled by the Wyoming Game and Fish Department (“WGFD”) and the U.S. Fish and Wildlife Service (“FWS”). However, all of this agency data is entitled to judicial notice under the Federal Rules of Evidence, as it is “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2).

The Wolf Coalition fails to offer any reason why the challenged data is not reliable. Instead, it complains that Sierra Club is improperly “attempt[ing] to expand the Administrative Record.” Motion To Strike Of Appellants Wyoming Wool Growers, et al. (“Strike Mot.”) at 5. However, this Court’s review of the jurisdictional rulings on appeal is not constrained to any administrative record. Moreover, Sierra Club does not cite this data to defend the challenged agency actions on the merits, but rather to ensure that the Court is not misled by the Wolf Coalition’s wholly unsupported claims regarding alleged harms caused by wolves in Wyoming.

## **ARGUMENT**

### **I. THE CHALLENGED FACTUAL REFERENCES ARE PROPERLY BEFORE THE COURT**

The Wolf Coalition asserts, without providing any supporting authority, that wolves are creating havoc in Wyoming. At the same time, it seeks to strike Sierra Club's citations to reliable data regarding wolves and their statewide impacts that contradict the Wolf Coalition's dire claims. There is no basis for the Court to grant the Wolf Coalition's inequitable request.

In its opening brief, the Wolf Coalition makes sweeping allegations that wolves "have killed Wyoming's wildlife resources" and thereby "damaged the outfitting and sportsmen industries." Brief of Appellants Wyoming Wool Growers, et al. ("Coalition Br." at 20). In its Reply Brief, the Wolf Coalition paints an even more dire picture, asserting, without any citations whatsoever, that FWS' alleged failure to properly manage wolves is causing "livelihoods [to] dry up" as game populations "continue to dwindle;" that "Communities watch as the hunting season is shortened on a yearly basis and their store fronts are closed;" and that ranchers are forced to contend with wolves that kill sheep "by the dozens." Reply Brief of Appellants Wyoming Wool Growers, et al. at 24-25.

Yet, having made these unsupported allegations, the Wolf Coalition takes issue with the Sierra Club's citation to official information from WGFD and FWS regarding the actual status of game populations, hunting revenues, and wolf control

actions undertaken in Wyoming — information that rebuts the Wolf Coalition’s unsupported claims. Specifically, the Wolf Coalition urges this Court to strike references to:

- (1) U.S. Fish and Wildlife Service, Rocky Mountain Wolf Recovery 2004 Annual Report, Table 5b available at [http://westerngraywolf.fws.gov/annualrpt04/FINAL%20Table%205b\\_acc.Pdf](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);
- (2) U.S. Fish and Wildlife Service, Gray Wolf Recovery Status Reports, available at <http://westerngraywolf.fws.gov> (reporting, as of August 2005, that FWS had killed 28 wolves in the Greater Yellowstone Area, including 16 wolves in Wyoming to resolve conflicts with livestock this year);
- (3) Wyoming Game and Fish Department, Annual Report 2004 at 70 (Supplemental Appendix at 12) (reporting that WGFD “continues to manage for a reduction in Wyoming’s elk population;” Wyoming hunter success and harvest levels have remained stable since 1999; and state hunting license revenues were up by more than \$1 million this past year) (emphasis added).<sup>1</sup>

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<sup>1</sup> The Wolf Coalition also challenges a citation to a weekly Gray Wolf Recovery Status Report that discussed the discovery of mange in several wolf packs in the Greater Yellowstone Ecosystem. See Recovery Status Report from 7/9-7/23/2004 available at <http://mountain-prairie.fws.gov/wolf/wk07232004.htm>. This report was included in the administrative record filed by Federal Appellees in the district court and cited in Sierra Club’s summary judgment briefing. See Aplt. App., Vol. 3 at 866. Thus, there is no possible basis for challenging its citation. In addition, the Wolf Coalition requests that this Court strike the sentence “wolves were hunted and killed with more passion and zeal than any other animal in U.S. history,” which was drawn from a basic wolf primer on FWS’ website. See U.S. Fish and Wildlife Service, [Gray Wolf](http://training.fws.gov/library/Pubs/graywolf.pdf) available at <http://training.fws.gov/library/Pubs/graywolf.pdf>. This is a “generally known” fact that is entitled to judicial notice. Fed. R. Evid. 201(b)(1); see also Final Rule, 63

Thus, the Wolf Coalition seeks to strike agency data regarding the current Wyoming elk over-population, increased state hunting revenues, and the high number of wolf control actions taken by FWS in Wyoming in recent years. In short, the Wolf Coalition seeks to prevent the Court from reviewing reliable factual materials that contradict the Coalition's own unsupported and shrill assertions of a wolf management crisis in Wyoming.

Contrary to the Wolf Coalition's argument, all of the challenged information is properly before this Court. First, the latter excerpts from the WGFD 2004 Annual Report were attached as an exhibit to Sierra Club's Motion to Intervene in the district court and subsequently cited in the Sierra Club's summary judgment briefing without any objection from the Wolf Coalition. See Aplt. App., Vol. 3 at 844 n.1. As these excerpts are part of the record on appeal, they were properly included in the Supplemental Appendix and properly cited in the Sierra Club's Response Brief. See Circuit Rule 30.2.<sup>2</sup>

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Fed. Reg. 15,804, 15,805 (April 3, 2003) (Aplt. App. Vol. 9 at 2272) (reviewing history of "widespread persecution" of wolves).

<sup>2</sup>The Wolf Coalition mistakenly states that the Sierra Club incorrectly cited to a page in the Appellants' joint appendix "as a reference for the 'WGFD's 2004 Annual Report.'" Strike Mot. at 3 n.3. In fact, Sierra Club cited the Gray Wolf Management Plan in Appellants' Appendix and the Wyoming 2004 Annual Report excerpts contained in the Supplemental Appendix for two separate propositions in the same sentence. See Response Brief of Sierra Club and Natural Resources Defense Council at 26 n.8.

Second, all of the challenged references are to agency data that is entitled to judicial notice by this Court. The Federal Rules of Evidence provide that “[j]udicial notice may be taken at any stage of the proceeding” of facts that are “(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b),(f). “A court may take judicial notice, whether requested or not,” and “[a] court shall take judicial notice if requested by a party and supplied with the necessary information.” Id. 201(c),(d); see also York v. American Tel. & Tel. Co., 95 F.3d 948, 958 (10th Cir. 1996) (explaining that the Rule “replaces the evidentiary procedure that would otherwise be necessary to establish adjudicative facts that are generally known or capable of accurate and ready determination by resort to reliable sources”) (internal alterations and quotations omitted).

Here, facts regarding the number of wolves killed by federal agents in Wyoming, and the status of Wyoming’s elk population, including harvest levels and revenues from elk-hunting, are capable of accurate and ready determination by resort to the cited reports, which were prepared by the agencies responsible for monitoring wolves and their prey base. The Wolf Coalition does not — and cannot — argue that this data provided by WGF and FWS is unreliable. Indeed, there is no more reliable source for figures regarding Wyoming game population numbers

and game-hunting than the state's Game and Fish Department. Similarly, there is no more reliable source than FWS regarding the number of wolf control actions undertaken by the agency itself. Accordingly, these facts are entitled to judicial notice. See, e.g., Cruz-Funez v. Gonzales, 406 F.3d 1187, 1189 n.2 (10th Cir. 2005) (taking judicial notice of decision that “appears on the website of the Executive Office of Immigration Review”); Nebraska v. EPA, 331 F.3d 995, 999 & n.3 (D.C. Cir. 2003) (taking “judicial notice of the information on the EPA’s database” regarding interstate drinking water sales in Commerce Clause case). Further, as these cases make clear, there is nothing improper about citation to websites that provide ready access to reliable sources. See id.; see also Laborers’ Pension Fund v. Blackmore Sewer Const., Inc., 298 F.3d 600, 607 (7th Cir. 2002) (relying on “quick search of the internet” to resolve issue of bank ownership).

## **II. THIS COURT’S REVIEW IS NOT CONSTRAINED TO THE ADMINISTRATIVE RECORD**

While all of the challenged agency data is entitled to judicial notice, the Wolf Coalition nevertheless insists that “extra-record information and references included in Sierra Club’s and NRDC’s Response Brief and Supplemental Appendix should be stricken as violating the scope of review provision of the

Administrative Procedures Act, which requires that judicial review of agency action be generally limited to the Administrative Record.” Strike Mot. at 3.<sup>3</sup>

This argument fails at the outset because this appeal is not governed by the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706. In the absence of any final agency action that would trigger this Court’s jurisdiction under the APA, the APA’s scope of review is not controlling. Indeed, judicial review is never constrained to the administrative record where, as here, the issues on appeal relate to the Court’s jurisdiction rather than the merits of an APA claim. See, e.g., Qwest Communications Intern., Inc. v. F.C.C., 240 F.3d 886, 893 (10th Cir. 2001) (“We therefore consider the affidavits not in order to supplement the administrative record on the merits, but rather to determine whether petitioners can establish a prerequisite to its jurisdiction.”) (quoting Northwest Environmental Defense Ctr. v. Bonneville Power Admin., 117 F.3d 1520, 1528 (9th Cir.1997)).

Moreover, even if the Wolf Coalition had properly invoked this Court’s jurisdiction pursuant to the APA, the administrative-record rule would not preclude this Court from taking judicial notice as appropriate under the Federal Rules of

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<sup>3</sup>As the Wolf Coalition notes, there is no existing administrative record for the Wolf Coalition’s claims that FWS “is failing and refusing to properly manage and control the wolves” to the detriment of Wyoming’s game populations and hunting industry. Coalition Br. at 47; see also Strike Mot. at 6 n.2. In the absence of an administrative record, the Wolf Coalition’s apparent position is that it is proper to make unsupported factual allegations, but improper to rebut these allegations with citations to reliable agency data. The Court should not embrace this view.

Evidence. As the Ninth Circuit has explained, “it is nonsense to suppose that we are so cabined and confined that we cannot exercise the ordinary power of any court to take notice of facts that are beyond dispute” in APA cases. Singh v. Ashcroft, 393 F.3d 903, 905 (9th Cir. 2004) (citing Fed. R. Evid. 201). To the contrary, “[e]very case involves the use of hundreds or thousands of non-evidence facts. Administrative cases and the review of administrative decisions are no exception to this universal truth. An agency or an appeals court could not function if it had to depend on proof in the record of facts capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.” Id. at 906 (internal quotations and citations omitted).

Where, as here, a party provides citations to reliable sources solely in order to provide accurate factual background information — not to justify an agency decision on the merits — the Court retains its “ordinary power” to take notice of facts that are beyond dispute. This Court should reject the Wolf Coalition’s attempt to suppress facts that discredit its prejudicial allegations of harm, which were made without citation to any source, much less the Administrative Record filed in the district court.

## CONCLUSION

For all of the foregoing reasons, Intervenor-Appellees Sierra Club and Natural Resources Defense Council respectfully request that this Court deny the Wolf Coalition's Motion to Strike.

Respectfully submitted this 20th day of September, 2005,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 20th day of September, 2005, I caused a copy of the foregoing Intervenor-Appellees' Opposition to Motion to Strike to be served via electronic mail and by United States First Class Mail, postage prepaid, upon the following:

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