

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

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

v.

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

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

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

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(WOLF COALITION)

Plaintiff/Appellants, Wyoming Wool Grower's, et al., (Wolf Coalition), filed a Motion to Strike requesting this Court to strike all references to materials outside of the Administrative Record that the Intervenor-Appellees Sierra Club and Natural Resources Defense Council (NRDC) included in their Response Brief and Supplemental Appendix. This Reply Brief is filed to respond to the Sierra Club's and NRDC's opposition to that Motion to Strike.

In summary, intervenors Sierra Club and NRDC have included in their Response Brief arguments and references (including a "Supplemental Index") that are based upon information that is outside of the Administrative Record currently before this Court. They neither requested nor received permission from the Court to supplement the Administrative Record. Their opposition to the Wolf Coalition's Motion to Strike only confirms that they should be prohibited from surreptitiously supplementing the Administrative Record, and that the related extraneous references and materials should be stricken.

The Sierra Club and NRDC first argue that this Court has the authority to take judicial notice of the extra-record materials. The materials in question, however, do not meet the test for judicial notice.

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (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.Civ.P. 201(b). The Wolf Coalition not only questions, but flat out disputes, the accuracy of the information that the Sierra Club and NRDC are attempting to present to the Court. The Federal Defendants' inability to properly manage and control the wolves is the very issue at dispute in this case. That failure to manage claim is based in part upon the fact that the Federal Defendants have consistently underestimated the number of wolves in this state. As pointed out in the Wolf Coalition's Complaint for Declaratory Judgment and Injunctive Relief (Complaint):

83. The foregoing gray wolf population numbers underestimate the wolf population since they are based on known packs. Packs are generally monitored by means of one or more radio collared wolves in the pack. Because the FWS has not always collared a wolf in each pack, the FWS does not know the actual gray wolf population in Yellowstone National Park or within Wyoming outside of the Park.

Wolf Coalition Complaint at 43, Aplt.App.Vol. 1 at 228. When answering the Wolf Coalition's Complaint, the Federal Defendants admitted that they underestimate the gray wolf population:

83. In response to the allegations in the first sentence of paragraph 83, Defendants admit that FWS may underestimate the northern Rocky Mountain area wolf population. ...

Answer to Plaintiffs' Complaint for Declaratory Judgment and Injunctive Relief at 17, Aplt.App.Vol. 1 at 315.

Wolves kill and eat livestock and wildlife. Sometimes they kill livestock and wildlife for sport. The numbers of dead livestock and wildlife is directly correlated to the number of wolves in the northern Rocky Mountain area. The more wolves in an area the more animals they have killed and will kill in the future. Simple math demonstrates that, by underestimating the wolf population, the Federal Defendants have also underestimated the impact of the wolves. As such, the impact analyses that they have done are inaccurate.

Based upon the Federal Defendants' own admissions, the information and materials that the Sierra Club and NRDC are relying on are inaccurate and are neither of the type nor of the caliber that is subject to judicial notice. Even without the Federal Defendants' admissions, however, the Wolf Coalition members have every reason to challenge the accuracy of materials in question. To put it more bluntly, the Wolf Coalition members believe that the data gathered by the Federal Defendants is so inaccurate that it is often meaningless. For example, attached hereto as Exhibit A is a recent newspaper article describing the Fish and Wildlife's Service's (FWS) investigation into the slaughter of thirty (30) head of domestic sheep near the Prospect Mountains. Although the FWS was able to confirm that wolves killed one (1) sheep, and "probably" killed fourteen (14) others, it was unable to determine that the remaining fifteen (15) dead lambs and ewes, which were lying next to the "confirmed" and "probable" kills, met the same fate. As such, the FWS, by defying common sense,

underestimated the wolf kills in this one circumstance by 50%.

The Intervenor's judicial notice argument is simple: because the websites and the related information were developed by Federal and State agencies they are subject to judicial notice. That argument is not only absurd, but has no legal basis. The Wolf Coalition is suing the Federal Defendants because they have failed and refused to properly manage and control the wolf population. Their failure to carry out their responsibilities has resulted in substantially higher livestock and wildlife kills than were anticipated and that have ever been acknowledged. The Federal Defendants (and the Intervenor) have every incentive to paint a rosy picture regarding the predator that they brought into the State. They have every incentive to minimize the fact that wolves have killed more livestock and wildlife, and have moved farther afield geographically, than was either anticipated or analyzed pursuant to the National Environmental Policy Act (NEPA).

The Wolf Coalition sued the Federal Defendants in part based upon the fact that they have refused to undertake the necessary Supplemental Environmental Impact Analysis (SEIS) to identify and describe the expanding impact of an expanding, uncontrolled and unmanaged wolf population. That claim is based, in part, upon the fact that, while there has been a substantial numeric and geographic increase in the wolf population, the Federal Defendants have never done any analysis to determine what impacts that "enhanced use" by the wolves have had. *See Airport Neighbors*

*Alliance, Inc. v. United States*, 90 F.3d 426, 428-429 (10<sup>th</sup> Cir. 1996) (court may consider NEPA claims after the proposed action has been completed to address the environmental impacts resulting from enhanced or different use). The Federal Defendants, Sierra Club, and NRDC argue before this Court that no such supplemental analysis is required. Considering their arguments, it is entirely disingenuous and misleading to now argue that the wolf “impact” data “cannot reasonably be questioned.” The Federal Defendants have so far refused to undertake the necessary environmental impact analysis to determine what impact the wolves have had on livestock, wildlife, and communities – i.e., “the quality of the human environment.” That refusal severely undermines the accuracy of the data at issue.

The status of the current case also establishes the fact that it would be improper to allow introduction of the information offered by the Sierra Club and NRDC, *especially* considering the purpose for which they are attempting to supplement the Administrative Record. The Intervenor laments the fact that the Wolf Coalition has painted a “dire picture” of the wolf population’s impact on livestock and wildlife and have made “shrill” assertions regarding a wolf management crisis in Wyoming. The Intervenor then argues that these “unsupported allegations” should not be allowed to stand unchallenged. The absurdity of that argument is exposed when it is pointed out that they (along with the Federal Defendants) are the parties who convinced the District Court that it was required to dismiss the Wolf Coalition’s lawsuit, *regardless*

*of whether or not the factual allegations made by the Wolf Coalition were true.* In other words, in challenging the Court's jurisdiction, the Intervenor argued that it does not matter whether there is a "wolf management crisis" or not. They argued that, regardless of how many head of livestock or wildlife have been killed, the Wolf Coalition members have no legal or judicially-recognized right to file suit against the Federal Defendants under the Endangered Species Act or NEPA. They argued that the Federal Agencies have absolute discretion regarding management of the wolf population.

Under the current circumstances, the Intervenor's jurisdictional challenge to the Wolf Coalition's "failure to manage" and NEPA claims must be likened to a motion to dismiss under Fed.R.Civ.P. 12(b)(1) and (6). "Generally, the complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Ramirez v. Department of Corrections*, 222 F.3d 1238, 1241 (10<sup>th</sup> Cir. 2000) (citations and internal quotations omitted). "We accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiffs.'" *Id.* (Citations omitted).

Regardless of whether the Intervenor is upset by the Wolf Coalition members description of losses *that they have suffered* as a result of the Federal Defendants' wrongful decisions, those facts are considered to be true at this point in the proceedings. If and when the Wolf Coalition is given the opportunity to establish

those facts, the Intervenors can respond and present the information that they believe contradicts the Wolf Coalition's claims. Until then, the Intervenors will have to satisfy themselves with the hope that they can forever preclude the Wolf Coalition members from informing the public that the wolf population and the Federal Defendants' refusal to adopt and implement an effective management and control program have severely impacted livestock producers, wildlife, local governmental entities and the State of Wyoming in general.

Apparently concerned that the Wolf Coalition has identified the real life consequences of the Federal Defendants' decisions to introduce a foreign predator into our midst, and that such predator is being allowed to kill livestock and wildlife essentially unchecked, they now seek to introduce inaccurate and disputed information, arguing that it is subject to "judicial notice" by this Court. They offer such information while they simultaneously argue that the Court should deny the Wolf Coalition the opportunity to point out the inaccuracies in the data because the Court lacks jurisdiction to hear the Wolf Coalition's complaints. The Intervenors' position is that they are entitled to submit extraneous data to support their arguments, while the Wolf Coalition must be summarily and forever foreclosed from pointing out why such data is worthless. The Intervenors argue that, based upon the data that suits their purpose here, this Court is required to declare that Wolf Coalition members – the people and entities most impacted by the Federal Defendants' wolf introduction and

management decisions – have no voice, have no judicial remedy, have no redress for the wrongs that have been committed, and have no right to challenge the Sierra Club’s and NRDC’s rosy picture regarding how wonderful the wolves have been.

This Court held in *Custer County Action Association v. Garvey*, 256 F.3d 1024, 1028, fn 1 (10<sup>th</sup> Cir. 2001), that “[j]udicial review of an agency decision is generally limited to review of the administrative record.” Furthermore, “[t]he circumstances which warrant consideration of extra-record materials are ‘extremely limited.’” *Id.* (Citation omitted).

The Sierra Club and NRDC have failed to present sufficient justification for this Court to consider the extra-record materials at issue.

Dated this 29<sup>th</sup> day of September, 2005.

WYOMING WOLF COALITION

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## CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that (1) no privacy redactions are required. Every document submitted in Digital Form and scanned PDF format is an exact copy of the written document filed with the Court and served on the parties. I further certify that the digital submissions have been scanned with the most recent virus scanning program (Norton Antivirus, System Works Professional 2004; most recent update September 29, 2005) and, according to the program, are free of viruses.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29<sup>th</sup> day of September, 2005, a true and correct copy of the **REPLY BRIEF IN SUPPORT OF MOTION TO STRIKE OF APPELLANTS WYOMING WOOL GROWERS, ET AL., (WOLF COALITION)**, was served upon the Clerk of Court and the following Parties as indicated.

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