

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

STATE OF WYOMING,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 05-8026
	)	
DEPARTMENT OF INTERIOR,	)	
	)	
Appellee.	)	

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On Appeal from the United States District Court  
For the District of Wyoming

The Honorable Alan B. Johnson  
District Judge

Civil No. 04-CV-0123

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**APPELLANT STATE OF WYOMING'S  
MOTION TO STRIKE EXTRA-RECORD MATERIALS**

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The State of Wyoming, through undersigned counsel, hereby moves this Court to strike extra-record materials submitted by the Federal Appellees and by Intervenor-Appellees Sierra Club and Natural Resources Defense Council ("NRDC") in the above captioned appeal. In support of this Motion, the State of Wyoming alleges as follows:

1. In accordance with 10<sup>th</sup> Cir. R. 27.3(C), undersigned counsel contacted counsel for the other parties to this appeal by telephone on September 21 and 22, 2005 to learn their position on the relief requested in this Motion. The Federal Appellees and Intervenor-Appellees Sierra Club and Natural Resources Defense Council ("NRDC") oppose the relief

requested. The Greater Yellowstone Coalition Intervenor-Appellees will withhold their position until they review the Motion. The Wolf Coalition Appellants support the relief requested in the Motion. Intervenor-Appellant Park County, Wyoming has no objection to the relief requested in the Motion.

2. On or about June 20, 2005, the State of Wyoming filed its opening brief in the above-captioned appeal. On or about August 8, 2005, the Federal Appellees filed a response brief which has two extra-record documents appended to it — a copy of a petition to delist the gray wolf that the State of Wyoming submitted to the United States Department of the Interior (“DOI”) in July 2005 and a copy of a petition to amend 50 C.F.R. § 17.84(i) that the State of Wyoming submitted to DOI in July 2005.

3. On or about August 8, 2005, Intervenor-Appellees Sierra Club and NRDC filed a response brief in which they cite internet websites on pages 13, 15, 26, and 36 for factual information in support of their arguments regarding the impacts of wolf depredations on livestock and wildlife in Wyoming. They cite a State of Wyoming internet website on pages 6 and 17 in referencing the State of Wyoming’s petition to delist the gray wolf. Intervenor-Appellees also filed a supplemental appendix which included excerpts from the 2004 Annual Report of the Wyoming Game and Fish Department. (Aple. Supp. App., at 3-12).

4. “Judicial review of an agency decision is generally limited to review of the administrative record.” *Custer County Action Ass’n v. Garvey*, 256 F.3d 1024, 1028 n.1 (10<sup>th</sup> Cir. 2001). A reviewing court may consider extra-record materials only in extremely limited circumstances. *Custer County Action Ass’n*, 256 F.3d at 1028 n.1. A court may consider

materials outside of the administrative record when: (a) the agency action is not adequately explained and cannot be reviewed properly without considering the cited materials; (b) the record is deficient because the agency ignored relevant factors it should have considered in making its decision; (c) the agency considered factors that were left out of the formal record; (d) the case is so complex and the record so unclear that the reviewing court needs more evidence to enable it to understand the issues; or (e) evidence coming into existence after the agency acted demonstrates the actions were right or wrong. *Custer County Action Ass'n*, 256 F.3d at 1028 n.1, citing *Am. Mining Cong. v. Thomas*, 772 F.2d 617, 626 (10<sup>th</sup> Cir. 1985).

5. The documents appended to the Federal Appellees' brief do not fall within the scope of any of the five exceptions set forth in *Custer County Action Ass'n*. Accordingly, this Court must strike the petition to delist and all references to the petition to delist from the Federal Appellees' brief.

6. The dispositive status of *Custer County Action Ass'n* notwithstanding, the petition to delist and the petition to amend 50 C.F.R. § 17.84(i) have no relevance whatsoever to the issues pending before this Court. The Federal Appellees cite the petition to delist in arguing that the issues concerning the adequacy of the Wyoming Plan are not final and are not ripe. Two conditions must be satisfied for agency action to be "final" – the action must mark the consummation of the agency's decisionmaking process and the action must be one by which rights or obligations have been determined or from which legal consequences will flow. *Bennett v. Spear*, 520 U.S. 154, 178 (1997). To determine whether an agency's decision is ripe for review under the APA, the reviewing court must consider the

four factors set forth in *HRI, Inc. v. Env't'l Protection Agency*, 198 F.3d 1224, 1235-1236 (10<sup>th</sup> Cir. 2000). The fact that the State of Wyoming has filed a petition to delist has no bearing on this Court's analysis of the factors relating to "final agency action" or ripeness. As a result, this Court should strike the petition to delist and the citations to the petition to delist in the Federal Appellees' brief as irrelevant.

7. The Federal Appellees cite the petition to amend 50 C.F.R. § 17.84(i) in arguing that the State of Wyoming has conceded that the language in 50 C.F.R. § 17.84(i) is discretionary and therefore the failure to manage issue is not reviewable under *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) ("SUWA"). The question of whether the language in 50 C.F.R. § 17.84(i) is mandatory or discretionary is a question of law for this Court. See *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 844 F.2d 714, 724 n.15 (10<sup>th</sup> Cir. 1988)(interpretation of a federal regulation is a question of law). Any statements by the State of Wyoming in the petition to amend 50 C.F.R. § 17.84(i) are irrelevant to this Court's interpretation of the language of 50 C.F.R. § 17.84(i) in the context of a SUWA analysis. Accordingly, this Court must strike the petition to amend 50 C.F.R. § 17.84(i) and all references to the petition from the Federal Appellees' brief.

8. In the court below, the Federal Appellees argued that a rejection of the Wyoming wolf management plan was not a "final agency action" subject to review by a federal court. The State of Wyoming has taken subsequent actions, including the filing of a petition to delist gray wolves and a petition to amend the rules under which gray wolves are managed prior to delisting, based on the refusal of the Federal Appellees to control an

exploding wolf population and the Federal Appellees' failure to act to the detriment of the State of Wyoming's other wildlife resources. The Federal Appellees have ignored their non-discretionary duty to proceed with a petition to delist, have ignored their lack of statutory authority to manage wolves post delisting, and are essentially holding the State of Wyoming hostage while wolves decimate other wildlife populations. While seeking review of the District Court's erroneous ruling, the State of Wyoming, out of necessity caused by the Federal Appellees' stonewalling and threat to the State of Wyoming's other wildlife resources and sovereignty, had to pursue other options to try and control an exploding wolf population. This Court cannot allow the Federal Appellees to avoid review of the erroneous District Court ruling on ripeness grounds based on actions taken by the State of Wyoming months after the District Court's final decision and based on matters not considered by the District Court. The Federal Appellees should not be allowed to blackmail the State of Wyoming into submission and then profit by their actions by pursuing a ripeness argument based on extra-record materials occasioned by the Federal Appellees' failure to follow the ESA.

9. In the District Court, the Federal Appellees opposed the State of Wyoming's submission of the transcript of the testimony of Deputy Interior Secretary Paul Hoffman as part of the administrative record. This testimony, before a Wyoming legislative committee, occurred just two days after the rejection of the Wyoming Plan. The District Court's decision striking this testimony of a high ranking government official has been raised by the State of Wyoming in this appeal. It is disingenuous for the Federal Appellees to argue that the

District Court and this Court should not consider testimony graphically illustrating the political nature of the Federal Appellees' rejection of the Wyoming Plan that explained the reason for the rejection just two days after the challenged decision, while relying on separate filings with the DOI that occurred months after the decision on review to argue ripeness. If the Federal Appellees want to use extra-record filings to attempt to avoid review of the illegal actions under the ESA, the Federal Appellees should concede the issues raised by the State of Wyoming in Section V of its opening brief.

10. This Court must strike the 2004 Annual Report of the Wyoming Game and Fish Department from the Intervenor-Appellees' supplemental index and strike all references to it in their brief because the 2004 Annual Report does not fall with the scope of any of the five exceptions set forth in *Custer County Action Ass'n*. The references to the internet websites on pages 13, 15, 26, and 36 must be stricken from their brief for the same reason. The references to the State of Wyoming internet website on pages 6 and 17 must be stricken from their brief for the reasons stated in paragraphs 4 and 5 above.


11. Even if this Court finds that the extra record materials are relevant, they must be stricken because neither the Federal Appellees nor the Intervenor-Appellees have followed the required procedure for admitting such materials to this Court. A party seeking to supplement the record on appeal must file a motion with this Court asking for permission to submit the supplemental materials. *See* FED. R. APP. P. 10(e)(3). The Federal Appellees did not file a motion asking this Court for permission to submit the petition to delist and the petition to amend 50 C.F.R. § 17.84(i) as supplemental materials. The Intervenor-Appellees

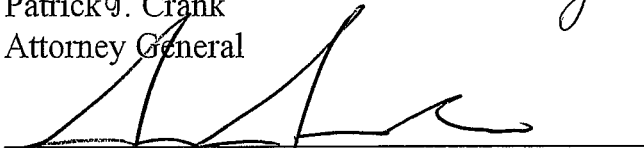
did not file a motion asking this Court for permission to submit the 2004 Annual Report or the information from the cited internet websites as supplemental materials. Given the failure of the Federal Appellees and the Intervenor-Appellees to comply with the requirements of FED. R. APP. P. 10(e)(3), this Court must strike the extra-record materials from the record and strike all references to these materials from the response briefs of the Federal Appellees and the Intervenor-Appellees.

12. For the foregoing reasons, the State of Wyoming respectfully requests that this Court strike the petition to delist and the petition to amend 50 C.F.R. § 17.84(i) and all references to these documents from the Federal Appellees' brief. The State of Wyoming also respectfully requests that this Court strike the 2004 Annual Report of the Wyoming Game and Fish Department from the Intervenor-Appellees' supplemental index and strike all references to the 2004 Annual Report and to the internet websites on pages 6, 13, 15, 17, 26, and 36 from their response brief.

Submitted this 26<sup>th</sup> day of September, 2005.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was placed in the United States mail, postage prepaid (except as otherwise noted), on the 26<sup>th</sup> day of September, 2005, to the following. A copy has also been provided to each via electronic mail.

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Further, pursuant to the 10<sup>th</sup> Circuit Emergency Order, filed May 23, 2005, I hereby certify that:

- (1) All required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital form is an exact copy of the written document filed with the Clerk; and
- (2) The Digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program (Symantec Anti-Virus, Version 9.0.0.338, virus definition file version June 17, 2005 (rev. 8)) and, according to the program, is free of viruses.



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