

FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

STATE OF WYOMING,)

Petitioner,)

v.)

UNITED STATES DEPARTMENT)

OF THE INTERIOR; UNITED STATES)

FISH AND WILDLIFE SERVICE; DIRK)

KEMPTHORNE, in his official capacity)

as Secretary of the United States Department)

of the Interior; H. DALE HALL, in his official)

capacity as Director of the United States Fish)

and Wildlife Service; and MITCH KING, in)

his official capacity as Region 6 Director of)

the United States Fish and Wildlife Service,)

Respondents.)

06 CV 245 J

Case No. _____

**PETITION FOR REVIEW
OF FINAL AGENCY ACTION
AND TO COMPEL AGENCY
ACTION UNLAWFULLY
WITHHELD OR
UNREASONABLY DELAYED**



Petitioner State of Wyoming ("State"), by and through the Wyoming Attorney General's Office, hereby petitions this Court to review the final agency action taken by the United States Department of the Interior, the United States Fish and Wildlife Service, Secretary of the Interior Dirk Kempthorne, United States Fish and Wildlife Director H. Dale Hall, and United States Fish and Wildlife Region 6 Director Mitch King (collectively "Respondents") when they issued a 12 month finding which denied the State's "Petition to Revise the Listed Status of the Gray Wolf (*Canis Lupus*) by Establishing the Northern Rocky Mountain Distinct Population Segment and to Concurrently Remove the Gray Wolf in the Northern Rocky Mountain Distinct Population Segment From the List of Endangered and Threatened Species" ("petition to delist"). The State also asks this Court to compel the Respondents to take action on the "Petition for Amendment of 50 C.F.R. § 17.84(i)" ("petition to amend") which the State filed with the Respondents on or about July 1, 2005. In support of this Petition, the State alleges as follows:

1. On or about July 1, 2005, the State filed the petition to amend with the United States Fish and Wildlife Service ("Service"). In the petition to amend, the State has proposed changes to 50 C.F.R. § 17.84(i) that are intended to mitigate the negative impacts on livestock and wildlife being caused by the rapidly growing recovered gray wolf population in Wyoming. In a letter dated August 17, 2005, the Region 6 office of the Service

acknowledged that the Service had received the petition to amend on July 5, 2005. As of the date of this Petition, the Service has not acted on the petition to amend.

2. On or about July 13, 2005, the State submitted the petition to delist to the United States Department of the Interior (“Interior”). The State filed the petition to delist in accordance with the requirements of the Endangered Species Act (“ESA”) and the regulations implementing the ESA. In the petition to delist, the State asked Interior to establish a northern Rocky Mountain distinct population segment (“NRM DPS”) for the gray wolf and to delist the NRM DPS.

3. In mid-October 2005, the United States Fish and Wildlife Service (“Service”) announced that the State’s petition to delist presented substantial evidence showing that the delisting of the northern Rocky Mountain gray wolf population may be warranted. The Service published notice of the positive 90-day finding in the Federal Register on October 26, 2005. *See* 70 Fed. Reg. 61,770-61,775 (Oct. 26, 2005).

4. In February 2006, the Service published an “advanced notice of proposed rulemaking” in the Federal Register. *See* 71 Fed. Reg. 6634-6660 (Feb. 8, 2006). In this advanced notice, the Service announced that it intended to conduct rulemaking to establish a distinct population segment of the gray wolf in the northern Rocky Mountains of the United

States “if Wyoming adopts a State law and a State wolf management plan that is approved by the Service.” *See* 71 Fed. Reg. 6634.

5. In July 2006, the Service announced that it had denied the State’s petition to delist because WYO. STAT. ANN. § 23-1-304 and the Wyoming Gray Wolf Management Plan (“Wyoming Plan”) are not adequate regulatory mechanisms for purposes of the ESA. On August 1, 2006, the Service published notice of its 12 month finding on the petition to delist in the Federal Register. *See* 71 Fed. Reg. 43,410-43,432 (Aug. 1, 2006).

6. The Respondents’s failure to act on the petition to amend is actionable under 5 U.S.C. § 706(1) of the Administrative Procedure Act (“APA”). The applicable Interior regulation provides that a petition to amend an administrative regulation “*will* be given prompt consideration[.]” 43 C.F.R. § 14.3 (emphasis added). The “prompt consideration” requirement in 43 C.F.R. § 14.3 is mandatory and nondiscretionary. The Respondents’ failure to act on the petition to amend during the past 15 months violates the “prompt consideration” requirement in 43 C.F.R. §14.3 and constitutes agency action unlawfully withheld or unreasonably delayed for purposes of 5 U.S.C. § 706(1).

7. The denial of the State’s petition to delist was arbitrary and capricious, an abuse of discretion, contrary to the APA, the ESA, and the Fifth and Tenth Amendments to the United States Constitution, and was otherwise not in accordance with law. Specifically,

(a) In evaluating the petition to delist, the Service did not comply with the non-discretionary “best science” mandate in 16 U.S.C. § 1533. Interior has adopted a policy that requires the Service to solicit independent peer reviews to ensure that the best scientific data available is being used when making decisions under the ESA. In 2003, the Service selected a panel of 11 preeminent wolf management experts to peer review the Wyoming Plan. Ten of the 11 peer review experts concluded that the Wyoming Plan is an adequate regulatory mechanism for purposes of the ESA. The findings of these peer review experts are the “best scientific and commercial data available” regarding the adequacy of the Wyoming Plan. In evaluating the petition to delist, the Service rejected the findings of the peer review experts for four reasons that have no basis in fact and/or law and instead improperly relied on Mr. Ausband’s unpublished and non-peer reviewed findings to support its decision. The stated reasons for finding that WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan are not adequate regulatory mechanisms thus either have no biological basis or are based upon something other than the best scientific data available. The Service’s actions with respect to the peer review also violate the pronouncements in the 1994 interagency peer review policy statement, and the Office of Management and Budget “Final Information Quality Bulletin for Peer Review.”

(b) In evaluating WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan, the Service relied upon factors Congress did not intend for the Service to consider. The ESA dictates that delisting decisions be based “solely” upon the best scientific and commercial data available. In finding that WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan are not adequate regulatory mechanisms, the Service improperly relied upon political considerations, concerns about possible future litigation by conservation groups, and concerns regarding the legal implementation of the Wyoming Plan. These factors do not relate to the biological status of the gray wolf.

(c) The Service acted outside of its decision-making authority under the ESA when it relied upon concerns regarding the legal implementation of the Wyoming Plan. In May 2003, the Wyoming Attorney General determined that, as a matter of law, the Wyoming Plan is consistent with WYO. STAT. ANN. § 23-1-304. The Service had no authority to disregard the May 2003 opinion from the Wyoming Attorney General in its evaluation of WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan.

(d) In denying the petition to delist, the Service violated the ESA by improperly relying upon speculation about future management actions by the State. In an attempt to explain the alleged deficiencies of WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan, the Service described several possible scenarios which could result in less than ten breeding pairs

of wolves in Wyoming. For each scenario, the Service described what “could” happen in the future, speculated as to what actions the Department “likely” would take under such circumstances, and drew negative inferences which the Service then relied upon to discredit biological soundness of WYO. STAT. ANN. 23-1-304 and the Wyoming Plan. The ESA precludes the Service from relying on speculative future management actions by a state in making listing or delisting decisions.

(e) In evaluating the petition to delist, the Service changed positions without explanation with respect to numerous material aspects of WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan including, but not limited to, the standard used to evaluate WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan and the definition of the recovery goals for delisting. In addition, during the formulation of WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan, officials at the highest levels of Interior and the Service (Craig Manson, Paul Hoffman, Steve Williams, Ralph Morgenweck, John Blankenship, and Ed Bangs) explicitly approved the management scheme set forth in WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan, including the dual classification for wolves, the management objectives for the number of packs in Wyoming, and the statutory definition of “pack.” In denying the petition to delist, the Service cited the dual classification, the management objectives, and the definition of “pack” as the reasons why WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan are not

adequate regulatory mechanisms. At no time during the development of WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan did any official from the Service or Interior tell any official from the State that the “predatory animal” classification for wolves, the management objectives, or the statutory definition of “pack” were biologically unsound and therefore unacceptable under the ESA.

(f) The denial of the petition to delist has resulted in an unauthorized taking of the State’s property for public use in violation of the Fifth Amendment to the United States Constitution. The Respondents acted outside of their statutory authority under the ESA when they relied on evidence other than the best scientific data available as the reason for denying the petition to delist. Had the Respondents complied with the best science mandate, they would have approved the petition to delist and would have taken the steps necessary to delist the gray wolf in Wyoming. The Respondents’ *ultra vires* actions in denying the petition to delist have unlawfully delayed the delisting of the gray wolf in Wyoming. The unlawful delay in delisting the gray wolf in Wyoming has caused, and continues to cause, losses of State revenues that would not have occurred had the Respondents properly discharged their statutory duties under the ESA.

(g) The denial of the petition to delist violates the Tenth Amendment to the United States Constitution as applied because the changes the Service have demanded with respect to WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan are a command for the Wyoming Legislature and the Wyoming Game and Fish Commission to implement an unlawful, politically motivated interpretation of the “adequate regulatory mechanisms” requirement in the ESA.

(h) The decision to deny the petition to delist is contrary to the evidence and is not supported by substantial evidence. The Service’s explanation of its decision on the petition to delist contains numerous factual inaccuracies and misinterprets WYO. STAT. ANN. § 23-1-304, the Wyoming Plan, and the May 2003 opinion from the Wyoming Attorney General. The Service’s stated reasons for finding that WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan are not adequate regulatory mechanisms either have no scientific support or are based upon a selective use of scientific evidence that is not the best scientific data available. The only science cited by the Service, Mr. Ausband’s unpublished and non-peer reviewed findings, are not the best scientific data available and in no way refute the evidence the State presented in the petition to delist with respect to the relationship between the statutory definition of “pack” and the likelihood that a pack has a breeding pair. In many instances, the Service improperly relied upon hypothetical conjecture instead of established facts to

support its findings with respect to WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan. The evidence relied on by the Service is not the type of evidence a reasonable mind might accept as adequate to support the decision with respect to the adequacy of WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan and with respect to the denial of the petition to delist.

8. If this Courts finds that the denial of the petition to delist was lawful, then the Respondents have violated the National Environmental Policy Act (“NEPA”). The size of the gray wolf population in Wyoming now far exceeds the population size contemplated in the 1994 environmental impact statement (“1994 EIS”). In addition, by requiring that the gray wolf be protected as a “trophy game animal” throughout all of Wyoming, the Respondents have expanded the recovery area for wolves far beyond the boundaries identified in the 1994 EIS. The Respondents have not prepared a supplemental environmental impact statement (“SEIS”) to address the impacts of the larger than expected wolf population or the impacts of the larger than anticipated recovery area. The Respondents’ failure to prepare an SEIS to address such impacts is arbitrary and capricious, is contrary to the NEPA, and is otherwise not in accordance with law.

9. This Court has jurisdiction over the claims in this Petition pursuant to 5 U.S.C. §§ 701-706, 16 U.S.C. § 1540(g)(1), 28 U.S.C. § 1331, FED. R. APP. P. 15, and U.S.D.C.L.R. 83.7.2. Sovereign immunity to the claims in this Petition is waived by 5 U.S.C. § 702 and

16 U.S.C. § 1540(g)(1). With respect to the ESA citizen suit claims, the State gave the Respondents written notice of the claims in a letter dated August 9, 2006. The State thus has given the Respondents at least 60 days notice before filing this Petition as required by 16 U.S.C. § 1540(g)(2) in the ESA. The State has filed this Petition within six years of the denial of the petition to delist as required by 28 U.S.C. § 2401(a).

10. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e). Each of the above-named Respondents is either an agency of the United States or an officer or employee of the United States acting in his official capacity, therefore each Respondent resides in this judicial district for purposes of suit. Venue also is proper because a substantial part of the events giving rise to the claims occurred in this judicial district and because the State “resides” in this judicial district for purposes of suit.

11. The denial of the petition to delist is a final agency action because: (a) the denial of the petition to delist marked the consummation of the agency’s decisionmaking process; and (b) the denial of the petition to delist determined rights and obligations and resulted in legal consequences for the State. The failure to act on the petition to amend also is a final agency action. *See Rounds v. United States Forest Serv.*, 301 F.Supp.2d 1287, 1291 (D. Wyo. 2004) (a “failure to act” claim under 5 U.S.C. § 706(1) is treated as final agency action). All claims arising from the denial of the petition to delist and the failure to act on

the petition to amend are subject to appellate review in this Court. *See Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994) (dictating that federal district courts in the Tenth Circuit must process reviews of federal agency action as appeals).

WHEREFORE, the State respectfully requests that this Court:

1. Declare that the Respondents have unlawfully withheld or unreasonably delayed taking action on the petition to amend;
2. Issue a mandatory injunction ordering the Respondents to take final action on the petition to amend no later than one month after this Court issues its final judgment on the merits in the above-captioned case;
3. Declare that the Respondents' 12 month finding on the petition to delist was arbitrary and capricious, an abuse of discretion, contrary to the ESA, the APA, and the Fifth and Tenth Amendments to the United States Constitution, and was otherwise not in accordance with law;
4. Set aside and vacate the Respondents' 12 month finding on the petition to delist;
5. Issue a mandatory injunction ordering the Respondents to immediately approve WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan as adequate regulatory mechanisms and to, no later than three months after this Court issues its final judgment on the merits in the

above-captioned case, propose a rule to create the NRM DPS for the gray wolf and to delist the NRM DPS;

6. Alternatively, if this Court finds that the denial of the petition to amend was lawful, declare that the Respondents have violated the NEPA by failing to prepare an SEIS to analyze the impacts of the larger than expected wolf population and the larger than anticipated wolf recovery area;

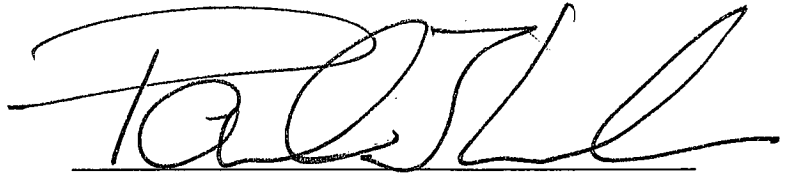
7. Issue a mandatory injunction ordering the Respondents to complete an SEIS on the impacts of the larger than expected wolf population and the larger than anticipated wolf recovery area no later than 6 months after this Court issues its final judgment on the merits in the above-captioned case;

8. Issue a mandatory injunction ordering the Respondents to reduce the gray wolf population in Wyoming to no more than 100 wolves as contemplated by the 1994 EIS until such time as the Respondents complete an SEIS which complies with the NEPA and the APA and which addresses the impacts of the larger than expected wolf population and the larger than anticipated wolf recovery area;

9. Award the State its reasonable fees, costs, and expenses, including attorneys fees, incurred as a result of this litigation; and

10. Grant the State such further and additional relief as the Court may deem just and proper.

Submitted this 10th day of October, 2006.



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