

Energy, Environmental, and Natural Resources Law Clinic 2017-2018

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October 9, 2017

MEMORANDUM

TO: EENR Law Clinic interns

FROM: Jay Jerde 
Special Assistant Attorney General

RE: Class Assignment #2

For Assignment #2, you will draft an answer to the attached complaint. For purposes of this assignment, you are counsel for the United States Department of the Interior and the United States Fish and Wildlife Service. In deciding how to respond to the factual allegations, consult the statute attached to the complaint and appropriate documents in the administrative record.

The responses in your answer must comply with the requirements of Rule 8 of the Federal Rules of Civil Procedure.

The first draft of this assignment is due by **5 p.m.** on **October 16**. The final draft is due by **1 p.m.** on **October 30**.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING
UNIVERSITY OF WYOMING, COLLEGE OF LAW DIVISION**

STATE OF WYOMING,)
)
) Plaintiff,)
)
) v.)
)
) UNITED STATES DEPARTMENT OF)
) THE INTERIOR, and UNITED STATES)
) FISH AND WILDLIFE SERVICE,)
)
) Defendants.)

Case No. 17-XXX

Plaintiff, State of Wyoming (State), through the Wyoming Attorney General, brings this Complaint under the Endangered Species Act and the Administrative Procedure Act seeking declaratory and injunctive relief, as well as attorney’s fees and costs, against Defendants United States Department of the Interior and the United States Fish and Wildlife Service. In support of this Complaint, the State alleges as follows:

INTRODUCTION

1. The gray wolf population in Wyoming and the rest of the northern Rocky Mountain region has recovered and no longer should be protected under the Endangered Species Act. Before the gray wolf can be delisted in the northern Rocky Mountain region, the ESA requires that Idaho, Montana, and Wyoming have adequate regulatory mechanisms in place to provide for the management of wolves after delisting. To satisfy this legal requirement, the State enacted Wyoming Statute § 23-1-304 (attached as Ex. A) and adopted a gray wolf management plan

(collectively “the Wyoming Plan”) to provide for state management of wolves in Wyoming after delisting.

2. The ESA requires the Defendants to evaluate the adequacy of the Wyoming Plan solely upon the best scientific and commercial data available. The best scientific and commercial data available confirms that the Wyoming Plan will provide an adequate regulatory mechanism to protect and preserve the northern Rocky Mountain gray wolf population at or above population recovery goals for the foreseeable future. Ignoring the unambiguous “best science” mandate in the ESA, the Defendants acted arbitrarily, capriciously, and illegally it rejected the Wyoming Plan based upon political considerations, fear of lawsuits by environmental organizations, and speculation regarding Montana and Idaho adopting plans similar to the Wyoming Plan.

3. The Defendants will not approve the Wyoming Plan and will not propose a rule to delist the gray wolf until Wyoming changes the Wyoming Plan: (i) to eliminate the “predator” classification for the gray wolf; (ii) to unambiguously commit to managing for a minimum of fifteen wolf packs in Wyoming; and (iii) to redefine the term “pack.” The State brings this civil action to compel the Defendants to act to approve the Wyoming Plan as written, and to proceed with the delisting process for the gray wolf without further delay.

JURISDICTION

4. This action arises under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706, and the Endangered Species Act (“ESA”), 16 U.S.C. §§1531-1540. This Court has subject matter jurisdiction over this action pursuant to 16 U.S.C. §1540(g)(1)(C), 28 U.S.C. §1331, 28 U.S.C. § 1346(a)(2), and 5 U.S.C. §§ 702-706.

5. On or about April 22, 2004, State provided notice of its intent to file suit under 16 U.S.C. § 1540(g) to the Defendants via Federal Express overnight delivery.

VENUE

6. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e)(2) and 16 U.S.C. §1540(g)(3)(A), as a substantial part of the events or omissions giving rise to this civil action occurred in this judicial district. The decision to reject the Wyoming Plan affects the State's sovereignty, hinders the State's ability to manage its wildlife resources, and affects the economy of Wyoming and the State's revenue collections. Venue also is proper in this judicial district pursuant to 28 U.S.C. § 1391(e)(3).

PARTIES

7. Plaintiff State of Wyoming is a sovereign state. The State brings this litigation on its own behalf.

8. Defendant United States Department of the Interior is an executive branch agency of the United States of America. The Department of Interior is the federal agency responsible for administering the ESA throughout the United States.

9. Defendant United States Fish and Wildlife Service is a sub-agency within the United States Department of the Interior. In this case, the Secretary of the Interior delegated the final decision-making authority regarding the adequacy of the Wyoming Plan to the United States Fish and Wildlife Service.

FACTS COMMON TO ALL CAUSES OF ACTION

Species Profile of the Gray Wolf

10. The gray wolf (*Canis lupus*) is the largest member of the dog family *Canidae*. Gray wolves form family groups referred to as “packs.” In 2001, the average size of a gray wolf pack in Wyoming outside of Yellowstone National Park (“Yellowstone Park”) was approximately nine wolves, and the average size of a gray wolf pack in Yellowstone Park was approximately thirteen wolves.

11. Gray wolves have high reproductive potential. The size of a gray wolf population which is not subjected to human-caused mortality may increase at a rate of 28 percent to 35 percent annually. Since 1998, the gray wolf population in Wyoming has increased by an average of 22 percent per year.

12. Gray wolves are highly efficient predators that feed primarily on large ungulates. In and adjacent to Yellowstone Park, 85 percent of documented gray wolf kills are elk (*Cervus elaphus*), followed by bison (*Bison bison*), moose (*Alces alces*), deer (*O. hemionus*), and pronghorn antelope (*Antilocapra americana*). Gray wolves also kill livestock and other domestic animals such as dogs and horses.

Recovery of the Gray Wolf in Wyoming and the Northern Rocky Mountains

13. In January 1995, the Defendants released fourteen western Canadian gray wolves into Yellowstone National Park. One year later, they released an additional seventeen western Canadian gray wolves into Yellowstone Park.

14. Since January 1995, gray wolves have dispersed into Wyoming from Yellowstone Park. Gray wolves have been sighted as far south as Wamsutter, Wyoming, and as far east as the Big Horn Mountains.

15. The recovery criteria specify that the gray wolf population in the northern Rocky Mountain recovery area will be recovered for purposes of the ESA when at least 30 breeding pairs, comprising at least 300 wolves, exist in the northern Rocky Mountain recovery area for a minimum of 3 years.

16. In 2003, the estimated northern Rocky Mountain gray wolf population consisted of a minimum of 761 wolves, including 51 breeding pairs. By the end of 2003, there were at least 174 wolves in 14 packs living in Yellowstone Park and 76 to 88 wolves in 8 packs living in Wyoming outside of Yellowstone Park.

Gray Wolf Predation in Wyoming

17. Wolves have killed a very large number of livestock in many parts of the state to the detriment of Wyoming residents and directly to the detriment of the State. Wolf predation of livestock causes income loss for Wyoming residents, which then results in a loss of expenditure within the Wyoming economy and a corresponding loss of sales tax income for Wyoming.

18. The number of livestock losses attributed to wolves is significantly understated. Because ranches in Wyoming can be very large, and livestock often is scattered over a vast area, ranchers frequently do not find carcasses from wolf kills, if at all, until well after evidence of the cause of death is available. Ranchers are therefore unable to demonstrate, to the degree demanded by the Defendants, that wolves killed the animals at issue. As a consequence, the Defendants' statistics grossly understate the number of cattle and sheep wolves have killed.

19. Experts, including personnel employed by the Defendants, readily acknowledge that the number of cattle lost to wolves is greater than what is reported in available statistics. Moreover, wildlife biologists generally acknowledge that statistics requiring so high a degree of proof yield misleadingly low estimates of depredation.

20. Wolf predation has caused a decrease in elk and moose herds in Wyoming. Calf-cow ratios and populations for both elk and moose in Wyoming have declined significantly where wolves have become established. Calf-cow ratios in elk herds not in close proximity to substantial wolf populations have maintained pre-wolf reintroduction levels, while cow-calf ratios in elk herds near Yellowstone Park have decreased by up to 26 percent since the reintroduction of the gray wolf to Wyoming.

21. At the current population level in the areas immediately adjacent to Yellowstone National Park, wolves currently kill approximately 1,500 elk, 330 mule deer, and 30 moose per year in Wyoming outside of the National Parks.

22. Wolf predation on big game animals in Wyoming near Yellowstone National Park has decreased hunter opportunity in Wyoming by approximately 1,700 hunters per year. The Wyoming Game and Fish Department has been deprived of approximately \$225,000 in license revenues and the Wyoming economy and Wyoming citizens have lost \$2,900,000 in hunter expenditures as a result of the lost hunter opportunities. Wyoming has been deprived of substantial sales tax, lodging tax, and fuel taxes as a result of these lost hunter opportunities.

Wyoming Statutes Governing Gray Wolf Management

23. Since at least 1939, wolves have been listed as a “predatory animal” pursuant to Wyoming law. Wyoming law lists an animal as a predatory animal if such animal can have a detrimental impact on Wyoming’s economy. Jackrabbits, porcupines, skunks, and stray cats also are considered predatory animals pursuant to Wyoming law.

24. In 2003, the Wyoming Legislature enacted § 23-1-304 to provide for the management of gray wolves in Wyoming upon delisting.

25. Section 23-1-304 provides that, upon delisting, the Game and Fish Department shall manage at least fifteen wolf packs in Wyoming as a whole and at least seven wolf packs living outside of the National Parks.

26. Section 23-1-304 provides that, upon delisting, gray wolves shall be classified as “trophy game animals” in the National Parks and those federally designated wilderness areas contiguous to the National Parks. Gray wolves will be classified as predatory animals in all other areas of Wyoming.

27. Section 23-1-304 provides that, if there are less than seven wolf packs located in Wyoming and primarily outside of the National Parks, the Commission shall adopt rules and regulations to classify the gray wolf as a trophy game animal within that area of Wyoming the Commission determines is necessary to reasonably ensure that seven wolf packs are located in Wyoming and primarily outside of the National Parks.

28. For purposes of § 23-1-304, the term “pack” means five or more gray wolves traveling together.

The Wyoming Plan

29. In anticipation of the recovery of the gray wolf population, the Game and Fish Department drafted the wolf management plan after extensive consultation with the Defendants.

30. In June 2003, the Game and Fish Department asked the Defendants to provide comments on the June 2003 draft version of the Wyoming Plan. On July 2, 2003, Ed Bangs, the Wolf Recovery Coordinator for the Service, responded to this request on behalf of the Defendants. The Service’s Regional Office upper level managers reviewed and approved the written response from Mr. Bangs.

31. In his response, Mr. Bangs stated that “Wyoming should commit to maintaining fifteen or more packs in Wyoming, so if wolf numbers in the Parks drop below eight packs, Wyoming will have more than seven packs outside of the Parks. The plan currently recognizes and provides for this.”

32. With respect to the dual status of wolves as “predatory animals” and “trophy game animals” under the Wyoming Plan, Mr. Bangs stated the Defendants believe that the dual status classification “was a very serious mistake that will continue to haunt our efforts to successfully delist wolves. Predatory animal status for wolves will make the whole delisting process much more contentious, emotional, expensive, and filled with hurtful rhetoric than necessary.”

33. Mr. Bangs elaborated, stating that

[w]olf restoration in Montana, Idaho, and Wyoming, particularly in and near Yellowstone National Park, is widely perceived as one of the most successful wildlife conservation efforts of this century. We believe that the image that under predatory animal status in Wyoming, wolves could be killed without a clear regulatory safety-net, at any time, without limit, and particularly by any means-is unacceptable to most Americans. We believe those perceptions will cause unimaginable rhetoric, conflict, emotion and mistrust. It could raise millions of dollars and provide a unifying justification for those groups who have most strongly supported wolf restoration, share animal fairness and humane concerns, but mistrust any type of state management-ie. the very organizations that are most likely to litigate over wolf delisting. While the Service is mandated to focus on science and biology, public attitudes and comments will influence subsequent litigation. We urge you to reconsider the wisdom of “predatory animal” status for wolves anywhere in Wyoming. The Wyoming legislature could help avoid a huge and very public brawl that will be damaging, if not fatal, to the Service’s efforts to delist a recovered wolf population and would greatly improve the national public’s attitude and trust of Wyoming’s abilities to manage wolves, by authorizing wolf trophy game status statewide.

34. In July 2003, the Commission adopted the final version of the wolf management plan. The final plan incorporates the gray wolf management objectives set forth in § 23-1-304.

Review of the Final Wyoming Plan by the Defendants

35. After receiving the peer review critiques and comments from the State, the Defendants reviewed the Wyoming Plan in light of the critiques and comments. In mid-January 2004, they accepted the Idaho and Montana wolf management plans, but rejected the Wyoming Plan.

36. The Defendants informed the Game and Fish Department that it would approve the Wyoming Plan if the following three changes were made: (i) eliminate the “predatory animal” status and classify the gray wolf as a “trophy game animal” only; (ii) amend § 23-1-304 so that the statutory language unambiguously commits to managing for at least fifteen wolf packs in Wyoming; and (iii) the State’s ’s definition of the term “pack” must be biologically based, consistent with the definitions in Idaho and Montana state plans, and, if the pack size must be established by law, the state law must define pack size as at least six wolves traveling together in the winter.

37. In the news release announcing the its rejection of the Wyoming Plan, the Defendants stated that “[d]elisting can move forward as soon as Wyoming makes the changes to both its state law and its wolf management plan, but not until then because these wolves are part of one distinct population segment.”

CAUSE OF ACTION

38. The State incorporates by reference the allegations set forth in paragraphs 1 - 37 as if fully set forth herein.

39. In accordance with 5 U.S.C. § 706(2), a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

40. In accordance with 16 U.S.C. § 1533(c)(2), the Secretary of the Interior must consider five factors to determine whether a species should be delisted, including whether the existing regulatory mechanisms for the species are adequate.

41. The ESA requires the Defendants to base their decision on the adequacy of existing regulatory mechanisms solely upon the best scientific and commercial data available.

42. To satisfy the “adequacy of existing regulatory mechanisms” factor for delisting, the Defendants required the State to develop a gray wolf management plan for the Game and Fish Department to follow in managing gray wolves in Wyoming upon delisting.

43. The best scientific and commercial data available demonstrates that the Wyoming Plan and § 23-1-304 provide an adequate regulatory mechanism to protect and preserve the gray wolf population at or above recovery goals.

44. The Defendants ignored the best scientific and commercial data available in their review of the Wyoming Plan and rejected the Wyoming Plan based upon political considerations, fear of litigation by environmental groups, and speculation regarding Montana and Idaho adopting plans similar to the Wyoming Plan.

45. The Defendants claim to have rejected the Wyoming Plan, in part, because § 23-1-304 does not unambiguously commit to managing for at least fifteen wolf packs in Wyoming, even though they previously had approved the language in § 23-1-304 with respect to the management of fifteen wolf packs in Wyoming and seven wolf packs located in Wyoming outside of the National Parks.

46. The Defendants also claim to have rejected the Wyoming Plan because it permitted the gray wolf to be classified as a “predatory animal” in certain circumstances. Yet, they will allow the State to manage wolves as a *de facto* “predatory animal” as long as the Wyoming Legislature capitulates and gives wolves some label other than “predatory animal.”

47. The Defendants will not propose a rule to delist the gray wolf until the State makes the required changes to the Wyoming Plan.

48. By rejecting the Wyoming Plan based upon considerations other than the best scientific and commercial data available, the Defendants acted arbitrarily, capriciously, and not in accordance with law within the meaning of 5 U.S.C. § 706(2).

49. By rejecting the Wyoming Plan based upon an alleged ambiguity in the language of § 23-1-304 after previously approving the language regarding the Game and Fish Department’s management authority over gray wolves, the Defendants acted arbitrarily, capriciously, and not in accordance with law within the meaning of 5 U.S.C. § 706(2).

50. By rejecting the Wyoming Plan because of the “predatory animal” classification, the Defendants acted arbitrarily, capriciously, and not in accordance with law within the meaning of 5 U.S.C. § 706(2).

PRAYER FOR RELIEF

The State prays for this Court to enter judgment in its favor and against the Defendants as follows:

1. Pursuant to 5 U.S.C. 5 U.S.C. § 706, declare that the Defendants have unlawfully withheld or unreasonably delayed agency action by basing the decision to reject the Wyoming Plan on considerations other than the best scientific and commercial data available and by failing

to properly manage the gray wolf population in Wyoming in accordance with 50 C.F.R. § 17.84(i) and its prior commitments;

2. Pursuant to 5 U.S.C. 5 U.S.C. § 706, declare that the Defendants have acted arbitrarily, capriciously, and not in accordance with law by rejecting the Wyoming Plan based upon an alleged ambiguity in the language of § 23-1-304 after expressly approving the language and by rejecting the Wyoming Plan because of the “predatory animal” classification;

3. Pursuant to 5 U.S.C. 5 U.S.C. § 706, issue an injunction prohibiting the Defendants from imposing its mandate upon the Wyoming Legislature and enjoining them from any further delay in delisting the gray wolf;

4. Pursuant to 5 U.S.C. 5 U.S.C. § 706, issue an injunction ordering the Defendants to immediately approve the Wyoming Plan and to proceed to propose a rule to create a northern Rocky Mountain distinct population segment and to delist the gray wolf in the NRM DPS;

5. Pursuant to 16 U.S.C. §1540(g)(4), award the State all reasonable costs incurred by Plaintiff in pursuing this matter including, but not limited to, all reasonable attorney’s fees, and;

6. Award such other relief as the Court may find just and appropriate.

FILED this 9th day of October, 2017.

Attorney for Plaintiff State of Wyoming



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§ 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;

Ex. A

(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, eff. March 4, 2003.

Historical and Statutory Notes

Laws 2003, ch. 115, §§ 3, 4 and 5 provided:

"Section 3. Nothing in this act shall prohibit the ownership of a wolf hybrid if the animal