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December 6, 2006

Via E-Mail Only: drice@3rivers.net
Representative Diane Rice
Montana State House of Representatives
P.O. Box 216
Harrison, MT 59735

Dear Representative Rice:

The purpose of this letter is to discuss the potential causes of action brought by the Friends of the Northern Yellowstone Elk Herd ("FOTNYEH") for the United States Fish and Wildlife Service's ("FWS") rejection of the FOTNYEH's petition to delist wolves found in the state.

I. FACTUAL BACKGROUND

Gray wolves (*Canis lupus*) are a common species found throughout Canada, Alaska, Siberia, and parts of India, Italy, France and Spain. Despite the species' abundance and broad global distribution, on January 4, 1974, the FWS listed four "subspecies" of gray wolf found or formally found in the continental United States as "endangered." One of these four so-called "subspecies" was the "northern Rocky Mountain gray wolf" ("NRMGW").

At the time of listing, wolves were not present in the northern Rocky Mountain region in any abundance. Accordingly, in 1994 the FWS designated portions of Idaho, Montana and Wyoming as an "experimental" wolf population area and, in 1995 and 1996, began importing and stocking Canadian wolves into in the greater Yellowstone area to artificially create a population of NRMGW. Given an abundant supply of large game and livestock in the region, the "experimental" population of transplanted Canadian wolves (now deemed to be an "endangered subspecies" by virtue of their new geographic home) flourished and, within a few years, wolves have expanded throughout the greater Yellowstone area and beyond.

On October 5, 2001, FOTNYEH filed a petition to delist the NRMGW. The petition stated and attached a number of scientific reports to the petition. Nearly four years later, on July 13, 2005, the State of Wyoming filed a petition to establish a "distinct population segment" of the NRMGW, and then delist it. On October 26, 2005, the FWS published a 90-day finding stating that Wyoming's petition presented substantial evidence showing that delisting may be warranted. The FWS rejected the FOTNYEH's petition with little comment, other than stating that the petition was not warranted.

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On February 8, 2006, the FWS published an advanced notice of proposed rulemaking announcing the agency's intention to grant Wyoming's petition, subject to Wyoming adopting a wolf management plan approved by the FWS. Six months later, on August 1, 2006, the FWS reversed its position, publishing a notice of 12-month finding on petition to delist which rejected Wyoming's petition. According to the FWS, Wyoming's management plan was inadequate to protect the NRMGW, should the subspecies be delisted.

On October 10, 2006, Wyoming filed a lawsuit against the FWS, alleging that the FWS's rejection of its petition was arbitrary and capricious, failed to consider the best available science, and considered improper factors such as politics and pressure from environmental groups. The case remains pending in the United States District Court for the District of Wyoming.

II. POTENTIAL CAUSES OF ACTION FOR THE FOTNYEH PETITION

As a general rule, any party who is suffering harm from an action by an agency of the federal government may sue that agency in a United States District Court for violations of federal law provided that agency's action is deemed to be a "final" agency action subject to judicial review. FOTNYEH meets these basic criteria. The FWS's October 26, 2005 and February 8, 2006 publications rejecting the FOTNYEH petition to delist were both "final" agency actions subject to judicial review. As an organization concerned about wolf predation on Yellowstone elk, the FOTNYEH qualifies as a party with a direct, vested interest in the management of wolves in the region. Because the FOTNYEH can demonstrate that the FWS's rejection of the petition to delist has caused harm, which may be remedied by forcing the FWS to comply with applicable law, then it qualifies as a plaintiff in a federal lawsuit against the FWS.

There are two basic causes of action FOTNYEH has against the FWS in this case. First FOTNYEH can complain that the rejection of its petition to delist is directly related to FOTNYEH's interest. For example, the State of Wyoming has sued the FWS for its decision rejecting the state's petition to delist. This is the preferred method of challenging an agency action, since it helps to avoid a number of procedural defenses which the agency may raise. Thus, FOTNYEH may bring such a lawsuit since the FWS issued a specific final agency action rejecting its petition to delist.

Second, the information sent to this office indicates that the FOTNYEH has provided the FWS with a scientific justification supporting its position. Likewise, the FOTNYEH may be able to rely on much of the same factual foundation that the State of Wyoming is currently relying on in its case. For instance, if Wyoming's petition to delist relied on the same body of scientific evidence which was referenced by the FOTNYEH petition, then the detailed analysis provided by Wyoming, and rejected by the FWS, may be challenged by the FOTNYEH. Likewise, since the FWS's only apparent objection to the concept of delisting is the alleged inadequacy of Wyoming's state management plan, then the FOTNYEH may be able to challenge the FWS for rejecting that plan, since rejection of the plan is the *de facto* basis for failing to delist wolves in either Wyoming or Montana. Therefore, the factual basis for a FOTNYEH lawsuit may closely resemble the factual basis of the State of Wyoming's lawsuit.

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However, the FOTNYEH should also be aware that the more closely its lawsuit resembles Wyoming's lawsuit, the more likely the FWS would be to attempt to have the FOTNYEH's lawsuit removed from federal district court in Montana to the Wyoming court, and consolidated with the State of Wyoming's suit. This is particularly true if the FWS believes that it will get more favorable treatment in front of the Wyoming judge than the Montana judge.

Third, with additional legal analysis, other statutory violations may be found. For example, the National Environmental Policy Act requires the FWS to prepare an Environmental Impact Statement whenever it takes a major federal action which significantly impacts the environment. Any such statement must also be adequate in scope and analysis. Substantive violations include any failures on the part of the FWS to comply with mandatory substantive requirements of applicable statutes. For example, the Endangered Species Act requires the FWS to use the "best available science" when it makes decisions regarding the listing of species. Likewise, the Administrative Procedures Act requires the FWS to provide a rational basis for its decisions. Failures of these procedural or substantive requirements generally results in the court issuing an injunction against the agency forcing compliance. In this case, the FWS's rejections would be reversed, and the FWS would be required to apply the correct procedure and/or statutory principals to the petitions.

The next step that needs to occur in this case is for this office to fully evaluate the factual and scientific record to date. In so doing, this office may ascertain the above noted elements, such as the cause of damage to the plaintiff, the issues raised by the parties prior to the decision, the factual basis for the challenge, and the legal causes of action which may be brought. In the course of this evaluation, additional factual and legal issues are commonly identified. Accordingly, this office may be able to ascertain causes of action not identified by the State of Wyoming, yielding a different and possibly more potent lawsuit. Once this evaluation was complete, this office would provide FOTNYEH with a draft Complaint describing all potential causes of action and related legal issues prior to actually filing a lawsuit.

III. CONCLUSION

We appreciate your request of this firm to assist you in this matter and look forward to your notification that we should proceed with this case. Should you have any questions, please do not hesitate to contact me.

Sincerely,

/s/ Karen Budd-Falen

Karen Budd-Falen
BUDD-FALEN LAW OFFICES, LLC

KBF:nec

xc: Robert Fanning, via e-mail only