



The Northern Rocky Mountain Wolf Delisting: What Would Leopold Think?

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INTRODUCTION

The reintroduction of the Northern Rocky Mountain ("NRM") gray wolf into Yellowstone National Park ("YNP") and central Idaho beginning in 1995 has been nothing if not controversial. Emotions have run high on both sides of the issue and for those choosing sides any possibility of a viable middle ground has increasingly narrowed.

It wasn't that long ago that, with considerable effort and tax dollars, the Federal government helped lead the charge to remove the last vestiges of the wolf from the Rocky Mountain Region. Earlier this century, wolves were vilified and declared enemies of the Western way of life. But as often happens, with the passage of time and the changing of generations, hard feelings softened. Thirteen years ago, the Federal government, with considerable effort and tax dollars, reintroduced the gray wolf into the Northern Rockies.

Part of the impetus for this change of heart was the strong support for wolf reintroduction throughout the country and the fact that the number of Westerners that make their living from ranching has continued to shrink. Many of those who now live in the West have no connection whatsoever with ranching and as the percentage of the ranching population continues to decline, so too does the percentage of the population that remains adamantly opposed to wolves.

In general, it could be said that as our knowledge of the environment and ecology has evolved, and as our society has grown increasingly wealthy, our attitudes towards the environment have become more sophisticated. Where once we strove to conquer the wilderness based on fears and ignorance, we now strive to find our place within the ecosystems surrounding us, and seek to better define our proper role as stewards of the earth.

Our fear of wolves is ancestral, reaching back to the time when conquering the wilderness was seen as basic to our survival and where wolves and other such creatures represented the dark forces that we least understood and that we feared the most. Myths and fairy tales helped illustrate those fears; for many, stories about the Big Bad Wolf and the wolf in the Three Little Pigs were part of their childhood. In the ranching communities of the West, however, fear of wolves went way beyond fairy tales. Ranchers, face to face with economic reality, fought hard to protect their livelihood from ruin by the forces of nature, including wolves, and the hatred of wolves has been passed on from generation to generation down to today.

And although ranching continues to serve as a foundation of many communities throughout the West, it no longer serves the function as one of the primary underpinnings of the West's economy. Today, ranching represents a microscopic percentage of the economy of the West as a whole. But while ranching may not be the fuel that makes the Western economy run, it is part of the skeleton that holds the West together and it is difficult to imagine a West without it. Ranchers remain politically powerful in sparsely populated states such as Montana and Wyoming and ranchers, aligned with a hunting community

that sees wolves as antithetical to their cause, do not, by God, want to have to contend with competing with wolves for a living. It's bad enough that they have to contend with uncertain markets, disease, and Mother Nature. Now they want to put wolves in my backyard? And they want to use my tax dollars to do it? I don't think so.

And so they have resisted – hard. It took not just years but decades from the time the concept of wolf reintroduction was first raised to reach the point of actually importing wolves into the NRM region. And for those opposed to wolves, the reintroduction was largely seen as having the Feds shove it down their throats. They weren't happy about it. They still aren't happy about it. But nonetheless, the Feds went ahead and did it.

Having brought the wolves back against their will, the Feds then turned to the states and asked them to manage the wolves. I mean, are they kidding? The Idaho legislature refused, going so far as to prohibit their Fish and Game Department from cooperating with the Fish and Wildlife Service ("FWS"). Wyoming openly rebelled, classifying the wolves as predators to be shot on sight. But, having reached the point where the original criteria designated for recovery of the NRM wolf has been achieved, the states have done an about face. With the wolf population far in excess of the recovery goals and continuing to climb, the states are now anxious to have the Feds turn over management to them so they can control those population numbers through, largely, hunting.

Not surprisingly, wolf advocates are appalled at the thought of hunters blasting away at wolves. They think there's something fundamentally wrong with spending millions of dollars in tax funds and putting in incomprehensible efforts by countless individuals to help this species recover only to have the wolves delisted and watch three-quarters of them shot on sight. And they plan to use every means at their disposal to make sure that doesn't happen. If history is any indication, this is going to be a long fight. Beyond what they see as the fundamental injustice of removing protection from the wolves only to have them killed, advocates are questioning the fundamental science behind the early recovery goals, claiming that we simply didn't know then what we know now. They are claiming that wolves within the NRM must be managed as a whole and that the substantial differences in the state management plans prevent that from happening.

And while there are also some within the conservation community that say, hey, a deal is a deal and it's time to let delisting go forward, there are many who were willing to hold out for the all-or-none full protection of the Endangered Species Act ("ESA") rather than compromise for less. These are the folks who would chain themselves to the wolves to prevent them from being shot if they could. The reality, however, is that at some point delisting is going to occur, the states are going to manage the wolves and hunters are going to swing the wolves they shot from the trusses in their garages and hang the hides of those wolves on

the walls of their cabins. It is the fight between now and then that is the issue at hand.

In theory, the only real struggle in the delisting process should be the difficult decisions involving what legal protections must be afforded the wolves under the ESA based on the best available scientific information. In reality, these decisions appear to be continually and disproportionately influenced by political considerations. In theory, the cry of public opinion, no matter how forcefully expressed, should not factor into agency decisions. In reality, the politics of the wolf reintroduction has thrown everything out of kilter and has made this a much more difficult and much uglier fight. In theory, in the court battles to follow, politics should not be allowed to penetrate the courthouse doors. In reality, where those courthouse doors are located plays a very big factor in the final outcome of any legal challenge.

In attempting to grapple with such a large topic and in order to put the struggle into context, it will first be necessary to provide some historical and background material relating to the wolf issue. Part of that history overlaps with passage of the ESA in the early 1970's, when the idea of bringing wolves back into the NRM region was first seriously considered. From then until now the issue has evolved at incredible speed: from actual reintroduction of wolves into the NRM region, to an unexpectedly quick recovery, to delisting, to a challenge of the delisting that led to reinstatement of ESA protection of the wolves, to continued hints that a new rule delisting the wolves will be out "soon." Throughout that period, the Federal agency most involved in the initial extirpation of the wolves from the region – the FWS – has been the agency most involved in their recovery.

By any standard, the reintroduction and recovery of the NRM wolf has been one of the high water marks of the modern conservation effort and that effort has been documented in countless books and articles. But, with no disrespect intended, as much can be learned from what went wrong with this effort as from what went right. And, while an analysis of what went wrong does not constitute a feel-good story that sells well with the public, it could provide valuable lessons that might be applied in future, comparable situations. Additionally, there are many facets of the recovery effort that provide insight into legal nuances that, while perhaps not exciting, are the central elements in the legal challenges to the delisting that have already begun. Finally, if we could turn back the hands of time, an examination of what might have been done differently could prove useful – not because Monday-morning quarterbacking is enjoyable, but because with the FWS rewriting the rule delisting the wolves, this is the chance for the agency to correct its earlier mistakes.

I. TAXONOMY

The gray wolf (*Canis lupus*) is the largest wild member of the dog family, with NRM females weighing slightly less than males and NRM males weighing

up to 130 pounds.¹ Fur color for the wolves is often a grizzled gray, but can range from white in color to coal black.² Wolves can live up to thirteen years in captivity, but the average lifespan for a NRM wolf is less than four years.³

Wolves are, by nature, social animals that band together into packs of anywhere from two to twelve animals.⁴ Fiercely territorial, these packs occupy a large and distinct area ranging from 200 to 500 square miles and protect that territory from other wolves and packs.⁵ How large each pack becomes is partially determined by the amount of available prey – normally medium and large animals – available within the area. Other factors that determine pack size are disease and conflicts with other wolf packs.⁶

As wolves within a pack mature, they eventually disperse from their pack to either join another pack or find a mate and start their own pack.⁷ During dispersal, a lone wolf from the NRM may wander upwards of 500 miles, although dispersals of around 60 miles are more common.⁸ Within each pack, only the top-ranking, or alpha, male and female mate and produce pups.⁹ Wolves typically begin breeding as two-year-olds and continue to breed annually past their tenth year.¹⁰

There are two types of wolf packs found in the wild: simple and complex. A “simple” pack is comprised of a breeding pair along with any pups, whereas a “complex” pack is multi-generational, containing pups born up to four or five years before.¹¹ Most of the packs found in areas such as Yellowstone, for instance, are complex because of the abundant prey and the protections afforded within the park.¹² Outside the park, the opposite is true.¹³

Within Yellowstone, and especially in Yellowstone’s Northern Range, a hotly debated topic is whether the Yellowstone wolves are causing what is known as a “trophy cascade.”¹⁴ With the Northern Range wolves having access to the

¹ Endangered and Threatened Wildlife and Plants; Designating the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and Removing This Distinct Population Segment from the Federal List of Endangered and Threatened Wildlife, 72 Fed. Reg. 6106, 6107 (Feb. 8, 2007) [hereinafter Proposed Delisting Rule].

² *Id.* (citations omitted).

³ *Id.* (citations omitted).

⁴ *Id.*

⁵ *Id.*

⁶ Proposed Delisting Rule, *supra* note 1, at 6106, 6107.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ DOUGLAS W. SMITH & GARY FERGUSON, *DECADE OF THE WOLF* 86–87 (The Lyons Press 2006).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 118.

highest known biomass in the world¹⁵ and with the wolf an "apex carnivore,"¹⁶ scientists have postulated that the feeding habits of wolves affect the entire Northern Range food chain, all the way down to the plant community. Evidence points to the recovery of certain trees and animals within riparian corridors in the Northern Range as being directly attributable to the reintroduction of wolves.¹⁷

Specifically, in spite of a large number of elk in the Northern Range that have historically ravaged willow and aspen trees in low-lying riparian areas, these plants have shown significant evidence of recovery since the reintroduction of wolves.¹⁸ Evidence suggests that the hunting pattern of wolves appears to have changed the behavior pattern of elk, thus resulting in this recovery.¹⁹ Because elk are more prone to be killed in areas such as riparian corridors where they cannot see approaching wolves, the elk have tended to avoid those areas and thus the trees appear to have recovered. As a result, beaver have returned to the area, creating ponds that provide habitat for insects, fish, small mammals and birds that can exist nowhere else.²⁰ In addition, the carrion the wolves leave behind after a kill is being used by a number of other animals, such as ravens, magpies, bald and golden eagles, and coyotes.²¹

II. HISTORICAL BACKGROUND

A. Eradication: Settlement – 1930

Before North America was settled, the gray wolf inhabited the entire North American continent with the exception of the southeast United States, which was occupied by the red wolf.²² When Lewis and Clark came through the Yellowstone region in the early 1800's, the number of wolves in the area is estimated to have been more than thirty-five thousand.²³ While early trappers and traders largely ignored wolves, the 1850's and 1860's saw increased activity in the trade of wolf hides.²⁴ Because the hide only had value in the winter, when it is at its thickest, wolfing, as it was called, became a seasonal occupation. "The wolfer's methods were simple and effective. He killed a buffalo every three or four miles and inserted strychnine into the entrails, tongue and flanks of

¹⁵ SMITH & FERGUSON, *supra* note 11, at 91.

¹⁶ Sitting atop the food chain; *see id.* at 118.

¹⁷ *Id.* at 119–22.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ SMITH & FERGUSON, *supra* note 11, at 119–22.

²¹ *Id.*

²² HANK FISCHER, *WOLF WARS* 11 (Falcon Press 1995).

²³ *Id.* at 12.

²⁴ *Id.* at 13.

the animal. The unsuspecting wolf ate the buffalo carcass and died near it.”²⁵ Arranging the poisoned buffalo in a circular pattern to save time, the wolfers rode their circuit every day or so to collect the pelts.²⁶

In the 1870's, with the slaughter of the bison in full swing, wolf numbers remained high in spite of the active pelt trade because the animals had a readily available food source in the form of discarded bison carcasses. Under such favorable conditions, wolves are capable of producing litters of eight to ten pups, rather than the more typical four to six.²⁷ But the 1870's also saw the introduction of the livestock industry into the region. When settlers decimated not only the bison but other large game animals, the wolves were left to forage food wherever they could find it – including livestock herds. As a result, animosity between the stockman and the wolves grew in direct proportion to the size of that industry. Towards the end of the century, some ranchers in the Yellowstone area reported losses to wolves of up to fifty percent of their herd, with losses averaging about twenty-five percent.²⁸ Faced with this situation, ranchers hired men for the express purpose of hunting wolves, and these efforts were augmented by state and federal government personnel who joined in the effort.

But the total destruction of the wolf in the NRM didn't kick into high gear until 1914, the year that Congress set aside funds for an agency known as the Biological Survey (“Survey”) – the predecessor of the FWS.²⁹ In a Federal bureaucracy not known for efficiency, the Survey was extremely competent at killing wolves, and by the 1930's wolves were eliminated from the NRM region.³⁰

B. Changing Attitudes: 1930 – 1973

Soon after wolves were wiped out, administrators and scientists in organizations such as the National Park Service (“NPS”) began to view wolves in a different light. Horace Albright, director of the NPS from 1929 to 1933, issued a policy letter stating that predatory animals, including wolves, were an integral part of the wildlife that must be protected within national parks, and prohibited the trapping and the use of poisons within the confines of any national park – including Yellowstone.³¹ In 1933, renowned ecological pioneer George Wright suggested that no predator should be destroyed simply because

²⁵ *Id.* (citation omitted).

²⁶ *Id.*

²⁷ FISCHER, *supra* note 22, at 14.

²⁸ *Id.* at 16–17.

²⁹ *Id.* at 20.

³⁰ Proposed Delisting Rule, *supra* note 1, at 6107.

³¹ HORACE ALBRIGHT, THE NATIONAL PARK SERVICE'S POLICY ON PREDATORY MAMMALS (1933), reprinted in THE YELLOWSTONE WOLF: A GUIDE AND SOURCEBOOK, at 232–34 (Paul Schullery ed., University of Oklahoma Press 2003) (1996).

of its natural tendency to kill other park animals and that rare predators, such as wolves, should "be considered special charges of the national parks in proportion that they are prosecuted everywhere else."³²

In 1944, in a book review of *The Wolves of North America*,³³ Aldo Leopold suggested that not only do wolves belong in national parks and wilderness areas, but that parks such as Yellowstone should have been restocked with wolves following their extirpation from the park.³⁴ The most famous Leopold quote regarding wolves comes from his book *Sand County Almanac* in which he recounts the aftermath of having shot a wolf:

We reached the old wolf in time to watch a fierce green fire dying in her eyes. I realized then, and have known ever since, that there was something new to me in those eyes – something known only to her and the mountain. I was young then, and full of trigger-itch; I thought that because fewer wolves meant more deer, that no wolves would mean hunters' paradise. But after seeing the green fire die, I sensed that neither the wolf nor the mountain agreed with such a view.³⁵

In like fashion, Leopold's son, Starker, suggested in the 1963 Leopold Report that efforts to protect natural predators within the parks should be intensified and that predators such as wolves should be used to help control ungulate numbers within the parks.³⁶

The genesis of the Leopold Report provides important background for the reintroduction of wolves to the Yellowstone ecosystem. In the early 1960's, primarily due to a lack of natural predators, the size of the elk herd in the Northern Range of Yellowstone had exploded. As a result, the aspen and willow saplings along the riparian corridors of the park were decimated by the foraging elk, throwing the riparian ecosystem out of balance and resulting in a lower number of riparian animals such as birds and beavers.³⁷ In an attempt to control the size of the herd, NPS officials began a herd reduction program that entailed deputizing hunters to go into the park and aggressively hunt and destroy elk. When word of this got out, the intense negative public reaction caused NPS officials to step back from this policy and rethink their approach. To help them in their reassessment, the Park Director commissioned a study, headed by

³² GEORGE M. WRIGHT, JOSEPH S. DIXON & BEN H. THOMPSON, SUGGESTED NATIONAL PARK POLICY FOR THE VERTEBRATES, *reprinted in* THE YELLOWSTONE WOLF, *supra* note 31, at 235–37.

³³ STANLEY YOUNG & EDWARD GOLDMAN, THE WOLVES OF NORTH AMERICA (Dover Publications 1944).

³⁴ ALDO LEOPOLD, REVIEW OF THE WOLVES OF NORTH AMERICA, *reprinted in* THE YELLOWSTONE WOLF, *supra* note 31, at 97–98.

³⁵ ALDO LEOPOLD, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE 130 (Oxford University Press 1989) (1949).

³⁶ A. Starker Leopold, *Natural Predation*, in THE LEOPOLD REPORT, *reprinted in* THE YELLOWSTONE WOLF, *supra* note 31, at 238–39.

³⁷ FISCHER, *supra* note 22, at 26.

Starker Leopold, to make recommendations on how best to handle the problem.

Going well beyond its original charter, the Leopold Committee felt that it could not fulfill its mission without fully analyzing how NPS goals and policies affect national park ecosystems. The resulting Leopold Report stated that it was not enough for the NPS to merely protect the natural resources of the parks; the Service must, to the extent possible, "recreate the ecologic scene as viewed by the first European visitors."³⁸ This would entail the reintroduction of natural predators, such as wolves. Additionally, the report suggested that animal populations, such as the Yellowstone elk, should be "regulated by predation and other natural means."³⁹ In other words, their conclusion was that the NPS should institute a policy of letting nature take its course with all aspects of the ecosystem and that such a policy assumed that all of the pieces of the ecosystem – including predators such as grizzlies and wolves – were a necessary part of that ecosystem. And, where those predators were missing because of past human actions, they should be reintroduced.

C. Endangered Species Act: 1973

In 1966, and again in 1969, Congress took tentative steps towards passage of today's ESA through passage of the Endangered Species Preservation Act, providing only limited protection to endangered species. In 1973, Congress passed the ESA,⁴⁰ which created two main categories of species deserving protection: those that are endangered and those that are threatened. An endangered species is one that "is in danger of extinction throughout all or a significant portion of its range,"⁴¹ while a threatened species "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."⁴²

In a decision whether or not to list a species under the ESA, the FWS, the Federal agency tasked with making such a determination, is required to consider: "1) The present or threatened destruction, modification, or curtailment of its habitat or range; 2) overutilization for commercial, recreational, scientific, or educational purposes; 3) disease or predation; 4) the inadequacy of existing regulatory mechanism; and 5) other natural or manmade factors affecting its continued existence."⁴³

Conversely, a species may be delisted if the best available scientific and

³⁸ Advisory Board on Wildlife Management Appointed by Secretary of the Interior Udall, A.S. Leopold (Chairman), et al., *THE LEOPOLD REPORT, reprinted in AMERICA'S NATIONAL PARK SYSTEM: THE CRITICAL DOCUMENTS 250* (Lary M. Dilsaver ed., Rowman & Littlefield Publishers 1994).

³⁹ *Id.*

⁴⁰ Endangered Species Act, 16 U.S.C. § 1532 (2006).

⁴¹ 16 U.S.C. § 1532(6) (2006).

⁴² 16 U.S.C. § 1532(20) (2006).

⁴³ 16 U.S.C. § 1533(a)(1) (2006).

commercial data indicate that the species is neither endangered nor threatened because of extinction, recovery or error in its original classification.⁴⁴ Prior to proceeding with a delisting decision, the FWS is required to consider the same five criteria used in deciding whether or not to list a species.⁴⁵

In 1974, the NRM gray wolf (*Canis lupus irremotus*) was listed as endangered at the subspecies level.⁴⁶ In 1978, the FWS agreed with the modern taxonomists' consensus that fewer subspecies of wolves should be recognized. This trend, plus possible problems with enforcement, led the FWS to list the entire gray wolf species as endangered throughout the lower forty-eight states.⁴⁷

III. WOLF WARS: 1980-1994

A. Fighting for Recovery

In 1980, the migration down from Canada of what became known as the Beartooth Wolf forced officials to meet the issue of the presence of wolves in Montana head on. The wolf announced its arrival by slaughtering livestock, and the situation had to be dealt with immediately.⁴⁸ Unfortunately, in the course of trying to capture and relocate the wolf, the animal perished.⁴⁹

Within this same timeframe, the Northern Rocky Mountain Wolf Recovery Team ("Recovery Team"), formed in 1975 by the FWS to prepare for restoration of the wolves in the Rocky Mountain area, was finishing the first of its plans.⁵⁰ However, the first attempt by the Recovery Team at writing a viable recovery plan, introduced in 1980, fell woefully short of expectations by failing to address the issues of reintroduction, population goals, or the handling of problem wolves who attack livestock.⁵¹ Because of these shortfalls, the document was largely relegated to sitting on the shelf until a more practical plan could be drafted.

B. Experimental Populations

In the interim, in 1982 the reauthorization of the ESA in Congress and the proposed reintroduction of the red wolf in Tennessee and North Carolina

⁴⁴ 50 C.F.R. § 424.11(d) (2008).

⁴⁵ *Id.*

⁴⁶ Amendments to Lists of Endangered Fish and Wildlife, 38 Fed. Reg. 14,678 (June 4, 1973).

⁴⁷ Reclassification of the Gray Wolf in the United States and Mexico, with Determination of Critical Habitat in Michigan and Minnesota, 43 Fed. Reg. 9612 (Mar. 9, 1978). ESA's decision to list at the species level would later be called into question in legal challenges to the NRM wolf reintroduction. See *Wyo. Farm Bureau v. Babbitt*, 987 F. Supp. 1349 (D. Wyo. 1997) (holding that the FWS could not very well reintroduce a subspecies that no longer existed and that the Agency's decision to list at the species rather than the subspecies level was entitled to deference).

⁴⁸ FISCHER, *supra* note 22, at 44-45.

⁴⁹ *Id.* at 45-46.

⁵⁰ *Id.* at 47.

⁵¹ *Id.*

coincided.⁵² Not surprisingly, the citizens in the affected areas of Tennessee and North Carolina did not welcome the concept of reintroduction and, as irate citizens are prone to do, they gave their congressmen an earful. Those citizens also made it clear that they would do whatever they had to do to take care of any wolves reintroduced in their area.

Attempting to defuse the situation, wolf advocates floated the idea of giving the wolves a lesser degree of protection that would allow a citizen to protect himself and his property against the wolves without breaking the law.⁵³ Typically, when a species is classified as “endangered,” the ESA prohibits the “taking,” or the killing or harming, of a member of that species. But, the thinking went, if wildlife managers and landowners were afforded greater flexibility to deal with animals such as problem wolves, the impact of the reintroduction could be softened. From this, the Experimental Population provision, also known as Section 10(j),⁵⁴ was born.

Thus, the red wolf population was reintroduced as an “experimental-nonessential population” and, as explained to the concerned citizens, because the wolves were “nonessential” if the experiment were to go horribly awry, the experiment could be terminated and the population removed.⁵⁵ Further, to help the farmers either unable or unwilling to deal with problem wolves themselves, federal officials offered to take care of any problem wolves that destroyed citizens’ livestock.⁵⁶ The legislation defused a volatile political situation and allowed the reintroduction of the red wolf to go forward. Such creativity is a testament to the willingness of wolf advocates to engage in the art of political compromise. This same willingness, and this same experimental population provision, would surface over a decade later with another wolf population – this time in the Northern Rocky Mountains.⁵⁷

⁵² THOMAS MCNAMEE, *THE RETURN OF THE WOLF TO YELLOWSTONE* 211 (Owl Books 1998).

⁵³ *Id.* at 211–13.

⁵⁴ 16 U.S.C.A. § 1539(j) (2009).

⁵⁵ Prior to designating a population as experimental, the Secretary of Interior must first determine whether the particular experimental population is essential or nonessential to the survival of the species as a whole. 16 U.S.C. § 1539(j)(2)(B) (2006). If the Secretary determines that that the population is essential, members of that population will be afforded the protection as “threatened” species, the next level down from endangered. *Id.* § 1539(j)(2)(C). The exception to this is when a member of the population is found within either a National Wildlife Refuge or Park, in which case the species receives the full protection of the ESA. *Id.* If, however, the Secretary determines that members of the experimental population are nonessential to the survival of the species, those members are treated as a species proposed for listing, thus giving wildlife managers greater flexibility in their oversight of that species. *Id.*

⁵⁶ MCNAMEE, *supra* note 52, at 213.

⁵⁷ Importantly, Congress requires that any proposed experimental population designation must follow the full rulemaking process in order to ensure adequate public participation in the decision. 16 U.S.C. § 1539(j)(2)(B) (2006).

C. The 1987 Wolf Recovery Plan

Following the failure of the 1980 plan, it took the Recovery Team another seven years to weave a workable plan through the gauntlet of politicians and stockmen. When it was finally approved, the 1987 Northern Rocky Mountain Wolf Recovery Plan ("1987 Plan") formally delineated three recovery areas as well as individual recovery goals within each of these areas.⁵⁸ Regarding the recovery areas, the plan called for the natural recolonization of wolves into the Glacier National Park area of northwest Montana and into central Idaho, and the reintroduction of wolves into Yellowstone. Yellowstone was seen as being too geographically isolated for natural recovery to occur, whereas northwest Montana had been naturally populated by wolves since 1979.⁵⁹ Not long afterwards, in 1982, a breeding pair along with seven wolf pups were spotted just north of Glacier in Canada,⁶⁰ and by 1985, wolves had permanently reestablished themselves in and around Glacier.⁶¹

In each of the three recovery areas, the plan called for a minimum of ten breeding pairs of wolves for a minimum of three successive years.⁶² In selecting these areas, the Recovery Team looked for what it considered to be suitable wolf habitat. Chief among the selection criteria was an area with a sufficient, year-round prey base of big game ungulates.⁶³ Additionally, each area had to be suitable and somewhat secluded to provide for both denning and rendezvous sites.⁶⁴ Finally, each area had to have sufficient space and minimal exposure to humans.

The plan noted that if natural recovery did not occur in Montana and Idaho after five years, other conservation strategies would be considered.⁶⁵ For the Yellowstone area, before reintroduction could be carried out the plan noted that two things had to occur: 1) an Environmental Impact Statement ("EIS") with full public involvement had to be written; and 2) final rulemaking designating the reintroduced Yellowstone wolves as an experimental population had to be enacted.⁶⁶ Clearing the necessary hurdles to accomplish both of these tasks would take almost ten years.

⁵⁸ FISH AND WILDLIFE SERV., NORTHERN ROCKY MOUNTAIN WOLF RECOVERY PLAN v (1987) [hereinafter 1987 PLAN].

⁵⁹ *Id.* at 3.

⁶⁰ *Id.* This wolf pack became known as the Magic Pack because of their tendency to constantly disappear and reappear over the years. See also FISCHER, *supra* note 22, at 48.

⁶¹ 1987 PLAN, *supra* note 58, at 3-4.

⁶² *Id.* A breeding pair is defined as an adult male and an adult female accompanied by two pups that survive until December 31st. See ROCKY MOUNTAIN WOLF RECOVERY 2005 INTERAGENCY ANNUAL REPORT, Table 4A (Fish and Wildlife Serv. et al. eds., 2005).

⁶³ 1987 PLAN, *supra* note 58, at 7.

⁶⁴ These are sites where wolves give birth in the spring and raise their pups in the summer and early fall.

⁶⁵ 1987 PLAN, *supra* note 58, at v.

⁶⁶ *Id.* at 6.

D. The EIS Process

Before the reintroduction of wolves could move forward, the FWS first had to comply with the requirements of the National Environmental Policy Act ("NEPA"). Under NEPA, any "major Federal action significantly affecting the quality of the human environment" requires the preparation of an Environmental Assessment ("EA") or an EIS.⁶⁷

With a clear understanding that the scope of the reintroduction would require preparation of an EIS, the Wyoming congressional delegation blocked the reintroduction by pressuring the Reagan administration into not including funding for the EIS in its fiscal budget.⁶⁸ To bypass this roadblock, separate funding for the EIS would have to be approved by Congress. Thus began a multi-year fight where each year the House of Representatives would vote to appropriate the necessary funds for the EIS while the Senate would refuse to approve the funding.⁶⁹

In the middle of this political fight, Defenders of Wildlife ("DOW") brought a lawsuit against the Secretary of the Interior, attempting to force him to implement the 1987 Plan.⁷⁰ Declining DOW's request, the court noted that the 1987 Plan was not an action document and that Congress had specifically terminated funding for reintroduction.⁷¹ Because of this, the court determined that any attempt to force implementation of a plan that depended on funds that were specifically withheld by Congress would be moot.⁷²

Finally, after years of backroom haggling, in November 1991, funding for the EIS was approved.⁷³ Starting in April 1992, the FWS began the EIS process with a series of public meetings designed to determine the range of topics that the public felt should be covered by the study. Held in the heart of the proposed area of reintroduction, the meetings, contentious from the beginning, turned into a pro-wolf, anti-wolf battleground.⁷⁴ Although the FWS made it clear that the EIS was not a popularity contest, politics and public opinion have always influenced how federal agencies have managed the wolf controversy.

In July 1993, the FWS completed its draft EIS.⁷⁵ The drafters of the EIS, led by Ed Bangs of the FWS, advocated the recommendation outlined in the 1987 Plan to reintroduce the NRM wolves as an experimental population.⁷⁶ Unlike

⁶⁷ 42 U.S.C. § 4332(2)(c) (2006).

⁶⁸ FISCHER, *supra* note 22, at 119.

⁶⁹ *Id.* at 119–41.

⁷⁰ *Defenders of Wildlife v. Lujan*, 792 F. Supp. 834 (D.D.C. 1992).

⁷¹ Language was introduced in an appropriations bill that read, "none of the funds in this Act may be expended to reintroduce wolves in Yellowstone National Park and Central Idaho." See *Defenders*, 792 F. Supp. at 835–36.

⁷² *Id.* at 836.

⁷³ FISCHER, *supra* note 22, at 141–42.

⁷⁴ *Id.* at 145–49.

⁷⁵ *Id.* at 150.

⁷⁶ As part of the EIS process, Federal regulation requires that the drafting agency explore all

the 1987 Plan, however, the EIS recommended reintroducing the wolves into both Idaho and Yellowstone.

Beyond the expansion of the anticipated area of reintroduction, the EIS held little in the way of surprises. It did, however, spell out that after ten breeding pairs, totaling approximately 100 wolves, are established in all three areas for three consecutive years, the wolves “would be removed from the list of threatened and endangered species and managed solely by the respective states and tribes in areas outside of national parks and national wildlife refuges.”⁷⁷

The EIS then laid out what constituted a “problem wolf,” and what to do about it. In order for a wolf to be designated a “problem,” there had to be clear evidence that the wolf had either wounded or killed livestock.⁷⁸ Such evidence was considered essential because it was quite possible that wolves may simply be feeding on the carrion they found rather than being responsible for its death. Additionally, there had to be evidence that the wolves were not artificially or intentionally fed. For instance, livestock carcasses not properly disposed of would be considered attractants. On Federal land, regulations require that livestock carcasses be removed, buried, burned or otherwise disposed of.⁷⁹ In what has been referred to as the “two-strike” rule, wolves involved in depredations two times in a calendar year were to be removed.⁸⁰

Finally, the EIS outlined the specific parameters related to the handling of the experimental population:

- All wolves found in the two experimental areas were to be designated as experimental animals;
- Provided that proper livestock practices were followed, artificial feeding did not occur and grazing permit plans were followed, federal agencies would harass, capture, move or kill wolves that attacked livestock;
- Compensation for depredation caused by wolves was to be paid out of the DOW Bailey fund;
- Land owners could harass adult wolves on private land;
- Grazing permittees on public land could harass wolves near their livestock at any time;
- Wolves caught in the act of depredation on private land could be

reasonable alternatives to the proposed action, including a no-action alternative, and clearly identify which of these alternatives the agency prefers. See 40 C.F.R. § 1502.14 (2008).

⁷⁷ FISH & WILDLIFE SERV., THE REINTRODUCTION OF GRAY WOLVES TO YELLOWSTONE NATIONAL PARK AND CENTRAL IDAHO FINAL ENVIRONMENTAL IMPACT STATEMENT vi (1994) [hereinafter 1994 EIS].

⁷⁸ *Id.* at xiv.

⁷⁹ *Id.*

⁸⁰ *Id.*

killed by the land owners;

- On public land, if agencies could not take care of the situation, permittees would receive permits to kill wolves caught in the act of attacking livestock; and
- The killing or injuring of wolves by unavoidable or unintentional actions during otherwise legal activities would not be considered to be a take.⁸¹

E. Checking off the Necessary Legal Boxes

Shortly after publication of the EIS, the FWS formally proposed reintroducing wolves into the Central Idaho and Yellowstone areas as nonessential experimental populations under the Section 10(j) provisions.⁸² As noted above, protections afforded a species under 10(j) were less than those normally provided by the ESA. Elsewhere, the wolves located in northwest Montana, who had migrated down from Canada, would retain their endangered status under the ESA.⁸³

Geographically, the Yellowstone area was defined as “that portion of Idaho east of Interstate 15; that portion of Montana that is east of Interstate 15 and south of the Missouri River from Great Falls, Montana, to the eastern Montana border; and all of Wyoming.”⁸⁴ The Central Idaho area was defined as “that portion of Idaho that is south of Interstate 90 and west of Interstate 15; and that portion of Montana south of Interstate 90, west of Interstate 15 and south of Highway 12 west of Missoula.”⁸⁵ Within the regulation, the FWS noted that the areas where the reintroduction was to take place consisted of large, contiguous blocks of approximately twelve million acres each of Federal land. Additionally, the rule noted that there would be no land use restrictions associated with the reintroduction, that management of the wolves would be shared between federal and state agencies and that – with the 10(j) provisions in place – land owners would be allowed to destroy wolves caught in the act of killing their stock.⁸⁶

F. Moving Forward

With the parameters of the reintroduction laid out, most of the legal obstacles were cleared. While those in the ranching community were opposed to the presence of wolves under any circumstances, a number of Western congressmen

⁸¹ *Id.* at xv–xvi.

⁸² Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in Central Idaho and Southwestern Montana, 59 Fed. Reg. 60,252 (Nov. 22, 1994) [hereinafter Nonessential Experimental Rule].

⁸³ *Id.* at 60,256.

⁸⁴ Proposed Delisting Rule, *supra* note 1, at 6110–11.

⁸⁵ *Id.* at 6111.

⁸⁶ Nonessential Experimental Rule, *supra* note 82, at 60,265.

understood that if wolves showed up on their own, they would be given the full protection of the ESA and were therefore pushing for reintroduction under the lesser-protected experimental population designation.⁸⁷

Following publication of the draft EIS, the public comment period that followed resulted in over 160,000 comments – the most ever for an EIS – with the number of responses showing the depth of public interest in wolf reintroduction.⁸⁸ In June 1994, the final EIS was released containing the decision to go with the experimental non-essential designation. Rather than being a cause for celebration, the decision to reintroduce wolves as an experimental species split the environmental community into opposing camps. Some environmental groups felt strongly that the decision represented the only politically viable way to move reintroduction forward. Something, they thought, was better than nothing. Other groups felt that the 10(j) designation was a sellout of gigantic proportions and vowed to sue to stop the reintroduction. Unfortunately for that second camp, in following through with their threat to sue they found themselves in the sack with some rather strange legal bedfellows.

G. Wyoming Farm Bureau v. Babbitt

As soon as the final EIS was released in 1994, those opposed to wolves initiated legal action to try and block the reintroduction. Leading the charge was the Wyoming Farm Bureau whose position was that *no* wolves should be reintroduced.⁸⁹ On the opposite end of the political spectrum, several groups, including the Sierra Club and the Audubon Society, strongly objected to the proposed designation of the reintroduced wolves as a nonessential experimental population, calling the EIS a “wolf-killing plan,”⁹⁰ and they too brought suit.⁹¹ To the surprise of many, and no doubt to the horror of the environmental groups, the court combined the two suits, joining the Farm Bureau and the environmental groups as plaintiffs.⁹²

In a classic example of a lawsuit taking forever to grind its way through the system, the suit did not reach final resolution until more than five years after the reintroduction occurred.⁹³ It did, however, delay the scheduled reintroduction by several days as the Farm Bureau attempted unsuccessfully to get an injunction stopping release of the wolves. While Farm Bureau lawyers made their plea in court, the wolves awaiting release sat in their shipping crates in Yellowstone and Idaho. When the district court finally did rule, it held that the

⁸⁷ SMITH & FERGUSON, *supra* note 11, at 25.

⁸⁸ FISCHER, *supra* note 22, at 152–53.

⁸⁹ *Id.* at 156.

⁹⁰ *Id.* at 153–54.

⁹¹ *Id.* at 151–53.

⁹² See *Wyo. Farm Bureau v. Babbitt*, 987 F. Supp. 1349 (D. Wyo. 1997).

⁹³ See *Wyo. Farm Bureau v. Babbitt*, 199 F.3d 1224 (10th Cir. 2000).

reintroduction as an experimental species had been improper and declared that the wolves must be removed.⁹⁴ However, the district court stayed its ruling pending review by the Tenth Circuit court.⁹⁵ The Tenth Circuit found that the reintroduction was proper, allowing the wolves to remain.⁹⁶

IV. REINTRODUCTION TO RECOVERY

With the Farm Bureau lawsuit initiated but unresolved, and with the Farm Bureau's request for preliminary injunction denied, reintroduction of the wolves moved forward. During the planning process, the FWS had proposed releasing thirty Canadian wolves a year into both Yellowstone and central Idaho for four consecutive years.⁹⁷ In Yellowstone, a "soft release" (with wolves spending time in acclimation pens prior to being released into the wild) was planned, while the wolves in central Idaho would be given a "hard release" (released directly into the wild). But because the wolves proved so adaptable within both environments, only two reintroductions totaling sixty-six wolves were necessary, one in 1995 and one in 1996.⁹⁸

As it was planning the reintroduction, the FWS, charged by the ESA to cooperate to "the maximum extent practicable" with the states in recovery of an endangered species,⁹⁹ attempted to involve the states in joint management of its wolf program. From the start, all three states – Montana, Idaho & Wyoming – responded to these attempts with reactions ranging from tepid to hostile. Montana, by now settling into its role as a state with wolves in its northwest corner, was the least hostile of the three. Idaho and Wyoming, however, basically stiff-armed the FWS. The Idaho legislature passed a statute forbidding the state wildlife department from having anything to do with the reintroduction effort¹⁰⁰ and Wyoming continued to classify wolves as predators, on par with coyotes.¹⁰¹

As time went on, and as wolf numbers began to rise, the states started to come to the realization that – like it or not – the wolves were there to stay and it was probably in their best interest to cooperate with the FWS. The FWS laid it on the line: even if the wolf population met its numerical goals, the FWS would not delist the wolves and turn over management to the states unless all three had management plans in place that complied with FWS requirements. They could either manage the wolves themselves, or the FWS would do it for them.

⁹⁴ Wyo. Farm Bureau, 987 F. Supp. at 1376.

⁹⁵ *Id.*

⁹⁶ Wyo. Farm Bureau, 199 F.3d at 1241.

⁹⁷ 1994 EIS, Alternatives, *supra* note 77, at 7.

⁹⁸ Proposed Delisting Rule, *supra* note 1, at 6108–10.

⁹⁹ 16 U.S.C. §1535(a) (2006).

¹⁰⁰ Patrick Impero Wilson, *Wolves, Politics and the Nez Perce: Wolf Recovery in Central Idaho and the Role of Native Tribes*, 39 NAT. RESOURCES J. 543, 546 (1999).

¹⁰¹ H.B. 0229, 57th Leg., 2003 Gen. Sess. (Wyo. 2003).

In 1999, the governors of Montana, Idaho and Wyoming entered into a Memorandum of Understanding ("MOU"),¹⁰² which noted that all three states recognized the importance of working together in a regional effort and were committed to devising state management plans that could achieve the stated delisting goals, and thus allow transfer of management to the states to proceed.¹⁰³ In the MOU, all three states committed to the goal of achieving ten breeding pairs and 100 wolves in each of their states, and further committed to achieving this goal by managing for fifteen wolf packs in each state. Finally, the states agreed to correlate their definition of pack with the FWS definition of a breeding pair.¹⁰⁴

Subsequent to the MOU, the FWS began working closely with the states to develop the management plans, providing both guidance and funding. Primarily, the FWS encouraged the states to focus on human-caused mortality of wolves as the key to their plans.¹⁰⁵ In order to accomplish this, the FWS asked the states to: 1) devise appropriate regulatory control of taking; 2) ensure that their definition of pack coincided with the FWS's definition of breeding pair; and, 3) provide a means to manage wolf populations above the agreed-upon recovery levels.¹⁰⁶ Within a few years, both Montana and Idaho had devised plans that the FWS approved as adequate to support the recovery goal subsequent to delisting. Wyoming, on the other hand, had not.

With the original recovery goal of thirty breeding pairs and 300 wolves achieved in 2000, and with the consecutive year requirement fulfilled at the end of 2002,¹⁰⁷ the pressure to delist the wolves began to increase and the states began to make it clear that they wanted to manage the wolf populations on their own. As Wyoming noted, "[i]t is clearly in the State's best interest for wolves to be delisted in a timely manner."¹⁰⁸ But the FWS continued to dangle the ultimate carrot – either bring all three state plans – including Wyoming's – into compliance with the FWS requirements, or delisting would not occur.

V. THE DECISION TO DELIST

As the NRM wolf population grew increasingly larger, the calls for delisting became louder. On October 30, 2001, the Friends of the Northern Yellowstone

¹⁰² Which was renewed in 2002.

¹⁰³ Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to Establish the Northern Rocky Mountain Gray Wolf Population (*Canis lupus*) as a Distinct Population Segment to Remove the Northern Rocky Mountain Gray Wolf Distinct Population Segment from the List of Endangered and Threatened Species, 71 Fed. Reg. 43,410, 43,425–26 (proposed Aug. 1, 2006) (to be codified at 50 C.F.R. pt. 17) [hereinafter NRM DPS Rule].

¹⁰⁴ *Id.* at 43,426.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 43,411.

¹⁰⁸ WYO. GAME AND FISH COMM'N, FINAL WYOMING GRAY WOLF MANAGEMENT PLAN 4 (2007) [hereinafter WYOMING PLAN].

Elk Herd, Inc., submitted a petition to the FWS seeking removal of the NRM gray wolf from the endangered species list.¹⁰⁹ Their petition, a total of two pages, fell well short of the required threshold to approve a delisting request.¹¹⁰ On July 19, 2005, the FWS received another, more substantial, petition from the governor of Wyoming and the Wyoming Game and Fish Commission.¹¹¹ This petition eventually resulted in the determination that, provided certain conditions related to state management of the species were met, delisting was warranted.

On February 8, 2007, the FWS issued a proposed rule removing the NRM gray wolf from the endangered species list.¹¹² Before proposing this rule, the FWS first had to consider five factors¹¹³ – the same five factors used to determine whether a species should be listed – and determine if the best scientific and commercial data available substantiate that the species is neither endangered nor threatened because of (1) extinction, (2) recovery, or (3) error in the original data used for classification of the species.¹¹⁴

In reviewing the Wyoming petition to delist, the FWS compared the initial recovery goals¹¹⁵ against the five listing criteria cited in the ESA and determined that, with the exception of the shortfalls present in Wyoming's regulations and recovery plan, none of the five criteria were present.¹¹⁶ In addressing Wyoming's shortfalls, the FWS noted that once the state changed its laws and brought its management plan in line with the FWS's recommendations, the threat to human-caused mortality would be sufficiently regulated.¹¹⁷

¹⁰⁹ Endangered and Threatened Wildlife and Plants; 90-day Finding on Petitions to Establish the Northern

Rocky Mountain Distinct Population Segment of Gray Wolf (*Canis lupus*) and to Remove the Gray Wolf in the

Northern Rocky Mountain Distinct Population Segment from the List of Endangered and Threatened Species, 70 Fed. Reg. 61,770 (proposed Oct. 26, 2005) (to be codified at 50 C.F.R. pt. 17).

¹¹⁰ *Id.* at 61,771. When FWS receives such a petition, it is required to determine whether the petition "presents substantial scientific or commercial information indicating that the petitioned action may be warranted." 16 U.S.C. §1533(b)(13)(A) (2006). The term "substantial information" is the amount of information that would lead a reasonable person to believe the petition was warranted. 50 C.F.R. § 424.14(b) (2008).

¹¹¹ NRM DPS Rule, *supra* note 103, at 43,411.

¹¹² Proposed Delisting Rule, *supra* note 1.

¹¹³ "1A) The present or threatened destruction, modification, or curtailment of its habitat or range; 2B) overutilization for commercial, recreational, scientific, or educational purposes; 3C) disease or predation; 4D) the inadequacy of existing regulatory mechanisms; [and] 5E) other natural or manmade factors affecting its continued existence." 16 U.S.C. § 1533(a)(1) (2006).

¹¹⁴ See 50 C.F.R. § 424.11(d) (2008).

¹¹⁵ "Thirty or more breeding pairs (i.e., and adult male and an adult female wolf that have produced at least 2 pups that survived until December 31 of the year of their birth, during the previous breeding season) comprising some 300+ wolves in a metapopulation (a population that exists as partially isolated sets of subpopulations) with genetic exchange between subpopulations should have a high probability of long-term persistence," 1994 EIS, *supra* note 77, at 6:75.

¹¹⁶ Proposed Delisting Rule, *supra* note 1, at 6135.

¹¹⁷ *Id.*

In its analysis, the FWS reviewed the status of wolves in all three recovery areas – Northwestern Montana, Central Idaho, and Greater Yellowstone – separately. In Northwestern Montana, the FWS determined that while repopulation had occurred naturally, the area is limited in its ability to support wolves because the habitat is less suitable for wolves than the other two areas, and because it lacks an overwintering ungulate prey base.¹¹⁸ Because of this, and because of the fact that the main prey in that area is white-tailed deer, the FWS felt that the wolf numbers would never be as high as those of Idaho or Yellowstone, and that the area had either reached, or was close to reaching, its maximum carrying capacity.¹¹⁹ In spite of this, the wolf population in the area had persisted for nearly twenty years and was considered by the FWS to be robust.¹²⁰ The analysis noted that since 2001, the area had sustained about ninety-six wolves and eight breeding pairs.¹²¹

The Central Idaho Recovery Area, at 20,700 square miles, contains the largest suitable habitat and the largest wolf population of the three recovery areas.¹²² As of late 2006, an estimated 713 wolves and forty-six breeding pairs resided in central Idaho.¹²³ The Greater Yellowstone Recovery Area (“GYA”) consists of 24,600 square miles and, although it is physically larger than the Central Idaho Area, it has a high percentage of high-elevation, deep snow areas that do not sustain a viable year-round prey base.¹²⁴ At the end of 2006, there were 371 wolves in thirty breeding pairs in the GYA.¹²⁵ Within Yellowstone itself, there were 136 wolves in ten breeding pairs and the analysis noted that it is unlikely that any significant population growth will occur in the park because the suitable wolf habitat had reached its saturation point.¹²⁶ In order for any growth to occur in the GYA, it will have to do so outside of the park and wilderness areas.

The delisting rule became final on February 27, 2008, more than a year after delisting was first proposed. As required by the ESA,¹²⁷ on that same day that the rule became final, a number of conservation groups, led by DOW, sent a sixty-day notice to the FWS of their intent to challenge the rule.¹²⁸ On April 28, 2008, DOW filed a complaint in the U.S. District Court of Montana asking the

¹¹⁸ *Id.* at 6109–10.

¹¹⁹ *Id.* at 6110.

¹²⁰ *Id.*

¹²¹ Proposed Delisting Rule, *supra* note 1, at 6110.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Proposed Delisting Rule, *supra* note 1, at 6110.

¹²⁷ 16 U.S.C. § 1540(g)(2)(A) (2006).

¹²⁸ Defenders of Wildlife, 60-Day Notice Letter to Fish and Wildlife Serv. (Feb. 27, 2008), *available* *at*

http://www.defenders.org/resources/publications/programs_and_policy/in_the_courts/60-day_notice_letter_on_gray_wolf_delisting.pdf [hereinafter 60-Day Delisting Notice].

court to invalidate the rule and to issue an injunction directing the FWS to cease state management and relist the wolves.¹²⁹ In its complaint, DOW alleged that the delisting was in violation of provisions of the Administrative Procedure Act ("APA")¹³⁰ because the FWS' decision was arbitrary, capricious, an abuse of discretion and otherwise contrary to law under the ESA.¹³¹ Specifically, DOW complained that: 1) there was insufficient genetic interchange and connectivity between the three wolf subpopulations; 2) the existing state regulations were inadequate to protect the wolves once delisting occurred; 3) the delisting failed to analyze threats to the wolf throughout significant portions of its range; and, 4) the area of the Distinct Population Segment designated by the FWS for the NRM wolves was overbroad.¹³²

On July 18, 2008, the court, agreeing that there was a sufficient likelihood that DOW would prevail in its attempt to show that there was insufficient genetic interchange between the wolf populations and that Wyoming's recovery plan was flawed, granted DOW's motion for preliminary injunction.¹³³ On September 22, 2008, the FWS asked the court to vacate the final delisting rule and remand it back to the FWS for further consideration.¹³⁴ On October 14, 2008, the court complied with that request.¹³⁵ Subsequent to the remand, the FWS reopened the comment period relating to its 2007 proposed rule, asking for comments related to the issues raised by DOW in its sixty-day notice and in its lawsuit.¹³⁶

VI. STATE PLANS

In its suit, DOW makes the valid point that while the FWS approved the various state recovery plans, the plans in and of themselves do not carry the force of law and, therefore, do not commit the states to manage for a specific number of wolves.¹³⁷ Stated intent aside, there is definitely a lack of firm, statutory commitment on the part of the states relating to the number of wolves they intend to maintain. While Montana and Idaho have both indicated that they intend to manage for wolf numbers far in excess of the minimum required for delisting, there is nothing forcing them to keep that commitment.

¹²⁹ See Complaint for Declaratory and Injunctive Relief, *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160 (D. Mont. 2008) (No. 908 Civ. 56).

¹³⁰ 5 U.S.C. § 706(2) (2006).

¹³¹ 16 U.S.C. § 1533(a), (b) (2006).

¹³² See generally Complaint for Declaratory and Injunctive Relief, *supra* note 129.

¹³³ See *Defenders*, 565 F. Supp. 2d at 1164.

¹³⁴ Endangered and Threatened Wildlife and Plants; Designating the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and Removing This Distinct Population Segment From the Federal List of Endangered and Threatened Wildlife [hereinafter Reopening Final Rule Comment Period], 73 Fed. Reg. 63,926, 63,926 (Oct. 28, 2008).

¹³⁵ *Id.* at 63,926–27.

¹³⁶ *Id.* at 63,927.

¹³⁷ Complaint for Declaratory and Injunctive Relief, *supra* note 129, ¶ 60.

The various state plans outlined below represent a broad range of management options for recovery of the NRM wolves. Montana's plan is clearly the most progressive, perhaps because the state has had sufficient time to grapple with the concept of wolves within its borders. Idaho, once well behind Montana because it refused to even address wolf management, has begun to catch up with its neighbor and the state plan has continued to show signs of progress. But, as outlined below, recent events in Idaho, with state entities at odds with each other over just how many wolves are appropriate, prove DOW's point. Finally, bringing up the rear by a substantial margin, Wyoming continues to be defiant to criticism of how it manages wolves within its borders. As it did in 2003, contrary to its own policy of delisting wolves in all three of the NRM states, or none at all, the FWS has begun to hint that it will proceed without Wyoming if the state is not willing to modify its law that designates the wolf as a predator to be shot on sight.

A. Montana: Best of the Bunch

1. 2002 Montana Wolf Conservation and Management Plan

Whether the state has simply perfected its rhetoric or is sincere in its intent, Montana's Wolf Conservation and Management Planning Document has been the one state plan cited by environmental groups as a model for wolf management. As part of that plan, Montana has designated the gray wolf as a "native species" within the state and noted that it "intends to implement positive management programs to make sure recovery is complete and wolves are integrated as a valuable part of our wildlife heritage."¹³⁸

Upon delisting, management of wolves shifts from the Montana Department of Livestock, which oversees the wolves as livestock predators,¹³⁹ and comes under the purview of the Montana Fish, Wildlife & Parks division ("MFWP"), which will manage wolves as a species "in need of management."¹⁴⁰ Once classified in this manner, the MFWP will manage the wolf "for the purpose of

¹³⁸ MONTANA WOLF MANAGEMENT ADVISORY COUNCIL, MONTANA WOLF CONSERVATION AND MANAGEMENT PLANNING DOCUMENT 1 (2002) [hereinafter MONTANA PLAN], 1 (Montana Wolf Management Advisory Council 2002) available at <http://fwp.mt.gov/wildthings/wolf/council/default.html>.

¹³⁹ See MONT. CODE ANN. § 87-3-130 (2007) ("Taking of Wildlife to Protect Persons or Livestock"); see also MONTANA PLAN, *supra* note 138, at 2.

¹⁴⁰ "'Management' means the collection and application of biological information for the purposes of increasing the number of individuals within species and populations of wildlife up to the optimum carrying capacity of their habitat and maintaining those levels. The term includes the entire range of activities that constitute a modern scientific resource program, including but not limited to research, census, law enforcement, habitat improvement, and education. The term also includes the periodic or total protection of species or populations as well as regulated taking." MONT. CODE ANN. § 87-5-102(5) (2007).

increasing the number of individuals within the species and populations of wildlife, up to the optimum carrying capacity of their habitat, and maintaining such levels.”¹⁴¹ At that point, the Montana Fish, Wildlife & Parks Commission¹⁴² and MFWP may choose to reclassify the wolf as a big game animal or furbearer, and implement a public harvest program.¹⁴³ Additionally, upon delisting, state law will be modified to relieve a person from criminal liability for taking a wolf that is threatening a person, livestock or a domestic dog.¹⁴⁴

In 2000, the state made a substantial step towards fulfilling its obligations under the 1999 MOU when Governor Marc Racicot convened the Wolf Management Advisory Council, a twelve-member organization, comprised of a mix of livestock producers, hunters, educators, outfitters and conservationists, whose task was to formulate a wolf management plan.¹⁴⁵ The Council’s Mission Statement directed them “[t]o assist MFWP in developing an implementable plan that will maintain viable wolf populations and is socially acceptable, biologically possible, and economically feasible.”¹⁴⁶ Additionally, the Council produced a number of “Guiding Principles” which were then used to guide the writing of the 2002 Montana Wolf Conservation and Management Planning Document. Among those principles were:

- Montana’s wolf management program should be proactive, responsive, cost-effective and incorporate public outreach to enhance general acceptance. Effective interagency, interstate, and state/tribal coordination will also be required.
- The Council recognizes the ecological and cultural significance of wolves to Native Americans and encourages their cooperation in coordinated management.
- We recognize that wolves have an important role in the ecosystem.
- The Montana Wolf Management Plan should take a proactive approach to integrate the management of ungulates and carnivores and to maintain traditional hunting heritage and wildlife viewing opportunities.
- Ungulate populations should be enhanced whenever possible . . .

¹⁴¹ MONT. CODE ANN. § 87-5-102 (2007).

¹⁴² The Commission is a five-person body appointed by the Governor from each of five wildlife districts “without regard for political affiliation” in order to ensure the “wise management” of wildlife resources. MONT. CODE ANN. § 2-15-3402 (2007).

¹⁴³ MONTANA PLAN, *supra* note 138, at 97.

¹⁴⁴ See MONT. CODE ANN. § 87-3-130 (2007) (“Taking of Wildlife to Protect Persons or Livestock”).

¹⁴⁵ MONTANA PLAN, *supra* note 138, at 2–3.

¹⁴⁶ *Id.* at 3.

to support viable wolf populations . . . and to minimize the potential for livestock depredation.

- MFWP should initiate and/or support research efforts to enhance understanding of the complex interactions and population dynamics of ungulate/carnivore ecosystems, in addition to applying adaptive harvest management principles to achieve more effective management.¹⁴⁷

The Montana Gray Wolf Conservation and Management Plan essentially included the recommendations contained in the Planning Document. Under the plan, MFWP will use adaptive management techniques to manage for fifteen breeding pairs (based on the federal definition of an adult male and female with at least two pups on December 31).¹⁴⁸ The plan is careful to note that this number does not indicate either the minimum or maximum number of wolves that are “allowed” in Montana; the plan merely uses this number as a guideline. In using adoptive management, MFWP will take into consideration a number of factors, including landowner tolerance, habitat considerations, social factors and biological considerations.¹⁴⁹ If the number of wolves dips below the fifteen breeding pair threshold, non-lethal management tools, such as harassment and relocation, will be used; if the number of breeding pairs exceeds fifteen, more “liberal management tools” could come into play, including lethal methods of resolving conflict.¹⁵⁰ Because of the trans-boundary nature of a species such as the wolf, the plan notes that the state may seek to enter into an MOU with both Idaho and Wyoming in order to designate which packs count for which state’s requirements.¹⁵¹

In 2002, the MFWP stated that it would not initiate a public harvest until the wolf population had become biologically sustainable.¹⁵² However, without specifically stating that it had changed its policy, or that it had made the determination that the state’s wolf population had indeed become biologically sustainable, early in 2008 MFWP published draft hunting regulations signaling the state’s intent to implement a wolf harvest as early as the fall of 2008.¹⁵³ Details of the public harvest plan are outlined below.

In addressing livestock-wolf conflicts, the state will take a two-pronged approach. First, it will seek to minimize these conflicts and attempt to resolve

¹⁴⁷ *Id.* at 93–95.

¹⁴⁸ *Id.* at 74.

¹⁴⁹ *Id.* at 22.

¹⁵⁰ MONTANA PLAN, *supra* note 138, at 26.

¹⁵¹ *Id.* at 44.

¹⁵² *Id.* at 8.

¹⁵³ MONTANA FISH, WILDLIFE AND PARKS, GRAY WOLF HUNTING/TRAPPING SEASON SUPPORTING INFORMATION 4 [hereinafter MONTANA SUPPORTING INFORMATION], available at <http://fwp.mt.gov/content/getItem.aspx?id=31024> (last visited Apr. 15, 2009).

them when they occur.¹⁵⁴ Second, the state will oversee a compensation program for any economic losses that should occur due to wolf predation.¹⁵⁵

When potential conflicts are identified, the MFWP is allowed to issue a special kill permit for removal of the animal by the livestock owner. Such a permit is required for lethal action against any legally classified wildlife in Montana, outside of defense of life or property.¹⁵⁶ However, rather than waiting until conflict occurs, the plan calls for the MFWP and other organizations to put extra effort into conflict prevention.¹⁵⁷ To accomplish this, the state will attempt to encourage livestock management techniques that tend to reduce the probability that such conflicts will occur by providing technical assistance to ranchers. In exchange for their cooperation, livestock owners would receive special incentives such as financial assistance in carrying out such measures. To fund this initiative, the state will use money set aside for animal damage management, and will look for private funds such as DOW's Proactive Carnivore Conservation Fund for assistance.¹⁵⁸

The plan notes that Montana intends to manage lands from an ecosystem-level perspective, taking into consideration long-term wolf habitat needs as those relate to public hunting of ungulates.¹⁵⁹ Further, the plan acknowledges the importance of the connection between sub-populations throughout the Rockies that allows for genetic mixing.¹⁶⁰ Additionally, the plan recognizes that the success of the management program requires a continuous public educational outreach program that provides scientifically-based factual information.¹⁶¹ Finally, the plan acknowledges that a collaborative approach between the state and the various stakeholders will be necessary and that MFWP will have to take the lead in that effort.¹⁶²

It is interesting to note that the plan claims that "[p]redatory mammals such as

¹⁵⁴ MONTANA PLAN, *supra* note 138, at 50.

¹⁵⁵ On April 15, 2008, Montana assumed control of the compensation program with a \$100,000 grant from DOW's Bailey Trust. The program will be run by the Montana Department of Livestock. While Montana has taken this initiative, the Bailey Trust will continue to pay compensation in Idaho, Wyoming (the non-trophy area), Oregon, Washington, Utah and Colorado for those ranchers that use reasonable nonlethal deterrents in compliance with the Trust's guidelines. If ranchers kill wolves without having used any methods to reduce conflict, those ranchers will not be eligible for compensation. Normally, compensation is determined at fair market value at the time of death for mature stock, and the fall value for young. Additionally, while responsibility for the compensation program is being assumed by the State, DOW will continue to work within the State on other initiatives to encourage non-lethal control of wolves. Whether this same level of funds will be available to both Idaho and Wyoming is an open question. Personal correspondence with Suzanne Stone, Northern Rockies Representative, Defenders of Wildlife (Apr. 2, 2008) (on file with author).

¹⁵⁶ MONTANA PLAN, *supra* note 138, at 55.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 59.

¹⁵⁹ *Id.* at 34.

¹⁶⁰ *Id.* at 36.

¹⁶¹ MONTANA PLAN, *supra* note 138, at 72.

¹⁶² *Id.* at 94.

the gray wolf are *probably* vital to the integrity of many ecosystems.”¹⁶³ Certainly, it would be helpful to ascertain whether they are, or are not, vital to the integrity of the state’s ecosystems and, if they are, what the significance of that finding is. The scientific analysis related to the wolf’s place in the ecosystems of the NRM region could well play an important role in legal challenges to the delisting process.

The plan notes that while Montanans may be more willing to accept wolves on remote public lands, their tolerance will decrease when conflict occurs on lands closer to more urban areas.¹⁶⁴ For that reason, wolf presence will be encouraged in Montana’s large contiguous blocks of public land where there is the least potential for conflict with livestock.

2. Montana Hunting Regulations

On February 20, 2008, Montana approved its first ever wolf hunting season.¹⁶⁵ The season, scheduled to run from September 15 through December 31, will not commence until the delisting process is complete.¹⁶⁶ In accordance with the 2002 plan, the wolf season will only be allowed if there are greater than fifteen breeding pairs of wolves statewide.¹⁶⁷ Hunters will have to report their kill within twelve hours, thus allowing the state to close the hunting season within twenty-four hours should the yearly quota be reached.¹⁶⁸

Unfortunately, while the state plan notes that there may be an estimated 328-657 wolves present by 2015, the hunting plan only commits the state to maintaining fifteen breeding pairs. This discrepancy is likely to send mixed signals regarding the state’s intentions and should be clarified. At this point, it is unclear how aggressive the state hunting quotas will be, and the announcement of the hunting regulations may have caught a number of supporters of the Montana management plan off guard. Prior to the introduction of these regulations, Montana had been held out as the prime example of how a state could manage wolves without decimating their population once delisting occurs. It will be interesting to see if these endorsements of Montana’s plan still hold once the state proceeds with its wolf hunt.

In general, in spite of its flaws, Montana’s approach to wolf management has been the most progressive of the three states. No doubt, the migration of wolves from Canada into the Glacier area in the early 1980’s has given the state more time to adapt to having wolves residing within its borders than either Idaho or Wyoming. Unlike with the other two states, nature, not the Feds, forced the

¹⁶³ *Id.* at 16 (emphasis added).

¹⁶⁴ *Id.* at 78.

¹⁶⁵ Eve Byron, *Season Set for Montana Wolf Hunting*, HELENA INDEPENDENT RECORD, Feb. 21, 2008, http://www.helenair.com/articles/2008/02/21/state/top/55st_080221_wolves.txt.

¹⁶⁶ See MONTANA SUPPORTING INFORMATION, *supra* note 153, at 4.

¹⁶⁷ *Id.* at 3.

¹⁶⁸ *Id.* at 5.

issue. Still, it's helpful to keep in mind that the Glacier wolves enjoyed the full protections of the ESA as an endangered species and perhaps gave Montana an added impetus to cooperate in the delisting process. Having said that, the involvement of stakeholders in formulating the state's management plan, and the state's willingness to manage for a much larger number of wolves than required, has earned the state some well-deserved praise.

B. Idaho: Kicking and Screaming

1. Idaho's Wolf Conservation and Management Plans

Attitudes towards the wolf reintroduction have evolved extensively over time in Idaho. From the early days of absolutely forbidding state agencies to become involved in any plans to reintroduce wolves, the state's 2008 Draft Management Plan goes so far as to advocate the long-term viability of the NRM gray wolf by sustaining a wolf population of 518-732 wolves.¹⁶⁹ The goals and approach now being taken move the state philosophically closer to Montana, and serve to further isolate Wyoming as a state out of step with the times.

The history of wolf management in Idaho is instructive on how far attitudes have changed over the past twenty years. After passage of the 1987 Plan, the opposition to wolf reintroduction in Idaho was manifested in legislation passed in 1988 that prohibited the Idaho Department of Fish and Game ("IDFG") from becoming involved in the recovery effort.¹⁷⁰ In mid-January 1995, after the first group of wolves had been reintroduced on federal lands within the state, the Idaho legislature approved a wolf management plan with provisions that were certain to be unacceptable to the FWS,¹⁷¹ and refused to allow the IDFG to enter into a joint agreement with the FWS to oversee wolf management. Faced with this decidedly uncooperative position, the FWS turned to the Nez Perce Tribe ("NPT"), whose Tribal Executive Committee approved tribal oversight of the wolves.¹⁷²

Related to the NPT's participation is the fact that the land where the wolves were reintroduced was part of the lands that the NPT ceded in the Treaty of 1855, but on which it retained the right to hunt.¹⁷³ In 1995, the FWS approved the NPT management plan and entered into a Cooperative Agreement with the NPT for the management of wolves in Idaho for the next ten years.¹⁷⁴

¹⁶⁹ These numbers represent the 2005 to 2007 population levels. IDAHO DEPARTMENT OF FISH AND GAME, IDAHO WOLF POPULATION MANAGEMENT PLAN: 2008-2012 I (2007) [hereinafter 2008 IDAHO PLAN].

¹⁷⁰ Wilson, *supra* note 100, at 546.

¹⁷¹ *Id.* at 552-53.

¹⁷² *Id.* at 553.

¹⁷³ *Id.* at 554.

¹⁷⁴ NEZ PERCE TRIBE AND IDFG, WOLF CONSERVATION AND MANAGEMENT IN IDAHO PROGRESS REPORT 2006 I (2007) [hereinafter 2006 PROGRESS REPORT].

2. 2002 Idaho Wolf Conservation and Management Plan

The ice jam between the FWS and the State of Idaho over wolf management began to show signs of a thaw with the drafting of the 2002 Wolf Conservation and Management Plan ("2002 Plan") by the Idaho Legislative Wolf Oversight Committee.¹⁷⁵ It was clear from the outset, however, that cooperation with the FWS over wolf management would not come easily. The 2002 Plan begins by noting that "[t]he State of Idaho is on the record asking the Federal government to remove wolves from the state by adoption in 2001 of House Joint Memorial No. 5. The position reflected in House Joint Memorial No. 5 continues to be the official position of the State of Idaho."¹⁷⁶

This rather curt opening aside, there were several deficiencies in the 2002 Plan that would have to be corrected down the road. The first of these was the 2002 management goal citing fifteen "packs" as the point where, should the population drop below that number, remedial management measures kick in.¹⁷⁷ Unfortunately, the plan did not specifically define a "pack" beyond noting that "[p]acks are formed when 2 wolves of opposite sex develop a pair bond, breed and produce pups."¹⁷⁸ This was clearly not consistent with the FWS' breeding pair definition.

Additionally, the plan noted that the:

wolf population will be managed at recovery levels that will ensure viable, self-sustaining populations until it can be established that wolves in increasing numbers will not adversely affect big game populations, the economic viability of IDFG, outfitters and guides, and others who depend on a viable population of big game animals.¹⁷⁹

Such a nebulous goal falls well short of the specific numerical goal required by the FWS prior to approval of a state management plan. Finally, the plan was non-committal about the future status of the wolves, stating that the Idaho Fish and Game Commission could classify them as a big game animal, as a furbearer or as a special class of predator with provisions for controlled takings.¹⁸⁰

The 2002 Plan alleged that actual livestock wolf predation losses were "considerably higher than confirmed" and noted that a compensation plan of some sort was going to be necessary if wolves were to be accepted as part of the natural wildlife.¹⁸¹ Further, the plan noted that "[a]lthough the impact of wolf

¹⁷⁵ The Wolf Oversight Committee was created in 1992 by legislation authorizing the wolf EIS participation plan.

¹⁷⁶ IDAHO LEGISLATIVE WOLF OVERSIGHT COMMITTEE, IDAHO WOLF CONSERVATION AND MANAGEMENT PLAN 4 (2002).

¹⁷⁷ *Id.* at 18.

¹⁷⁸ *Id.* at 8.

¹⁷⁹ *Id.* at 18.

¹⁸⁰ *Id.* at 4.

¹⁸¹ IDAHO LEGISLATIVE WOLF OVERSIGHT COMMITTEE, IDAHO WOLF CONSERVATION AND MANAGEMENT PLAN 14 (2002).

predation to the entire livestock industry in the state is expected to be small, the impact to individual operators can be devastating.”¹⁸²

While the plan was a step in the right direction, the state was going to have to lose its chest-thumping rhetoric before its management of the wolves would be acceptable under the ESA. In order for the FWS to legally turn wolf management over to a state, that state must, at least on the surface, show that it is truly committed to conservation of that species.

3. MOA Between Idaho and the NPT

The ice jam thawed even further in 2003 with passage of House Bill 294 which allowed the IDFG to participate in wolf management and directed the agency to cooperate with both the FWS and the NPT.¹⁸³ In May 2005, an MOA was signed between the state and the NPT designating a sharing of wolf management responsibilities.¹⁸⁴ The MOA notes that once delisting occurs, the NPT will be responsible for management within IDFG Clearwater and McCall regions and IDFG will oversee the rest of the state.¹⁸⁵

The MOA provides an oversight Policy Committee tasked with determining the annual wolf harvest goals following delisting.¹⁸⁶ The Committee is comprised of four NPT and four state representatives that, operating on a majority vote, will approve recommendations for wolf harvest issues. Any wolf harvest must be consistent with the goal of maintaining a self-sustaining viable wolf population. The MOA provides for a Fair Share Allocation relating to the percentage of harvest that each party may derive. The share of the “Harvestable Surplus” of wolves varies from a 50/50 split between the tribe and the state if the surplus is fifty wolves or less to a 35/65 split (35 percent, but no less than forty wolves for the tribe) if the surplus is greater than 100 wolves.¹⁸⁷ The MOA notes that the determination of a harvestable surplus will be based on sound biological data and “will be identified only at a population level of more than fifteen packs.”¹⁸⁸

In January, 2006, an MOA was signed between the Department of the Interior (“DOI”) and Idaho giving the state responsibility over wolf management based on the Idaho-NPT MOA.¹⁸⁹ Although the state has assumed the primary wolf

¹⁸² *Id.* at 15.

¹⁸³ 2006 PROGRESS REPORT, *supra* note 174, at 1.

¹⁸⁴ *Id.* at 3.

¹⁸⁵ *Id.*

¹⁸⁶ MEMORANDUM OF AGREEMENT BETWEEN THE STATE OF IDAHO AND THE NEZ PERCE TRIBE CONCERNING COORDINATION OF WOLF CONSERVATION AND RELATED ACTIVITIES IN IDAHO 7–8 (2005).

¹⁸⁷ *Id.* at 8.

¹⁸⁸ *Id.* at 9.

¹⁸⁹ MEMORANDUM OF AGREEMENT BETWEEN THE SECRETARY OF THE INTERIOR AND THE STATE OF IDAHO 1 (2006).

management oversight role, the NPT is understandably proud of its role in the history of the recovery of the NRM wolves. And, although the state has, at times, failed to include the NPT in the day-to-day decisional processes, the NPT intends to participate as a full partner in wolf management within Idaho into the future. The NPT has yet to make a decision whether to participate in a wolf hunt or, if it does not, what it will do with its allotment.¹⁹⁰

4. 2008 Idaho Wolf Conservation and Management Plan

In October 2007, a draft management plan covering the five-year period from 2008-2012 was published. Following a comment period on the draft, a final plan was published in March 2008.¹⁹¹ While drafting the 2002 Plan fell to a Legislative Oversight Committee, the 2008 plan was written by the IDFG. As a result, the 2008 plan is much more oriented towards the conservation of wolves in the state. Similar to Montana's approach, a public stakeholder working group was formed to help draft the plan and set management goals.

With publication of the 2008 plan, many of the deficiencies present in the 2002 Plan were corrected. First, the obviously anti-wolf language is missing from the 2008 plan and is replaced with the statement that wolves in Idaho are a native wildlife resource.¹⁹² Second, the 2008 plan is careful to discard the 2002 Plan's use of the term "packs" in favor of the term "breeding pairs,"¹⁹³ although it does continue to advocate a surrogate method of determining breeding pairs based on total pack size.¹⁹⁴

As the 2008 plan was being drafted, the state initially advocated setting the population goal as the number of wolves in the state in 2003.¹⁹⁵ This would result in a 50 percent reduction in the overall wolf population.¹⁹⁶ The NPT strongly encouraged the state to reconsider that goal. The tribe expressed the concern that such a drastic reduction in population could not be justified and would result in a significant public relations controversy.¹⁹⁷ With the NPT's encouragement, the state reset its management goals in the 2008 plan to the 2005-2007 population levels (518-732 wolves).¹⁹⁸ Subsequent to this, however, in May 22, 2008, the politically-appointed Idaho Fish and Game Commission ("Commission") overruled the IDFG by setting a harvest level of 428 wolves for

¹⁹⁰ Telephone conversation with Keith Lawrence, Director of Nez Perce Tribe Wildlife Division, Mar. 28, 2008.

¹⁹¹ See 2008 IDAHO PLAN, *supra* note 169, at 1.

¹⁹² *Id.* at 3.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 37.

¹⁹⁵ Telephone conversation with Mr. Lawrence, Mar. 28, 2008, *supra* note 190.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ 2008 IDAHO PLAN, *supra* note 169, at 19.

2008.¹⁹⁹ Not only did this decision outwardly negate the plan's goals, at a 43 percent reduction, it falls outside of the plan's stated maximum sustainable mortality rate of 40 percent.²⁰⁰

This decision only confused the issue and left Idaho open to criticism.²⁰¹ While the state should be congratulated for setting goals that maintain a substantial wolf population, the inconsistency between the goals outlined in its newly minted plan and the Commission's May 2008 decision not only undermined whatever credibility the state may have been able to create with the 2008 plan but also presented DOW with a perfect example of how the state management plans lack the force of law.

The 2008 plan spends a great deal of space discussing the results of the state's public survey focused on the wolf issue. Not surprisingly, the majority of hunters indicated that wolves should be removed from the Endangered Species list and were generally in favor of hunting.²⁰² It was interesting to note, however, that only 31 percent of the "random/non-hunter" survey participants agreed that it was too early to remove wolves from the list,²⁰³ and 63 percent of those participants were in favor of hunting as a means to control the wolf population.²⁰⁴

The annual Idaho fiscal budget for wolf management is approximately \$720,000, in addition to the \$380,000 budgeted for the tribal management.²⁰⁵ With anticipated reimbursement from DOW's Bailey Fund for livestock depredation ceasing at delisting, the state's budget includes funds for this compensation.²⁰⁶ In noting the possibility of reduced federal funding subsequent to delisting, the plan advocates raising the wolf tag fee as a means of making up this shortfall.²⁰⁷ With 72 percent of the public survey participants indicating they would be willing to pay an average of \$42 for a wolf tag, the plan notes that the entire wolf management program could be funded if the state merely raised

¹⁹⁹ LocalNews8.com, Hunting Season Announced for Once Endangered Gray Wolf, http://www.localnews8.com/Global/story.asp?S=8366594&nav=menu554_2_2 (last visited Apr. 15, 2009).

²⁰⁰ In general, and in contrast to the FWS' overall 50% figure, the Plan notes that an overall mortality rate of between 30-40%, with 20-25% of that human caused, should result in a sustainable wolf population. 2008 IDAHO PLAN, *supra* note 169, at 29.

²⁰¹ The plan also contains clearly contradictory population goals. Having cited the 518-732 population goal in one segment of the plan, other segments continue to discuss the baseline of 15 breeding pair needed to meet the state's MOA obligations and the presence of a minimum of 20 breeding pair in order to allow hunting. *Id.* at 19.

²⁰² *Id.* at 51, 54.

²⁰³ *Id.* at 56.

²⁰⁴ *Id.* at 55.

²⁰⁵ 2008 IDAHO PLAN, *supra* note 169, at 38.

²⁰⁶ If, as DOW has indicated, the Bailey Fund will continue to be available in Idaho subsequent to delisting, it seems likely that, as Montana has done, the State should assume control over the compensation program, perhaps with the same level of seed money that Montana received.

²⁰⁷ 2008 IDAHO PLAN, *supra* note 169, at 39.

the current \$9.50 tag to \$25.²⁰⁸

In spite of initial criticism of Idaho's wolf management program by members of the conservation community, and in spite of the contrary actions of the Fish and Game Commission, the 2008 plan, standing on its own, should be encouraging to wolf advocates. With management goals substantially higher than the minimums required by the FWS, Idaho's 2008 plan brings the state much closer philosophically to Montana and further isolates Wyoming as the renegade state in the NRM. By using solid scientific information, along with a combination of the public stakeholder group and the public survey, in formulating its new plan, Idaho should be given credit for having shown a willingness to approach wolf management from a progressive and adaptive management approach.

The question that Idaho now needs to answer is whether it is willing to listen to the well-reasoned and thoughtful recommendations of both its citizens and the scientists within its state agencies, or whether it will continue to cave in to the ranching community's anti-wolf rhetoric. The Commission's decision to ignore the harvest recommendations of IDFG, in the face of a stiff legal challenge, shows either a lack of political sophistication, or an act of defiance on the part of the Commissioners. This action will likely come back to haunt the state and it significantly undercuts years of hard work by both the NPT and IDFG to insert a voice of reason into this discussion.

C. Wyoming: Make Me

1. Initial Refusal to Cooperate

Although Wyoming's governor agreed to the terms of the 1999 MOU along with the governors of Wyoming and Idaho, the state's commitment was not borne out in either word or deed. With the FWS looking to the states to manage the human-caused mortality of wolves, Wyoming fell short of the FWS' expectations in two main areas: the total number of breeding pairs they agreed to maintain within state borders and, similar to the deficiency found in Idaho's 2002 plan, how the state intended to track the wolf population.

In 2003, Wyoming passed a dual designation for wolves that classified them as either trophy or predatory animals, depending on their location.²⁰⁹ Within YNP, the Rockefeller Memorial Parkway, Grand Teton National Park ("GTNP") and the wilderness areas directly contiguous to those areas, wolves were permanently classified as trophy animals.²¹⁰ Beyond those boundaries, all other

²⁰⁸ *Id.*

²⁰⁹ H.B. 0229, 57th Leg., 2003 Gen. Sess. (Wyo. 2003).

²¹⁰ NRM DPS Rule, *supra* note 103, at 43,427. A "Trophy game animal" also includes black bear, grizzly bear, or mountain lion, *see* WYO. STAT. ANN. § 23-1-101(a) (2009).

wolves within the state would be classified as predators.²¹¹ To clarify the significance of this designation, under Wyoming state law, predators

may be taken by anyone, anywhere in the predatory animal area, at any time, without limit, and by any means (including shoot-on-sight; baiting; possible limited use of poisons; bounties and wolf-killing contests; locating and killing pups in dens including use of explosives and gas cartridges; trapping; snaring; aerial gunning; and use of other mechanized vehicles to locate or chase wolves down).²¹²

In its review of Wyoming's plan, the FWS objected to the geographical boundary between the two classifications, noting that the majority of the designated trophy area was unsuitable for wolf habitat due to high elevation, deep snow and a lack of food.²¹³ The FWS also objected to the unwillingness of the state to apply adaptive management procedures in expanding the size of the trophy area in the event of a decline in the state's wolf population.²¹⁴ Additionally, in direct contradiction to the MOU and the FWS' definition, Wyoming state law defined a pack as five wolves traveling together, regardless of whether those wolves contained a breeding pair.²¹⁵ Finally, both state law and the management plan allowed a pack of ten or more wolves with two or three breeding females to be classified as two or three packs, respectively.²¹⁶

With these concerns in mind, the FWS turned down Wyoming's request that it accept the state plan and told Wyoming that it would have to address these deficiencies to the FWS' satisfaction before it would approve the state's management plan.²¹⁷ In response, the state got testy and filed suit claiming that the FWS had violated the ESA, the APA, NEPA and the U.S. Constitution by rejecting Wyoming's plan.²¹⁸ The Wyoming federal district court, however, held that the court lacked jurisdiction under the APA to review the FWS' decision because the FWS had not taken what constituted a "final agency action."²¹⁹ Additionally, the court determined that the FWS was not under a

²¹¹ NRM DPS Rule, *supra* note 103, at 43,428.

²¹² *Id.*

²¹³ *Id.* at 43,427.

²¹⁴ *Id.* at 43,428. Specifically, when seven or more wolf packs in the state are primarily outside of the designated area or when there were fifteen or more wolf packs elsewhere in the state (meaning within YNP and GTNP), all wolves outside of the designated area must be classified as predators. Of greatest concern was that because it was not unusual for there to be more than fifteen packs in YNP, and because many wolves leave the national park/wilderness areas in the winter, those wolves would be classified as predators without any protection once they left the park. Should any other unforeseen factors such as disease contribute to a sharp decline in wolves within YNP, as happened in 2005, the total amount of wolves within the state would drop well below the required recovery levels.

²¹⁵ *Id.*

²¹⁶ NRM DPS Rule, *supra* note 103, at 43,428.

²¹⁷ *Id.* at 43,429.

²¹⁸ *Wyoming v. U.S. Dep't of the Interior*, 360 F. Supp. 2d 1214, 1225, 1238 (D. Wyo. 2005).

²¹⁹ *Id.* at 1231 (In order for an action to be "final," the action must both be the consummation of

mandatory duty to delist the wolf and thus the plaintiffs failed to prove that the FWS had “unlawfully withheld or unreasonably delayed” statutorily required agency action.²²⁰ The district court also held that Wyoming’s NEPA claim failed on its merits and that the FWS’ actions were consistent with the powers delegated to them by Congress under the ESA.²²¹ On appeal, the 10th Circuit Court upheld the district court’s decision.²²²

At that point, the relationship between the state and the FWS went from strained to bizarre when the state charged federal officers who had darted and radio collared wolves on what turned out to be private land with trespassing and littering. The officers, who thought they were on Bureau of Land Management (“BLM”) land, were able to remove the case to federal court and asserted Supremacy Clause immunity in their defense.²²³ The 10th Circuit agreed, holding that a federal officer is entitled to immunity if he is acting within the course of his authorized duty and if he had an objectively reasonable and well-founded basis to believe that his actions were necessary to fulfill those duties.²²⁴ The court concluded that the prosecution of the defendants was not a bona fide effort to punish a violation of Wyoming trespass law, but was an attempt to hinder a locally unpopular federal program.²²⁵

2. Wyoming’s 2007 Plan: One that Supposedly Works

With its attempt to compel the FWS to accept its initial plan thrown out of court, Wyoming appeared to give in to the FWS’ demands. In paving the way for progress, the 2007 legislature had to make some fundamental changes to state law. To begin with, going along with the FWS’ suggestion, the state changed the boundaries of the trophy area to encompass state lands outside of the parks and wilderness areas to better ensure that at least seven breeding pairs would be located within the state but “primarily” outside of those federal lands.²²⁶ Additionally, the legislature removed the term “pack” from the statutes and replaced it with “breeding pair” followed by a definition of that term that conformed to the FWS requirements.²²⁷

With those changes in place, the state issued an updated management plan in September, 2007, that committed the state to maintain fifteen breeding pairs. This plan calls for this population to consist of eight pairs within national parks

the decision-making process and must be one from which rights and obligations have been determined) (citations omitted).

²²⁰ *Id.* at 1226, 1244–45.

²²¹ *Id.* at 1245.

²²² *Wyoming v. U.S. Dep’t of the Interior*, 442 F.3d 1262, 1264 (10th Cir. 2006).

²²³ *Wyoming v. Livingston*, 443 F.3d 1211, 1215–16 (10th Cir. 2006).

²²⁴ *Id.* at 1222.

²²⁵ *Id.* at 1231.

²²⁶ WYO. STAT. ANN. § 23-1-304(a) (2007).

²²⁷ WYO. STAT. ANN. § 23-1-304(c) (2007).

and seven pairs located in the northwestern portion of the state directly contiguous to those lands.²²⁸ Additionally, the plan directs the Wyoming Game and Fish Commission to apply adaptive management mechanisms to limit the take within the trophy area, if necessary, to ensure that the total number of wolves in the state remains above the required minimums.²²⁹

In setting the boundaries of the trophy area, the state took into consideration the seasonal movements of the current wolf packs and considered the designated area sufficient to accommodate those movements.²³⁰ But as with Idaho, Wyoming is concerned about the difficulty in identifying and counting actual breeding pairs and has encouraged the FWS to allow the state to use pack size as a substitute for the breeding pair criteria.²³¹

As with Idaho and Montana, Wyoming's plan anticipates the DOW Bailey compensation fund to be discontinued after delisting, and states that only livestock killed within the trophy area will be compensated for. However, as noted above, DOW intends to continue with the Bailey Trust and compensate ranchers that comply with DOW's criteria. Without compensation in place, Wyoming ranchers inclined to be tolerant of wolves would likely feel compelled to err on the side of protecting their livestock – even if the wolves are simply in the wrong place at the wrong time.

On December 12, 2007, the FWS Director concluded that the state's 2007 plan met the requirements of the ESA, but conditioned final approval of the plan on the 2007 statutory changes coming into effect and the 2007 plan being statutorily approved.²³² On March 3, 2008, the FWS certified that all previous conditions necessary for approval of Wyoming's Wolf Management Plan had been met and that delisting could proceed.²³³

The day after implementation of the final delisting rule, March 28, 2008, hunters began killing wolves in Wyoming's predator zone.²³⁴ By May 12, sixteen wolves had been killed in the state,²³⁵ providing ammunition for DOW's motion for a preliminary injunction. Subsequent to the *Defenders* ruling and remand to the FWS, cracks in the armor began to show when the other states pointed fingers at Wyoming's "cavalier" recovery plan as the reason for the

²²⁸ WYOMING PLAN, *supra* note 108, at 4.

²²⁹ *Id.* at 3–4.

²³⁰ *Id.* at 11.

²³¹ *Id.* at 12.

²³² U.S. FISH AND WILDLIFE SERV., STATUS OF GRAY WOLF RECOVERY (2007), <http://www.fws.gov/mountain-prairie/species/mammals/wolf/weeklyrpt07/wk12142007.htm> (last visited Apr. 15, 2009).

²³³ U.S. FISH AND WILDLIFE SERV., GRAY WOLF RECOVERY STATUS REPORT (2008), <http://www.fws.gov/mountain-prairie/species/mammals/wolf/WeeklyRpt08/wk03072008.html> (last visited Apr. 15, 2009).

²³⁴ Cory Hatch, *Wolf-Kill Total Reaches 16*, JACKSON HOLE DAILY, May 12, 2008.

²³⁵ *Id.*

relisting,²³⁶ and in-state editorial pages advocated abandoning the dual classification.²³⁷

But with an opportunity to help move delisting forward, Wyoming legislators vetoed a proposal to classify wolves as trophy animals throughout the state.²³⁸ That move pits the state directly against the FWS which, after the *Defenders* decision, retracted its support for the dual classification, and hinted that it could move forward with delisting in Idaho and Montana without Wyoming.²³⁹ This statement, and the apparent rush to publish a new delisting rule as the Bush administration headed out the door, drew criticism – and threats of lawsuits – from both sides of the issue.²⁴⁰

VII. EVOLUTION OF THE 10(J) EXPERIMENTAL POPULATION RULE

A. Changes Made and Challenged

As the reintroduced wolves started to reproduce and approach the population levels stated in the delisting goals, the Bush administration made several attempts to modify the legal status of wolves, both in the NRM region and throughout the lower forty-eight states. The first effort, which was challenged and shot down by the courts, was an attempt to reduce ESA protections for wolves throughout a significant portion of the U.S. An examination of this attempt, and the courts' holding in setting the rule aside, is relevant to the discussion of the NRM wolf delisting because the legal arguments put forth in this case will likely resurface in challenges to delisting. The second effort, an attempt to tweak the NRM 10(j) regulation, was first introduced in 2005 and later modified in 2007. The changes were intended to allow states greater latitude to modify the take provisions outlined in 10(j) when wolves either pose a direct threat to a rancher's livestock or domestic animals or when they significantly impact designated elk populations. Those changes are currently being challenged in Montana Federal district court.

1. Attempting to Downgrade Wolf Protections

In 2003, in order to "provide for the conservation" of wolves in the lower 48 states, the FWS proposed a final rule change consolidating wolf populations throughout the U.S. into three distinct population segments ("DPS"),²⁴¹ and reclassifying all wolves in the Eastern and Western DPSs from endangered to

²³⁶ *Our View: Wyoming's cavalier wolf plan set back delisting*, IDAHO STATESMAN, July 22, 2008.

²³⁷ *Wyo Needs to Revise Wolf Management Plan*, CASPER STAR-TRIBUNE, Oct. 21, 2008; *Defending Wolf Plan isn't Worth the Effort*, CASPER STAR-TRIBUNE, Nov. 30, 2008.

²³⁸ *Panel Keeps Dual Classification*, CASPER STAR-TRIBUNE, Nov. 22, 2008.

²³⁹ Chris Merrill, *Wolves may be Delisted – Again – this Week*, CASPER STAR-TRIBUNE, Dec. 14, 2008.

²⁴⁰ Chris Merrill, *Wolf Debate Lingers into New Year*, CASPER STAR-TRIBUNE, Jan. 5, 2009.

²⁴¹ Western DPS, Eastern DPS and Southwestern DPS.

threatened.²⁴² Additionally, the rule removed gray wolves from protections of the ESA in the Southern and Eastern states where the species historically did not occur.²⁴³

Related to this rule change is language found in the ESA defining a species as endangered when it is “in danger of extinction throughout all or a significant portion of its range . . .”²⁴⁴ Because the “significant portion” phrase is ambiguous, FWS’ interpretation of the meaning of that phrase is entitled to deference unless that interpretation is unreasonable.²⁴⁵ It was not until after publication of the rule change that the Service formally interpreted the phrase to mean an “area that is important or necessary for maintaining a viable, self-sustaining, and evolving representative population or populations in order for the taxon to persist into the foreseeable future.”²⁴⁶ In tying the interpretation to the rule change, the Service noted that because “the presence or absence of wolves outside of core recovery areas [was] not likely to have a bearing on the long-term viability of the three wolf populations,” those areas did not constitute a significant portion of the wolf’s range.²⁴⁷

The new rule, as it pertained to both the proposed Western and Eastern DPSs, was successfully challenged in separate court actions.²⁴⁸ Both lawsuits challenged the Service’s interpretation of what constituted a significant portion of the wolf’s range. The FWS contended that if wolves were not present in an area, and if that presence or absence did not have a long-term bearing on the viability of wolf populations that exist elsewhere, that area should not be considered a significant portion of the wolf’s range and therefore protections within the confines of that area could be downgraded.

Both courts disagreed with FWS’s interpretation and relied on the Ninth Circuit’s conclusion that a species could be considered “extinct throughout a significant portion of its range if there are major geographical areas in which it is no longer viable but once was.”²⁴⁹ Both courts also found that classifying an

²⁴² Except in those areas where experimental populations existed. Endangered and Threatened Wildlife and Plants; Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Coterminous United States; Establishment of Two Special Regulations for Threatened Gray Wolves, 68 Fed. Reg. 15,804, 15,804 (Apr. 1, 2003) [hereinafter 2003 Reclassify Rule].

²⁴³ *Id.*

²⁴⁴ 16 U.S.C. § 1532(6) (2006).

²⁴⁵ See *Defenders of Wildlife v. Sec’y, U.S. Dep’t Secretary, U.S. Dep’t of the Interior*, 354 F. Supp. 2d 1156, 1164 (D. Or. 2005) (interpreting *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984)).

²⁴⁶ Definition put forth by the FWS at a meeting at Marymount University during November 2000; AR Doc. 663 at 9924.

²⁴⁷ 2003 Reclassify Rule, *supra* note 242, at 15,825.

²⁴⁸ See *Nat’l Wildlife Fed’n v. Norton*, 386 F. Supp. 2d 553 (D. Vt. 2005) (successfully challenging FWS’ rule relating to Eastern DPS); *Defenders*, 354 F. Supp. 2d 1156 (successfully challenging the FWS’ rule relating to the Western DPS).

²⁴⁹ See *Nat’l Wildlife Fed’n*, 386 F. Supp. 2d at 566; *Defenders*, 354 F. Supp. 2d at 1169.

area as outside a significant portion of a species' historic range because the species was not currently present was unreasonable and therefore was not permitted. The question of how this relates to the DPS outlined in the proposed delisting of the NRM wolves is discussed in detail below.

2. Tweaking 10(j)

In January 2005, in response to complaints from the states that the wolves were having "unacceptable impacts" on wild ungulate populations (specifically elk), the FWS proposed revising the 10(j) rule²⁵⁰ allowing the states to more aggressively manage wolf populations when wolves were the "primary" cause of such impacts.²⁵¹ This change was designed to address the negative impact that wolves in a specific area of a state were having on hunting. Idaho was the state that had protested the loudest, claiming that it had been especially hard hit in several areas of the state where wolves were having a disproportionate negative impact on the elk herd.

Subsequent to publication of the draft 10(j) rule change, Idaho proposed reducing the number of wolves in three game management zones to better balance the wolf/elk ratio and increase the elk population.²⁵² However, in applying the draft rule, Idaho was unable to make the case that wolf predation *alone* was the primary cause of the "unacceptable impacts" on ungulates in those areas. In fact, Idaho claimed, it was unlikely that it could ever prove that this would be the case and therefore the draft rule presented an unattainable threshold.²⁵³ In response to this claim, in September 2007, FWS issued a final rule and accompanying EA downgrading the stringency of the proposed rule and only required that wolves be *one of the major causes* of decline in an elk population.²⁵⁴

In addition, the rule change expanded a citizen's ability to protect his private property on public lands by allowing that citizen to take a wolf in the act of attacking that person's stock or dog as long as there was no evidence of

²⁵⁰ Endangered and Threatened Wildlife and Plants; Regulation for Nonessential Experimental Populations of the Western Distinct Population Segment of the Gray Wolf; Final Rule, 70 Fed. Reg. 1286 (Jan. 5, 2005); 50 C.F.R. § 17.84(i)-(n) (2008).

²⁵¹ Endangered and Threatened Wildlife and Plants; Proposed Revision of Special Regulation for the Central Idaho and Yellowstone Area Nonessential Experimental Populations of Gray Wolves in the Northern Rocky Mountains [hereinafter 10(j) Rule], 72 Fed. Reg. 51,770, 51,771 (Sept. 11, 2007).

²⁵² MOUNTAIN PRAIRIE REG'L OFFICE, U.S. FISH & WILDLIFE SERV.,²⁵²Environmental Assessment for Proposed Revision of Special Regulation for the Reintroduction of Gray Wolves into the Central Idaho and Yellowstone Areas [hereinafter 10(j) EA] 5 (FWS 2007), *available at* www.fws.gov/mountain-prairie/species/mammals/wolf/EA_10182008/Wolf_10j_FONSI_EA_011608.pdf], 5 (FWS 2007).

²⁵³ *Id.* at 5-6.

²⁵⁴ 10(j) Rule, *supra* note 251, at 51,770 (emphasis added).

intentionally baiting, feeding or attracting the wolf.²⁵⁵ Prior to this proposal, the only individuals on public lands that could protect their stock or dogs were permittees within the confines of their allotments.

In January 2008, Earthjustice filed a complaint and a request for an injunction against implementation of this rule on the grounds that it “substantially and unjustifiably lower[ed] the bar for killing endangered wolves.”²⁵⁶ In its complaint, Earthjustice challenged the adequacy of the EA, claiming that an EIS was required. As of the date of this writing, the court has not ruled on the complaint nor has it issued an injunction.

It is significant to note that publication of this rule change was specifically required as part of the settlement between Wyoming and FWS over FWS’ refusal to accept the State’s management plan. Like Idaho, Wyoming had expressed concern over the impact that wolves were having on the state’s elk population and Wyoming wanted the flexibility to deal with that problem aggressively. With political pressure to push forward with the delisting process mounting, FWS was clearly motivated to issue this rule change and complete the NEPA process sooner rather than later, something that would not have been possible had a full EIS been deemed necessary. The question of whether these circumstances influenced FWS’ decision to go forward with the rule change without an EIS will be something for the court to consider.

VIII. OBSERVATIONS AND RECOMMENDATIONS

The reintroduction of wolves into an area has historically been one of the more contentious issues involving the legal protections of the ESA. Beyond the direct economic impacts of reintroduction on ranchers, the emotional resistance to being forced to live with an animal that their ancestors eradicated not all that many years ago has sometimes proven overwhelming within local communities. Such controversy brings the actions taken by the various state and federal agencies involved in the NRM reintroduction/recovery/delisting process into the limelight. With such focus comes the opportunity to analyze these actions in a way that may provide valuable insights to those communities and agencies faced with comparable situations down the road. As a corollary to that analysis, a discussion of the merits and deficiencies of the 10(j) rule change and the *Defenders* legal challenge is in order. Finally, because the *Defenders* challenge to specific aspects of the delisting rule was deemed likely to succeed,²⁵⁷ the

²⁵⁵ 10(j) EA, *supra* note 252, at 287; Endangered and Threatened Wildlife and Plants; Proposed Revision of Special Regulation for the Central Idaho and Yellowstone Area Nonessential Experimental Populations of Gray Wolves in the Northern Rocky Mountains, 72 Fed. Reg. 36,942, 36,948-49 (proposed July 6, 2007).

²⁵⁶ *Minette Glaser v. H. Dale Hall*, Complaint for Declaratory and Injunctive Relief, *Minette Glaser v. H. Dale Hall*, No. 9:08-cv-00014-DWM, (D. Montana Jan. 28, 2008), *available at*: http://www.earthjustice.org/library/legal_docs/08-01-28-doc-1-complaint.pdf.

²⁵⁷ See *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160, 1163 (D. Mont. 2008) (stating that

FWS now finds itself with the task of correcting those deficiencies. But, rather than simply fixing those deficiencies in a piecemeal fashion, the Service now has the chance to step back from its mad rush to delist and take the time to do it correctly. If the Service were to take advantage of this opportunity, the observations and recommendations outlined below provide the FWS with a viable roadmap to a legally-defensible delisting rule.

A. Interplay Between Federal and Federal/State Agencies

Although the FWS is the designated lead agency for ESA decisions, its authority overlaps with the duties of a number of federal land management agencies. In the case of the NRM gray wolf, the NPS and the USFS have primary jurisdiction over federal lands which contain the core wolf populations. Additionally, when seasonal migration of the wolves is considered, BLM lands also come into play.

Within the National Parks, the 10(j) regulations specify that the NPS must provide experimental wolves residing within the Parks with the full protection of an endangered species under the ESA.²⁵⁸ Outside the parks, the bulk of the wilderness areas where the wolf populations reside are comprised of a patchwork quilt of national forest lands. As it has done traditionally, the USFS leaves management of wildlife resources within the national forests to the states.²⁵⁹ The NPS and USFS, along with representatives from state and tribal agencies involved in NRM wolf management, have been cooperating and coordinating since the formation of the Interagency Wolf Working Group in 1989.²⁶⁰

Because wolf packs traverse ownership boundaries on a regular basis, successful management of the wolf populations would not be possible without such cooperation. With the transition to state management of the wolves, the actions of the federal land management agencies could have a significant impact on the ability of a state to carry out its management responsibilities, giving added weight to the need for continued cooperation. For instance, within the National Forests, decisions by the USFS relating to the number and timing of grazing permits allowed in an area could significantly increase or decrease the amount of wolf/livestock conflicts that occur. Additionally, decisions by the USFS that either allow or prohibit lumber operations or road building in sensitive denning or rendezvous areas could also have a significant impact on the local wolf population. Because of these potential impacts, close and ongoing

Defenders was likely to prevail on the merits of its challenge to the delisting and therefore granting a preliminary injunction against delisting).

²⁵⁸ 16 U.S.C. § 1539(j)(2)(C)(i) (2006).

²⁵⁹ While the USFS is responsible for managing the surface area of the National Forests, the Federal agencies concede management of the wildlife that reside within the Forests – including wolves – to the respective state wildlife agencies.

²⁶⁰ Proposed Delisting Rule, *supra* note 1, at 6108.

coordination between the states and the various federal land management agencies subsequent to delisting is critical.

For the most part, cooperation between the federal and state agencies have produced functional working relationships that have enabled the agencies to smoothly carry out their respective responsibilities. A notable exception to these cooperative arrangements is the relationship between the various federal agencies and the state of Wyoming.²⁶¹ Although not surprising, it is difficult to justify the state's continued animosity and lack of cooperation. The absence of a good working relationship between Wyoming and the federal agencies will become increasingly important because Wyoming's management plan assumes a base population of eight breeding pair of wolves within YNP as part of its required wolf population.²⁶² With the seasonal migration of these wolves out of Yellowstone into Wyoming, how Wyoming commits to manage these wolves affects both parties.

To put this potential strain into context, what protection, if any, should an "endangered" YNP wolf be entitled to once it crosses the park boundary into Wyoming? Historically, the answer would be none. Traditionally, the Park Service has not objected – at least formally – when a neighboring state "takes" one of its animals. A controversial example of this is the capture and slaughter of YNP bison that cross into Montana on an annual basis. In spite of a significant criticism, the NPS has yet to challenge Montana's right to control bison leaving the park.

While theoretically the NPS could assert primacy under federal law to protect park resources such as wolves,²⁶³ such action is unlikely. There is little precedent for such an aggressive stance and it would likely prove to be politically impractical. Additionally, unless it can be shown that the NPS has a discrete duty to take such action, any attempt to force it to protect the wolves in court will fail.²⁶⁴

B. Popularity of Wolves

Much has been written about the drama surrounding the reintroduction of the NRM wolves, specifically in Yellowstone. By far the most visible, the Yellowstone wolves have become America's darlings. Even today, a cadre of wolf watchers, each equipped with a radio and a designated callsign, is on watch

²⁶¹ As manifested by Wyoming's involvement in the lawsuit charging a FWS wolf management employee with trespassing. See section on Wyoming Management Plan, *supra* note 108. Additionally, a glance at the participants of the Interagency Working Group shows the absence of Wyoming representation within the Working Group. See U.S. FISH & WILDLIFE SERV. ET. AL., ROCKY MOUNTAIN WOLF RECOVERY 2007 INTERAGENCY ANNUAL REPORT (2008), available at <http://www.fws.gov/mountain-prairie/species/mammals/wolf/annualrpt07/index.html>.

²⁶² See generally WYOMING PLAN, *supra* note 108.

²⁶³ 16 U.S.C.A. § 1 (1997).

²⁶⁴ See *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004).

seven days a week, 365 days a year, somewhere in the Lamar Valley in Yellowstone. Fourteen years after reintroduction, some of the same people who excitedly tracked the first reintroduced wolves continue to dedicate a significant portion of their lives to accounting for every single wolf in the park. The information they gather is shared within their group and with the FWS, and is compiled and placed onto laminated charts to help watchers identify the individual wolves. To be around those watchers is to observe an obsession of the first magnitude and the stories associated with the wolf saga in Yellowstone are worth reading for those curious about the passion that wolf advocates bring to the table.

While the anti-wolf forces are largely confined to the NRM region – because, frankly, nobody else really relates to their fear and hatred of the wolves – people from across the U.S. and the world continue to travel to Yellowstone to see the wolves. The reality is that wolf advocates vastly outnumber wolf opponents both numerically and in terms of potential political strength. The difficulty is in translating those numbers and that strength into something politically meaningful. Certainly, environmental groups fighting the delisting proposal in court have and will continue to take advantage of this support to help finance their efforts. But with all that is currently tugging at the political awareness of the American people – the recession, two wars, the fluctuating price of fuel, the housing crisis, stock depreciation, a new administration – it is doubtful that wolf advocates could garnish the awareness and support they would need in order to be able to significantly impact the local political decisions affecting the wolves. This is, after all, the West, and Westerners tend to resent outsiders butting their noses into state politics.

At the national level, the power of the NRM state congressional delegations to significantly influence the politics of discretionary endangered species decisions within their states should not be disregarded. Unwritten rules in Congress grant enormous respect to an affected state's position on these matters, largely based on the concept of "you mess with what happens in my state and I mess with what happens in yours." With that in mind, it is unlikely that, no matter how popular the wolves are on the east coast, a senator from Virginia will take a hard stand on wolves in Montana.

However, the significant shift in national politics at the presidential level with the new administration could well move the wolf delisting process in a different direction. With the Montana district court ruling against FWS' initial delisting decision,²⁶⁵ the Service is now forced to reexamine several aspects of its proposed rule. In spite of its best efforts, time appears to have run out on the Bush administration's attempt to push a delisting decision favorable to its Western allies out the door. With the installation of a new administration more inclined to be supportive of endangered species issues, the strong pro-wolf

²⁶⁵ See *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d, 1160, 1163 (D. Mont. 2008).

sentiment that exists nationally could have a meaningful impact on the final wolf delisting outcome. Ideally, FWS will now take a step back from its mad rush to finalize a delisting rule and do it correctly.

C. FWS' Position on Delisting

With passage of the Final Rule²⁶⁶ on February 21, 2008, the FWS announced that it was removing the NRM gray wolves from the endangered species list as outlined in its February 2007 proposed rule. Ed Bangs, FWS Wolf Recovery Coordinator, had been outspoken that it was time to proceed with delisting, and that reintroduction could not be considered "a success until the wolves are considered just another animal."²⁶⁷ As stated in the rule, FWS' position was that the goals contained in both the 1987 Plan and the 1994 EIS were adequate, that those goals had been met and that delisting was appropriate. With the *Defenders* court finding otherwise,²⁶⁸ FWS is now in the process of reexamining and reissuing its delisting rule.

Immediately following implementation of the Final Rule, environmental groups launched their initial legal salvo challenging the delisting decision. Following closely the alignment of environmental groups involved in the 10(j) lawsuit, Earthjustice will be the lead counsel for this challenge.²⁶⁹ Not surprisingly, the NRM state governments, along with several ranching and hunting groups, joined FWS in defending the delisting.

Nationally, a consensus position on the NRM wolf delisting has proven difficult to achieve for environmental organizations. Some groups are adamant that delisting should not occur under any circumstances and that wolves should be afforded the full protection of the ESA as an endangered species. This position, however, could have negative long-term repercussions. Because the ESA is such a powerful statute, with huge economic implications, there have been a number of nearly successful attempts within Congress to gut the protections of the Act in order to lessen those impacts.

Supporters of the ESA are well aware of this history and the more politically adroit national environmental groups appear unwilling to take such an unbending stand on wolf desisting, perhaps out of fear that doing so could prove

²⁶⁶ 50 C.F.R. § 17.11 (2008); Endangered and Threatened Wildlife and Plants; Final Rule Designating the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and Removing This Distinct Population Segment From the Federal List of Endangered and Threatened Wildlife [hereinafter Final Rule] 73 Fed. Reg. 10,514 (Feb. 27, 2008).

²⁶⁷ John Cramer, *Wolves in Delisting Cross Hairs*, MISSOULIAN, Jan. 21, 2008, at 5.

²⁶⁸ *Defenders*, 565 F. Supp. 2d at 1163.

²⁶⁹ See *supra* note 256. On January 28, 2008, Earthjustice filed a complaint in U.S. District Court in Missoula alleging that the EA associated with the 10(j) modification was inadequate and that an EIS should have been conducted. In that complaint, Earthjustice represented, among other groups, DOW, NRDC, Sierra Club, Humane Society and Center for Biological Diversity. On April 28, 2008, this alignment was also reflected in the *Defenders* lawsuit challenging the FWS decision to delist the NRM wolf.

harmful to the ESA in the long run. Some groups have acknowledged that the intent of the Act is to allow recovery of a species and, at that point, delisting should occur. While there may be disagreement over what the proper recovery goals for the NRM wolf should be, assuming that the proper goals are in place, and assuming that the wolf population has exceeded those goals, these groups have acknowledged that under those conditions it would be proper for the NRM wolf to be delisted.

No small part of the controversy is the published intention of all three states to use hunting as their primary means of population control subsequent to delisting. Having fought for decades to bring the wolf back to the NRM ecosystem, having spent countless resources and effort to accomplish reintroduction of the wolves and having seen the wolves thrive beyond all expectations, wolf proponents seem uncomfortable standing by while the states allow the wolf population to be substantially reduced.

On the other hand, wolf opponents, especially in Wyoming, are clear that they do not want any more wolves than the law requires. Forced to accept the presence of wolves they did not want in the first place, opponents now want the Feds to keep their side of the bargain by delisting the wolf and turning management over to the states. And the Final Rule gave every indication that the FWS intended to do just that. The question now is what direction the FWS will take with the Obama administration in place and with Ken Salazar as DOI Secretary.

D. Potential Legal Challenges to Delisting

1. Overview

One of the difficulties with writing an overview of a volatile situation such as the proposed NRM gray wolf delisting is that it is hard to get everything to stand still long enough for a good, comprehensive analysis. Things are simply changing too quickly. With the *Defenders* court issuing a preliminary injunction reversing the delisting process, the initial delisting rule has been remanded to FWS for reconsideration.²⁷⁰ What the FWS ultimately decides remains an open question.

In its lawsuit, *Defenders* challenged the 2008 Rule under the judicial oversight provisions of the Administrative Procedures Act (“APA”),²⁷¹ claiming that the FWS failed to properly apply the delisting criteria contained in the ESA. The APA provides courts with guidance they must use to judge the decision-making process of the federal agencies. Specifically, the courts must decide if the agency’s decision is “arbitrary, capricious, an abuse of discretion, or

²⁷⁰ See *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160, 1163 (D. Mont. 2008).

²⁷¹ 5 U.S.C. §§ 551-59,559; 701-06 (2006)

otherwise not in accordance with law.”²⁷²

While *Defenders* is the first lawsuit to challenge FWS’ decision, it is likely only the beginning of a long legal dance focused on the delisting process. Although *Defenders* represents the efforts of pro-wolf groups, future FWS decisions are just as likely to be challenged by wolf foes. With that in mind, a comprehensive overview of both the legal deficiencies found in the 2008 Final Rule, and the statutory baseline that must be used when exposing those vulnerabilities in court, is in order.

2. Elements of the ESA Required to be Considered in a Delisting Decision

Prior to going forward with a decision to delist the NRM wolves, the FWS must consider the same five factors it must use in considering whether or not to list a species. These factors are: 1) present or threatened destruction, modification, or curtailment of its habitat or range; 2) overutilization for commercial, recreational, scientific, or educational purposes; 3) disease or predation; 4) the inadequacy of existing regulations; and 5) other natural or manmade factors affecting its continued existence.²⁷³ An analysis of each of these factors as they relate to the 2008 Final Rule follows.

a. Present or threatened destruction, modification, or curtailment of its habitat or range

This criterion is one of the more legally complex aspects of the NRM wolf delisting that the FWS must consider, especially the designation of the appropriate boundaries for the delisting area. Within those boundaries, the FWS must also designate the appropriate level of protection under the ESA. In the case of the NRM wolves, the FWS designated different layers of protection within the boundaries of the delisted area, creating a series of three islands, and the lands in between these islands, where the wolves are protected. Outside of those islands and the connecting strips of land, to the outer boundaries of the delisting area, the FWS removed all protections from the wolves.

i. Establishment of the DPS Boundaries

As part of the 2008 Final Rule, the FWS, under authority of the ESA,²⁷⁴ designated a specific geographic area, and the wolf population residing within that area, for delisting. This area was referred to in the rule as the Northern Rocky Mountain Distinct Population Segment (“NRM DPS”). In conjunction with that designation, the Service removed the wolf population within the NRM

²⁷² 5 U.S.C. § 706(2)(A) (2006).

²⁷³ 16 U.S.C. § 1533(a)(1) (2006); 50 C.F.R. § 424.11 (2008).

²⁷⁴ See 16 U.S.C. §§ 1532(16), 1533(a)(1) (2006) (authorizing the Secretary to determine whether a “distinct population segment” of a species should be protected under the ESA.).

DPS from the Endangered Species list. In establishing the DPS, the Service noted that it was following its stated "DPS Policy" which outlines three factors used to determine whether the NRM wolf population should be construed as a valid DPS: 1) the discreteness of the segment of the wolf population; 2) the significance of that segment to the species as a whole; and, 3) whether that segment qualified for delisting under ESA standards.²⁷⁵ In delineating the boundaries of the NRM DPS, the Service included "all of Montana, Idaho & Wyoming, the eastern third of Washington and Oregon, and a small part of north central Utah."²⁷⁶

In the 60-Day Notice preceding its suit, Defenders objected to several aspects of the NRM DPS, including establishment of what it considered to be "boundaries of convenience."²⁷⁷ It further asserted that in extending those boundaries well beyond where the wolf population resides, and removing the protected status of wolves in the no man's land in between there and the proposed boundaries of the DPS, the Service was effectively isolating the current wolf population and precluding it from populating other portions of its historic range.²⁷⁸ In its lawsuit, Defenders asserted that the analysis of threats to the wolves in that no man's land was insufficient and that the FWS had overreached in establishing the borders of the DPS.²⁷⁹

The authority of FWS to authorize a DPS is not unlimited; Congress directed the FWS to invoke its power to designate a DPS "sparingly and only when such action is warranted."²⁸⁰ With the NRM DPS, FWS has a defensible argument that designation of a DPS for the wolves was appropriate. However, it will have more difficulty justifying the actual DPS boundaries and the determination that only the wolves residing in a fraction of that DPS are entitled to protections under the ESA. The net effect of the DPS parameters outlined in the 2008 Rule is that wolves that wander outside the core population areas, but that still remain within the boundaries of the DPS, are not protected. Conversely, wolves that manage to travel outside of the DPS unscathed are given full protection as an endangered animal under the ESA.

²⁷⁵ Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act [hereinafter DPS Policy], 61 Fed. Reg. 4722, 4725 (Feb. 7, 1996). *See also* Endangered and Threatened Wildlife and Plants; Final Rule, *supra* note 266 at Designating the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and Removing This Distinct Population Segment From the Federal List of Endangered and Threatened Wildlife; Final Rule [hereinafter Final Rule] 73 Fed. Reg. 10,514, 10,515; *see also* 60-Day Delisting Notice, *supra* note 128, at 2.

²⁷⁶ Final Rule, *supra* note 275, at 10,516.

²⁷⁷ 60-Day Delisting Notice, *supra* note 128, at 2. (Boundaries of Convenience refer to setting boundaries based on political boundaries, such as state lines, or on other boundaries of convenience, such as interstate highways (the NRM DPS is based on both)).

²⁷⁸ *Id.* at 2-3.

²⁷⁹ *See* Third and Fourth Causes of Action, Complaint for Declaratory and Injunctive Relief, *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160, 1163 (D. Mont. 2008)..

²⁸⁰ *Id.* (quoting S. REP. No. 96-1, at 151.)

In its DPS Policy, the Service discusses the use of both international and “other political boundaries, such as State lines.”²⁸¹ The Policy notes that the designation of an international boundary as the outer limits of a DPS makes sense both for practical reasons and because it is reasonable for national legislation to be “delimited by international boundaries.”²⁸² Regarding state boundaries, however, the Policy is quite clear that using “political boundaries, such as State lines . . . [is] inappropriate as a focus for a national program.”²⁸³ The Policy goes on to say that while “recognition of State boundaries would offer attractive possibilities . . . [n]evertheless, the Act provides no basis for applying different standards for delisting than those adopted for listing.”²⁸⁴

Although it did not pursue this line of reasoning in its lawsuit, in its 60-Day Notice, Defenders justifiably claims that “the Service ignored . . . its own DPS Policy in order to draw ‘boundaries of convenience’ along state lines.”²⁸⁵ While in the abstract it makes sense to use easily identifiable boundaries for the sake of administrative convenience, the Service will be hard pressed to justify its statement that the “DPS Policy allows an artificial (e.g. State line) or manmade (e.g. road or highway) boundary to be used as a boundary of convenience for clearly identifying the geographic area for a DPS” when this position directly contradicts that very same policy.²⁸⁶

ii. Varying Degrees of Protection Within and Outside of the NRM DPS

Most troublesome is the designation of such a large DPS coupled with the removal of protections of wolves in all but a core area in the DPS’ center. The FWS undertakes an elaborate explanation of why it has designated the specific boundaries of the DPS,²⁸⁷ only to note that a large portion of that DPS consists of largely unsuitable habitat²⁸⁸ and that wolves found in these unsuitable areas “are not important or necessary for maintaining a viable, self-sustaining and evolving representative wolf population in the NRM DPS into the foreseeable future.”²⁸⁹

²⁸¹ DPS Policy, *supra* note 275, at 4723-24.

²⁸² *Id.* at 4723.

²⁸³ *Id.* at 4723-24.

²⁸⁴ *Id.* at 4724.

²⁸⁵ 60-Day Delisting Notice, *supra* note 128, at 2.

²⁸⁶ Final Rule, *supra* note 275, at 10,516.

²⁸⁷ *Id.* at 10,515-19.

²⁸⁸ *Id.* at 10,536-37.

²⁸⁹ *Id.* at 10,541 (citations omitted). Interestingly, in its October 2008 reopening of comments, the FWS notes that some of the very same portions of the DPS that it previously designated as “unsuitable” and “not important or necessary” may, in fact, be critical dispersal routes for wolves migrating into Yellowstone because of geographic barriers to the north and west of the park. Reopening Final Rule Comment Period, *supra* note 134, at 63,930. The lack of wolves dispersing into Yellowstone has presented a significant obstacle to the required genetic interchange component of the delisting goal.

In essence, the Service's position in the 2008 Rule is that suitable wolf habitat consisted solely of the three core recovery areas and the land in between those areas. As a result, the 2008 rule allows states to treat wolves within the designated boundaries of the DPS but outside of these core areas as nonessential. That means, for instance, that wolves found in the DPS segment of Washington, Oregon and Utah would not be protected unless the individual states make the decision to protect them. Further, by limiting protection to these core areas, the 2008 Rule validates Wyoming's dual classification system allowing wolves to be classified as predators throughout the vast majority of the state.

As Defenders points out, a notable consequence of the DPS portion of the Rule is that it significantly reduces the possibility that lone wolves will successfully disperse outside of the DPS to areas in neighboring states that once constituted the historical range of the gray wolf. The FWS agrees with this assessment, noting that:

The combination of limited suitable habitat and high rates of human-caused mortality that will be associated with predatory animal status in eastern and southern Wyoming will further reduce the already extremely low probability of dispersing wolves successfully recolonizing Colorado, Utah, South Dakota, or Nebraska.²⁹⁰

If a huge portion of the DPS consists of unsuitable habitat, why include it in the DPS in the first place? Part of the answer to that question might be the complexity of the protections afforded wolves found outside the DPS. "Once this rule goes into effect, if a wolf goes beyond the NRM DPS boundary it attains the listing status of the area it has entered (i.e., endangered in much of the lower 48 States except where listed as nonessential experimental or delisted, as in the WGL DPS.)"²⁹¹ But more likely, the FWS set the boundaries where it did as a political concession to Wyoming in the ongoing battle over FWS' refusal to accept the state's management plan.

Wyoming agreed to settle its pending litigation with the FWS over the rejection of their management plan if "the Service published a delisting rule that includes the entire State of Wyoming prior to February 28, 2007."²⁹² In other words, with the vast majority of Wyoming outside of the core areas, but within the DPS, Wyoming would be free to manage wolves outside of the "trophy" area as predators. Without including the rest of Wyoming within the DPS, wolves found outside the "trophy" area would be protected as endangered.

As an aside, but very much part of the picture, publication of the January 2008 10(j) modifications was also part of the settlement agreement. Those published 10(j) modifications, discussed above, were tailored to address

²⁹⁰ Final Rule, *supra* note 275, at 10,540.

²⁹¹ *Id.* at 10,530.

²⁹² *Id.* at 10,549.

“Wyoming’s concerns about wolf management to maintain ungulate herds above state management objectives.”²⁹³ Further, the 10(j) modifications give the states more flexibility in managing wolf populations during the expected, lengthy delisting litigation.

While it is likely that the Service’s designation of a DPS will be deemed proper, the same cannot be said for the extensive boundaries of that DPS. Because the ESA is ambiguous on what constitutes a “distinct population segment,” FWS’ subsequent attempt to define that term is normally given a great deference. However, once FWS published its “DPS Policy,” it is required to abide by the terms outlined in that policy. Having stated, for instance, that boundaries of convenience should not be used, the Service is not at liberty to ignore its policy without justification or explanation.

b. Overutilization for commercial, recreational, scientific, or educational purposes

Objections to the overutilization of wolves for recreational hunting fall within this criterion. The FWS has actively encouraged the States to utilize hunting as a means of population control and does not consider this to be outside the confines of the Act. Given that the NRM gray wolf population has been classified as a nonessential experimental population and that there will be increasing human-wolf and livestock-wolf conflicts as the wolf population increases, hunting likely poses an acceptable means of population control, provided hunting is properly managed.

While both Montana and Idaho have published guidelines for the controlled hunt of wolves as trophy animals, Wyoming continues to advocate a dual trophy/predator classification with predators not subject to regulatory take.²⁹⁴ In the 2008 Rule, the Service justified its decision not to object to this practice because the predatory area fell within that portion of the DPS where the FWS deemed any wolves to be “not important.”²⁹⁵ As noted in the *Defenders* decision, the court found significant flaws in the Wyoming plan that will have to be corrected before the FWS can legally accept Wyoming’s management plan.²⁹⁶ To the degree that the Service’s decision to accept Wyoming’s 2007 plan, substantially unchanged from the 2003 plan rejected by the FWS, was influenced by political expediency rather than sound science, that plan will have to be revised.

c. Disease or predation

Although the NRM wolf population is exceptionally hardy, predation, both

²⁹³ *Id.*

²⁹⁴ See WYOMING PLAN, *supra* note 108, at 10; see also Final Rule, *supra* note 275, at 10,542.

²⁹⁵ Final Rule, *supra* note 275, at 10,542.

²⁹⁶ See *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d. 1160, 1172–76 (D. Mont. 2008).

legal and illegal, and disease continue to play a role in population reduction. In recent years, especially in YNP, disease has significantly reduced the wolf population. In 2005, for example, as a result of suspected parvo or canine distemper, eighty percent of the pups in YNP died and breeding pairs were reduced from sixteen down to seven.²⁹⁷ Similarly, in 2008 the YNP population dropped an estimate twenty-seven percent from a combination of wolf-on-wolf conflicts and disease, from 171 animals down to 124 and from ten breeding pair down to six.²⁹⁸ Additionally, because wolves do not appear particularly wary of humans, they are very susceptible to human-caused predation.²⁹⁹ Although the FWS has stated that the percentage of wolves killed illegally is difficult to estimate, Defenders estimates that percentage to be approximately thirteen percent each year.³⁰⁰

In spite of these numbers, the FWS contends that wolf mortality as high as fifty percent annually may be sustainable.³⁰¹ Idaho's plan is a bit more conservative, noting that with thirty to forty percent wolf mortality, the wolf population should stabilize.³⁰² Because the states have committed to regulating human-caused mortality in a manner that assures the wolf population is not reduced below recovery levels, the FWS feels that this factor should not prevent delisting.³⁰³

Clearly, however, there are aspects of the 2008 Rule related to this criterion that are difficult to justify. Establishing a scientifically viable mortality figure that provides for a sustainable population would appear to be a basic, and necessary, component of the state wolf management plans. The question, however, is whether that level should be set at fifty percent or thirty percent. Because of the importance of a specific mortality figure, FWS should designate a single mortality figure that is scientifically justified, that is agreed to by all of the federal and state agencies involved in the delisting, and that is used consistently in all three state plans.

d. Inadequacy of existing regulations

Of all the factors FWS must consider in its rulemaking, this criterion requires

²⁹⁷ Defenders of Wildlife, Re: RIN number 1018-AU53 Proposed Rulemaking Regarding Establishing and Delisting a Distinct Population Segment for Gray Wolves in the Northern Rocky Mountains [hereinafter Defenders Comments], at 7 available at: http://www.defenders.org/resources/publications/programs_and_policy/wildlife_conservation/imperiled_species/wolf/pacific_west_wolves/defenders_of_wildlife_et_al_nr_m_wolf_comments.pdf?ht=.

²⁹⁸ Cory Hatch, *Wolf Numbers Decline in Yellowstone in 2008*, JACKSON HOLE DAILY, Jan. 13, 2009, at 1.

²⁹⁹ Proposed Delisting Rule, *supra* note 1, at 6125.

³⁰⁰ Defenders Comments, *supra* note 297, at 7.

³⁰¹ Proposed Delisting Rule, *supra* note 1, at 6125.

³⁰² 2008 IDAHO PLAN, *supra* note 169, at 29.

³⁰³ Proposed Delisting Rule, *supra* note 1, at 6126.

the most comprehensive review and will be the primary focus of challenges to delisting. Examining the 2008 Rule and the three state plans, this section provides comprehensive analysis of the shortfalls found within those documents. Specifically, the analysis includes an examination of: i) the inadequacy of the 1987/1994 goals, including the methodology used to derive those goals; ii) the decision not to conduct a supplemental EIS; iii) the lack of coordination between the state plans, especially the connectivity between the core areas needed to ensure adequate genetic exchange; iv) the lack of adequacy of, and consistency between, the three state plans; v) the formulation and characteristics of the proposed DPS (discussed in detail above); vi) assuming that the initial numerical goals are inadequate, the lack of a modified trigger criteria for relisting; and, vii) the lack of long-term planning commitments within the state plans needed to ensure the viability of the wolf populations beyond the five-year federal oversight period. Each of these items is discussed in detail below.

i. Inadequacy of the 1987/1994 Goals

Any challenge to the 2008 Final Rule should begin with the recovery goal outlined in the 1987 Recovery Plan and used as the minimum goal in the 1994 EIS. Although a clear statement of this goal is both critical and necessary to determine whether recovery has been achieved, it is perhaps one of the “softer” aspects of the 2008 Rule. To put it mildly, it is difficult to ascertain from the Rule what the actual numerical goal is that the FWS used. On the one hand, the Rule refers to the 1987/1994 recovery goal of thirty breeding pairs and 300 wolves as the standard used by FWS in a number of instances, while on the other hand dismissing this goal as incorrect and inadequate.

As reiterated in the Rule, the minimum recovery goal consists of:

- “thirty or more breeding pairs (i.e., an adult male and female wolf that have produced at least 2 pups that survived until December 31 of the year of their birth, during the previous breeding season) comprising some 300+ wolves
- in a metapopulation (a population that exists as partially isolated sets of subpopulations)
- with genetic exchange between subpopulations”³⁰⁴

If this goal is met, the Rule states that the NRM wolves “should have a high probability of long-term persistence.”³⁰⁵

As noted in both the 2007 Proposed and the 2008 Final Rule, the 1994 EIS stated that the “1987 recovery goal was, at best, a minimum recovery goal, and

³⁰⁴ Proposed Delisting Rule, *supra* note 1, at 6107; *see also* Final Rule, *supra* note 275, at 10,521.

³⁰⁵ Final Rule, *supra* note 275, at 10,521.

that modifications were warranted on the basis of more recent information about wolf distribution, connectivity and numbers.”³⁰⁶ Beyond determining that an essential component of a successful recovery was “a well-distributed number of wolf packs and individual wolves among the three states and the three recovery zones,”³⁰⁷ little updating of this goal has occurred.

A review of the Final Rule leaves the reader with the impression that the Service knows it is on shaky ground and that the initial goal is inadequate. However, rather than conducting a thorough analysis of what a new required minimum should be, the FWS makes the case that even if the Service is not sure what the new goal should be, the state plans, by managing for a minimum of fifteen breeding pair each, must be sufficient. Such flimsy rationale is inadequate. What the FWS appears to be saying is that whatever that new goal should be, certainly a fifty percent increase over the initial goal must exceed that requirement. Having admitted that its initial goal falls short, the Service should have taken whatever actions were necessary to produce an updated goal.

For example, the Final Rule states several times that a metapopulation of at least thirty breeding pairs and at least 300 wolves would ensure a viable and recovered population and therefore uses those criteria both as the standard for determining the adequacy of the state plans and as the numerical threshold the agency would use to consider relisting the wolves should that prove necessary.³⁰⁸ However, in another instance, the Rule proclaims that the 30/300 numbers are clearly inadequate.³⁰⁹ Finally, brushing aside the 30/300 guideline, the Rule notes that the states are actually managing for a minimum of 45/450 wolves implying, as the old saw says, that this is close enough for government work.³¹⁰

The issue, of course, is that the Service never clearly delineates what the minimum recovery goal should be or how it reached the conclusion that managing for 45/450 wolves is sufficient. A legal challenge to the 2008 Rule could, and should, attack FWS’ use of the minimum recovery goal. Additionally, such a challenge should compare the NRM numerical goal with the Western Great Lakes gray wolf recovery goal of between 1,250 and 1,400 wolves.³¹¹ The FWS has stated that the Western Great Lakes goal is necessary

³⁰⁶ *Id.*

³⁰⁷ Final Rule, *supra* note 275, at 10,522.

³⁰⁸ See e.g., Final Rule, *supra* note 275, at 10,521, 10,523, 10,527, 10,546, 10,552, & 10,553 (for references to the minimum criteria for state sub-populations) and at 10534 & 10559 (for the relisting criteria).

³⁰⁹ See *id.* at 10,553 (noting that a wolf genetics expert’s assumptions regarding an inadequate population were incorrect because he “mistakenly believed the Service’s recovery goals were to have only 10 breeding pairs and 100 wolves in each of the three States and were unaware of the States’ intentions to manage for about 883-1,250 wolves in mid-winter.”)

³¹⁰ See e.g., *id.* at 10,552, 10,527-28, 10,546, 10,552, 10,557, & 10,559.

³¹¹ USFWS Final Rule Designating the Western Great Lakes Populations of Gray Wolves as a Distinct Population Segment; Removing the Western Great Lakes Distinct Population Segment of the Gray Wolf from the List of Endangered and Threatened Wildlife, 72 Fed. Reg. 6052 (Feb. 8,

to “increase the likelihood of maintaining its genetic diversity over the long term [and to] provide resiliency to reduce the adverse impacts of unpredictable demographic and environmental events.”³¹² While contending that both goals are scientifically valid, the FWS notes that the lower NRM goal is justified when compared to the Western Great Lakes goal because the connectivity between the U.S. and Canada helps ensure population viability within the NRM.³¹³ Commenting on the proposed rule, the Society for Conservation Biology (the Society) has expressed concern, however, that the increasing loss of habitat, in combination with the proposed increase of human-caused mortality, will negate this connectivity.³¹⁴ This certainly would be true the further the population area is from Canada.

The Society further stated that the numeric recovery goal is simply outdated and that it does not reflect new research focused on the carrying capacity of wolves in the NRM region.³¹⁵ These charges point out that the FWS focus on the number of breeding pairs “does not adequately consider recent research concerning the temporal (demographic) and spatial dynamics of wolves within their ecosystems [and that a] wolf population that only numbers in the hundreds may not be ecologically effective across such a large geographic area.”³¹⁶ Defenders’ 60-Day Notice claims that the “two-decades-old recovery goal . . . [is] known to be biologically inadequate.”³¹⁷

Rather than a population base that numbers in the hundreds, scientists have postulated that, in order to be viable, the NRM population should actually number in the thousands.³¹⁸ Even Ed Bangs was quoted as saying that “everyone agrees that 300 (wolves) and 30 (breeding pairs) is the absolute minimum and that 1,000 wolves is a much more viable population.”³¹⁹

To be frank, the 30/300 goal is a bit too convenient. A cursory glance at a map reveals substantial geographic distinctions between the three areas and it must be asked whether the initial goal resulted from political expediency rather than from science. The ESA requires the FWS to consider the ecosystem within which the endangered species exists, and with the wolf subpopulations residing in three diverse geographic areas, the goal for each of the three should reflect that diversity.

2007).

³¹² *Id.*

³¹³ See NRM Proposed Rule Comments, North American Section of the Society for Conservation Biology [hereinafter Society Comments] at 6 (May 7, 2007), available at: <http://www.conbio.org/sections/namerica/NAPolicy.CFM#NA20070507>.

³¹⁴ *Id.*

³¹⁵ *Id.* at 7–8.

³¹⁶ *Id.*

³¹⁷ 60-Day Delisting Notice, *supra* note 128, at 3.

³¹⁸ Erin Halcomb, *My, What a Small Family Tree you Have: In the Northern Rockies, Gray Wolves may Face the Problems of Inbreeding*, HIGH COUNTRY NEWS, October 1, 2007, at 8.

³¹⁹ *Id.*

The Service has stated that its focus is to provide for an adequate population level that ensures a viable wolf population, and not to ensure: (1) that the wolves' "viability would be theoretically maximized,"³²⁰ (2) that the wolves are restored to historic levels,³²¹ or, (3) that the Service "achieve or maintain ecological effectiveness (i.e., occupancy with densities that maintain critical ecosystem interactions and help ensure against ecosystem degradation)."³²² Because "the Endangered Species Act is a law of limited scope whose provisions must be read together,"³²³ and because Congress intended that conservation of a species be integrally tied into the ecosystem within which it survives,³²⁴ it is fair to ask whether the Service must also use criteria that ensure ecological viability of the species. Additionally, a number of key U.S. Supreme Court decisions point to Congress' clear intent that the Service should err on the side of conservation of an endangered species.³²⁵

Arguing against its own position as stated in the 2008 Rule, the Service acknowledges that its policies "apply an ecosystem approach in carrying out [its] programs for fish and wildlife conservation,"³²⁶ and that "[s]uccessful recovery of a threatened or endangered species requires that the necessary components of its habitat and ecosystem be conserved."³²⁷ By further recognizing that the "wolf recovery appears to have caused trophic cascades and ecological effects that affect numerous other animal and plant communities, and their relationships with each other,"³²⁸ the Service effectively makes the argument that it should tie its population goal to the ecosystem as a whole. Taking an ecosystem perspective in setting the population goal could, but does not necessarily, imply a maximization of the wolf population in any particular ecosystem. It would, however, require that the goals for each of the core recovery areas be refined and be specifically tailored to each area.

ii. Lack of a Supplemental EIS

In responding to criticism that it should have updated the 1994 EIS prior to delisting, the Service noted that the EIS "is not applicable to the delisting

³²⁰ Final Rule, *supra* note 275, at 10,521.

³²¹ *Id.* at 10,527.

³²² *Id.* at 10,529 (quotations and citations omitted).

³²³ *Sierra Club v. Clark*, 755 F.2d 608, 613 (8th Cir. 1985).

³²⁴ 16 U.S.C. § 1531(b) (1973), as reprinted in 1973 U.S.C.C.A.N. 2989, 2995 (the original language noted that the purposes of the Act "include providing an effective means to 'conserve, protect, and restore the ecosystems' upon which species depend").

³²⁵ See generally *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978); and *Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995).

³²⁶ Final Rule, *supra* note 275, at 10,529 (citing National Policy Issuances 95-03 and 96-10; Notice of Interagency Policy for the Ecosystem Approach to the Endangered Species Act, 59 Fed. Reg. 34274 (July 1, 1994)).

³²⁷ *Id.*

³²⁸ *Id.* at 10,528-29.

process.”³²⁹ In support of this position, the Service points to a 1983 policy stating that NEPA documents need not be prepared for a delisting action.³³⁰ However, because the delisting is based on achieving a recovery goal that even the Service acknowledges is outdated, and because the 1994 EIS is the supporting document for that recovery goal, the Service cannot justify its insistence that an update to the 1994 EIS is not required.

The requirement to conduct a supplemental EIS (“SEIS”) is independent of the delisting process and is tied to whether there “are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”³³¹ The Service’s blanket policy that a SEIS need not be prepared for a delisting decision is deficient. The standard that must be used is the same one used in deciding if an EIS must be conducted in the first place.³³² “If there remains ‘major federal action[s]’ to occur, and if the new information is sufficient to show that the remaining action will ‘affect the quality of the human environment’ in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.”³³³

Similar to other agency decisions, a challenge under the APA would consider whether the Service’s refusal to conduct a SEIS was arbitrary and capricious.³³⁴ In conducting this review, a court would be required to determine if the Service took a “hard look” at any new, relevant information³³⁵ and whether the decision not to complete an SEIS “was based on a consideration of the relevant factors [or] whether there has been a clear error of judgment.”³³⁶ However, the court’s review would be a narrow one and, because the new information is likely to be highly technical, the court would defer to the “informed discretion” of the Service in their evaluation of that information.³³⁷

The Service’s insistence in adhering to the EIS policy is flawed because the EIS does not take into account the significant quantity of new and updated scientific data produced since the 1995 reintroduction. At a minimum, the FWS should have conducted a supplemental EIS in order to update the 1994 goals. Council on Environmental Quality (“CEQ”) rules require a supplement to an existing EIS if there is significant new information that bears on the FWS

³²⁹ *Id.* at 10,526–27.

³³⁰ *Id.* (citing Endangered and Threatened Wildlife and Plants; Preparation of Environmental Assessments for Listing Actions under Final Rule to Remove the Eastern North Pacific Population of the Gray Whale From the List of Endangered Species Act, 48 Fed. Reg. 49,244 (Oct. 25, 1983)).

³³¹ *Marsh v. Or. Nat’l Res. Council*, 490 U.S. 360, 372 (1989) (citing 40 C.F.R. § 1502.9(c) (2008)).

³³² *Id.* at 374.

³³³ *Id.*, (citing 42 U.S.C. § 4332(2)(C) (1969)).

³³⁴ *See id.* at 376.

³³⁵ *See id.* at 385.

³³⁶ *Id.* at 378, (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

³³⁷ *See id.* at 377.

recovery goal.³³⁸ While the mere passage of time does not trigger the need for a supplement,³³⁹ any EIS older than five years is a prime target for an update.³⁴⁰ Far from taking a hard look at new information, a blanket policy that a SEIS is not required in conjunction with a delisting decision is clearly arbitrary.

iii. Lack of Coordination between State Plans Relating to Connectivity
Between Core Areas Necessary to Achieve Genetic Exchange

There has been criticism that the FWS has done little to require the states to carry out their management plans in a way that ensures sufficient connectivity between the three subpopulations such that they would qualify as a metapopulation with sufficient genetic interchange.³⁴¹ Beyond making references to the individual state plans and noting that there have been some conservation efforts to ensure preservation of critical wildlife habitat, as the *Defenders* court points out,³⁴² the Service has not done all that it should have to address this issue.

The 2008 Final Rule notes that reviewers of the recovery goal “thought connectivity (either natural or human-facilitated) was important.”³⁴³ Additionally, the Rule states that an equitable distribution of wolves to ensure strong genetic mixing within the population is necessary to maintain its viability.³⁴⁴ Such mixing assumes, of course, sufficient connectivity between the subpopulations. However, prior to the *Defenders* ruling, the FWS continued to assert that the state plans promoted a sufficient level of connectivity and genetic exchange. Subsequent to *Defenders*, the Service continues to insist that genetic diversity, especially in the Yellowstone population, is extensive and adequate.³⁴⁵ However, one of FWS’ own experts has stated that while the Service was successful at achieving genetic diversity during the reintroduction process,

[d]espite the currently high levels of variation, there is concern for maintaining the genetic health over the long-term given the lack of connectivity with other populations. Population-based simulations provide a pessimistic outlook for genetic viability of the Greater Yellowstone wolf population if the population is isolated and not maintained at high

³³⁸ 40 C.F.R. § 1502.9(c)(1)(ii) (2008).

³³⁹ RONALD E. BASS, ALBERT I. HERSON & KENNETH M. BOGDAN, *THE NEPA BOOK: A STEP-BY-STEP GUIDE ON HOW TO COMPLY WITH THE NATIONAL ENVIRONMENTAL POLICY ACT* 84, 264 (Solano Press Books 2001).

³⁴⁰ *Id.* at 264.

³⁴¹ See *Defenders Comments*, *supra* note 297, at 11–12.

³⁴² See generally, *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160 (D. Mont. 2008).

³⁴³ Final Rule, *supra* note 275, at 10,521.

³⁴⁴ *Id.*

³⁴⁵ See Reopening Final Rule Comment Period, *supra* note 134, at 63,929.

numbers.³⁴⁶

The *Defenders* court cited this deficiency,³⁴⁷ but the Service discounted the expert's observations as "unjustifiably pessimistic" and based on "faulty assumptions" because the expert was "unaware of the States' intentions to manage for about 883-1,250 wolves in mid-winter."³⁴⁸ The Service does acknowledge, however, that the cumulative increases in human-caused mortality that are certain to occur once delisting is finalized will likely result in more genetic isolation of the GYA wolves.³⁴⁹

In spite of this, the Service contends that there "appears to be enough habitat connectivity . . . to ensure exchange of sufficient numbers of dispersing wolves to maintain demographic and genetic diversity in the NRM DPS."³⁵⁰ While making this assertion, the Service fails to show how the three states will work together to achieve this goal. Instead, the Service points to the state plans as evidence that the states are committed to ensuring that connectivity and genetic exchange will be achieved, even if the states have to actually relocate wolves to accomplish that.³⁵¹

The problem is that the state plans do little more than pay lip service to the concept of connectivity. None of the plans propose concrete means to achieve connectivity, and none of the plans commit to coordination between the states to achieve this goal.³⁵² With such an obvious deficiency in the state plans, the Service should have proactively ensured that the necessary coordination took place prior to advocating relinquishing control to the states. Because it did not, the *Defenders* court found that the Service must make more of an effort to ensure that this is accomplished.

The Service's answer to this criticism³⁵³ is to point to a Draft Memorandum of Understanding between the Service and the three states agreeing to "jointly assure gene flow among the three population areas of gray wolves by natural or human-assisted techniques."³⁵⁴ Of course, such a Memorandum is only valid if

³⁴⁶ Von Holdt, et al., Genealogy and Genetic Viability of the Gray Wolves (*Canis lupus*) of Yellowstone National Park, Proceedings from the 2007 North American Wolf Conference (April 25, 2007).

³⁴⁷ Final Rule, *supra* note 275, at 10,553.

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 10,540.

³⁵⁰ *Id.* at 10,539.

³⁵¹ *Id.*

³⁵² Final Rule, *supra* note 275, at 10,546–47. The only reference to the States working together with their management plans is the Memorandum of Understanding that the States signed in 1999 and renewed in 2002 stating that all three States agreed to develop management plans sufficient to allow the wolf delisting to go forward. *Id.*

³⁵³ See Reopening Final Rule Comment Period, *supra* note 134, at 63,930.

³⁵⁴ U.S. FISH AND WILDLIFE SERV., Draft Memorandum of Understanding, Maintenance and Enhancement of Gray Wolf Recovery in the Northern Rocky Mountains, at 2, available at: http://www.westerngraywolf.fws.gov/mountain-prairie/species/mammals/wolf/DRAFTGENETICS_MOU102208.PDF (last visited Apr. 15, 2009).

all three states participate in the delisting process, and if both the goal of the MOU, and a means to achieve that goal, are sufficiently delineated in all three state plans.

Finally, it is not reasonable for the Service to demand that experts use what can only be described as optimistic state population outlooks in analyzing potential connectivity and genetic interchange. The numbers found in state plans are not based on realistic forecasts and cannot be counted on as firm commitments on the part of the states. For instance, while Montana's plan notes the possibility of a population of 328-657 wolves by 2015,³⁵⁵ its recent wolf hunting plan asserts that Montana is really only committing to a minimum of ten breeding pairs.³⁵⁶ Similarly, Idaho's management plan outlook of 518-732 wolves was directly undercut by that state's aggressive May 2008 harvest recommendation. Regardless of FWS' optimism, it cannot rely on state commitments to maintain population targets unless those commitments are backed by firm legislative action. Until such time, the agency is unjustified in its insistence that its scientific experts use "the states' intention to manage" at certain population levels when analyzing genetic interchange modeling.

iv. Lack of Adequacy of, and Consistency Between, the Three State Plans

In its 60-Day Notice and Complaint for Declaratory and Injunctive Relief, Defenders focused the majority of its disagreement with the Rule on what it perceived to be the various inadequacies of the three state plans.³⁵⁷ A careful reading of the plans shows shortfalls in the plans as well as the vast disparities between them.

As noted above, while both Montana and Idaho have stated their intent to manage for a wolf population that is significantly higher than their individual 10/100 initial goal, verbiage found elsewhere in their plans detracts those statements to the point where they constitute little more than political rhetoric. For instance, rather than firmly committing to manage for a wolf population of between 328-657 wolves, Montana's plan only cites this as a "possibility," while elsewhere noting that the state is really only obligated to manage for fifteen breeding pairs.³⁵⁸

Also, as noted *infra*, each state advocates one of the more controversial means of controlling the wolf population – recreational hunting. It should come as no

³⁵⁵ MONTANA PLAN, *supra* note 138, at 132. Montana has two primary areas of focus for its wolf populations: the northwest segment of the State adjacent to Glacier NP and the nearby wilderness areas; and the national forests/wilderness areas northwest of Yellowstone NP. These represent portions of two of the three NRM population centers.

³⁵⁶ MONTANA SUPPORTING INFORMATION, *supra* note 153, at 6.

³⁵⁷ See 60-Day Delisting Notice, *supra* note 128, at 5–10; Memorandum in Support of Motion for Preliminary Injunction at II.B., *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160 (D. Mont. 2008) (No. 9:08-CV-00056), at 15.

³⁵⁸ MONTANA SUPPORTING INFORMATION, *supra* note 153, at 3, 6, & 9.

surprise that there is a strong opposition to recreational hunting of wolves from some members of the environmental community. Clearly, though, FWS does not share this objection and has openly encouraged the States to incorporate hunting into their management plans.³⁵⁹ Commenting on the recent approval of the Montana hunting plan, Ed Bangs noted that “[i]t’s time [wolves were hunted]. It’s past time, and the sooner we just start treating wolves like any other animal – mountain lions, black bears, deer or elk – the better it will be for everyone, including the wolves.”³⁶⁰ Perhaps Mr. Bangs is correct, but the difficult aspect of his position is the wide disparity between, for instance, Montana’s recommendation that human actions should account for no more than thirty percent of wolf mortality and Wyoming’s formal plan to treat wolves in ninety percent of the state as predators killed without limit. That the *Defenders* court rejected Wyoming’s plan should come as no surprise.

Additionally, there is justifiable concern that aggressive population reduction in a state such as Wyoming would have a negative effect on a neighboring state that has agreed to maintain a significantly higher population level. Would such a difference in management plans, for instance, create a “sink” that would pull in wolves from the neighboring state, thus undermining that state’s ability to manage its wolves at the desired level?³⁶¹ If so, would the burdened state have an action against its neighbor for detracting from its ability to adequately manage its wolf population and/or could private citizens compel the burdened state to take such an action?

v. Improper Formulation of DPS

As noted in detail *infra*, the 2008 Final Rule creates a Distinct Population Segment that encompasses all of the states of Montana, Idaho and Wyoming, as well as the eastern third of both Washington and Oregon and a small segment of Utah. At the same time, the Rule removes protection from wolves in all but the core recovery areas within the center of the DPS. While the FWS has the authority to create a DPS for the NRM gray wolf, the Service overreached its authority when it created what *Defenders* calls a “moat” around existing wolf populations that effectively prohibit those wolves from dispersing into protected areas.³⁶²

vi. Lack of Modified Trigger Criteria

Having determined that delisting was appropriate, the Service is required by

³⁵⁹ Final Rule, *supra* note 275, at 10,531.

³⁶⁰ Eve Byron, *Season Set for Montana Wolf Hunting*, HELENA INDEPENDENT RECORD, Feb. 21, 2008 at 1.

³⁶¹ Society Comments, *supra* note 313, at 7–8.

³⁶² See Complaint for Declaratory and Injunctive Relief at 23, Fourth Cause of Action, *Defenders*, 565 F. Supp. 2d 1160.

law to enact, in cooperation with the states, a five-year monitoring regime to verify that the NRM wolves remain sufficiently recovered.³⁶³ If within that five-year period the Service determines that relisting is necessary, it “may” invoke its emergency listing authority under the Act to protect the well being of the wolves.³⁶⁴ In spite of criticism that the 2008 Rule lacks clear emergency relisting guidance, the FWS has stated that the relisting criteria promulgated in the Rule are adequate.

The Rule notes four possible scenarios that might lead to a relisting: 1) if the population in any of the three states falls below the 10/100 minimum at the end of any year; 2) if the population in any of the three states falls below the 15/150 minimum for three consecutive years; 3) if the population in Wyoming but outside of Yellowstone NP falls below the seven breeding pair minimum for three consecutive years; or 4) if a change in any of the state’s laws or management objectives would “significantly increase the threat to the wolf population.”³⁶⁵ Should any of these scenarios occur, the initial five-year period would be extended for an additional five years for the offending state from the point of the infraction.³⁶⁶

Unfortunately, FWS’ position on its relisting guidance is difficult to justify. While tacitly acknowledging that the initial goals of 10/100 per area, or 30/300 overall, are inadequate, the Service continues to cite those numbers in reference to its criteria for possible relisting. At a minimum, an argument could be made that because the Service acknowledged that the earlier goals are inadequate, it should also consider those same goals are no longer valid for its relisting criteria.

Additionally, with the three states advocating different methodology of how to count the wolf population, the Service is obligated to ensure that whatever methods are used produce consistent results. Currently, and since its formation in 1989, counting the NRM wolf population has fallen to the Interagency Wolf Working Group.³⁶⁷ The Working Group annual reports are considered by many to be the best available data on the size of the wolf population. The population estimates found in the reports are derived using FWS’ standard definition of breeding pair, with wolf pairs counted in winter at the beginning of the annual courtship and breeding season.³⁶⁸

³⁶³ 16 U.S.C.A. § 1533(g)(1) (2003).

³⁶⁴ *Id.* The language in § 1533(g)(2), noting that “[t]he Secretary *shall* make prompt use of the authority under paragraph 7 of subsection (b) of this section to prevent a significant risk to the well being of any such recovered species,” indicates an obligation to institute relisting proceedings in such an instance. (emphasis added). Should the Secretary fail to so proceed, the citizen suit provisions noted in § 1540(g)(1)(C) would allow a third party, such as a conservation group, to initiate a lawsuit to compel the Secretary to take action.

³⁶⁵ Final Rule, *supra* note 275, at 10,534.

³⁶⁶ *Id.*

³⁶⁷ Proposed Delisting Rule, *supra* note 1, at 6108 (citations omitted).

³⁶⁸ *Id.*

During the five-year monitoring period, the Service has indicated that it will use state and tribal annual wolf reports in place of the Interagency report.³⁶⁹ These counts, outlined within each state plan, all conform to the FWS breeding pair requirement and all require on the ground counting of the wolves supervised by state agency personnel.

Although the methodology theoretically conforms to the FWS criteria, both Wyoming and Idaho have encouraged the FWS to allow the states to use pack size, rather than breeding pair, for counting because it makes the task of counting significantly easier. If such a switch is made, or if the FWS allows a state to use either breeding pair or pack size, the challenge will be to identify a statistically dependable pack size that could be used as a breeding pair substitute. The FWS has indicated that a pack of nine wolves during the winter months has a 90 percent chance of containing a breeding pair,³⁷⁰ but the Service has not taken a firm stance on what pack size, if any, it would accept. Should the Service, at some point, agree to allow the substitution, the Service's decision regarding a statistically sufficient pack size could be open to criticism.

Finally, the threshold of seven breeding pair within Wyoming, but outside of park boundaries, is in direct contraction with the Defenders holding requiring that Wyoming manage for fifteen breeding pairs.³⁷¹ The Service will have to ensure that the relisting criteria within its delisting rule conform to Wyoming's population management requirements.

vii. Lack of Long-Term State Commitments

While the FWS must oversee the execution of the approved state plans for five years following delisting, there is also an implicit requirement that the Service ensure that the plans themselves focus on the long-term viability of the recovered species. Part of the required FWS determination is whether the species is threatened in the foreseeable future, which the Service prefers to apply on a case-by-case basis.³⁷² For the NRM gray wolf, the Service has stated that it is using a thirty-year window to determine whether the wolves are threatened by factors within the NRM.³⁷³ However, none of the state plans use this same timeframe, focusing instead on the mandatory five-year window. While the Service is only required to provide direct oversight of the management of the state plans for the first five years, an argument could be made that the plans themselves should reflect the same thirty-year timeframe that the Service used.

³⁶⁹ *Id.* at 6137.

³⁷⁰ *Id.* at 6108 (citations omitted).

³⁷¹ See *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160, 1172–76 (D. Mont. 2008).

³⁷² Final Rule, *supra* note 275, at 10,535.

³⁷³ *Id.*

e. Natural or manmade factors affecting its continued existence

While the assertion has been made that absent Federal protection or adequate state mechanisms there is too much public animosity to ensure viability,³⁷⁴ such an assertion is likely too vague to serve as an effective challenge a delisting decision. Defenders' Sixty-Day Notice cites both the loss of the wolf's historic range, and "continued threats within the DPS posed by illegal killing of wolves by humans openly hostile to wolves' presence in the region,"³⁷⁵ to argue that there are significant manmade factors affecting the wolf's continued existence. While this criterion works effectively as a catch-all dumping ground for wolf proponent rhetoric, it is not likely to find a prominent place in any legal challenge.

IX. RETROSPECTIVE RECOMMENDATIONS

Prior to making recommendations to the FWS on how best to repair the deficiencies of the 2008 Final Rule, it is important to take note of the difficult situation in which the FWS finds itself. Caught in the middle between not only wolf advocates and foes, but between other federal and state agencies, the Service is in an unenviable position. Recognizing that almost incomprehensible institutional and political pressure has been brought to bear upon the agency during the wolf recovery process, the circumstances have not been helped by the overwhelmingly successful breeding habits of the NRM wolves. The initial goal of 300 wolves has long since been left behind and the wolf population now numbers 1,500+ with no signs of slowing down. In the meantime, with signs of prolonged legal challenges to whatever delisting decision the Service advocates, population numbers are going to continue to climb as those challenges play out. And with an increasing wolf population comes increased conflict, increased livestock predation and increased political pressure.

In addition to these difficulties, Wyoming legally challenged FWS' disapproval of its wolf management plan in 2004. With the entire delisting process held up until Wyoming's plan came into compliance with the Service's requirements, the FWS was no doubt under additional pressure to settle with the state. As the FWS attempts to move the delisting process forward subsequent to the *Defenders* decision, the Service once again hinted that Wyoming could be left behind. This has brought threats from Wyoming's Attorney General that if that were to happen, "litigation is probable."³⁷⁶

Unfortunately, while the pressure to move the delisting process forward is understandable, the resulting 2008 Final Rule was flawed. As my old boss used to say, "You want it bad, you get it bad." And while some of the lower hanging

³⁷⁴ Defenders Comments, *supra* note 297, at 11.

³⁷⁵ 60-Day Delisting Notice, *supra* note 128, at 4-5.

³⁷⁶ Chris Merrill, *Wolf Debate Lingers into New Year*, CASPER STAR-TRIBUNE, Jan. 5, 2009 at 1.

litigation fruit has been removed, such as obvious anti-wolf rhetoric in Idaho's and Wyoming's management plans, the Final Rule still comes up short in a number of places. While the *Defenders* challenge pointed out several of the more obvious deficiencies, there are other, more legally complex aspects of the plan that are subject to challenge.

One could probably speculate about the reasons why we have arrived at this point – shrill public anti-wolf rhetoric, unreasonable state governments, intransigent agency personnel – but we are here nonetheless and the only remaining question is: what needs to be fixed so the delisting process can pass legal muster? Below is a list of deficiencies, with recommended corrections, that the FWS has an opportunity to address in its rewrite of the 2008 Final Rule. If the Service were to follow these recommendations, challenges to a subsequent delisting rule might well prove unsuccessful.

A. The FWS Should have Revised its Numerical Goals

As noted above, the FWS is, at best, elusive in stating what the minimum numerical goal should be for recovery. In fact, an accusation that the Service is playing fast and loose with these numbers would not be far off the mark. Prior to publishing the 2008 Rule, the Service should have conducted a detailed scientific analysis of the sufficiency of the 1987 recovery goals. Such a review should have conformed to NEPA rules and regulations.

B. The FWS Should have Conducted Studies, Through the EIS Process, Focused on Using an Ecosystem Basis for Determining Updated Numerical Goals

In determining these updated recovery numbers, the FWS should have backed away from enumerating goals that did not take into account the varying ecological aspects of the core recovery areas and should have used the NEPA process to conduct a SEIS. The supplement should have included scientific studies that determined the appropriate population goals for each subpopulation taking into account the specific geography and ecosystem of each area. In doing so, FWS would have received and considered the necessary public input.

By failing to allow interested parties to properly challenge and respond to its findings, the Service's actions are immediately suspect. Having completed a SEIS, there would be no need to elaborate on these goals within the Final Rule. Instead, the FWS took what could only be characterized as a shortcut by using the rulemaking process to put forth its vague new goals.

There seems little doubt that the 10/100 requirement for each area is obsolete. Even a casual assessment of the three areas shows that the harsh terrain of GNP, with its limited prey base, is simply incompatible with Yellowstone's Serengeti-like Northern Range or the vast terrain found in central Idaho. Regardless of FWS' position that an EIS is unnecessary for a delisting decision, publication of such a document is clearly appropriate, and likely necessary, when the Service

itself has acknowledged that there is at least a fifty percent variance between its initial and what the updated, but undefined, goal should be.

C. The FWS Should have Anticipated the Need to Conduct the EIS in Advance of Initiating the Delisting Process

The FWS should have, but apparently did not, recognize that a challenge to its decision not to update the 1994 EIS has a high probability of success. Further, knowing that undertaking publication of such a document would entail a significant delay in the delisting process and further recognizing that there are significant questions regarding the initial goal, the Service should have begun the EIS process several years ago. That it did not is both the fault of Service personnel and its legal advisors.

D. The FWS Should have Assumed a Leadership Role in its Relationship with the States Sufficient to Ensure that the Issues of Connectivity and Genetic Exchange were Properly Coordinated

An examination of the historical relationship between FWS and the three NRM states shows that it has been strained at times. Between Idaho's refusal to even allow its wildlife personnel to participate in the wolf reintroduction and Wyoming suing the Service over its lack of acceptance of its wolf management plan, it is clear that things have not gone smoothly. Still, beyond the draft Memorandum of Understanding published subsequent to the *Defenders* decision, there is little evidence that the FWS actively encouraged the states to work together on issues such as connectivity and genetic exchange. While the three states agreed to help facilitate development of acceptable management plans in 1999, that is not the same as working together on a regular basis to ensure that these issues were adequately addressed. Because the FWS has noted that both connectivity and genetic exchange are necessary in maintaining a viable NRM wolf population, the Service should have assumed a more active leadership role with the intent to both synchronize the efforts of the three states to ensure that the issue of connectivity was adequately addressed and to pressure the states to carry out a coordinated connectivity plan.

E. The FWS Should have Ensured Consistency Between the State Plans

The delisting process is not the proper forum for an exercise in federalism (the concept that the states should be allowed the type of autonomy from the federal government that allows them to experiment with regulations in the hopes that such experiments will result in societal advancements). Although the Secretary is tasked by the ESA to "cooperate" with the states in devising management plans,³⁷⁷ there is an implicit requirement that the FWS ensure a

³⁷⁷ 16 U.S.C. § 1535(a) (2006).

degree of uniformity in state management planning. Even a cursory examination of the three plans reveals that this did not occur. To the degree that the Service has yielded to political pressures from the states, it has left itself open to charges of making decisions for political rather than for scientific or legal reasons. This is especially true with its acceptance of the 2007 Wyoming Plan. As with connectivity and genetic exchange, the FWS could have, and probably should have, asserted a stronger leadership role in bringing the states together for the purpose of better coordinating their management plans.

F. The FWS Should have Created a DPS More Protective of the NRM Wolves Outside the Borders of the Core Populations

The DPS created by the 2008 Rule appears to be a creature of political expediency largely designed to accommodate Wyoming's desire to classify the wolf as a predator throughout most of that state. Rather than enhancing natural decolonization outside of the core recovery areas, the Rule effectively created a lop-sided island with a large kill zone in southern and eastern Wyoming. While both Montana and Idaho will oversee all hunting of wolves within their borders, thus providing the wolves with a degree of protection, Wyoming's plan continues to classify wolves as predators in approximately ninety percent of the state.³⁷⁸ The FWS could have, and should have, stood up to Wyoming and required it to treat wolves as trophy animals throughout the state. In line with that, the Service should have confined the borders of the DPS to the area surrounding the wolf subpopulations and the land in between.

G. The FWS Should have Modified and Explained its Relisting Trigger to Reflect the Updated Goals

Criticism that there should be clearly defined criteria for relisting in the event that state management falls short is valid. While the FWS approaches this task in a cavalier fashion, future threats to the NRM wolves, including state mismanagement, must be addressed and a plan of action identified. And, as with all of its decisions, the FWS is obligated to explain how it arrived at its conclusions; if for no other reason than to inform a reviewing court that its decision was not arbitrary or capricious. With that in mind, the Service should have included an explanation of how and why it set the relisting criteria that it did. Additionally, in the event that the initial 1987 goals are deemed insufficient, the relisting criteria should be changed to reflect the new goals and the criteria should be accompanied by a detailed explanation.³⁷⁹

³⁷⁸ *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160, 1172 (D. Mont. 2008).

³⁷⁹ An adequate and detailed explanation of how an agency arrived at its decision is required in the record in order to allow a reviewing court to determine whether the agency's decision is arbitrary and capricious under the APA's 706(2) (5 U.S.C. 706(2)) standard. In the absence of such an explanation, a reviewing court will be forced to compel the agency to provide the reasoning used to

H. The FWS Should have Required the States to Commit to Long-Term Recovery Goals

Throughout the 2008 Final Rule, the FWS discusses future threats to the NRM wolves using either a thirty year timeline for the purposes of foreseeability³⁸⁰ or 100 years for the purposes of genetic viability.³⁸¹ However, the Service notes that the states are only required “to evaluate the wolf population status annually for the first five years after delisting.”³⁸² It is difficult to reconcile these two concepts and the FWS should have required the states to at least analyze what the Service perceives to be long-term foreseeable threats to the NRM wolves with the state plans. If the Service was required to consider the long-term viability of the wolves (thirty or 100 years) in analyzing the necessary delisting factors, it seems logical to require the state plans to also address that long-term viability. In analyzing both the 2008 Rule and the three state plans, the reader is left asking the question: what happens after five years? The FWS should have required the plans to address that issue.

CONCLUSION

When Congress passed the Endangered Species Act in 1973, there is no question that they could not possibly have anticipated the controversy that would result from enactment of provisions of the act in cases such as the NRM wolf. It is safe to say that in the vast majority of endangered species listings, of which there have been thousands, very few individuals outside of discrete scientific circles, or directly affected landowners, would be familiar with a listed species or the impact that a specific listing has. That is not the case with the NRM gray wolf.

In abstract terms, it is difficult to imagine that anyone in the NRM region even gave it a second thought when the gray wolf was listed as endangered in 1974. After all, the wolf was listed throughout the lower forty-eight states, not in any one specific region. But when wolf advocates began specifically targeting the Montana/Idaho/Wyoming area for reintroduction, the entire landscape changed dramatically.

Although ranching may not have the same economic impact that it once had in the West, it is an essential part of the West’s culture and likely always will be. Ranching conjures up images of cowboys on horseback pushing a herd of cattle down a road enveloped in a cloud of dust; of livestock peacefully grazing in a wide-open pasture of bright green grass; of fields of hay being mowed and made into bales as far as the eye can see; of John Wayne westerns and Louis L’Amour novels. But these romantic images do not portray how truly difficult it is to

reach its decision. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 417–21 (1971).

³⁸⁰ Final Rule, *supra* note 275, at 10,535.

³⁸¹ *Id.* at 10,553.

³⁸² *Id.* at 10,540.

make a living raising livestock or how deeply ingrained ranching is in communities throughout the NRM States.

Because ranching is such an integral part of the NRM culture, the ranching community has a disproportionate amount of political clout in relationship to the industry's economic impact, both locally and within their national congressional delegations. All politics are local and for an NRM official to be reelected, that official must either avoid going head to head with the ranching community or, more likely, be openly supportive of ranching issues. That makes it understandable why, with ranchers adamantly opposed to the presence of wolves, a sparsely populated rancher-friendly state like Wyoming would push the envelope in resisting wolf reintroduction. It makes perfect political sense for politicians in the state to tell the FWS: You can make me obey the law, but you can't make me like it and you can't stop me from using my political clout to get what I want. Understandable – yes; permitted – no.

The pressure that the ranching community exerted has had, as one would expect, a significant influence on how each state proposed to manage its wolves. In some cases, states initially refused to even participate in the management effort or published management plans that began by stating that the wolves were not welcome in the state. In states like Wyoming and Idaho, this local pressure easily influenced their congressional delegation to strongly and successfully resist reintroduction for over a decade. It is also this type of local pressure that led to the 10(j) concept in the first place, and that made it certain that if the FWS was going to introduce wolves into the NRM region, they were only going to do so if they were classified as non-essential and experimental.

But while this level of political influence is both understandable and even acceptable on the local level, a federal agency such as the FWS has a statutory duty to ensure that this influence does not prevent the requirements of the ESA from being fully complied with. As it was required to do, early in the reintroduction process the FWS made it clear to Idaho and Wyoming that their plans were not in compliance with the ESA and that if the states wanted delisting to occur, they would have to follow the law. That the Service eventually caved in to political pressure is unfortunate.

In reality, what exactly constitutes the statutory duty of the FWS is often difficult to discern. The truth of the matter is that the agency has a significant amount of discretion to determine how best to meet its legal obligations under the Act. Statutory language is seldom exact and, as such, is often open to interpretation. As long as the Service's interpretation of the statute is reasonable, it is allowed considerable leeway. So too, scientific data is often unclear and is seldom universally accepted. Scientists often legitimately disagree on the meaning and significance of available data, and because of that agency officials are often required to either chose between different scientific opinions, or are required to craft their own interpretation of what the data means. Again, as long as the Service's selection or interpretation is reasonable, the

agency is given that choice.

The problem occurs when local political pressures bleed over into the decisionmaking process to the point where an agency makes decisions that fall out of bounds; when accommodations are made that are clearly not in accordance with the requirements of the Act; or when the agency fails to carry out its statutory mandate. Unfortunately, the final delisting decision has several instances of this.

In some cases, the Service simply failed to do an adequate job either anticipating a requirement or explaining its position. Examples of these are the decision to forego a SEIS, the lack of new and appropriate recovery goals for each of the three recovery areas, and the failure to ensure coordination between the states in the areas of interconnectivity and genetic interchange. These oversights, while unfortunate, can be corrected.

Other decisions are more problematic. The biggest area of concern, and the one with the most on-the-ground impact, is designation of a DPS area that allows Wyoming to remove protections from wolves in over ninety percent of the state. It is difficult to interpret this as anything other than a concession to political pressure in clear violation of the requirements of the Act. Without going into great detail, the *Defenders* court was equally troubled by FWS' approval of the 2007 Wyoming plan, noting that the plan was substantially similar to the 2003 plan which FWS rejected.³⁸³ Political pressure also appears to be behind the 10(j) modifications that allow a state to selectively remove wolves from an area to accommodate hunter-friendly state ungulate goals. That this modification was specifically required in the FWS/Wyoming settlement, which occurred in advance of passage of the 10(j) rule change, makes it at least suspect.

If the Obama administration does not do what it should to correct the oversights and the out-of-bounds politically-motivated portions of the 2008 Rule, pro-wolf groups will continue to seek legal recourse in their attempt to force the FWS to bring its delisting rule into compliance with the law. From the perspective of non-lawyers, the process of filing a lawsuit to challenge an agency decision is a bit like calling in the referees after the football game is over to decide if any fouls were committed. If there were, and if they were significant enough, the teams have to go back onto the field and replay that portion of the game to see who wins. It is, to say the least, a bit cumbersome.

That we accept this resort to the courts as an integral part of the process is evidence of just how prevalent politics is in agency decision-making. That we would expect the pro-ranching groups to file suit if the FWS decision was tilted in the opposite direction only shows that our acceptance plays no favorites. While we complain about the cost and the delay and the waste of these lawsuits, we also know that both sides of the aisle depend on the legal system to filter out

³⁸³ See *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160, 1172–75 (D. Mont. 2008).

the adversary's political influence in the hopes of achieving an equitable final decision. If there's a better solution to this problem it is far from obvious.

It didn't take a psychic to foretell that the NRM gray wolf delisting decision – *any* delisting decision – was going to be challenged in court. And it doesn't take a psychic to foretell that there will be more lawsuits to follow. In a decision as controversial as the wolf reintroduction, it is unrealistic to expect that either side will refrain from using every possible means, including politics or the courts, to influence the final outcome. But between the *Defenders* decision, and the change in administration, the FWS now has the chance to make its delisting rule relatively judgment proof. Whether it will take it or not is another matter.

One can't help but wonder what Aldo Leopold would think of all the hoopla surrounding the NRM wolf reintroduction. Certainly he would be astonished at how complex the modern agency decisionmaking process is, with its multi-million dollar and multi-year Environmental Impact Statements, its convoluted informal rule making procedures and its protracted court battles. Perhaps he would be disappointed and even disgusted with the bifurcated partisan political system and how deeply that political divide infects federal agencies that should be insulated from such influence. But perhaps, in the end, he would be happy to sit with a spotting scope on a beautiful spring day in the Lamar Valley content in the knowledge that – at least in that one place, on that one day, in spite of all the nonsense – we got it right. And with a shrug of his shoulders he might tell himself that how this all plays out is less important than the fact that it is playing out at all. Of that, both the wolf and the mountain would surely agree.
