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Edward A. Fitzgerald*

PREMATURE GRAY WOLF DELISTING

INTRODUCTION

On November 3, 2020 the U.S. Fish and Wildlife Service (“FWS”)¹ issued “Removing the Gray Wolf (*Canis Lupus*) From the List of Endangered and Threatened Wildlife” (“Final Rule”) delisting the gray wolf in forty-eight states, except for the Mexican gray wolf in the Southwest.² This Final Rule returned gray wolf management to the states. Wolf delisting was a last-minute gift from the Trump administration to conservative voters, particularly hunters, trappers, and livestock owners right before the November 2020 presidential election. Hunters and trappers view the wolf as a competitor for the game that they want to kill, while livestock owners fear wolf depredation of their stock. It was also the culmination of a twenty-year effort by the FWS to delist the gray wolf.

Conservation groups have filed lawsuits challenging the delisting.³ These lawsuits allege that the gray wolf cannot be delisted because it is still missing from significant portions of its range.⁴ In promulgating the Final Rule, the FWS focused solely on the gray wolf populations of the Western Great Lakes (“WGL”) and Northern Rocky Mountain (“NRM”), but did not consider the importance of peripheral populations in the Pacific Northwest, central Rockies, and Northeast.⁵ The FWS supported its limited focus by arguing that the gray wolf had recovered and

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1. The Secretary of Interior is granted primary responsibility for implementing the ESA with respect to terrestrial species. 16 U.S.C. § 1532(15); *see* REORGANIZATION PLAN NO. 4 OF 1970, 5 U.S.C. APP. 1 REORG. PLAN 4 1970 §§ 1-3. The Secretary of Commerce has the same responsibility with respect to marine and anadromous fish species. 16 U.S.C. § 1532(15); REORGANIZATION PLAN NO. 4 OF 1970, 5 U.S.C. APP. 1 REORG. PLAN 4 1970 §§ 1-3. These responsibilities have been delegated the FWS and National Marine Fisheries Service respectfully. 50 C.F.R. § 402.01(2021). *See also* Jason M. Patlis, *Recovery, Conservation, and Survival under the Endangered Species Act: Recovering Species, Conserving Resources, and Saving the Law*, 17 PUB. LAND & RES. L. REV. 55, 59 n.10 (1996).

2. Endangered and Threatened Wildlife and Plants, 85 Fed. Reg. 69778, 69778 (Nov. 3, 2020) (codified at 50 C.F.R. pt. 17).

3. *Natural Resources Defense Council v. Dept. of Interior*, F.W.S., No. 4:21-cv-00561-JSW, Def. of Wildlife v. F.W.S., No. 4:21-cv-00344-JSW, *WildEarth Guardians v. Secretary of Interior*, No. 4:21-cv-00349-JSW, (N.D. Cal. Feb. 10, 2022).

4. Plaintiffs Joint Notice of Motion, Motion for Summary Judgment, and Memorandum in Support of Summary Judgment at 10-13, *Defs. of Wildlife v U.S. Fish & Wildlife Serv.*, N.D. Cal. (2021) (No. 4:21-cv-00344-JSW).

5. *Id.*

faced no danger in the WGL and NRM metapopulations.⁶ Gray wolves in the peripheral regions are not important to the survival of the species, according to the FWS.⁷

Gray wolves have recovered in the WGL and NRM regions, but are still facing threats under aggressive state management. Gray wolves in the peripheral regions have not yet recovered. Federal delisting may jeopardize their recovery under state management. This article posits that the premature delisting of the gray wolf violates the Endangered Species Act (“ESA”). The FWS definition of “the significant portion of the range” was mistaken. The FWS focused solely on the wolf’s current range but failed to consider portions of the wolf’s historic range where suitable habitat is present. The FWS employed flawed distinct population segment (“DPS”) strategies to delist the wolf.⁸ The FWS failed to consider significant portions of the wolf’s current range where suitable habitat is present. And the FWS delegated wolf management authority to states, which have questionable commitments to wolf recovery. This article will extensively analyze prior judicial decisions and show the faulty reasoning behind the gray wolf delisting.

I. Legal Standard

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”⁹ When drafting the law, Congress recognized that the prioritization of economic growth and development above conservation has led to the depletion and extinction of “various species of fish, wildlife, and plants in the United States.”¹⁰ Congress enacted the ESA in 1973 to

6. *Id.* at 13-18. “A metapopulation consists of a group of separated populations of the same species which interact at some level.” Wikipedia, <https://en.wikimacnipedia.org/wiki/Metapopulation> (last visited March 2, 2022). A meta-population is considered to be more secure than isolated populations “because adverse impacts experienced by one of the subpopulations resulting from genetic drift, demographic shifts, and local environmental fluctuations can be countered by occasional influxes of individuals and their genetic diversity from other components of the meta-population.” Dr. Daniel MacNulty, Summary Report of Independent Peer Reviews for the U.S. Fish and Wildlife Service Gray Wolf Delisting Review, at 7 (2019) [hereinafter Dr. Daniel MacNulty].

7. *Id.*

8. A DPS is defined as a group of vertebrate animals that is both discrete from and significant to the taxon as a whole. The population is discrete if it is “markedly separate from other populations of the same taxon, as a consequence of physical, physiological, ecological, or behavior factors,” or “it is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of sec 4(a)(1)(D) of the Act.” Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4725 (Feb. 2, 1996). The significance of the DPS is determined by its importance to the taxon as a whole. Indicators include, but are not limited to, “the use of an unusual or unique ecological setting, a marked difference in genetic characteristics, or the occupancy of an areas that, if devoid of species, would result in a significant gap in the range of the taxon.” *Id.* at 4724-25. *See also* Defs. of Wildlife v. U.S. Dep’t of the Interior, 354 F. Supp.2d 1156, 1160 (D. Or. 2005); Humane Soc. of U.S. v. Zinke, 865 F.3d 585, 601-602 (D.C. Cir. 2017).

9. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

10. 16 U.S.C. § 1531(a).

“provide a program for the conservation of . . . endangered species and threatened species.”¹¹

To list a species as a protected under the ESA, the FWS first must identify the “species” at issue, which the ESA defines as a species, subspecies, or “distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.”¹² Then, the FWS must determine if the species is to be listed either as endangered species or threatened species based on five factors: “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 mechanisms; or 5) other natural or manmade factors affecting its continue existence.”¹³ This analysis must be made “solely on the basis of the best scientific and commercial data available.”¹⁴

The same five-factors are used for both listing and delisting a species.¹⁵ After the FWS delists a species, it must monitor the species for at least five years.¹⁶ If the monitoring reveals a significant risk to the species, the FWS may relist the species using the ESA’s emergency procedures.¹⁷

Federal courts review FWS listing and delisting decisions under the Administrative Procedures Act (“APA”).¹⁸ Pursuant to the APA, agency action must not be “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁹ The APA requires the court to conduct “a thorough, probing, in-depth review” of the challenged action.²⁰ The court must ensure the agency “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action.”²¹ Agency action must not “be inconsistent with the governing statute.”²² Administrative action violates the APA when the agency “has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”²³ Contradictory statements by the agency also constitute arbitrary and capricious action.²⁴ The agency must

11. 16 U.S.C. § 1531(b). An endangered species is a species that is “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). A threatened species is a species that is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20).

12. 16 U.S.C. § 1532(16).

13. 16 U.S.C. § 1533(a)(1).

14. 16 U.S.C. § 1533(b)(1)(A).

15. 16 U.S.C. § 1533(c)(2).

16. 16 U.S.C. § 1533(g).

17. *Id.*

18. *See* 5 U.S.C. § 706(2)(A).

19. *Id.*

20. *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

21. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30 (1983).

22. *Defs. of Wildlife v. EPA*, 420 F.3d 946, 959 (9th Cir. 2005).

23. *Motor Vehicle Mfrs. Ass’n of U.S., Inc.*, 463 U.S. at 43.

24. *Nat’l Parks Conservation Ass’n v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015).

rationally explain its findings regarding scientific judgments within its area of expertise.²⁵ Courts will “not rubber stamp . . . administrative decisions that [they] deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying the statute.”²⁶

II. The Battle to Delist the Gray Wolf

The gray wolf at one time occupied most of the continental U.S.²⁷ The wolf population declined due to multiple factors: the expansion of human settlement, the move westward, the growth of agriculture and livestock industries, trapping and hunting, and federal and state predator control.²⁸ By the 1970s, the gray wolf had been extirpated from more than 95% of its historic range.²⁹ The only remaining substantial wolf population was located in Minnesota.³⁰ Following the enactment of the ESA in 1973, various subspecies of the gray wolf were granted protection: the Northern Rocky Mountain wolf in 1973, the eastern timber wolf in 1974, the Mexican gray wolf in 1976, and the Texas gray wolf in 1976.³¹ In 1978, the FWS moved away from subspecies protection and listed the gray wolf as an endangered species throughout the continental U.S., except Minnesota, where the gray wolf was downlisted to a threatened species.³²

The gray wolf population expanded to multiple regions, creating two metapopulations. The Western Great Lakes metapopulation was formed when wolves from Minnesota migrated to northern Wisconsin and northern Michigan.³³ Minnesota gray wolves also dispersed to North and South Dakota, Illinois, and Missouri.³⁴ Gray wolves from Canada naturally recolonized northwest Montana.³⁵ FWS reintroduced gray wolves into Wyoming and Idaho in 1995-1996 as a nonessential experimental population under the ESA.³⁶ These wolves prospered,

25. *Greater Yellowstone Coal. v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011).

26. *Nat. Res. Def. Council, Inc. v. Pritzker*, 828 F.3d 1125, 1139 (9th Cir. 2016).

27. Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife, 68 Fed. Reg. 15,804, 15,805 (Apr. 1, 2003) (to be codified at 50 C.F.R. pt. 17).

28. *Id.*

29. *Id.*

30. *Id.*

31. Conservation of Endangered Species and Other Fish or Wildlife, 38 Fed. Reg. 14678 (June 4, 1973); Taking Possession, Transportation, Sale, Purchase, Barter, Exportation, and Importation of Wildlife, 39 Fed. Reg. 1158,1175 (Jan. 4, 1974); Endangered and Threatened Wildlife and Plants, 41 Fed. Reg. 17736, 17737 (Apr. 28, 1976); Endangered and Threatened Wildlife and Plants 41 Fed. Reg. 24062, 24066 (June 14, 1976).

32. Reclassification of the Gray Wolf in the U.S. and Mexico, 43 Fed. Reg. 9607 (Mar. 9, 1978).

33. Final Rule to Reclassify and Remove the Gray Wolf From the List of Endangered and Threatened Wildlife in Portions of the Conterminous U.S., 68 Fed. Reg. 15804, 15810 (April 1, 2003) (to be codified at 50 C.F.R. pt. 17).

34. *Def. of Wildlife v. Sec’y, U.S. Dep’t of the Interior*, 354 F. Supp. 2d 1156, 1161 (D. Or. 2005).

35. Final Rule to Reclassify and Remove the Gray Wolf, 68 Fed. Reg. at 15810.

36. Section (j) permits the Secretary of Interior (SOI) to introduce an experimental population of an endangered or threatened species, which is “wholly separate geographically from nonexperimental populations of the same species” and “outside the current range of such species, if the SOI determines that such release will further the conservation of such species.” 16 U.S.C. § 1539(j)(1)-(2)(A). Prior to the release, the SOI must decide “whether or not such population is essential to the continued existence of an

dispersed into eastern Washington and eastern Oregon and formed the Northern Rocky Mountain (NRM) metapopulation. The return of gray wolf to a small part of its historic range was considered an “exciting success story.”³⁷

The FWS in 2000 began its effort to delist the gray wolf across the nation and in various regions, but its numerous attempts were blocked by federal courts.³⁸ In 2011, Congress enacted Section 1713 of the Department of Defense and Full-Year Continuing Appropriations Act, which delisted the wolves in the Northern Rocky Mountain Distinct Population Segment (“NRM DPS”), except those in Wyoming, and precluded judicial review of the regulation.³⁹ The U.S. District Court for the District of Montana and the Ninth Circuit upheld the constitutionality of the appropriation rider.⁴⁰ In 2012, the FWS delisted gray wolves in Wyoming.⁴¹ The U.S. District Court for the District of Columbia invalidated the rule,⁴² but the D.C. Circuit reversed the district court.⁴³ Wyoming’s wolves became part of the delisted NRM DPS.

The FWS established and simultaneously delisted the gray wolf in the Western Great Lakes DPS in 2011.⁴⁴ The U.S. District Court for the District of Columbia reviewed and rejected the proposal in 2014.⁴⁵ The D.C. Circuit upheld the district court decision in 2017.⁴⁶

The FWS proposed delisting all gray wolves on March 15, 2019.⁴⁷ The Final Rule issued on November 3, 2020 assessed the status of gray wolf in three different configurations: 1) the threatened Minnesota and endangered “44 state

endangered species or a threatened species.” 16 U.S.C. § 1539(j)(2)(B). The experimental population is treated as a threatened species and is therefore subject to 4(d) regulation. 16 U.S.C. § 1539(j)(C).

37. ADRIAN P. WYDEVAN ET AL., *RECOVERY OF GRAY WOLVES IN THE GREAT LAKES REGION OF THE UNITED STATES: AN ENDANGERED SPECIES SUCCESS STORY* (1st ed. 2009).

38. *See* *Def. of Wildlife v. Sec’y, U.S. Dep’t of the Interior*, 354 F. Supp. 2d 1156 (D. Or. 2005) (vacating the 2003 rule splitting gray wolves into three groups); *Nat’l Wildlife Fed’n v. Norton*, 386 F. Supp. 2d 553 (D. Vt. 2005) (vacating 2003 rule splitting gray wolves into three groups); *Humane Soc’y of U.S. v. Kempthorne*, 579 F. Supp. 2d 7 (D.D.C. 2008) (vacating 2007 rule delisting WGL DPS); *Def. of Wildlife v. Hall*, 565 F. Supp. 2d 1160 (D. Mont. 2008) (vacating 2008 rule delisting gray wolf in NRM DPS except for Wyoming); *Humane Soc’y of U.S. v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017) (upholding vacatur of 2011 delisting of WGL DPS).

39. Department of Defense and Full-Year Continuing Appropriations Act, Pub. L. No. 112-10, 125 Stat. 38, 125 (2011). The Northern Rocky Mountain Distinct Population Segment consists of gray wolves in Idaho, Montana, Wyoming, eastern Washington, eastern Oregon, and north-central Utah.

40. *All. for the Wild Rockies v. Salazar*, 800 F. Supp. 2d 1123 (D. Mont. 2011); *All. for the Wild Rockies v. Salazar*, 672 F.3d 1170 (9th Cir. 2012). For a full analysis, *see* Edward A. Fitzgerald, *Alliance for Wild Rockies v. Salazar: Congress Behaving Badly*, 25 VILL. ENV’T L. J. 351 (2014).

41. *Removal of the Gray Wolf in Wyoming From the Federal List of Endangered and Threatened Wildlife*, 77 Fed. Reg. 55530 (Sept. 10, 2012) (to be codified in 50 C.F.R. pt. 17).

42. *Def. of Wildlife v. Jewell*, 68 F. Supp. 3d 193 (D.D.C. 2014); *see* Edward A. Fitzgerald, *Defenders of Wildlife v. Jewell: Wyoming Wolves Receive a Warranted Reprieve—But for How Long?*, 45 ENV’T L. REP. 10447 (2015).

43. *Def. of Wildlife v. Zinke*, 849 F.3d 1077, 1093 (D.C. Cir. 2017).

44. *Final Rule Revising the Listing of the Gray Wolf in the Western Great Lakes*, 76 Fed. Reg. 81665 (Dec. 28, 2011) (to be codified at 50 C.F.R. pt. 17).

45. *Humane Soc’y of U.S. v. Jewell*, 76 F. Supp. 3d 69 (D.D.C. 2014).

46. *Humane Soc’y of U.S. v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017).

47. *Removing the Gray Wolf (Canis lupus) From the List of Endangered and Threatened Wildlife*, 84 Fed. Reg. 9648 (Mar. 15, 2019).

entity,” separately; 2) a “combined listed entity” that aggregated endangered and threatened species together; and 3) a “lower 48 state entity,” that lumps endangered and threatened areas with the congressionally delisted NRM population.⁴⁸ The Mexican wolf was not included in the delisting rule.

The FWS concluded that gray wolves in the WGL have met recovery goals. Other gray wolves in the Pacific Northwest, central Rocky Mountains and Northeast can also be delisted because they are “not necessary for the recovered status of the combined listed entity”⁴⁹ or the “lower 48 United States entity.”⁵⁰ Conservation groups have filed lawsuits in the U.S. District Court for the District of Northern California, alleging the delisting rule violates the ESA.⁵¹

III. Significant Portion of the Range

In the ESA, “significant portion of its range” is used to describe the area where the FWS focuses its analysis to determine whether to list a species if it is missing from that significant portion of its range or delist the species if it has recovered in that significant portion of its range.⁵² The FWS determined that the gray wolf’s significant portion of range to be the proposed WGL and NRM DPSs.⁵³ According to the FWS, these were the only areas necessary for the survival of the species.⁵⁴ This meant that the FWS amalgamated the wolf populations in the peripheral areas in the Pacific Northwest and central Rockies with these two core areas. The FWS focused solely on the gray wolf’s current range and did not consider the loss of its historic range. Each of these actions was unreasonable.

A. The Meaning of “Significant Portion of the Range”

To determine significant portions of gray wolf’s range, the FWS assessed the significance of current wolf populations by using Shafer and Stein’s metric of resiliency, redundancy, representation (“3rs”).⁵⁵ Resiliency is “the ability [of a species] to withstand demographic and environmental variation,” it is positively related to population size and growth rate and maybe influenced by connectivity among populations.⁵⁶ Redundancy is related to “the ability of species to withstand catastrophic events” it involves “spreading risk among multiple populations to minimize the potential loss of the species from catastrophic events.”⁵⁷ And it is

48. Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. 69778, 69784 (Nov. 3, 2020) (codified at 50 C.F.R. pt. 17).

49. *Id.* at 69886.

50. *Id.* at 69893.

51. Nat. Res. Def. Council Inc. v. Dep’t. of Interior, No. 21-CV-00561-JSW, 2022 WL 499838 (N.D. Cal. Feb. 10, 2022); Def. of Wildlife v. U.S. Fish & Wildlife Serv., No. 21-CV-00344-JSW, 2022 WL 499838 (N.D. Cal. Feb. 10, 2022); WildEarth Guardians v. Sec. of Interior, No. 21-CV-00349-JSW, 2022 WL 499838 (N.D. Cal. Feb. 10, 2022).

52. 16 U.S.C. §1532.

53. Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. at 69853.

54. *Id.*

55. *Id.* at 69854.

56. *Id.* at 69791, 69825.

57. U.S. FISH & WILDLIFE SERV., SPECIES STATUS ASSESSMENT FRAMEWORK 13 (3.4 2016).

achieved “by having multiple, resilient populations distributed within the species’ ecological settings and across the specie’s range.”⁵⁸ Representation is defined as “the ability of a species to adapt to changing environmental conditions over time.”⁵⁹ It is dependent upon “the breadth of genetic and environmental diversity within and among populations.”⁶⁰

Using the 3rs, the FWS determined that only the WGL and NRM DPSs constituted the significant portions of the gray wolf’s range. The FWS determined that wolves in Pacific Northwest, central Rockies, and Northeast are not “significant under any reasonable definition of ‘significant’” because they are “not biologically meaningful” to the gray wolf entity in terms of its “resiliency, redundancy, or representation.”⁶¹ Wolves in these peripheral areas only occur in small numbers and contain few breeding pairs.⁶²

But the FWS decision was inconsistent with the Shafer and Stein model.⁶³ Shafer and Stein assume the species should be present with many populations arrayed across a range of ecosystems to ensure survival.⁶⁴ Representation does not just focus on the population as whole but is also concerned with the ecological role of species in their particular portion of the range and whether that particular range contains unique ecosystems.⁶⁵ Wolves play an important role in managing the ecosystem.⁶⁶ Premature delisting will preclude wolves from performing their ecological functions in various habitats because of state sanctioned human-caused mortality.⁶⁷

Representation and resiliency also depend on taxonomic and genetic diversity.⁶⁸ Shafer and Stein stated “the principle of representation . . . will require identifying conservation targets not simply as species and communities but as the complexes of populations, communities, and environmental settings that are the true weave of biodiversity.”⁶⁹ Efficient wolf management within an ecosystem helps preserve genetic possibilities.⁷⁰ Protecting gray wolves until they are able to occupy

58. *Id.*

59. *Id.* at 12.

60. *Id.*

61. Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. at 69885.

62. *Id.*

63. Letter from 115 Scientists to Sec. of Interior, Deborah Haaland (May, 13 2021) (on file at ResearchGate) (regarding Scientists in Support of Reinstating Federal Protections of the Gray Wolf) [hereinafter Letter]; see Press Release, Center for Biological Diversity, 115 Top U.S. Wolf Experts Urge Biden Administration to Restore Federal Protections for Gray Wolves (May 13, 2021) (on file with author).

64. Letter, *supra* note 63.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. CHARLES CARROLL, PEER REVIEW OF USFWS’S DRAFT BIOLOGICAL REPORT AND PROPOSED DELISTING RULE at 12 (2019) in ATKINS NORTH AMERICA, INC., SUMMARY REPORT OF INDEPENDENT PEER REVIEWS FOR THE U.S. FISH AND WILDLIFE SERVICE GRAY WOLF DELISTING REVIEW (2019).

70. *Id.*

unoccupied suitable habitat in their historic range will help to conserve biodiversity and meet the 3rs for the species.⁷¹

The FWS, dealing with other DPS, recognized “peripheral populations can possess slight genetic or phenotypic divergences from the core population” that “may be central to the species survival in face of environmental change.”⁷² However, the FWS ignored the importance of peripheral populations and their genetic contributions to the gray wolf’s survival.

The FWS did not address the genetic diversity or demographics of the gray wolf across the U.S.⁷³ The FWS presumes the gray wolf population is single metapopulation with little significant variation across the country.⁷⁴ Scientists point out that wolves disperse widely and can adapt to different habitats. Wolves in the NRM and WGL will migrate and occupy suitable habitat in other areas, so the minimal presence of wolves in other peripheral areas is not relevant.⁷⁵

The FWS final rule is inconsistent with the best available science. Dr. Carroll, a peer reviewer, points out there is “substantial genetic and ecotypic variation within the gray wolf metapopulation”⁷⁶ that is “driven by historical biogeographic factors, isolation by distance and associated with particular ecosystems.”⁷⁷ Studies show that North American wolves vary morphologically and genetically on local scale.⁷⁸ The unique local environment allows wolves to adapt to changing conditions.⁷⁹ Such local factors must be considered before delisting.⁸⁰ Furthermore, the severity of genetic threats differs between large and small populations.⁸¹

The FWS dismissed the importance of peripheral populations because of their small numbers and few breeding pairs. The FWS recognized that wolves in the Pacific Northwest and central Rockies “may be at greater risk from human caused mortality or from factors related to the small number of individuals.”⁸² Yet, the FWS determined these wolves were not “meaningful” to the 3rs.⁸³ This conflates two

71. *Id.*

72. Endangered Species Status for Southern Mountain Caribou Distinct Population Segment, 84 Fed. Reg. 52632, 52604 (Oct. 2, 2019); *see* Plaintiff Joint Notice of Motion, Motion for Summary Judgment, and Memorandum in Support of Summary Judgment at 24, *Def. of Wildlife v. U.S. Fish & Wildlife Serv.*, N.D. Cal. (2021) (No. 4:21-cv-00344-JSW).

73. CARROLL, *supra* note 69, at 6, 17.

74. *Id.* at 17.

75. *Id.*

76. CARROLL, *supra* note 69, at 17.

77. *Id.* at 7.

78. *Id.* at 17; Bridgett M. vonHoldt et al., *A Genome-Wide Perspective on the Evolutionary History of Enigmatic Wolf-Like Canids*, 21 GENOME RESEARCH 1294 (2011); Rena M. Schweizer et al., *Genetic Subdivision and Candidate Genes Under Selection in North American Gray Wolves*, 25 MOLECULAR ECOLOGY 380 (2016); L. E. Carmichael et al., *Historic and Ecological Determinants of Genetic Structure in Arctic Canids*, 16 MOLECULAR ECOLOGY 3466 (2007).

79. CARROLL, *supra* note 69, at 9.

80. *Id.* at 17.

81. *Id.* at 7-8.

82. Removing the Gray Wolf (*Canis Lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. 69778, 69881 (Nov. 3, 2020) (to be codified in 50 C.F.R. pt. 17).

83. *Id.* at 69881-82.

prongs of listing inquiry—the significance of the range and the extinction risk there—virtually insuring that peripheral gray wolves at most risk of extinction will never meet FWS standards because they do not occupy a significant portion of the range.⁸⁴

The FWS’s equating the “significant portion of the range” with “all of the range” is redundant. The FWS conflation of the “significant portion of the range” with all of the wolf’s current range rendered the statutory text superfluous.⁸⁵ As discussed below, this interpretation has been rejected by the courts.

1. *Defenders of Wildlife v. Norton*

The Ninth Circuit addressed the meaning of “significant portion of the range” (“SPR”) in *Defenders of Wildlife v. Secretary of Interior Norton*, which dealt with FWS refusal to list the flat-tailed horned lizard as an endangered species.⁸⁶ DOW brought suit, arguing that the lizard’s private land habitat constituted a significant portion of its range where its survival was in jeopardy.⁸⁷ The Secretary of Interior (“Secretary”) responded that a species can only be protected if it “faces threats in enough key portions of its range that the entire species is in danger of extinction, or will be in the foreseeable future.”⁸⁸ The Secretary “assume[d] that species is endangered in a significant portion of its range only if endangered everywhere.”⁸⁹ This interpretation became known as the clarification interpretation.⁹⁰

The Ninth Circuit did not find the statutory text illuminating, determining that the phrase “significant portion of its range” is an oxymoron because “extinction suggests total rather than partial disappearance.”⁹¹ According to the court, the statutory language was “inherently ambiguous, as it appear[ed] to use language in a manner in some tension with ordinary usage.”⁹²

The Ninth Circuit rejected the FWS interpretation, which focused on the risk of extinction to the species as a whole. This interpretation wrote the SPR language out of statute and rendered the SPR language superfluous.⁹³ The court

84. Plaintiffs Joint Notice of Motion, Motion for Summary Judgment, and Memorandum in Support of Summary Judgment at 26, *Defs. of Wildlife v U.S. Fish & Wildlife Serv.*, N.D. Cal. (2021) (No. 4:21-cv-00344-JSW).

85. See *Defs. of Wildlife v. Norton*, 258 F.3d 1136, 1142 (9th Cir. 2001).

86. *Id.* at 1137.

87. *Id.* at 1140-41.

88. *Id.* at 1141.

89. *Id.*

90. Kristyn Judkins, *Deciphering the ESA’s Enigmatic SPR Phrase*, ENV’T, NAT. RES., & ENERGY L. BLOG, August 19, 2020.; see U.S. Dep’t of Interior, M-37013, Opinion Letter on The Meaning of In Danger of Extinction Throughout All or a Significant Portion of Its Range, at 2 (Mar. 16, 2007).

91. *Defs. of Wildlife v. Norton*, 258 F.3d 1136, 1142 (9th Cir. 2001).

92. *Id.*; Ryan Jenness, *Defenders of Wildlife v. Norton: “Extinction” Under the ESA Construed Favorably to Conservation Efforts*, 15 TUL. ENV’T L. J. 143, 147 (2001); see also Linda C. Maranzana, *Defenders of Wildlife v. Norton: A Closer Look at the “Significant Portion of Its Range” Concept*, 29 ECOLOGY L. Q. 263, 269 (2002).

93. *Defs. of Wildlife*, 258 F.3d. at 1142.

followed “a natural reading . . . which would give effect to all of the [the statutes] provisions.”⁹⁴

The Ninth Circuit held “that a species can be extinct ‘throughout a significant portion of its range’ if there are major geographic areas in which it is no longer viable but once was.”⁹⁵ The court required the FWS to analyze the status of the flat-tailed horn lizard on 34% of its historic range, which constituted a significant portion of its range.⁹⁶

2. *Tucson Herpetological Society v. Salazar*

The FWS evaluation of the significant portion of the flat tailed horned lizard’s range continued to be litigated. The Secretary again refused to protect the lizard because it was not in danger of extinction in its current range.⁹⁷ The U.S. District Court for Arizona in *Tucson Herpetological Society v. Salazar*,⁹⁸ determined that the Secretary can list the lizard if it is endangered in a significant portion of its range, even if it is not threatened in its current range. The district court ruled that the Secretary must consider the historic range of the lizard and explain why the loss of historic range is insignificant.⁹⁹ On appeal, the Ninth Circuit reaffirmed its earlier decision that the Secretary must explain why unoccupied areas of lizard’s historic range are insignificant.¹⁰⁰ The court stated: “It is insufficient under *Defenders of Wildlife*, to point to one area or class of areas where [a specie’s] population persists to support a finding that threats to the species elsewhere are not significant . . .”¹⁰¹ However, the court found that the Secretary fulfilled this requirement by determining that the loss of the lizard’s historic range was insignificant to the survival of the species.

94. *Id.* (alteration in original) (quoting *United Food & Com. Workers Union Local 751 v. Brown Grp. Inc.*, 517 U.S. 544, 549 (1996)).

95. *Id.* at 1145.

96. The DOW cited other cases, which addressed whether the loss of a percentage of habitat constituted a significant portion of the species range. In *Federation of Fly Fishers v. Daley*, the federal district court found the listing of the steelhead trout was warranted despite protections encompassing 64% of its range. In *ONRC v. Daley*, the federal district court found the coho salmon in danger of extinction despite federal forest land protections extending over 35% of its range. The FWS listed the Coachella Valley fringe toed lizard as a threatened species, although 50% of its historical habitat remained. *Id.* at 1143. The Ninth Circuit rejected the DOW’s strictly quantitative approach and found there is no presumption in the ESA that a loss of predetermined amount of range qualifies for listing. *Id.* The percentage must be determined on a case by case basis. If there was a bright line, Congress would have so stated. *Id.*

97. Withdrawal of the Proposed Rule to List the Flat-tailed Horned Lizard as Threatened, 68 Fed. Reg. 331, 333 (Jan. 3, 2003) (to be codified at 50 C.F.R. pt. 17).

98. *Tucson Herpetological Soc’y v. Kempthorne*, No. 04-CV-00075, 2007 U.S. Dist. LEXIS 50740 (D. Ariz. July 12, 2007) (*rev’d sub nom.* *Tucson Herpetological Soc’y v. Salazar*, 566 F.3d 870 (9th Cir. 2009)).

99. *Id.* at 37.

100. *Tucson Herpetological Soc’y v. Salazar*, 566 F.3d 870, 877 (9th Cir. 2009).

101. *Id.*

3. *Center for Biodiversity v. Jewell*

The U.S. District Court for the District of Arizona rejected the FWS SPR interpretation in *Center for Biodiversity v. Jewell*.¹⁰² The court found that the SPR language “cannot permissibly be interpreted ‘to mean that a species is eligible for protection under the ESA’ only ‘if it faces threats in enough key portions of its range that the *entire species* is in danger of extinction, or will be within the foreseeable future.’”¹⁰³ The FWS interpretation of SPR renders the term “significant” superfluous in clear violation of the Ninth Circuit precedent.¹⁰⁴ The district court criticized the FWS SPR policy because it is designed to give little substantive effect to the SPR language in order to avoid providing range wide protection to a species based on threats in portion of range.¹⁰⁵ This is contrary to the conservation goal of ESA.¹⁰⁶

4. *Desert Survivors v. Department of Interior*

The FWS interpretation of SPR was again rejected by the U.S. District Court for District of Northern California in *Desert Survivors v. United States Department of Interior*.¹⁰⁷ The FWS failed to acknowledge that its interpretation had been vacated across the U.S.¹⁰⁸ Instead, the FWS insisted: “Our approach in this rule is consistent with *Desert Survivors* and our approach to recovery for other species.”¹⁰⁹

In *Desert Survivors*, the plaintiffs challenged the FWS decision to withdraw the proposed listing of the Bi-State Sage Grouse as “threatened” under the ESA.¹¹⁰ The district court granted the plaintiff’s summary judgement motion, holding that the FWS decision was unsupported by the record.¹¹¹ Relying on the rejection of Interior’s 2003 clarification opinion by the Ninth Circuit in *DOW v. Norton*,¹¹² the district court struck down the FWS’s interpretation of SPR.¹¹³ In *Norton*, the Ninth Circuit held that “significant” could not be interpreted to only trigger SPR when the entire species is threatened or endangered “throughout all of its range” because it would “unacceptably” render SPR superfluous.¹¹⁴ The district court pointed out that the FWS SPR policy only allows listing if 1) species is either endangered or threatened throughout all of its range, 2) the portion’s contribution to the viability of

102. Ctr. for Biological Diversity v. Jewell, 248 F. Supp. 3d 946, 959 (D. Ariz. 2017).

103. *Id.* at 956 (emphasis in original) (quoting Defs. of Wildlife, 258 F.3d at 1142).

104. *Id.* at 956-57.

105. *Id.* at 958.

106. *Id.*

107. See generally *Survivors v. U.S. DOI*, 336 F. Supp. 3d 1131 (N.D. Cal. 2018).

108. WESTERN ENVIRONMENTAL LAW CENTER, NOTICE OF INTENT TO SUE FOR VIOLATIONS OF THE ESA 11 (Nov. 6, 2020) <https://westernlaw.org/wp-content/uploads/2020/11/2020.11.06-Wolf-Delisting-NOI.pdf>

109. Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. 69778, 69853 (Nov. 3, 2020) (codified at 50 C.F.R. pt. 17).

110. *Survivors*, 336 F. Supp. 3d at 1132.

111. See Defs. of Wildlife, 258 F.3d at 1141-42.

112. *Id.*

113. *Survivors*, 336 F. Supp. 3d at 1133.

114. Defs. of Wildlife, 258 F.3d at 1141-42.

the species is so important that, without the members in that portion, the species would be endangered or threatened throughout all of its range, and 3) the species is endangered or threatened in that portion of its range.¹¹⁵ These three conditions cannot be satisfied at once because whenever conditions 2 and 3 are satisfied, a species should properly be determined to be endangered or threatened throughout all of its range.¹¹⁶ The FWS definition failed to grant any independent meaning to significant. The court found that there was no difference between SPR and “all of its range.”¹¹⁷

B. Significance of Lost Historic Range

The FWS limited its delisting analysis to the significant portions of the gray wolf’s current range.¹¹⁸ The FWS attempted to do this in all prior delisting efforts.¹¹⁹ Federal courts consistently rejected this interpretation and held the FWS must consider the wolf’s status in significant portions of its historical range, where suitable habitat exists.¹²⁰ This long-standing position was affirmed in *Humane Society v. Jewell*,¹²¹ but was reversed by the D.C. Circuit in *Humane Society v. Zinke*.¹²²

In *Zinke*, the D.C. Circuit held that the “range” is not defined in statute, so the court must determine if the FWS interpretation is reasonable.¹²³ The court found that the reference to the present tense of terms in the statute can refer to either the current or historical range. Prior courts have held that the ambiguity supported the historical range.¹²⁴ The D.C. Circuit, ignoring precedent, held the FWS change in

115. Survivors, 321 F. Supp.3d at 1019.

116. *Id.* at 1072-73.

117. *Id.* at 1073.

118. Final Policy on Interpretation of the Phrase “Significant Portion of its Range”, 79 Fed. Reg. 37578, 37579 (July 1, 2014) (to be codified in 50 C.F.R. ch.2). FWS policy states: 1) if a species is found to be endangered or threatened throughout significant portion of its range, the entire species is listed as endangered or threatened, respectively, and the Act’s protections apply to all individuals of the species wherever found; 2) a portion of the range of a species is “significant” if the species is not currently endangered or threatened throughout all of its range, but the portion’s contribution to the viability of the species is so important that, without the members of that portion, the species would be in danger of extinction, or likely to become so in the foreseeable future throughout all of its range; 3) the range of species is considered be the general geographical area within which the species can be found at the time FWS and NMFS make any particular status determination; and 4) if a vertebrate species is endangered or threatened throughout an SPR, and the population in that significant portion is a valid DPS, we will list DPS rather than the entire taxon species or subspecies. *Id.*

119. See *Def. of Wildlife v. Sec’y, U.S. Dep’t of the Interior*, *supra* note 38.

120. Survivors, 321 F. Supp.3d 1011; *Defs. of Wildlife v. Norton*, 258 F. 3d 1136 (9th Cir. 2001) (regarding SPR interpretation for the horned lizard); *Defs. of Wildlife v. Norton*, 239 F. Supp.2d 9 (D.D.C. 2002) (regarding SPR interpretation for the lynx); see *Sw. Ctr. for Biodiversity v. Norton*, 2002 WL 1733618 (D.D.C. 2002) (rejecting FWS definition of SPR); see also *Defs. v. Secretary of Interior*, 354 F. Supp.2d 1156, 1167 (D. Or. 2005) (rejecting FWS definition of SPR); see also *Tucson Herpetological Soc’y v. Kempthorne*, No. 04-CV-00075-PHX-NVW, 2007 U.S. Dist. LEXIS 50740 (D. Ariz. July 12, 2007) (rejecting FWS definition of SPR).

121. *Humane Soc’y of the United States v. Jewell*, 76 F. Supp.3d 69, 137-38 (D.D.C. 2014).

122. *Humane Soc’y of the U.S. v. Zinke*, 865 F.3d 585, 615 (D.C. Cir. 2017). This position was subsequently adopted in *Ctr. for Biodiversity v. Zinke*, 900 F.3d 1053 (9th Cir. 2018); *Survivors v. U.S. DOI*, 321 F. Supp.3d 1011 (N.D. Cal. 2018).

123. *Humane Soc’y of the U.S. v Zinke*, 865 F.3d 585.

124. *Id.* at 592.

policy was reasonable.¹²⁵ However, the D.C. Circuit failed to acknowledge that there was no change in policy. The FWS 2014 regulation regarding the meaning of a significant portion of the range was the same as the earlier rejected 2003 clarification opinion.¹²⁶

The D.C. Circuit adopted a constrained textual analysis, which ignored the text, legislative history, and statutory purposes of the ESA.¹²⁷ Statutory interpretation begins with the text, which has been enacted into law through constitutionally prescribed process.¹²⁸ If the text does not answer the interpretative question, the court must examine the legislative history to discover the legislative intent, which is how the enacting legislature would have resolved the interpretative question.¹²⁹ Studying the legislative history places the court in the proper deferential framework regarding Congress and establishes criteria of reliability that helps the court select and weigh elements of the language in the legislative context.¹³⁰ Further guidance and clarification of statutory meaning are found in the statutory purposes.¹³¹ While more abstract than the legislative intent, statutory purposes provide the overall statutory goals.¹³² Statutory purposes help the court determine legislative intent, direct the court when legislative intent has not been manifested, and allow the court to keep the statute in harmony with contemporary values.¹³³

The two statutes preceding the ESA described endangered species as those facing complete extinction.¹³⁴ The ESA of 1973 expanded the definition of endangered species to those facing “extinction throughout all or a significant portion of its range. . . .”¹³⁵ The new language was added to encourage greater federal-state cooperation and grant the Secretary greater flexibility regarding wildlife management.

Congress attempted to change the statutory text in 1978. The Senate passed an amendment, which defined “essential [as] that portion of the range necessary for

125. *Id.*

126. Kristyn Judkins, *Deciphering the ESA’s Enigmatic SPR Phrase*, ENVIRONMENTAL, NATURAL RESOURCES, & ENERGY LAW BLOG (August 19, 2020).

127. Edward Fitzgerald, *Dysfunctional Downlisting Defeated: Defenders of Wildlife v. Secretary, U.S. Dept. of Interior*, 34 B.C. ENV’T AFFAIRS L. REV. 37, 47-65 (2007).

128. T. Alexander Alienikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 23 (1988).

129. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 68-69 (Little Brown, 1975); William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 643-50 (1990).

130. Eskridge, *supra* note 131; Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 246-47 (1983); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 813-15 (1994).

131. HENRY M. HART AND ALBERT M. SACKS, *THE LEGAL PROCESS* 1124, 1374-80 (Foundation Press, 1994).

132. *Id.*

133. *Id.*

134. Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926, 926 (1966); Endangered Species Conservation Act, Pub. L. No. 91-135, 83 Stat. 275 (1969).

135. *Def. of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001) (“a significant shift in the definition in existing law which considers a species to be endangered only when it is threatened with worldwide extinction.”) (quoting H.R. REP. NO. 93-412 (1973)).

the continued survival and recovery of the species.”¹³⁶ The amendment was rejected by the conference committee.¹³⁷ The failure of Congress to adopt this amendment represented an explicit rejection of Interior’s definition of “significant portion of its range.”¹³⁸

There was also language by the House Merchant Marine and Fisheries Committee in 1978 indicating that the term “range” refers to the “historical range” of the species.¹³⁹ Section 4(c)(1) requires the Secretary to publish a list of endangered and threatened species and specify the portion of the range in which they are protected.¹⁴⁰ The committee bill amended section 4(c)(1) to require the Secretary to include critical habitat designations on endangered and threatened species lists.¹⁴¹ The committee stated that “the term ‘range’ is used in the general sense and refers to the historical range of the species.”¹⁴²

The ESA Amendments of 1982 added section 10(j), which provides for the release of an experimental population of endangered or threatened species “outside the current range of such species if the Secretary determines that such release will further the conservation of such species.”¹⁴³ This demonstrates congressional awareness of the difference between the current and historical range of the species.

Through the ESA Amendments of 1982, Congress was concerned with the protection, conservation, and restoration of endangered and threatened species and particularly with the ecosystems on which they depend.¹⁴⁴ Congress found “the two major causes of extinction are hunting and destruction of natural habitat.” The most crucial was the destruction of natural habitat.¹⁴⁵ Congress recognized the “critical nature of interrelationship of plants and animals between themselves and with their environment [demonstrated the] ecologist’s shorthand phrase that ‘everything is connected to everything else’ is nothing more than a cold, hard fact.”¹⁴⁶

Congress mandated that ecosystems be preserved to protect endangered and threatened species. The House Merchant Marine and Fisheries Committee stated: “As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in a position to supply (usually unwillingly) we threaten their—and our own—genetic heritage. The value of this genetic heritage is, quite literally, incalculable.”¹⁴⁷

136. Senate, Committee on Environment and Public Works, *A Legislative History of the ESA of 1973, as Amended in 1976, 1977, 1978, and 1980*, 97th Cong., 2d Sess. 1126-1130 (1982) [hereinafter *Legislative History*].

137. See H.R. REP. NO. 95-1804 (1978), cited in *Legislative History*, *supra* note 136 at 1192.

138. See generally William N. Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 84-89 (1988).

139. H.R. Rept. 95-1625 (1978), reprinted in CONG. RSCH. SERV., SN97-6, *A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980* at 742 (1982).

140. 16 U.S.C. § 1533 (c).

141. H.R. Rept. 95-1625 (1978), *supra* note 139 at 742.

142. *Id.*

143. 16 U.S.C. § 1539.

144. 16 U.S.C. § 1531(b), (c).

145. S. REP. NO. 93-307 at 2 (1973); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 179 (1978).

146. H.R. REP. NO. 93-412, at 6 (1973).

147. *Id.* at 4-5.

All organisms rely on a healthy ecosystem, which depends upon the viability of species whose interactions regulate the system.¹⁴⁸ There is a hierarchy within the ecosystem. Keystone species, which link other species to the food chain above and below themselves, include predator, prey, plants, links, and modifiers.¹⁴⁹ All species are interconnected, so the removal of one species can lead to population changes or severe physical disturbances.¹⁵⁰ Disruptions in the ecosystem cause environmental instabilities that diminish nature's ability to establish food chains, cycle nutrients, maintain air and water quality, control the climate, maintain the soil, dispose of waste, pollinate crops, and control pests and disease.¹⁵¹ Robert Costanza estimated the value of ecosystem services in the range of sixteen to fifty-four trillion dollars per year.¹⁵² With an estimated value of thirty-three trillion dollars per year, ecosystems provide services that cost almost twice the gross domestic product of all the nations in the world combined.¹⁵³

Ecosystem maintenance requires biodiversity, which relies on a diverse gene pool.¹⁵⁴ The degree of complexity necessary for healthy maintenance is unknown.¹⁵⁵ Paul Ehrlich equates the loss of species to the loss of structural rivets on an airplane—a dozen may never be missed, but the loss of the thirteenth might spell disaster.¹⁵⁶ The gray wolf plays an important role by balancing the ecosystem and preserving biodiversity, which are among the central purposes of the ESA.¹⁵⁷

148. MARTY BERGOFFEN, ESA REAUTHORIZATION: A BIOCENTRIC APPROACH 5-15 (1995); John C. Nagle, *Playing Noah*, 82 MINN. L. REV. 1171, 1210 (1998).

149. *Id.*

150. *Id.*

151. PAUL EHRLICH & ANNE EHRLICH, EXTINCTION: THE CAUSES AND CONSEQUENCES OF THE DISAPPEARANCE OF SPECIES 86-95 (1981); Patrick Parenteau, *Rearranging the Deck Chairs: Endangered Species Act Reforms in the Era of Mass Extinctions*, 22 WM. & MARY ENV'T L. & POL'Y REV. 227, 236-44 (1998).

152. He noted: "Because ecosystem services are not fully captured in commercial markets or adequately quantified in terms comparable with economic services and manufactured capital, they are often given too little weight in policy decisions. This neglect may compromise the sustainability of humans in the biosphere. The economies of the Earth would grind to a halt without the services of ecological life support systems, so in one sense their total value to the economy is infinite." Robert Costanza et al., *The Value of the World's Ecosystem Services and Natural Capital*, 387 NATURE 253, 259 (1987).

153. *Id.*

154. Robert S. Steneck, *An Ecological Context for the Role of Large Carnivores in Conserving Biodiversity*, in LARGE CARNIVORES AND THE CONSERVATION OF BIODIVERSITY 8, 13 (Justina C. Ray, Kent H. Redford, Robert S. Steneck, Joel Berger eds., 2005); see Jason Patlis, *Biodiversity, Ecosystems, and Endangered Species*, in BIODIVERSITY AND THE LAW 43, 43-58 (William J. Snape III ed. 1996).

155. Keith Saxe, *Regulated Taking of Threatened Species Under the Endangered Species Act*, 39 HASTINGS L. J. 399, 407-08 (1988); EDWARD A. FITZGERALD, WOLVES, COURTS, AND PUBLIC POLICY 87 (2015).

156. EHRLICH & EHRLICH, *supra* note 151, at xii-xiii.

157. Oliver A. Houck, *Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings"?*, 80 IOWA L. REV. 297, 301 (1995); William S. Boyd, *Federal Protection of Endangered Wildlife Species*, 22 STAN. L. REV. 1289, 1290 n.9 (1970); EDWARD A. FITZGERALD, *supra* note 155 at 87.

The wolf provides sustenance for the entire food chain.¹⁵⁸ After the wolf makes a kill, other scavengers take their share, insects clean the carcass, and birds feed on the insects.¹⁵⁹ The wolf also maintains the balance between predators.¹⁶⁰ The wolf limits the coyote population, which expands in their absence.¹⁶¹ This replenishes the coyote's prey, mainly rodents, for predatory birds, such as hawks, eagles, and owls.¹⁶² The reduction in the coyote helps the fox, which coexists with the wolf.¹⁶³ The wolf keeps its prey in check, culls the weak and infirmed prey, affects prey behavior, and increases the supply and diversity of plant life.¹⁶⁴ This "top-down" effect, which is known as a trophic cascade, varies across ecosystems because of food web complexity, diversity, productivity, and other factors.¹⁶⁵ A balanced ecosystem provides goods and service beneficial to man.¹⁶⁶

Despite all of this, the D.C. Circuit in *Zinke* insisted that the FWS was still required to assess the impact of the loss historic range on the species status.¹⁶⁷ The court held that the FWS failed to acknowledge how the loss of historic range affected the current status of the gray wolf.¹⁶⁸ The court determined that the FWS can't just write off substantial loss of historic range as irrelevant to species status.¹⁶⁹ The FWS Range Policy states that a species may be "endangered or threatened throughout significant portion of its range because loss of historic range is so substantial that it undermines the viability of the species as it exists today."¹⁷⁰ The court noted that any loss of historic range for a species whose "distribution and abundance is restricted," can reduce genetic diversity, which increases the danger of extinction in the foreseeable future. In addition, the loss of historic range for a "species with reduced range" places the population at greater risk from "a catastrophic event such as a hurricane or fire."¹⁷¹

158. John Terborgh et al, *The Role of Top Carnivores in Regulating Terrestrial Ecosystems*, in CONTINENTAL CONSERVATION: SCIENTIFIC FOUNDATION OF REGIONAL RESERVE NETWORKS 39, 39-65 (Michael E. Soule and John Terborgh eds., 1999).

159. *See id.*

160. *See id.*

161. *See id.*

162. *See id.*

163. *See id.*

164. *See id.*

165. Mark Hebblewhite et al., *Human Activity Mediates a Trophic Cascade Caused by Wolves*, 86 ECOLOGY 2135 (2005).

166. Mark A. Urbanski, *Chemical Prospecting, Biodiversity Conservation, and the Importance of International Protection of Intellectual Property Rights in Biological Materials*, 2 BUFFALO J. INT'L L. 131, 134-35 (1995); Eric Christensen, *Genetic Ark: A Proposal to Preserve Genetic Diversity for Future Generations*, 40 STAN. L. REV. 279, 285-88 (1987); George Cameron Coggins & Anne Fleishel Harris, *The Greening of American Law?*, 27 NAT. RES. J. 247, 253-55 (1987); Douglas O. Heiken, *The Pacific Yew and Taxol*, 7 J. ENV'T L. & LITIG. 175, 185-86 (1992).

167. Humane Soc'y of U.S. v. Zinke, 865 F.3d 585, 605-606 (D.D.C. 2017).

168. *Id.* at 605-607.

169. *Id.* at 605.

170. Final Policy on Interpretation of the Phrase "Significant Portion of its Range", 79 Fed. Reg. 37578, 37584 (July 1, 2014) (to be codified in 50 C.F.R. ch.2).

171. Humane Soc'y of U.S. v. Zinke, 865 F.3d at 605-606.

The D.C. Circuit stressed that an adequate evaluation of the threats within the current range requires more than just look at current time.¹⁷² The gray wolf is in danger in the lower forty-eight states because 95% of historic range has been lost.¹⁷³ The FWS failed to consider the loss historic range and its impact on the survival of the gray wolf within its current range.¹⁷⁴ Such a failure was arbitrary and capricious.¹⁷⁵

C. Flawed Distinct Population Segment Delisting Strategies

The FWS primarily focused on the viability of the NRM and WGL gray wolf populations and ignored the importance of the peripheral populations in the Pacific Northwest, central Rockies, and Northeast.¹⁷⁶ The FWS amalgamated the two core populations in the WGL and NRM with peripheral areas to delist the wolf. In addition, the FWS established the WGL DPS as a prelude to wolf delisting across the U.S. Both strategies are contrary to case law.

1. Defenders of Wildlife (DOW) v. Secretary of Interior

The U.S. District Court for the District of Oregon in *DOW v. Secretary of Interior*¹⁷⁷ addressed the Bush administration's effort to delist the wolf across most of the U.S., a case similar to the current delisting proposal. At end of the Clinton administration, the FWS proposed establishing four distinct population segments (DPS)¹⁷⁸ in the Western Great Lakes, Northeast, West, and Southwest along with downlisting the gray wolf from an endangered to threatened species throughout most of its historic range, except the Southwest.¹⁷⁹

172. *Id.* at 605-606.

173. *Id.*

174. *Id.* at 605-606.

175. *Id.* at 606.

176. The FWS acknowledged that wolf populations “peripheral to WGL metapopulation within the lower 48 . . . “ were “not meaningful” to the survival of the species. Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. 69778, 69885 (Nov. 3, 2020) (codified at 50 C.F.R. pt. 17).

177. *Def. of Wildlife v. Sec’y, U.S. Dep’t of the Interior*, 354 F. Supp. 2d 1156 (D. Or. 2005); *see also* Edward A. Fitzgerald, *Defenders of Wildlife v. Secretary of Interior: Dysfunctional Downlisting Defeated*, 34 B.C. ENVTL AFF. L. REV. 37 (2007).

178. Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722 (Feb. 2, 1996). A DPS is defined as a group of vertebrate animals that is both discrete from and significant to the taxon as a whole. The population is discrete if it is “markedly separate from other populations of the same taxon, as a consequence of physical, physiological, ecological, or behavior factors,” or “it is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that re significant in light of sec 4(a)(1)(D) of the Act.” *Id.* at 4725. The significance of the DPS is determined by its importance to the taxon as a whole. Indicators include, but are not limited, “the use of an unusual or unique ecological setting, a marked difference in genetic characteristics, or the occupancy of an areas that, if devoid of species, would result in a significant gap in the range of the taxon.” *Id.* at 4724-25.

179. Proposal to Reclassify and Remove the Gray Wolf From the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States, 65 Fed. Reg. 43450 (July 13, 2000) (to be codified in 50 C.F.R. pt. 17).

The Final Rule published in 2003 established only three DPSs for wolves in the East, West, and Southwest and downlisted gray wolves in the Eastern and Western DPS.¹⁸⁰ The FWS, applying its definition of SPR, concluded that “the presence or absence of gray wolves outside of core recovery area is not likely to have a bearing on the long-term viability of the three wolf populations . . .”¹⁸¹

The U.S. District Court ultimately held that “the Secretary’s conclusion that the viability of two core populations in the Eastern and Western DPS make all other portions of wolf’s historical or current range insignificant and unworthy of stringent protection is contrary to Ninth Circuit precedent and the ESA.”¹⁸²

2. *National Wildlife Federation v. Norton*

In 2003, the Bush administration published the final regulation that eliminated a separate Northeast DPS.¹⁸³ The FWS asserted that the existence of a wolf population in the region was dubious.¹⁸⁴ A DPS could not be established in the absence of a wolf population.¹⁸⁵ Furthermore, the identity of the Northeast wolf was uncertain.¹⁸⁶ Some scientists claimed the Northeast wolf is a subspecies of the gray wolf. While others asserted that the Northeast wolf is a red wolf.¹⁸⁷ Given these doubts the Northeast DPS was subsumed into the Eastern DPS, where all wolves were treated as a threatened species.¹⁸⁸

Environmental groups criticized the proposal.¹⁸⁹ The FWS responded: “Our job is to keep animals from going extinct . . . Having wolves in Northeast might be desirable, but it’s not the purpose of ESA to get more wolves in more places.”¹⁹⁰

The National Wildlife Federation (NWF), filed suit in the U.S. District Court for the District of Vermont, challenging the FWS abandonment of wolf recovery efforts in the Northeast.¹⁹¹ The court determined that Secretary of Interior Gail Norton did not analyze the five factors for downlisting across a significant portion of the gray wolf’s range.¹⁹² The court held “the FWS simply cannot downlist or delist an area that it previously determined warrants an endangered listing because it ‘lumps together’ a core population with a low to non-existent population outside of the core area.”¹⁹³

180. Final Rule to Reclassify and Remove the Gray Wolf From the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States, 68 Fed. Reg. 15804 (Apr. 1 2003) (to be codified in 50 C.F.R. pt. 17).

181. *Id.* at 15825.

182. *Def. of Wildlife v. Sec’y, U.S. Dep’t of the Interior*, 354 F. Supp. 2d 1156, 1168 (D. Or. 2005).

183. Final Rule to Reclassify, 68 Fed. Reg. at 15818 (Apr. 1, 2003).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 15818.

189. Wilson Ring, *National Wildlife Federation to sue over wolf rules*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, (Sept. 25, 2003).

190. Natalie M. Henry, *FWS Faces Lawsuit for Downlisting Western Population to: “Threatened”*, LAND LETTER (Oct. 9, 2003) (on file with Author).

191. *Nat’l Wildlife Fed’n v. Norton*, 386 F. Supp. 2d 553 (D. Vt. 2005).

192. *Id.* at 565.

193. *Id.* at 565-66.

The court found the FWS's determination rendered the remainder of the Eastern DPS insignificant, even though "extensive and significant gaps" in range would be created without the Northeast DPS.¹⁹⁴ The Final Rule rendered all areas outside the core area irrelevant. This contradicted the meaning of "significant portion of the range" set forth by Ninth Circuit in *DOW v. Norton*¹⁹⁵ dealing with the flat-tailed horned lizard and the federal district court in *DOW v. Norton*¹⁹⁶ dealing with the lynx. The FWS decided not to appeal the decision.

3. *Humane Society of the U.S. v. Jewell*

After the Bush administration's delisting proposal was defeated in 2006, wolves in the Great Lakes region outside of Minnesota returned to endangered species status. There were various unsuccessful attempts by Bush administration to delist wolves in WGL DPS.¹⁹⁷

On May 5, 2011, the Obama administration published a Proposed Rule establishing the WGL DPS, which separated the WGL wolves from other Northeast wolves.¹⁹⁸ The Proposed Rule identified the Minnesota, Michigan, and Wisconsin populations of the gray wolf as the WGL DPS and removed the WGL DPS from the list of endangered and threatened species. On December 28, 2011, the FWS published its Final Rule delisting the WGL DPS.¹⁹⁹ Humane Society of U.S. (HUS) brought suit.²⁰⁰

The US District Court for the District of Columbia held that the DPS designation cannot be used to simultaneously list and delist a species. Furthermore, the FWS can't decrease ESA protection from a species or subspecies listing through a DPS designation.²⁰¹ The FWS must consider the impact of DPS designation on the status of the entire listed species.²⁰²

4. *Humane Society of U.S. v. Zinke*

The D.C. Circuit also rejected FWS effort to delist the WGL DPS.²⁰³ The D.C. Circuit, agreeing with the district court, held that the FWS must evaluate the impact of the DPS on the remaining population of the species as defined in the

194. *Id.* (citing Proposal to Reclassify and Remove the Gray Wolf, 65 Fed. Reg. 43450, 43473 (July 13, 2000)).

195. *Def. of Wildlife v. Norton*, 258 F.3d 1136, 1144-45 (9th Cir. 2001).

196. *Def. of Wildlife v. Norton*, 239 F. Supp. 2d 9, 19-21 (D.D.C. 2002).

197. Final Rule Delisting the Western Great Lakes Population of Gray Wolf as a Distinct Population Segment, 72 Fed. Reg. 6052 (Feb. 8, 2007) (to be codified in 50 C.F.R. pt. 17) (rejected the court in *HUS v. Kempthorne*, 579 F. Supp. 3d 7, 20-23 (D.D.C. 2008)); Final Rule To Identify the Western Great Lakes Populations of Gray Wolves as a Distinct Population Segment, 74 Fed. Reg. 15069, 15070 (Apr. 2, 2009) (to be codified in 50 C.F.R. pt. 17) (vacated for violation of APA).

198. Proposed Rule To Revise the List of Endangered and Threatened Wildlife for the Gray Wolf (*Canis lupus*) in the Eastern United States, 76 Fed. Reg. 26086 (May 5, 2011) (to be codified in 50 C.F.R. pt. 17).

199. Final Rule Revising the Listing of the Gray Wolf in the Western Great Lakes, 76 Fed. Reg. 81665 (Dec. 28, 2011) (to be codified at 50 C.F.R. pt. 17)..

200. *HSUS v. Jewell*, 76 F. Supp. 3d 69 (D.D.C. 2014).

201. *Id.* at 110.

202. *Id.*

203. *Humane Soc'y of U.S. v. Zinke*, 865 F. 3d 585, at 600-603 (D.C. Cir. 2017).

original listing.²⁰⁴ The FWS can't create the DPS, just to delist the remnant population. Such backdoor delisting undermines the five-factor requirements of the ESA.²⁰⁵

The D.C. Circuit was particularly concerned about the fate of the remaining wolf population in the peripheral areas, which must remain protected. Otherwise, the FWS could later attempt to delist those wolves, arguing that they are no longer a listable entity.²⁰⁶ According to the court, the DPS process could become "a backdoor route to the de facto delisting of already listed species, in open defiance of the ESA specifically enumerated requirements for delisting."²⁰⁷ To preclude this outcome the FWS "must make it part and parcel of its segment analysis to ensure that the remnant, if still endangered or threatened, remains protectable under the ESA."²⁰⁸

IV. Significant Portion of the Wolf's Current Range

The FWS determined the recovery of WGL and NRM wolf populations fulfilled the ESA mandate. However, according to the FWS gray wolf populations in the peripheral areas are not important for the survival of the metapopulations in the NRM DPS and WGL.²⁰⁹ The FWS failed to acknowledge that the gray wolf populations in the Pacific Northwest, central Rocky Mountains, and Northeast occupied significant portions of the gray wolf's current range. The failure by the FWS to recognize and analyze the importance of these peripheral gray wolf populations was unreasonable. The following section will analyze the unique positioning of grey wolves in each area.

A. Pacific Northwest

The FWS noted that wolves in the Pacific Northwest (PNW) "may be at greater risk from human caused mortality or from factors related to small numbers of individuals."²¹⁰ These wolves are dispersers from NRM DPS, they "are not an isolated population with unique or markedly different genotypic or phenotypic traits" and are "well represented in lower 48 states."²¹¹ These wolves don't contribute to the 3rs of the species.²¹²

The FWS conclusion is contrary to the best available science.²¹³ Dr. Carroll, a peer reviewer, points out that the current size of the population doesn't indicate its importance to the survival of the metapopulation over the long term.²¹⁴ This will be

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 602.

208. *Id.*

209. Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. 69778, 69853 (Nov. 3, 2020) (codified at 50 C.F.R. pt. 17).

210. See Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. at 69855.

211. *Id.*

212. *Id.*

213. See generally 16 U.S.C. § 1533(b)(1)(A).

214. CARROLL, *supra* note 69, at 16.

determined by habitat and other factors.²¹⁵ The existence of a small population with unique characteristics can contribute to metapopulation's resiliency in the future when dealing with disease and climate change.²¹⁶ Consequently, population abundance alone is not a determining factor.²¹⁷

Gray wolves in the PNW are unique. The FWS acknowledged that wolves in Washington are descended from both Canadian and NRM wolves.²¹⁸ These wolves have "markedly different genetic or phenotypic traits."²¹⁹ Scientists pointed out that "genetic testing of the gray wolves that have migrated naturally to the Pacific Northwest has found that some derive from the British Columbia coastal wolf population, which are genetically distinct from the inland stock of gray wolves used as the source for the reintroduction into the NRM."²²⁰

Wolves in Washington and Oregon have a dominant coastal ancestry that must be conserved because of its unique evolutionary heritage and adaptations.²²¹ This is because the "blanket delisting that is proposed would foreclose that important evolutionary process, resulting in the reduced genetic variability and evolutionary potential for the species as a whole."²²²

Gray wolves in the PNW occupy a unique habitat, which contains different types of forests and a temperate climate.²²³ The PNW provides a unique prey base of

215. *Id.*

216. *Id.*

217. CARROLL, *supra* note 69, at 16.

218. CARROLL, *supra* note 69, at 6. FWS acknowledged that wolves occurring in the Cascade Mountains would not be part of NRM DPS. 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, 73 Fed. Reg. 10514, 10518 (Feb. 27, 2008) (to be codified at 50 CFR pt. 17). Any wolves that dispersed into the Cascades "would remain protected by the Act, as endangered because it is outside the NRM DPS." Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and To Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15123, 15127 (April 2, 2009) (to be codified at 50 C.F.R. Pt. 17).

219. CARROLL, *supra* note 69, at 17 (quoting Hendricks et al. 2018); Dr. Fallon, an earlier peer reviewer, noted that "Pacific Northwest wolves are likely to be genetically and ecologically distinct."; Plaintiffs Joint Notice of Motion, Motion for Summary Judgment, and Memorandum in Support of Summary Judgment at 15 n.12, *Defs. of Wildlife v U.S. Fish & Wildlife Serv.*, N.D. Cal. (2021) (No. 4:21-cv-00344-JSW).

220. Plaintiffs Joint Notice of Motion, Motion for Summary Judgment, and Memorandum in Support of Summary Judgment at 15 n.12, *Defs. of Wildlife v U.S. Fish & Wildlife Serv.*, N.D. Cal. (2021) (No. 4:21-cv-00344-JSW) (citing Letter American Society of Mammologists to Secretary Jewell (May 22, 2013)); Letter from sixteen scientists (May 21, 2013), https://www.predatordefense.org/docs/wolves_scientists_letter_to_secretary_jewell_on_delisting_052113.pdf

221. CARROLL, *supra* note 69, at 17 (citing Hendricks et al. 2018).

222. Plaintiffs' Joint Motion for Summary Judgment at 17 n.12, N.D. Cal. (2021) (No. 4:21-cv-00344-JSW)(citing letter of 128 scientists).

223. According to the U.S. Forest Service (USFS), "the Pacific Northwest has a different domain (humid temperature domain), different divisions (marine and Mediterranean), and different provinces (Cascade Mixed Forest-Coniferous Forest- Alpine Meadow and Sierran steppe--Mixed Forest-Coniferous Forest--Alpine Meadow Provinces) from other wolf populations in the lower 48 states." CENTER FOR BIOLOGICAL DIVERSITY & THE HUMANE SOCIETY OF THE UNITED STATES, PETITION TO MAINTAIN PROTECTIONS FOR GRAY WOLVES (*CANIS LUPUS*) IN THE LOWER 48 STATES AS ENDANGERED OR THREATENED "DISTINCT POPULATION SEGMENTS" UNDER THE ENDANGERED SPECIES ACT 17 (2018) [hereinafter CENTER FOR BIOLOGICAL DIVERSITY PETITION]

white-tailed deer, mule deer, and Roosevelt elk. Wolves in the region tend to be smaller as result of the smaller prey base.²²⁴ In addition, coastal wolves feed on fish, which is a unique adaptation not found in other regions.²²⁵ The FWS asserted that wolves in PNW are simply dispersers from NRM DPS.²²⁶ Nevertheless, the FWS should not have aggregated PNW wolves with NRM DPS. Previously, the FWS recognized wolves in the NRM DPS were discrete when the NRM DPS was established in 2008 because they would not be able to migrate to the PNW.²²⁷

The FWS also noted that PNW wolves are not discrete because there is little separation in suitable habitat between NRM DPS and western Oregon and western Washington.²²⁸ This contradicts the FWS earlier findings that “factors such as habitat type and prey species have been shown to influence genetic structuring, leading to measurable differentiation even between species with no physical barriers to dispersal.”²²⁹ Genetic differences are “driven more by climate and ecological factors” than by “isolation and distance.”²³⁰ There are distinct climate and ecological differences between the PNW and NRM.²³¹

The FWS asserted delisting will not affect connectivity from the NRM DPS to PNW.²³² However, recent actions by Idaho and Montana to severely reduce their wolf populations will preclude dispersal into the PNW.

The FWS approach regarding PNW wolves was specifically rejected in *DOW v. Interior*. The Oregon federal district court stated: “The decision to downlist the wolf in Pacific Northwest without first assessing the threats to the wolf exemplifies the FWS violation of ESA. The Pacific Northwest contains major geographic areas in which the wolf is no longer viable but once was, suitable habitat to which wolves have dispersed, and threats that demonstrate the wolf is in danger of extinction . . .”²³³

Scientific studies demonstrated that there is suitable wolf habitat in the PNW to support an estimated 600 wolves.²³⁴ Areas with suitable habitat include the “Olympic Peninsula, Oregon Cascades, Northern California, Sierra Nevada [and] southern Washington Cascades.”²³⁵ There are approximately 70 million acres of suitable wolf habitat in Oregon, Washington, California, and Nevada.²³⁶

224. *Id.*

225. CENTER FOR BIOLOGICAL DIVERSITY PETITION, *supra* note 223 at 17.

226. Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. 69778, 69885 (Nov. 3, 2020) (codified at 50 C.F.R. pt. 17).

227. CARROLL, *supra* note 69, at 16; 73 Fed. Reg. 10518–19 (Feb 27, 2008) (codified at 50 C.F.R. Pt. 17).

228. Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. at 69784.

229. Complaint for Declaratory and Injunctive Relief at 28, Nat. Res. Def. Council v. Dept. of Interior (No. 21-cv-561).

230. *Id.*

231. *Id.*

232. Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. at 69851.

233. *Defs. of Wildlife v. Sec’y, U.S. Dep’t of the Interior*, 354 F. Supp. 2d 1156, 1167 (D. Or. 2005).

234. CENTER FOR BIOLOGICAL DIVERSITY PETITION, *supra* note 223, at 16-17.

235. *Id.*

236. *Id.*

B. Central Rocky Mountains

The FWS failed to adequately evaluate the significance of wolves in central Rocky Mountains (CRM). The FWS acknowledged that the CRM wolf population “would add to the resiliency and redundancy of gray wolves in the lower 48 United States”²³⁷ and also faced greater threats from human-caused mortality.²³⁸ However, the FWS concluded that the wolf populations in the CRM are “not meaningful to resiliency or redundancy because they contain few wolves, or few or no breeding pairs.”²³⁹

The FWS conclusion is inconsistent with its findings and fails to acknowledge the importance of returning these wolves to their historic range. Dr. Carroll explained: “For those regions (Colorado/Utah, the northeastern U.S.) where breeding pairs or packs are not yet documented, but multiple exploratory dispersals have been recorded, the ESA mandate for ‘institutional caution’ towards preventing extinction would suggest in-depth consideration and potentially inclusion within the definition of range.”²⁴⁰

The CRM, which extend from south-central Wyoming to northern New Mexico, contain some of greatest potential wolf habitat in U.S.²⁴¹ This forty-one million-acre region includes twenty-five million acres of public lands and has abundant elk and deer populations.²⁴² The CRM region contains one and half times more public land than is available in the Greater Yellowstone Ecosystem, almost twice as much land as available in central Idaho, and six times the amount of public land available in the former Blue Range Wolf Recovery Area (“BRWRA”) in Arizona and New Mexico.²⁴³ The region contains roadless areas and wilderness, which equals seventy percent of the wilderness available to wolves in the Yellowstone area. It is equivalent to the amount of wilderness available to the wolves in central Idaho and about four times the amount of wilderness available to Mexican wolves in the former BRWRA.²⁴⁴

The absence of wolves in the CRM represented a significant gap in the taxon. Since the region is equidistant from the NRM and the Mexican Wolf Experimental Recovery Area, the establishment of the CRM wolf population would

237. Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. at 69866.

238. *Id.* at 69885.

239. *Id.* at 69892.

240. Zack Strong, *One Key to National Wolf Recovery: Protecting “Dispersers,”* NRDC (June 21, 2019), <https://www.nrdc.org/experts/zack-strong/one-key-national-wolf-recovery-protecting-dispersers>.

241. Michael Robinson et al., *South from Yellowstone, What Remains to be Done*, INT. WOLF, Spring 2006, at 8, 9.

242. *Id.*

243. The BRWRA was terminated and replaced by the Mexican Wolf Experimental Recovery Area, which extends south of Interstate 40 in Arizona and New Mexico to the Mexican border, and expands areas in eastern Arizona and western New Mexico. Revision to the Regulation for the nonessential Experimental Population of the Mexican Wolf, 80 Fed. Reg. 2512, 2519-20 (Jan. 16, 2015) (to be codified in 50 C.F.R. pt. 17).

244. Michael K. Phillips, Rob Edward & Tina Arapkiles, *Restoring the Gray Wolf to the Southern Rocky Mountains: Anatomy of a Campaign to Resolve a Conservation Issue*, in PEOPLE AND PREDATORS: FROM CONFLICT TO COEXISTENCE 240, 244 (Nina Fascione, Aimee Delach, & Martin E. Smith eds., 2004).

create “a spatially segregated population of wolves that extended from the Arctic to Mexico.”²⁴⁵ David Mech, a noted wolf expert, declared that “[CRM] restoration could connect the entire North American wolf population from Minnesota, Wisconsin, Michigan through Canada and Alaska, down the Rocky Mountains into Mexico. It would be difficult to overestimate the biological and conservation value of this achievement.”²⁴⁶

FWS studies showed the CRM area can support 1,000 wolves.²⁴⁷ Potential gray wolf restoration sites include Vermejo Park Ranch/Carson National Forest complex, the San Juan Mountains, Rocky Mountain National Park, and the Gunnison National Recreation Area. The CRM has been described as “the mother lode for wolves.”²⁴⁸

C. Northeast

The FWS failed to analyze the impacts of wolves delisting in the Northeast because the area is not permanently inhabited by wolves.²⁴⁹ However, the FWS definition of range specifies the “general geographic area within which the species is currently found, including those area used throughout all or part of species life cycle, even if not used on a regular basis.”²⁵⁰ Wolves from Canada have been sighted in the Northeast,²⁵¹ where there is adequate habitat and prey base for wolf recovery.²⁵²

The FWS treatment of wolves in the Northeast is contrary to earlier efforts. The Clinton administration proposal in 2000 called for the establishment of four DPS of wolves, including the Northeast DPS.²⁵³ All of the peer reviewers who commented on the proposed 2000 rule supported the establishment of the Northeast DPS.²⁵⁴ The

245. *Id.* at 244.

246. *Id.* at 244-45.

247. CENTER FOR BIOLOGICAL DIVERSITY PETITION, *supra* note 223, at 19-20.

248. Robinson, *supra* note 241, at 9.

249. CENTER FOR BIOLOGICAL DIVERSITY PETITION, *supra* note 223, at 27.

250. Final Policy on Interpretation of the Phrase “Significant Portion of its Range”, 79 Fed. Reg. 37578, 37583 (July 1, 2014) (to be codified in 50 C.F.R. ch.2).

251. Removing the Gray Wolf (*Canis Lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. 69778, 69789 (Nov. 3, 2020) (to be codified in 50 C.F.R. pt. 17); Proposal to Reclassify and Remove the Gray Wolf From the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States, 65 Fed. Reg. 43450, 43456, 43462, 43473, 43477 (July 13, 2000) (to be codified in 50 C.F.R. pt. 17); *see also* Final Rule To Reclassify and Remove the Gray Wolf From the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States; Establishment of Two Special Regulations for Threatened Gray Wolves, 68 Fed. Reg. 15804, 15820 (Apr. 1, 2003).

252. DANIEL J. HARRISON & THEODORE B. CHAPIN, AN ASSESSMENT OF POTENTIAL HABITAT FOR EASTERN TIMBER WOLVES IN THE NORTHEASTERN UNITED STATES AND CONNECTIVITY WITH OCCUPIED HABITAT IN SOUTHEASTERN CANADA 7 (65 Fed. Reg. at 43456; *see generally* BIOLOGY, POLITICS, AND ETHICS, WOLVES AND HUMAN COMMUNITIES (Virginia A. Sharpe, Bryan Norton & Strachan Donnelly eds., 2001)).

253. Proposal to Reclassify and Remove the Gray Wolf From the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States, 65 Fed. Reg. 43450.

254. *Defs. of Wildlife v. Sec’y, U.S. Dep’t of the Interior*, 354 F. Supp. 2d 1156, 1166 (D. Or. 2005).

final regulation published in 2003 during the Bush administration eliminated a separate Northeast DPS.²⁵⁵

The National Wildlife Federation (“NWF”)²⁵⁶ filed suit in the U.S. District Court for the District of Vermont, challenging the FWS abandonment of wolf recovery efforts in the Northeast.²⁵⁷ The federal district court rejected the FWS decision on several grounds.²⁵⁸ First, the FWS abandonment of the Northeast DPS in the Final Rule deviated too much from Proposed Rule.²⁵⁹ Second, the FWS declared that the Northeast wolves could be a different subspecies from the Midwest wolves.²⁶⁰ Nevertheless, the FWS combined the two subspecies into a single DPS, which was based on geography not biology.²⁶¹ Third, the FWS assertion that a “non-DPS remnant” could not remain outside the DPS was rejected. A “non-DPS remnant” designation could be established, particularly when the remnant area was already listed within the historic range of the endangered species.²⁶² Finally, the Secretary did not analyze the five downlisting factors across a significant portion of the gray wolf’s range.²⁶³

The FWS continued to consider wolf recovery in the Northeast. In 2008, the FWS embarked on an effort to develop the National Wolf Strategy through the use of structured decision-making process that was “designed to identify and rank, based on policy concerns, a range of wolf recovery alternatives that set forth where wolf recovery would occur and areas where wolf recovery was deemed ‘both unrealistic and unnecessary.’”²⁶⁴ Although the process was flawed, “this process at least provided a comprehensive analysis of what recovery efforts would be appropriate in the different regions which still held suitable habitat for the species.”²⁶⁵ Colorado, Utah, and the Northeast were under consideration for wolf recovery because they hold substantial suitable wolf habitat.²⁶⁶

The FWS proposed to establish and delist the WGL DPS in May 2011.²⁶⁷ The Proposed Rule would revise the range of gray wolf (*Canis lupus*) by eliminating all or parts of the 29 eastern states from its range and removing it from the list of

255. Final Rule To Reclassify and Remove the Gray Wolf From the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States; Establishment of Two Special Regulations for Threatened Gray Wolves, 68 Fed. Reg. at 15818.

256. *NWF Takes Legal Action to Ensure Wolf Recovery in the Northeast*, TWIN TIMBER WOLF INFORMATION NETWORK (Dec. 18, 2003), <https://www.timberwolfinformation.org/nwf-takes-legal-action-to-ensure-wolf-recovery-in-the-northeast/>.

257. *Nat’l Wildlife Fed’n v. Norton*, 386 F. Supp. 2d 553 (D. Vt. 2005).

258. *Nat’l Wildlife Fed’n v. Norton*, 386 F. Supp. 2d 553, 566 (D. Vt. 2005).

259. *Id.* at 561-62.

260. *Id.* at 557, 563-64 (citing 68 Fed. Reg. at 15810, 15814).

261. *Id.* at 563-64 (citing Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act 61 Fed. Reg. 4722, 4724 (Feb. 7, 1996)).

262. *Id.* at 564-65.

263. *Id.* at 558, 565-66.

264. Jeff Ruch, *Structured Decision Making: A Vehicle for Political Manipulation of Science*, PEER (May 2013), https://peer.org/wp-content/uploads/attachments/5_22_13_SDM_background.pdf.

265. CARROLL, *supra* note 69, at 14.

266. *Id.* at 18-20.

267. Proposed Rule to Revise the List of Endangered and Threatened Wildlife for the Gray Wolf in the Eastern United States, 76 Fed. Reg. 26085 (May 5, 2011) (to be codified at 50 C.F.R. pt. 17).

endangered and threatened species in those areas.²⁶⁸ It would elevate the gray wolf sub-species, *Canis lycaon*, to full species status pending a status review.²⁶⁹ A New National Wolf Strategy (“NNWS”) would be established that is based on changes to long standing principles of wolf taxonomy.²⁷⁰ All of the peer reviewers who commented on the 2013 proposal issue supported the establishment of the Northeast DPS.²⁷¹

The proposal was criticized because it was based on a scientifically unsupportable and erroneous premise that the gray wolf (*Canis lupus*) never inhabited the Northeast.²⁷² However, according to the New York Department of Environmental Conservation, there was documented evidence that the gray wolf occasionally entered the Northeast.²⁷³ The elimination of the Northeast from the gray wolf’s range would remove all federal protection for wolves entering the Northeast.²⁷⁴ The proposal to elevate gray wolf sub-species, *Canis lycaon* to full species status was not supported by scientific evidence.²⁷⁵ The most recent genetic study supported the retention of *Canis lupus* on the endangered species in the Northeast.²⁷⁶ The NNWS was inconsistent with recommendations made by state participants in the 2010 Wolf Structured Decision-Making Workshop because it abandons wolf recovery in the Northeast in violation of ESA.²⁷⁷

The FWS published the Proposed Rule establishing and delisting the WGL DPS on May 5, 2011.²⁷⁸ The Final Rule, which was published on December 28, 2011,²⁷⁹ differed from the Proposed Rule in two respects. First, the Final Rule reversed the agency’s initial view that eastern wolves were a distinct species because it represented “neither a scientific consensus nor the majority opinion of researchers on the taxonomy of wolves.”²⁸⁰ The FWS continued to recognize the gray wolf (*Canis lupus*) as the only species that occupied the WGL. Second, rather than retracting the proposed delisting the gray wolf in the 29 eastern states as improperly listed, the FWS announced that it would separate and delist the WGL population.²⁸¹ Further decision on the status of remaining eastern wolves would be made at a later date.²⁸²

268. *Id.*

269. *Id.*

270. *Id.*

271. WESTERN ENVIRONMENTAL LAW CENTER, *supra* note 111 at 22-23.

272. N.Y. Dep’t Env’t Conservation, Comment Letter on Proposed Rule to Revise the List of Endangered and Threatened Wildlife for the Gray Wolf (June 30, 2011), <https://www.regulations.gov/comment/FWS-R3-ES-2011-0029-0654>.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. Proposed Rule to Revise the List of Endangered and Threatened Wildlife for the Gray Wolf in the Eastern United States, 76 Fed. Reg. 26085 (May 5, 2011) (to be codified at 50 C.F.R. pt. 17).

279. Final Rule Revising the Listing of the Gray Wolf in the Western Great Lakes, 76 Fed. Reg. 81665 (Dec. 28, 2011) (to be codified at 50 C.F.R. pt. 17).

280. *Id.* at 81699.

281. *Id.* at 81723.

282. *See id.* at 81699.

On June 13, 2013, the Obama administration proposed delisting the wolf across much of the U.S.²⁸³ The listing decision was supported by science like a recent in-house study that reviewed the existing scientific literature defining wolf taxonomy.²⁸⁴ The FWS declared that molecular analysis shows that the gray wolf is not present in the Northeast. Therefore, the Northeast wolf is not a gray wolf subspecies, but a separate wolf species, *Canis lycaon*.²⁸⁵

Scientists, who were critical of the FWS proposal, argued that the status of the Northeast wolf is under investigation.²⁸⁶ The Northeast wolf should not be listed as a separate species until scientific consensus is established.²⁸⁷ The Northeast wolf *may* be a gray wolf subspecies.²⁸⁸ This uncertainty warrants protection for any wolf that may colonize suitable habitat in the region, whether it is *Canis lupus* or *Canis lycaon*.²⁸⁹ The 2013 proposed delisting rule was never finalized because peer reviewers found treatment of the wolf's taxonomy in Northeast was flawed.²⁹⁰

The Northeast contains suitable wolf habitat from upstate New York to Maine,²⁹¹ with a prey base that could sustain a wolf population of 1,312.²⁹² Wolves from Quebec and Ontario in Canada could serve as a source population for recovery in the Northeast. Wolf recovery in the Northeast is important because the wolves historically occupied the region and currently live across the border in Canada.²⁹³ These wolves may differ genetically from other wolves in the continental U.S.²⁹⁴ Wolves in the Northeast would perform vital ecological functions and close a vital gap in the taxon.²⁹⁵

V. State Wolf Management Plans

The ESA envisions a system of cooperative federalism. Section six of the ESA requires the federal government to cooperate with states to the maximum extent

283. See generally, Removing the Gray Wolf (*Canis Lupis*) from the List of Endangered and Threatened Wildlife, 78 Fed. Reg. 35664 (June 13, 2013) (to be codified at 50 C.F.R. pt. 17).

284. See STEVEN M. CHAMBERS ET AL., *An Account of the Taxonomy of North American Wolves from Morphological and Genetic Analysis*, 77 NORTH AMERICA FAUNA 1 (2012).

285. Proposed Rule Removing the Gray Wolf from the Endangered Species List, 78 Fed. Reg. 35664, 35670, 35717-18 (June 13, 2013) (to be codified at 50 C.F.R. pt. 17).

286. See e.g., Letter from American Society of Mammalogists to Sally Jewell, Sec'y of the Interior, Dep't of the Interior (May 22, 2013) http://www.mammalsociety.org/uploads/committee_files/2013WolfDelistingLetter.pdf; see also Letter from Bradley Bergstrom et al. to Sally Jewell, Sec'y of the Interior, Dep't of the Interior (May 21, 2013) https://www.predatordefense.org/docs/wolves_scientists_letter_to_secretary_jewell_on_delisting_052113.pdf.

287. *Id.*

288. *Id.*

289. *Id.*

290. CARROLL, *supra* note 69, at 19 (citing the National Center for Ecological Analysis and Synthesis 2014); see also Edward A. Fitzgerald, *Wolf Delisting: Old Wine in New Bottles*, 44 ELR 10,413, 10,423-24 (2014).

291. CENTER FOR BIOLOGICAL DIVERSITY PETITION, *supra* note 223, at 18.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* at 18-19.

possible to achieve recovery²⁹⁶ and authorizes the FWS to enter into cooperative agreements with the states.²⁹⁷ Section 4 of the ESA requires as a delisting criteria that the species must not be at risk from human-caused mortality²⁹⁸ and an adequate regulatory framework must be in place.²⁹⁹ States regulate human predation through hunting and trapping laws, so the regulation of human predation is an important factor in assessing the adequacy of state regulatory programs.

The FWS's evaluation of the adequacy of state management plans must be reasonable.³⁰⁰ Federal courts have insisted that "regulatory mechanisms" essential to species viability must consist of specific legal mandates with "some method of enforcing compliance."³⁰¹ Voluntary agreements are "inconsistent with the aggressive preventative posture of the ESA" because "there are no assurances that the measures will be carried out, nor whether they will be effective in eliminating the threats to the species."³⁰² The Ninth Circuit noted that "state management plans may be considered adequate regulatory mechanisms, but only if they work."³⁰³ Additionally, the D.C. Circuit noted that such state plans must be "sufficiently certain and effective to alleviate a threat of endangerment . . . after delisting."³⁰⁴

The transfer of authority over endangered and threatened species from the federal government to state governments has been viewed with great skepticism.³⁰⁵ Several scholars cautioned that "devolution of federal authority and responsibility over threatened and endangered species to states is likely to undermine conservation and recovery efforts, lead to a greater number of species becoming imperiled, and result in fewer species recovered."³⁰⁶ Other scholars have pointed out that the FWS "has a spotty . . . track record when it comes to assessing the adequacy of regulatory mechanisms and deploying them as a substitute for ESA protections."³⁰⁷

The FWS determination that the states with current wolf populations have adequate regulatory mechanisms in place is dubious. There have been ongoing conflicts in many of these states that call into question the adequacy of their plans

296. 16 U.S.C. § 1535(a).

297. 16 U.S.C. § 1535(b).

298. Adrian Treves, Peer Review of USFWS's Draft Biological Report and Proposed Delisting Rule at 19-21 (2019) in Atkins North America, Inc., Summary Report of Independent Peer Reviews for the U.S. Fish and Wildlife Service Gray Wolf Delisting Review at 9-21 (2019) (finding that the "proposed rule does not address human-caused mortality or habitat suitability adequately").

299. 16 U.S.C. § 1533(a)(1).

300. See *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (discussing the arbitrary and capricious standard as courts apply it to FWS determinations).

301. *Oregon Nat. Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1155 (D. Or. 1998).

302. *Fed'n Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, 1165 (N.D. Cal. 2000).

303. *Crow Indian Tribe v. United States*, 965 F.3d 662, 680 (9th Cir. 2020).

304. *Def. of Wildlife v. Zinke*, 849 F.3d 1077, 1083 (D.C. Cir. 2017).

305. Alejandro E. Camacho et al., *Assessing State Laws and Resources for Endangered Species Protection*, 47 ENV'T L. REP. NEWS & ANALYSIS 10837, 10843 (2017); see Holly Doremus, *Delisting Endangered Species: An Aspirational Goal, Not a Realistic Expectation*, 30 ENV'T L. REP. NEWS & ANALYSIS 10434, 10446 (2000); see also Federico Cheever, *The Rhetoric of Delisting Under the Endangered Species Act: How to Declare Victory Without Winning the War*, 31 ENV'T L. REP. NEWS & ANALYSIS 11302 (2001).

306. Alejandro E. Camacho et al., *supra* note 305, at 10838.

307. Sandra B. Zellmer et al., *Species Conservation & Recovery Through Adequate Regulatory Mechanisms*, 44 HARV. L. REV. 367, 368 (2020).

and could endanger gray wolf recovery. The following section will provide an overview of the state management plans implemented in the different regions.

A. Western Great Lakes

The FWS endorsed state management plans in Michigan, Minnesota, and Wisconsin. The FWS is confident that these plans will maintain healthy populations of wolves above the outdated recovery goals: 1600 in Minnesota, 250 in Wisconsin, and 200 in Michigan.³⁰⁸ The FWS determined that state plans “would ensure the wolf’s continued survival by requiring populations to exceed the Recovery Plan goals.”³⁰⁹ The plans contain conservation objectives like managing populations above 350.³¹⁰ They allow state managers to set future goals in light of the expansion of wolf populations and diverse stakeholder views.³¹¹

The courts have examined the adequacy of state wolf management plans in the WGL region. In 2011, the FWS published its Final Rule delisting the WGL DPS.³¹² The U.S. District Court for the District of Columbia in *Human Society v. Jewell* invalidated the rule, in part, finding that the state management plans were inadequate.³¹³ The D.C. Circuit in *Humane Society v. Zinke* reversed, upholding the wolf management plans in the WGL states.³¹⁴ Any problems will be addressed in the FWS’s 5-year post-listing monitoring.³¹⁵ Furthermore, the court found the lack of state management plans in other states in the proposed WGL DPS was insignificant “given the near non-existence of gray wolves within these jurisdictions.”³¹⁶

1. Wisconsin

After wolves were delisted 2011, Wisconsin enacted a law that mandated the Wisconsin Department of Natural Resources (“WDNR”) to authorize a hunting and trapping season on wolves from October 15 through the end of February.³¹⁷ Quotas were established in various zones, which once met ended the season.³¹⁸ The WDNR authorized three wolf hunts. Hunters and trappers killed over 500 wolves.³¹⁹

308. Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. 69778, 69842 (Nov. 3, 2020) (to be codified at 50 C.F.R. pt. 17).

309. Federal Defendants Cross-Motion for Summary Judgment at 52, *Humane Soc’y v. Jewell*, 76 F. Supp. 3d 69 (2014) (No. 1:13-cv-00186-BAH), 2013 WL6506881.

310. *Id.*

311. *Id.*

312. Final Rule Revising the Listing of the Gray Wolf in the Western Great Lakes, 76 Fed. Reg. 81665, 81666 (Dec. 28, 2011) (to be codified at 50 C.F.R. pt. 17).

313. *Humane Soc’y of the United States v. Jewell*, 76 F. Supp. 3d 69, 170 (D. D. C. 2014); *contra* Edward A. Fitzgerald, *Humane Society v. Jewell: The Court Cries Wolf*, 46 ENV’T L. REP. NEWS & ANALYSIS 10020 (2016).

314. *Humane Soc’y of the United States v. Zinke*, 865 F. 3d 585, 608-612 (D. C. Cir. 2017).

315. *Id.* at 611.

316. *Id.*

317. 2011-2012 Wisc. Legis. Serv. Act 169, Wis. Stat. § 29.185 (2012).

318. *Id.*

319. Pioneer Press, *Loss of Livestock from Wolves has Declined in Wisconsin*, TWIN CITIES PIONEER PRESS (Dec. 12, 2014), <https://www.twincities.com/2014/12/12/loss-of-livestock-from-wolves-has-declined-in-wisconsin/> (stating that in 2012 licensed hunters killed 117 wolves [illegal poaching 21, depredation control 76.] Legislation allowed hunting with hounds, which was upheld in a legal challenge

After the D.C. Circuit struck down the federal delisting of the WGL DPS in 2017, the Wisconsin legislature reacted by considering the Wolf Poaching Act, which would prohibit the state from cooperating with wolf recovery, including monitoring and law enforcement.³²⁰

Wisconsin intends to reduce its wolf population to 350 post-delisting.³²¹ The goal was established in its 1999 and 2007 management plans, and constitutes a 60% reduction in state's wolf population.³²² Scientists point out that this goal is based on outdated science and "runs counter to a widely accepted scientific model for harvest management."³²³ The scientific community has recognized the inadequacy of the plan for years.³²⁴ Recent peer-reviewed studies determined that reducing the wolf population to 350 wolves is inconsistent with the best available science and could bring the wolf back to the brink of extinction.³²⁵

Once gray wolves are federally delisted, Wisconsin law requires the state to conduct an annual wolf hunt.³²⁶ Hunters and trappers, fearing that the Biden administration would reverse Trump's wolf delisting, demanded that the wolf hunt occur.³²⁷ The WDNR refused to conduct the hunt. Hunter Nation, a Kansas hunting

that argued practice was akin to legalized dog fighting. In 2013, trappers and hunters killed 257 wolves, a 119% increase from prior year, hounds were allowed to run down 35 wolves. In 2014, after reported population decrease by 20%, DNR reduced quota and 154 wolves were legally killed by hunters, trappers, and hounders).

320. Paul A Smith, *Smith: Wolf Poaching Bill Deserves to be Buried*, MILWAUKEE JOURNAL SENTINEL (Jan. 10, 2018), <https://www.jsonline.com/story/sports/columnists/paul-smith/2018/01/10/smith-wolf-poaching-bill-deserves-buried/1018923001/>; Todd Richmond, *Conservationists Line Up Against Ending Wolf Management*, AP NEWS (Jan. 10, 2018), <https://apnews.com/article/44832d7f9427410db5be89cb53ea11e1>.

321. Brief of Amici Tribes in Support of Plaintiffs Motion for Summary Judgment at 14, *Defs. of Wildlife v U.S. Fish & Wildlife Serv.*, (2021) (No. 4:21-cv-00344-JSW).

322. *Id.* at 14-16; WISCONSIN DEPARTMENT OF NATURAL RESOURCES, WISCONSIN WOLF MANAGEMENT PLAN 3 (Oct. 27, 1999) <https://p.widencdn.net/hsp15b/ER0099> (Note, the link has the 1999 plan, followed by the 2007 addendum. The information can be found on page 3 of the addendum, or page 78 of 134 of the entire PDF.).

323. Rory Linnane, *Scientists Question State's Course on Wolves*, WISCONSIN WATCH (Oct. 13, 2013), <https://wisconsinwatch.org/2013/10/scientists-question-states-course-on-wolves/>.

324. See Linnane, *supra* note 323; Memorandum from The Humane Soc'y of the U.S. on Unlawfulness of Early 2021 Wolf Hunt (Nov. 19, 2020) <https://blog.humanesociety.org/wp-content/uploads/2020/11/HSUS-Letter-on-Unlawful-Wolf-Hunt-11-19-2020.pdf> (stating that Richard Thiel and Tim Van Deelan, coauthors of the Wisconsin Wolf Plan, testified before the Wisconsin Senate pointing out that reducing the population to 350 would have devastating consequences. Van Deelan testified: The 350 number was derived when we thought the carrying capacity for wolves in Wisconsin was dramatically lower than it's turning out to be, and so if you set 350 as the goal and then choose to manage by setting quotas that would get to that number, pretty elementary harvest management theory would suggest that you run the risk of destabilizing the population).

325. Memorandum, *supra* note 324 at 10; see Adrian Treves et al., *Transparency About Values and Assertions of Fact in Natural Resource Management*, 2 FRONTIERS IN CONSERVATION SCI., no. 631998, 2021, at 1,6.

326. Danielle Kaeding, *Study Finds Hunters and Poachers Have Killed a Third of Wisconsin Wolves Since Delisting*, WISCONSIN PUBLIC RADIO (July 6, 2021, 3:40 PM), <https://www.wpr.org/study-finds-hunters-and-poachers-have-killed-third-wisconsin-wolves-delisting> [herein after *Hunters and Poachers*].

327. See *id.* (stating that politics relies on the outdated 1999 wolf management plan).

group, brought suit demanding that the wolf hunt go forward.³²⁸ Jefferson County Judge Bennett Brantmeier sided with Hunter Nation and ordered the hunt to proceed.³²⁹ The Wisconsin Court of Appeals upheld the lower court decision, declaring that it “lacks jurisdiction over direct appeal at this time.”³³⁰

The WDNR established a hunting quota of 200 wolves.³³¹ The state’s Chippewa tribes, which opposed the hunt, claimed 81 wolves of the quota.³³² Treaty rights grant the tribes 50% of the quota on Ceded Territory in northern Wisconsin (effectively 40% of the total quota).³³³ This left 119 wolves to be taken. The WDNR sold 1,547 tags, 13 per animal.³³⁴ Wisconsin hunters proceeded to exceed the 119 quota and harvested 218 wolves in less than 72 hours at end of February 2021. Subsequent study shows that 100 additional wolves were killed during the hunt. Wisconsin lost 313-323 wolves or 33% of its wolf population.³³⁵

Conservation groups criticized the hunt, which occurred in middle of wolf breeding season. Dr. Adrian Wydeven, a peer reviewer, noted that “where you’re removing adult males that are holding down territories and females that have just probably bred, the dissolution of packs is likely to occur. Packs are going to lose their ability to raise pups.”³³⁶ Dr. Adrian Treves, an environmental studies professor, noted that “there’s simply no evidence for public hunting and trapping in reducing losses . . .”³³⁷

The WDNR initially planned another hunt for November 2021 with a quota of 130 wolves.³³⁸ The politically-appointed Wisconsin Natural Resources Board (“Board”), which establishes policy for WDNR, overruled the state biologists and

328. *Hunters and Poachers*, *supra* note 326; Danielle Kaeding, *Wolf Hunt Will Move Forward After Panel of Judges Dismisses DNR Appeal*, WISCONSIN PUBLIC RADIO (Feb. 19, 2021, 5:30 PM), <https://www.wpr.org/wolf-hunt-will-move-forward-after-panel-judges-dismisses-dnr-appeal> [herein after *Wolf Hunt*].

329. *Wolf Hunt*, *supra* note 328.

330. *Id.*

331. Adam Roy, *Wisconsin Officials Want to Double Their Wolf Hunt. Conservationists Are Suing to Shut It Down*, BACKPACKER (Sept. 9, 2021), <https://www.backpacker.com/news-and-events/news/wisconsin-officials-want-to-double-their-wolf-hunt-conservationists-are-suing-to-shut-it-down/>.

332. *Id.*

333. For a full description of treaty rights *see*, Brief of Amici Tribes in Support of Plaintiffs Motion for Summary Judgment at 2-7, *Def. of Wildlife v U.S. Fish & Wildlife Serv.*, (2021) (No. 4:21-cv-00344-JSW).

334. Roy, *supra* note 331.

335. *Hunters and Poachers*, *supra* note 326; Will Cushman, *The Swelling Scientific Fallout from Wisconsin’s Wolf Hunt*, PBS WISCONSIN (July 12, 2021), <https://pbswisconsin.org/news-item/the-swelling-scientific-fallout-from-wisconsins-wolf-hunt/>.

336. Susan Bence, *Wisconsin Wolf Management Faces Criticism As DNR Drafts Plan*, WUWM 89.7 MILWAUKEE’S NPR (May 11, 2021 at 11:04 AM) <https://www.wuwm.com/2021-05-11/wisconsin-wolf-management-faces-criticism-as-dnr-drafts-plan>.

337. *Id.*

338. Neil Vigdor, *Wisconsin More Than Doubles Wolf-Hunting Quota, Angering Conservationists*, NYT (Aug. 11, 2021) <https://www.nytimes.com/2021/08/11/us/wisconsin-wolves-hunting-kill.html> (stating “this population is small, and that requires careful biological scientific population management . . . This calls for a conservative quota until we have more population data, more science, to back up our decision making.”).

authorized the killing of 300 wolves.³³⁹ Scientists complained the Board is not utilizing good science.³⁴⁰ The scientists argued that non-lethal methods are more effective than hunting and trapping to reduce wolf depredation.³⁴¹ Furthermore, Wisconsin's aggressive action might cause the FWS to review the state's wolf management plan.³⁴²

The WDNR, which has final authority, defied the Board and set the quota at 130.³⁴³ Conservation groups brought suit in Dane County, challenging the Wisconsin law, which is the only state law mandating an annual wolf hunt. They alleged that the law violates the state's public trust duty to manage natural resources in the public interest.³⁴⁴ Dane County Judge Jacob Frost issued an injunction, halting the hunt. Judge Frost pointed out the WDNR's authority for the wolf hunt rest on emergency power granted nine years ago. The WDNR must engage in formal rulemaking to define the terms of hunt and update the state's wolf plan that hasn't been changed since 2007.³⁴⁵

The Board plans to appeal the decision but wants the appointment of outside counsel.³⁴⁶ The Board questions Wisconsin Attorney General Kaul's impartiality. Attorney General Kaul brought a suit seeking to remove the chair of the Board, Fred Prehn, who is allegedly serving illegally. His term ended in May 2021, but he refused to step down until his replacement, Sandra Nass, is confirmed. Her confirmation would give Democratic Governor, Tony Evers, a majority on the board. However, the Republican Senate has refused to grant a hearing for his replacement.³⁴⁷ Attorney General Kaul lost the case,³⁴⁸ but is appealing the decision.

339. *Id.*

340. Bence, *supra* note 336 ("The public should oppose any further wolf hunts because we simply do not know what we are doing. Despite all the rhetoric and talk about good science being used, in fact the best available science was not fully used the way it should have been.").

341. *Id.*

342. Will Cushman, *How Wisconsin's Wolf Hunt Quotas May Prompt Federal Review*, PBA WISCONSIN (Aug. 30, 2021) <https://pbswisconsin.org/news-item/how-wisconsins-wolf-hunt-quotas-may-prompt-federal-review/> (stating that the 300 wolf quota "'would likely have destabilizing effect on almost every wolf pack in the state' and make a review of state management by [FWS] 'highly likely.'").

343. Leah Asmelash, *Wisconsin wolf hunt quota is lowered following months of conflict*, CNN (Oct. 5, 2021) <https://www.cnn.com/2021/10/05/us/wisconsin-wolf-hunt-quota-lowered-cec/index.html>.

344. Jessie Opoien, *A guide to legal battles over Wisconsin's wolf hunt*, THE CAP TIMES (Sept. 4, 2021) https://captimes.com/news/local/govt-and-politics/election-matters/a-guide-to-the-legal-battles-over-wisconsin-s-wolf-hunt/article_cafc3ae3-0a2e-57cf-ad19-302893524ab6.html; Roy, *supra* note 331.

345. Jack Kelly, *Dane county judge blocks fall wolf hunt in Wisconsin*, CAPITAL TIMES (Oct. 25, 2021) https://captimes.com/captimes/news/government/dane-county-judge-blocks-fall-wolf-hunt-in-wisconsin/article_f284c29c-fce7-5e83-b3c2-284e32b31b26.html.

346. M.D. Kittle, *DNR Board looks to remove conflicted Kaul's office in wolf hunt lawsuit*, EMPOWER WISCONSIN (Oct. 8, 2021) <https://empowerwisconsin.org/dnr-board-looks-to-remove-conflicted-kauls-office-in-wolf-hunt-lawsuit/>.

347. Roy, *supra* note 331.

348. M.D. Kittle, *supra* note 348 (stating Dane county Judge Valerie Bailey-Rihn rejected Kaul's lawsuit to remove Prehn. This precludes Governor Evers appointed candidate from taking the seat. Judge Bailey-Rihn cited prior law-Thompson v. Gibson-which held the state auditor can remain in his present position until his successor confirmed. The court stated it "is bound by holding in Thompson v. Gibson to conclude there is no vacancy in the Board seat.")

Six Ojibwe tribes also brought a suit in federal court seeking an injunction to halt the November 2021 wolf hunt. Given the reduction in the wolf population in the February 2021 hunt, the tribes allege that the number of wolves protected by their 50% quota remains unknown.³⁴⁹ Federal judge James Petersen refused to issue the injunction but expressed “deep misgivings” regarding how state sets the wolf hunt quota.³⁵⁰

Studies show wolves in Wisconsin provide public benefits. Wolves keep the deer population low, so there has been a decrease in vehicle accidents involving deer.³⁵¹ Wolves provide advantages to rural counties by killing deer, which eat crops, and harbor ticks, which cause Lyme’s disease.³⁵² Wolves also have a positive impact on deer and elk populations in the region by killing ungulates infected with chronic wasting disease.³⁵³

2. Minnesota

Minnesota’s 2001 wolf management plan established a population goal of 1,600 wolves. Minnesota promised that there would be no hunting or trapping season for at least five-year post delisting. This promise proved hollow.³⁵⁴ After wolves were delisted in 2011, Minnesota conducted several wolf hunts. In the 2012 season, hunters and trappers killed 413 wolves. From 2012 to 2013 Minnesota’s wolf population remained stable between 2,211 to 2,221.³⁵⁵

Minnesota Department of Natural Resources announced that it will cull its wolf population by 40%, liberalize the private killing of depredating wolves;³⁵⁶ and consider restarting trophy hunting and trapping seasons post-delisting.³⁵⁷ The expansion of hunting and trapping will cause problems for the gray wolf populations. The FWS acknowledged that “trapping, in particular may remove age classes most

349. Steve Karnowski, *6 tribes sue Wisconsin to try to stop November wolf hunt*, DENVER POST (Sept. 22, 2021 at 7:18 AM) <https://www.denverpost.com/2021/09/22/wisconsin-tribes-lawsuit-wolf-hunt/>; Paul A. Smith, *Ojibwe tribes have claimed 50% of wolf quota and are pushing for a reduction in the overall number*, MILWAUKEE JOURNAL SENTINEL (Sept. 18, 2021) <https://www.jsonline.com/story/sports/outdoors/2021/09/18/ojibwe-tribes-ask-reduction-wisconsin-wolf-hunting-quota/8379025002/>.

350. *Federal judge rejects request to block wolf hunts*, KFIZ (Oct. 31, 2021); *Judge declines to issue a ruling on Ojibwe wolf case*, PUBLIC RADIO 90, WNMU (Nov. 2, 2021, 9:38 AM) <https://www.wnmufm.org/wildlife/2021-11-02/judge-declines-to-issue-a-ruling-in-ojibwe-wolf-case>.

351. Todd Wilkinson, *Study: Wolves Bring Fewer Car Wrecks, Save Money, and Human Lives*, MOUNTAIN JOURNAL (May 26, 2021) <https://mountainjournal.org/value-of-wolves-in-wisconsin-brings-illumination-upon-lobo-eradication-campaigns-in-west>.

352. *Id.*

353. ADRIAN WYDEVEN, ATKINS, SUMMARY REPORT OF INDEPENDENT PEER REVIEWS FOR THE U.S. FISH AND WILDLIFE SERVICE GRAY WOLF DELISTING REVIEW, at 162 of 245 (2019).

354. Plaintiffs Joint Notice of Motion, Motion for Summary Judgment, and Memorandum in Support of Summary Judgment at 33-34, *Defs. of Wildlife v U.S. Fish & Wildlife Serv.*, N.D. Cal. (2021) (No. 4:21-cv-00344-JSW).

355. USFWS, *Gray Wolf Numbers in Minnesota, Wisconsin, and Michigan (excluding Isle Royale) 1976-2015*.

356. Plaintiffs’ Joint Motion for Summary Judgment at 31 n.18, N.D. Cal. (2021) (No. 4:21-cv-00344-JSW) (stating 215 from 2015-2018 depredation control by Wildlife Service and private citizens “accounted for loss of 7.5% of population.”).

357. *Id.* at 32-33.

likely to disperse because younger, less experienced wolves are often more vulnerable to this form of harvest.”³⁵⁸ Furthermore, the best available science indicates that liberalized legal killing is likely to increase the incidence of illegal poaching.³⁵⁹

Minnesota is currently updating its 2001 management plan.³⁶⁰ Recreational hunting, if permitted, will not occur until 2022 at the earliest.³⁶¹ Democratic Governor Walz and Minnesota Department of Natural Resources opposed gray wolf delisting³⁶² and any recreational hunting of wolves.³⁶³

3. Michigan

After delisting in 2011, Michigan authorized wolf hunt in 2013 with a quota of 43. Hunters killed 22 wolves during the hunt. From 2012 to 2014 Michigan’s wolf population shrank from 687 to 636.³⁶⁴

In response, Keep Michigan’s Wolves Protected introduced two ballot referendums that prohibited wolf hunting. Both were passed by voters in November 2014. Proposition 1 repealed Public Act 520, which changed the wolf’s status from a protected species to a game species.³⁶⁵ Proposition 2 repealed Public Act 21, which authorized the politically appointed Natural Resource Commission (“NRC”) to establish a hunting season on designated species, by a 64% majority.³⁶⁶

The Michigan legislature reacted in August 2015 by enacting the Scientific Fish and Wildlife Conservation Act (“SFWCA”), which nullified the ballot referendums and restored NRC authority to designate game species.³⁶⁷ Keep Michigan Wolves Protected challenged the law, but the Michigan Court of Claims upheld the law.³⁶⁸ However, the Michigan Court of Appeals in 2016 reversed the

358. *Id.* at 36.

359. *Id.* at 36-37.

360. Removing the Gray Wolf From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. 69778, 69825-28 (Nov. 3, 2020) (codified at 50 C.F.R. pt. 17).

361. *Minnesota DNR: No wolf season until 2022 at soonest*, U.S. NEWS (July 7, 2021) <https://www.usnews.com/news/best-states/minnesota/articles/2021-07-07/minnesota-dnr-no-wolf-season-until-2022-at-soonest>.

362. Dan Kraker, *Gray wolf loses federal protection; state will manage instead*, MPR NEWS (Oct. 30, 2020, 9:00 AM) <https://www.mprnews.org/story/2020/10/30/gray-wolves-lose-federal-protection-state-will-manage-instead>.

363. Dennis Anderson, *Minnesota’s path isn’t so clear after wolves become delisted*, STAR TRIBUNE (Mar. 6, 2020, 12:51 PM) <https://www.startribune.com/anderson-minnesota-s-path-isn-t-so-clear-when-wolves-are-delisted/568529752/>.

364. Glen Wunderlich, *Biologists conducting U.P wolf survey, DNR supporting efforts to return wolf management to Michigan*, THINKINGAFIELD.ORG (Mar. 9, 2016) <https://thinkingafield.org/2016/03/biologists-conducting-u-p-wolf-survey-dnr-supporting-efforts-return-wolf-management-michigan-2.html>.

365. *Id.*

366. *Id.*; *Gov. Snyder signs wolf-hunt bill despite voter opposition*, THE HUMANE SOC’Y OF THE U.S. (Dec. 22, 2016) <https://www.humanesociety.org/news/gov-snyder-signs-wolf-hunt-bill-despite-voter-opposition> (Prop 2 was defeated in 69 of 83 counties. Michigan voters cast 1.8 million votes against Prop 2, more votes than any statewide candidate.)[hereinafter THE HUMANE SOC’Y OF THE U.S.].

367. *See*, Glen Wunderlich, *supra* note 364.

368. *Keep Mich. Wolves Protected v. State, Dep’t of Nat. Res.*, 328604 Mich. Ct. Cl., LC No. 15-000087-MZ.; *See also*, *Judge Upholds Law Enabling Commission to Allow Wolf Hunting*, TRUE NORTH

lower court and held the SFWCA was unconstitutional.³⁶⁹ The Michigan Constitution contains a Title-Object Clause, which states “no law shall embrace more than one object, which shall be expressed in its title.”³⁷⁰ The court ruled that the portion of SFWCA granting free hunting licenses to members of the military was unrelated to the law’s purpose of managing game; consequently, the entire law had to be struck down.³⁷¹

Again, the Republican Legislature responded by passing SB 1187, which mirrored the earlier defeated Proposition 2.³⁷² Republican Governor Snyder signed SB 1187 into law, which grants the unelected members of the NRC authority to declare a hunting season on wolves. A superfluous appropriation was added to the bill solely to make SB 1187 immune from another voter referendum.³⁷³ The Humane Society of the U.S. commented: “Governor Snyder has affirmed the Michigan legislature’s elaborate game of voter circumvention.”³⁷⁴

Several anti-wolf measures are being considered in Michigan post delisting. Senate Resolution 15 calls for the NRC and Michigan Department of Natural Resources (“MDNR”) to authorize a wolf hunt in 2021.³⁷⁵ The Michigan Senate passed a bill that only allows Upper Peninsula (“UP”) residents to serve on the Wolf Management Advisory Council (“WMAC”).³⁷⁶ The Director of MDNR is being sued for appointing hunting advocates to seats on WMAC that are reserved for agricultural and conservation groups.³⁷⁷ Native American leaders criticized the MDNR’s decision to appoint a Wisconsin resident to a seat on the WMAC reserved for tribal

RADIO NETWORK (July, 16, 2015) <https://www.truenorthradionetwork.com/2015/07/16/judge-upholds-law-enabling-commission-to-allow-wolf-hunting/>; *Wolf Hunting Law Ruled Unconstitutional by Michigan Court of Appeals*, ANIMAL LEGAL DEFENSE FUND

(Dec. 7, 2016), <https://aldf.org/article/wolf-hunting-law-ruled-unconstitutional-by-michigan-court-of-appeals/>.

369. *Keep Mich. Wolves Protected v. State, Dep’t of Nat. Res.*, Not Reported in N.W.2d 2016 WL 6905923 (2016); Paul Egan, *Court Rules Michigan Wolf Hunt Law Unconstitutional*, DETROIT FREE PRESS, (Nov. 24, 2016), <https://www.freep.com/story/news/politics/2016/11/23/michigan-wolf-hunt-unconstitutional/94332292/>; Garrett Ellison, *Michigan Wolf Hunting Law Ruled Unconstitutional by Appeals Court*, MLIVE (Nov. 23, 2016), https://www.mlive.com/news/2016/11/michigan_wolf_hunt_law_ruled_u.html.

370. *Id.*; Mich. Const. art. 4 § 24.

371. *Id.*

372. THE HUMANE SOC’Y OF THE U.S., *supra* note 366.

373. *Id.*

374. *Id.*

375. Max White, *Senate resolution aims to establish wolf hunt in Michigan this year*, WXYZ DETROIT (Feb. 22, 2021, 11:46 AM), <https://www.wxyz.com/news/senate-resolution-aims-to-establish-wolf-hunt-this-year-in-michigan>.

376. Kelly House, *Michigan Senate passes bill to create a Yoopers-only wolf council*, BRIDGE MICHIGAN (June 10, 2021), <https://www.bridgemi.com/michigan-environment-watch/michigan-senate-passes-bill-create-yoopers-only-wolf-council>.

377. Kelly House, *Lawsuit: Michigan Wolf advisory group stacked with hunting advocates*, BRIDGE MICHIGAN (Apr. 8, 2021), <https://www.bridgemi.com/michigan-environment-watch/lawsuit-michigan-wolf-advisory-group-stacked-hunting-advocates>.

government.³⁷⁸ Nevertheless, the MDNR will not allow wolf hunting until after the current litigation is concluded and the state's 2015 management plan is updated.³⁷⁹

4. Other Areas

There will be very limited protection for the wolf in other areas of the proposed WGL DPS, which lack any wolf management plans, after delisting. In South Dakota, the gray wolf will be considered a predator/varmint that can be shot on sight.³⁸⁰ In North Dakota and Iowa, the wolf will be considered a fur bearing animal with a regulated hunting season and limited protection.³⁸¹ In Illinois, the wolf will be treated as a threatened species under state law.³⁸² The wolf will receive no protection in Ohio and Indiana where it is considered to be extinct.³⁸³ Furthermore, none of the Native American tribes in these states have approved wolf management programs, but their reverential attitude toward the wolf will ensure future protection on Native American land.³⁸⁴

These areas are important for dispersing wolves, which are crucial for species recovery.³⁸⁵ Dispersers may establish new packs in new areas, expanding the current range.³⁸⁶ The FWS defined range as "the general geographic area within which the species is currently found, including those areas used throughout all or part of the species life cycle, even if not used on a regular basis."³⁸⁷ Dispersing wolves have been sighted in many of the states in the proposed WGL DPS, which constitutes the current range of the wolf.³⁸⁸

Dr. MacNulty, peer reviewer, noted "it is more logical to classify the interconnecting 'historical range' as 'current range' given that these interconnections reflect contemporary corridors of regular movement and occurrence, which are themselves subject to potential pack establishment."³⁸⁹

378. Sophia Kalakailo & Kelly House, *Wolf wars: as Michigan Packs grow, a battle brews over killing the predators*, BRIDGE MICHIGAN (July 9, 2021), <https://www.bridgemi.com/michigan-environment-watch/wolf-wars-michigan-packs-grow-battle-brews-over-killing-predators>.

379. White, *supra* note 375.

380. Gordy Krahn, *South Dakota Cries 'No Wolf'*, GRAND VIEW OUTDOORS (Jan. 6, 2021), <https://www.grandviewoutdoors.com/predator-hunting/south-dakota-cries-no-wolf>.

381. Endangered and Threatened Wildlife and Plants; Revising the Listing of the Gray Wolf (*Canis lupus*) in the Western Great Lakes, 76 Fed. Reg. 249, 81666, 816713 (Dec. 28, 2011) (to be codified at 50 CFR pt. 17).

382. *Id.*

383. *Id.*

384. *Id.*

385. Proposed Amicus Brief of People of the State of Michigan and The State of Oregon, at 6-7, Defs. of Wildlife v U.S. Fish & Wildlife Serv., N.D. Cal. (July 23, 2021) (No. 4:21-cv-00344-JSW).

386. *Id.*

387. Final Policy on Interpretation of the Phrase "Significant Portion of Its Range", 79 Fed. Reg. 37578, 37609 (July 1, 2014) (to be codified at 50 C.F.R. ch. 2).

388. Proposed Amicus Brief of People of the State of Michigan and The State of Oregon, at 6-7, Defs. of Wildlife v U.S. Fish & Wildlife Serv., N.D. Cal. (July 23, 2021) (No. 4:21-cv-00344-JSW).

389. See Dr. Daniel MacNulty, *supra* note 6 at 7,8.

B. Northern Rocky Mountains

The FWS determined that states of Idaho, Montana and Wyoming have laws, regulations, and management plans in place that meet the requirements of the ESA to maintain their respective wolf populations within the NRM DPS above recovery levels into the foreseeable future.³⁹⁰ The FWS's conclusion is problematic, particularly in light of Idaho and Montana's recent actions.³⁹¹

Federal courts have examined and upheld the adequacy of state wolf management plans in the NRM region. The Bush administration established the NRM DPS in 2008.³⁹² The U. S. District Court for the District of Montana in *Defenders of Wildlife v. Hall* halted the effort because of deficiencies in Wyoming's management plan.³⁹³ Subsequently, Wyoming submitted a revised plan that was rejected by the FWS, in part, because it maintained the dual classification of trophy game in northwest Wyoming and predator in the remainder of the state.³⁹⁴

The Obama administration resurrected the Bush administration's proposal and established the NRM DPS.³⁹⁵ Wolves in Idaho and Montana were delisted, but ESA protections remained for wolves in Wyoming. The U.S. District Court for the District of Montana rejected the delisting proposal in 2010 in *Defenders of Wildlife v. Salazar*.³⁹⁶ The court held that the NRM DPS could not be subdivided on a state-by-state basis because 1) the ESA defines units for listing and delisting as species, subspecies, and DPS; 2) the NRM DPS must be treated as a single unit.³⁹⁷ The court found that the SPR language could not be utilized to change the definition of an

390. Endangered and Threatened Wildlife and Plants; Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. 213, 69778, 69822 (Nov. 3, 2020) (to be codified at 50 CFR pt. 17).

391. Six-hundred scientists criticized state wolf management plans in the NRM. They asserted that the state laws are 1) a major setback for wildlife recovery in North America, 2) misinformed and short-sighted policy that lacks scientific credibility and disregards successful non-lethal mitigation measures to promote human-wolf coexistence, and 3) decisions by the three states that run counter to modern day wildlife management and to the will of much of the American people, who value wolves. *Why We Should Act Now in Defense of Wolves*, (July 1, 2021), https://wildlifecoexistence.org/wp-content/uploads/2021/09/Why-We-Should-Act-Now-in-Defense-of-Wolves_7.1.2021-updated-Dec-12.pdf.

392. 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, 73 Fed. Reg. 10514 (Feb. 27, 2008) (to be codified at 50 CFR pt. 17).

393. *Def. of Wildlife v. Hall*, 565 F. Supp. 2d 1160 (D. Mont. 2008).

394. Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and To Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15123, 15149, 15172, & 15182-83 (April 2, 2009) (to be codified at 50 CFR pt. 17). In the brief period that Wyoming wolves lost ESA protection, 17 of the 28 wolves in the predator control area were killed within a few weeks. *Id.* at 15170.

395. Endangered and Threatened Wildlife and Plants; Final Rule To Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and To Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15123 (April 2, 2009) (to be codified at 50 CFR pt. 17).

396. *Def's of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010); see Edward A. Fitzgerald, *Defenders of Wildlife v. Salazar: Delisting the Children of the Night in the Northern Rocky Mountains*, 31 PUB. LAND & RES. L. REV. 1, 1 (2010).

397. See *Def's of Wildlife v. Salazar* 729 F. Supp. 2d at 1228 (D. Mont. 2010).

endangered or threatened species.³⁹⁸ Since Wyoming constituted a significant portion of the range of the NRM DPS, wolves in the NRM DPS cannot be delisted until Wyoming developed an adequate management plan.³⁹⁹

Congress intervened. Section 1713 attached to the Department of Defense and Full-Year Continuing Appropriations Act of 2011,⁴⁰⁰ restored the FWS's delisting of the wolf in the NRM DPS (except Wyoming) and precluded judicial review of the regulation. The FWS was instructed to reconsider Wyoming's plan to determine if a statewide trophy game designation is warranted.⁴⁰¹ The U.S. District Court for the District of Montana in *Alliance for the Wild Rockies v. Salazar* found section 1713 constitutional, but noted the section represented "an undermining and disrespect for the fundamental idea of the rule of law."⁴⁰² The Ninth Circuit upheld the lower court decision.⁴⁰³

1. Idaho and Montana

Gray wolves in Idaho and Montana are threatened because of recent changes in state management. The FWS determination that the wolf population in Idaho will remain stable after delisting is dubious.⁴⁰⁴ Idaho stopped conducting its annual wolf count in 2015. After public outcry, Idaho Department of Fish and Game in 2019 instituted a camera trap survey,⁴⁰⁵ which conservation groups allege inflates wolf numbers.⁴⁰⁶ Aggressive wolf hunting and trapping laws instituted since 2017 have adversely affected the wolf population.⁴⁰⁷ In 2019, 583 wolves were killed, which exceeded 50% of the state's population.⁴⁰⁸

398. *See id.* at 1223.

399. *See id.* at 1218.

400. Department of Defense and Full-Year Continuing Appropriations Act, Pub. L. No. 112-10, 125 Stat. 38 (2011).

401. Section 1713 states: "Before the end of the 60-day period beginning on the date of enactment of this Act, The Secretary of the Interior shall reissue the final rule published on April 2, 2009 (74 Fed. Reg. 15123 et seq.) without regard to any other provision of statute or regulation that applies to issuance of such rule. Such reissuance (including this section) shall not be subject to judicial review and shall not abrogate or otherwise have any effect on the order and judgement issued by the United State District Court for the District of Wyoming in Case Numbers 09-CV-118J and 09-CV-138J on November 18, 2010 [involving Wyoming's management plan for gray wolves.]" *Id.* § 1713.; *see generally* Edward A. Fitzgerald, *Alliance for Wild Rockies v. Salazar: Congress Behaving Badly*, 25 VILL. ENVTL. L. J. 351 (2014).

402. *All. for the Wild Rockies v. Salazar*, 800 F. Supp. 2d 1123, 1125 (D. Mont. 2011).

403. *All. for the Wild Rockies v. Salazar*, 672 F.3d 1170, 1171, 1174-75 (9th Cir. 2012) (stating "[T]hat preclusion of judicial review indicates Congressional intent to change the law applicable to the precedent."). For a full analysis, *see* Fitzgerald, *supra* note 41, at 374. The Ninth Circuit upheld the lower court's decision on constitutionality because the congressional rider was not interfering with pending litigation, but instead simply replaced preexisting standard with new standards that the court must follow.

404. 50 C.F.R. § 17.11 (2020).

405. *Id.*

406. CENTER FOR BIOLOGICAL DIVERSITY PETITION, *supra* note 223 at 20, 25.

407. *Id.* at 17, 25.

408. TALASI BROOKS ET AL., A PETITION TO LIST THE WESTERN NORTH AMERICAN POPULATION OF GRAY WOLVES (*CANIS LUPUS*) AS A DISTINCT POPULATION Segment 33 (2021).

After delisting, Idaho Governor Brad Little signed SB 1211 into law, which is designed to kill 90% of 1556 wolves in Idaho.⁴⁰⁹ The Idaho Department of Fish and Game opposed the bill, which allows individuals to purchase an unlimited number of wolf tags that will be valid for hunting, trapping, and snaring in any hunting unit with an open wolf season at the time the wolf is killed.⁴¹⁰ Individuals with tags can kill unlimited number of wolves employing hounds, using night vision goggles, chasing and running wolves down with mechanized vehicles, shooting wolves from helicopters and trapping wolves year-round on private land. Private contractors can be hired to implement this policy.⁴¹¹

New laws in Montana allow the killing of 85% of the state's 833 wolves. HB 224 allows license holders to use snares during wolf trapping season.⁴¹² HB 225 extends wolf trapping season by a month from the first Monday after Thanksgiving until March 15.⁴¹³ SB 267 grants individuals and entities the right to reimburse hunters or trappers for their costs incurred in the hunting or trapping of wolves.⁴¹⁴ SB 314 requires state wildlife officials to establish a hunting and trapping season "with the intent to reduce the wolf population in the state to a sustainable level, but not less than number of wolves necessary to support at least 15 breeding pairs."⁴¹⁵ The holder of a single hunting or trapping license is allowed to take an unlimited number of wolves. Hunters and trappers are allowed to operate on private land even

409. Richard Pallardy, *Montana and Idaho Have Legalized Killing Wolves on a Massive Scale*, GIZMODO (July 5, 2021, 12:00 PM), <https://gizmodo.com/montana-and-idaho-have-legalized-killing-wolves-on-a-ma-1847222618>; see also Andrea Zaccardi, *Bill Aimed at Killing 90% of Idaho's Wolves Headed to Governor's Desk*, CTR. FOR BIOLOGICAL DIVERSITY (Apr. 27, 2021), <https://biologicaldiversity.org/w/news/press-releases/bill-aimed-at-killing-90-of-idahos-wolves-headed-to-governors-desk-2021-04-27/>.

410. Pallardy, *supra* note 409.

411. *Id.*; Idaho has set aside \$200,000 from license fees paid by hunters for its wolf bounty. Funds will be distributed by state's Wolf Depredation Control Board in agreement with Foundation for Wildlife Management. Reimbursements will be \$2,500 for killing a wolf in areas of chronic livestock depredation (one confirmed or probable kill in a year), \$2,000 for killing a wolf in hunting units where the elk population is not meeting management objectives, \$1,000 for killing a wolf in the northern tip of the state, and \$500 for killing a wolf elsewhere. Most high reimbursement areas are located in central and west-central Idaho and include designated wilderness. Keith Ridler, *Idaho Reaches Deal to Reimburse Hunters Who Kill Wolves*, ABC NEWS (Oct. 11, 2021, 2:22 PM), <https://abcnews.go.com/Technology/wireStory/idaho-reaches-deal-reimburse-hunters-kill-wolves-80525212>.

412. Maggie Caldwell et al., *Groups File Legal Notice Over Montana Wolf Trapping's Threat to Grizzlies, Lynx*, EARTHJUSTICE (June 23, 2021), <https://earthjustice.org/news/press/2021/groups-file-legal-notice-over-montana-wolf-trappings-threat-to-grizzlies-lynx>.

413. *Id.*

414. *Id.*

415. CENTER FOR BIOLOGICAL DIVERSITY PETITION, *supra* note 223, at 16.

at night using artificial light.⁴¹⁶ The Montana Fish, Wildlife, and Parks Commission has enacted regulations implementing these laws.⁴¹⁷

These Idaho and Montana statutes are ostensibly designed to stop wolf predation of livestock and increase game for hunter and trappers. However, wolf predation is low and the elk populations in both states are stable.⁴¹⁸ There is no major conflict with wolves. Michael Phillips, a noted wolf expert, stated: “there are no data that would suggest that conflicts exist at such a level that a massive massacre of gray wolves is indicated.” State legislators are “ecologically illiterate.”⁴¹⁹

In light of Montana and Idaho’s hostility towards wolves, more than 50 conservation groups filed two petitions with the FWS to restore ESA protection for the wolves in NRM DPS and re-evaluate state management plans.⁴²⁰ Center for Biodiversity (“the Center”) stated: “Wildlife managers in Idaho and Montana are rushing out regulations that’ll allow the widespread slaughter of wolves to start this summer. Decades of progress recovering wolves in the NRM will be erased unless FWS acts now to restore their ESA protections.”⁴²¹ This effort is supported by former FWS Director, Dan Ashe.⁴²²

Conservation groups asked the FWS to stop providing federal funds to Montana and Idaho pursuant to the Pittman-Robinson Act (“PRA”), which provides federal funds to state wildlife managers to support critical conservation and outdoor

416. *Id.*; see also Madelyn Beck, *Mountain West Lawmakers Take Aim at Wolves*, BOISE STATE PUB. RADIO NEWS (Apr. 22, 2021, 1:04 PM), <https://www.boisestatepublicradio.org/environment/2021-04-22/mountain-west-lawmakers-take-aim-at-wolves>; Andrea Zaccardi, *Wolf-Killing Could Disqualify Montana for \$24 Million in Federal Funding, State Warned*, CTR. FOR BIOLOGICAL DIVERSITY (May 20, 2021), <https://biologicaldiversity.org/w/news/press-releases/wolf-killing-could-disqualify-montana-for-24-million-in-federal-funding-state-warned-2021-05-20/>.

417. Under the regulations, if more than 450 wolves are harvested or regional quotas are exceeded, a reappraisal of the harvest numbers will be reconsidered. Hunters and trappers can each acquire 10 wolf tags. Baiting and snares are allowed statewide. If lynx or grizzly bears are killed, the use of snares will be reconsidered. Laura Lundquist, *By Close Vote, FWP Commission Approves Drastic Wolf Regulations, Snaring, Baiting*, MISSOULA CURRENT (Aug. 21, 2021), <https://missoulacurrent.com/outdoors/2021/08/drastic-wolf-regulations/#:~:text=On%20Friday%2C%20the%20FWP%20commission,allowed%20before%20relisting%20is%20required;see%20also%20Scott%20Shindledecker,FWP%20Commission%20Approves%20More%20Liberal%20Wolf%20Hunting,Trapping%20Regs,DAILY%20INTER%20LAKE,AUG.25,2021,6:25AM>, <https://hungryhorsenews.com/news/2021/aug/25/fwp-commission-approves-more-liberal-wolf-hunting-t/>.

418. Pallardy, *supra* note 409 (“Predation on livestock by wolves is relatively low and elk populations are stable. In Idaho, between July 2019 and July 2020, there were only 102 confirmed livestock kills, with 28 more considered probable. Montana saw 238 confirmed kills in 2020. Both states host millions of cattle, sheep, and other ruminants, and compensate ranchers for each confirmed loss. Elk herds are thriving, with around 136,000 animals in Montana and 120,000 in Idaho. Most hunting districts meet or exceed their population goals.”).

419. *Id.*

420. 90-Day Finding for Two Petitions to List the Gray Wolf in the Western United States, 86 Fed. Reg. 51857 (Sept. 17, 2021) (to be codified at 50 C.F.R. pt. 17).

421. Steve Kirch, *More Than 50 Conservation Groups Want Federal Protections Restored to Protect Wolves*, KMTV 11 (June 16, 2021, 9:21 PM), <https://www.kmtv.com/2021/06/17/more-than-50-conservation-groups-want-federal-protections-restored-protect-wolves/>.

422. Daniel Ashe, *Opinion: Cruelty Towards Wolves is Erasing Conservation Efforts. It’s Time to Reinstate Their Protections.*, THE WASH. POST (Aug. 3, 2021, 5:50 PM), <https://www.washingtonpost.com/opinions/2021/08/03/wolves-idaho-montana-cruelty-conservation/>.

recreation projects.⁴²³ PRA funding is designed to ensure sound conservation policies for the benefit of a diverse array of wildlife.⁴²⁴ States, which adopt or implement policies contrary to the conservation purposes of act, are not eligible for funds.⁴²⁵

Conservation groups petitioned Secretary of Agriculture Vilsack to protect wolves in national forest wilderness areas from new Montana and Idaho laws that resemble nineteenth century bounties.⁴²⁶ Conservation groups are asking the National Forest Service (“NFS”) to issue new regulations and closure orders to prevent the killing of wolves by hunters and trappers across nearly eight million acres of designated wilderness in Idaho and Montana, including the Bob Marshall Wilderness in northwest Montana and Frank Church River of No Return and Selway-Bitterroot wilderness areas in central Idaho.⁴²⁷ The Center stated: “wolves need wilderness to serve as refuge where they can be safe from the slaughter they face across Idaho and Montana. Protecting wilderness requires the NFS to also protect wolves, which are so ecologically important to our national forests.”⁴²⁸

Conservation groups are asking the federal government to establish a five-mile buffer zone around Yellowstone and Grand Teton National Parks and four national forests in the NRM where wolf hunting will be prohibited. Footloose Montana stated: “This insanity of allowing the slaughter of national park wolves and endangering the public was enabled by Governor Gianforte and our legislature and must be stopped by the federal government. It is time that they assume their rightful control over these federal forested lands, to protect wolves. . . .”⁴²⁹ Recently, three Yellowstone wolves were killed during Montana’s wolf hunting season.⁴³⁰

Conservation groups plan to sue Montana, alleging that Montana’s new wolf trapping laws pose a threat to federally protected grizzly bears and Canadian

423. 16 U.S.C. §§ 669-669i (2019); Zaccardi, *supra* note 416.

424. Zaccardi, *supra* note 416.

425. *Id.*

426. Federal public land managers must ensure protection for the wolf. The FWS acknowledged that NFS and BLM lands, as well as wilderness areas, are managed to protect wildlife. However, the NFS “typically defers to States on hunting decisions.” FWS expressed confidence that these lands managed by NWS and BLM will continue to be “adequately managed for multiple uses including for the benefit of wildlife.” Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. 69778, 69825 (Nov. 3, 2020) (codified at 50 C.F.R. pt. 17); *see also* WildEarth Guardians v. Jeffries, 370 F. Supp. 3d 1208 (D. Or. 2019) (holding that NFS violated ESA and NEPA when it failed to consult with FWS regarding impact on wolves in Ochoco Summit Trail Project).

427. Maggie Caldwell et al., *Forest Service Protections Sought for Wolves in Idaho, Montana Wilderness*, CTR. FOR BIOLOGICAL DIVERSITY (June 9, 2021), <https://biologicaldiversity.org/w/news/press-releases/forest-service-protections-sought-for-wolves-in-idaho-montana-wildernesses-2021-06-09/>.

428. *Id.*

429. Andrew Rossi, *Conservation Group Seeks “Buffer Zone” Around Greater Yellowstone Ecosystem*, BIG HORN RADIO NETWORK (Nov. 1, 2001), <https://mybighornbasin.com/conservation-group-seeks-buffer-zone-around-greater-yellowstone-ecosystem/>.

430. Kamila Kudelska, *Three Yellowstone Wolves Dead in Montana*, WYO. PUB. RADIO (Sep. 9, 2021, 3:40 PM), <https://www.wyomingpublicmedia.org/natural-resources-energy/2021-09-29/three-yellowstone-wolves-dead-in-montana>.

lynx.⁴³¹ These new laws permit the use of snares, which also capture non-targeted animals, including federally protected species. Sierra Club stated: “Montana’s unwarranted, extreme new laws aimed at annihilating the wolf population are a sharp departure from the state’s historically more reasoned science-based approach to wildlife management. The proliferation of strangling neck snares across Montana’s landscape will not only injure and kill countless wolves, but also threatens species including grizzly bears and lynx, as well as domestic pets.”⁴³²

The Montana Fish, Wildlife and Parks Commission changed its rules in response. The Commission has delayed wolf hunting in the areas overlapping in grizzly bear territory until December 31, when grizzly bears are hibernating.⁴³³ The Commission has also prohibited the use of snares on public lands in lynx protection zones.⁴³⁴

2. Wyoming

Wyoming has committed to maintaining 10 breeding pairs and 100 wolves within the Wyoming Trophy Game Management Area (WTGMA), which comprises 15% of state.⁴³⁵ The WTGMA is 50 miles south of Yellowstone National Park in Sublette and Lincoln Counties and one half of Teton County. Wolves in the WTGMA have year-round trophy game status.⁴³⁶ Wyoming relies on at least 50 additional wolves and 5 breeding pairs on federal public lands in Yellowstone National Park, Grand Teton National Park, and Wind River Reservation to meet its requirement to maintain 150 wolves and 15 breeding pairs in the state.⁴³⁷ Wolves are treated as predators in the remaining 85% of the state where they can be shot on sight. Seventy-one wolves were killed in the WTGMA and forty-three wolves were killed in the predator control zone in 2020.⁴³⁸ Conservation groups accuse Wyoming of waging war on wolves.⁴³⁹

431. Maggie Caldwell et al., *Groups File Legal Notice Over Montana Wolf Trapping’s Threat to Grizzlies, Lynx*, CTR. FOR BIOLOGICAL DIVERSITY (June 23, 2021), <https://earthjustice.org/news/press/2021/groups-file-legal-notice-over-montana-wolf-trappings-threat-to-grizzlies-lynx>.

432. *Id.*

433. Amanda Eggert, *Fish and Wildlife Commission Pares Down Wolf Trapping Season, Shrinks Areas for Snaring*, MONT. FREE PRESS (Oct. 29, 2021), <https://montanafreepress.org/2021/10/29/montana-wolf-trapping-regulation-change/>.

434. *Id.*

435. Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife,, 85 Fed. Reg. 69778, 69822 (Nov. 03, 2020) (codified at 50 C.F.R. pt. 17). In 2020, Wyoming Game and Fish Department implemented a wolf hunting season with the biological objective to stabilize the wolf population at approximately 160 wolves in the WTGMA. WYOMING GAME AND FISH DEP’T., WYOMING GRAY WOLF MONITORING AND MANAGEMENT: 2020 ANNUAL REPORT, Executive I (2020).

436. WYOMING GAME AND FISH DEP’T., *supra* note 437, at Executive I; *Secretary Salazar Oks Weak Wyoming Wolf Plan*, DEFENDERS OF WILDLIFE (Jul. 7, 2011), <https://defenders.org/blog/2011/07/salazar-oks-weak-wyoming-wolf-plan> (wolves being shot in the WTGMA).

437. Removing the Gray Wolf, 85 Fed. Reg. at 69823.

438. WYOMING GAME AND FISH DEP’T., *supra* note 436.

439. William H. Funk, *Wyoming Is Waging War on Wolves*, SIERRA CLUB (April 2, 2019), <https://www.sierraclub.org/sierra/wyoming-waging-war-wolves>.

Wyoming's wolf management plan has been controversial.⁴⁴⁰ Congress delisted gray wolves in the NRM DPS in 2011, except Wyoming. Congress instructed the FWS to reconsider Wyoming's management plan.⁴⁴¹ The Obama administration negotiated a settlement and delisted wolves in Wyoming in August 2012. The U.S. District Court for the District of Columbia in *Defenders of Wildlife v. Jewell* invalidated the delisting of Wyoming wolves.⁴⁴² The court held that Wyoming's promise to establish a buffer (a population above recovery goals to achieve recovery goals) was not legally enforceable; FWS could not rely on Wyoming's promise to satisfy the ESA requirement for an adequate regulatory framework.⁴⁴³ Subsequently, the D.C. Circuit, reversing the district court, determined that the Wyoming plan has adequate regulatory provisions.⁴⁴⁴ Wyoming wolves joined the NRM DPS.

C. Pacific Northwest

The FWS declared that the state management plans for Washington, Oregon, and California contain objectives to conserve and recover gray wolves. Wolves in Washington, Oregon, California will also be protected by state laws and regulations when federally delisted.⁴⁴⁵ The FWS appraisal of these state management plans is questionable. Gray wolf recovery is just beginning in these peripheral areas.

1. Washington

Wolves in the eastern third of Washington were federally delisted as part of the NRM DPS in 2011. Problems with Washington's 2011 wolf management plan have been identified. Conservation groups point out that the state plan is not binding or codified as a regulation, has never gone through public comment or peer review, and is routinely violated.⁴⁴⁶ The Director of Washington Department of Fish and Wildlife (WDFW) acknowledged that the Washington plan is just an "advisory" document that can be "changed" with a letter to the file.⁴⁴⁷ The U.S. District Court for the Western District of Washington recognized the inadequacy of the plan, noting the plan "is not mandatory . . . and is subject to changes and addition, allowing for room for discretionary acts."⁴⁴⁸ Washington's plan "gives public scant recourse" to comment or influence "changes or additions [] by the WDFW."⁴⁴⁹

440. Edward A. Fitzgerald, *supra* note 42 at 10447.

441. Department of Defense and Full-Year Continuing Appropriations Act, Pub. L. No. 112-10, §1713, 125 Stat. 150 (2011).

442. *Defenders of Wildlife v. Jewell*, 68 F. Supp. 3d 193, 196 (D. C. Cir. 2017).

443. The court did however uphold the FWS determination that there was adequate genetic connectivity in the NRM DPS and that the remainder of Wyoming outside public lands and the state trophy game area did not constitute a significant portion of the wolf's range. *Id.* at 210.

444. *Defenders of Wildlife v. Zinke*, 849 F. 3d 1077, 1079 (D.C. Cir. 2017).

445. Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. 69778, 69865 (Nov. 3, 2020) (to be codified at 50 C.F.R. pt. 17).

446. Plaintiffs' Joint Motion, *supra* note 75 at 37-38.

447. *Id.* at 37, n. 24.

448. *Id.* (citing *Cascadia Wildlands v. Woodruff*, 151 F. Supp. 3d 1153, 1161 (W.D. Wash. 2015)).

449. *Id.*

Nevertheless, Washington officials are committed to protecting the gray wolf post-delisting. The Governor's office noted that "Washington state has a strong wolf management plan that is based on sound science, promotes social tolerance of wolves on our landscape, and has resulted in wolf population that are recovering."⁴⁵⁰ Washington's wolf population has continued to prosper. Washington has a population of 132 wolves with another 46 on the Colville Indian Reservation.⁴⁵¹ Furthermore, gray wolves continue to remain protected as an endangered species under state law after delisting.⁴⁵²

There is, however, growing concern that too many wolves are being killed in northeast Washington, ostensibly to stop livestock depredation, particularly on one farm.⁴⁵³ The Center for Human Economy has filed suit to curtail the killing wolves in the region.⁴⁵⁴ Governor Inslee, echoing similar concern, stated: "The potential for future depredations and lethal control actions, under our existing framework, remains unacceptably high. We must move more quickly and decisively to institute practices that will avoid the repeated loss of wolves and livestock in our state."⁴⁵⁵ Governor Inslee has instructed the WDFW to draft of new rules for wolf management that would include the employment of range riders, the use of non-lethal deterrents, the development of action plans to address chronic depredation, and compliance rules for livestock operators.⁴⁵⁶

Conservation groups have been critical of the state's wolf management. The Center stated: "The department's management of wolves in Washington makes it seem as though its mission is to preserve the livestock industry rather than conserving native wildlife. The state's relentless killing of wolves in Eastern Washington for conflicts with livestock is totally ineffective method of conflict prevention, and runs counter to sound science."⁴⁵⁷ However, they praised Governor Inslee's recent efforts,

450. Karina Brown, *Inslee Breaks With State Officials, Opposes Removing Protections for Gray Wolf*, COURTHOUSE NEWS SERV. (Jul. 10, 2019), <https://www.courthousenews.com/inslee-breaks-with-state-officials-opposes-removing-protections-for-gray-wolf/>.

451. Nicholas K. Geranios, *Washington State Orders the Killing of Up To 2 Wolves*, COLOMBIA BASIN HERALD (Aug. 27, 2021), <https://columbiabasinherald.com/news/2021/aug/28/washington-state-orders-the-killing-of-up-to-2/>.

452. Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. 69778, 69865 (Nov. 3, 2020) (to be codified at 50 C.F.R. pt. 17).

453. Sophia Ressler, et al., *Governor Inslee Directs Drafting of New Rules for Wolf Management*, CTR. FOR BIOLOGICAL DIVERSITY (Sep. 4, 2020), <https://biologicaldiversity.org/w/news/press-releases/gov-inslee-orders-rework-of-washingtons-wolf-killing-policies-2020-09-04/>.

454. Nicholas K. Geranios, *Lawsuit Filed to Stop Washington State from Killing Wolves*, ASSOC. PRESS (Aug. 1, 2019), <https://apnews.com/article/b4fea984e7bc4ae0bb5b26f9961ddec9>.

455. Dave Nichols, *Gov. Inslee Directs Drafting of New Rules for Wolf Management*, THE SPOKESMAN-REVIEW (Sep. 4, 2020), <https://www.spokesman.com/stories/2020/sep/04/gov-inslee-directs-drafting-of-new-rules-for-wolf-/>; Nicholas K. Geranios, *Conservation Groups Ask Washington State to Kill Less Wolves*, ASSOC. PRESS (May 11, 2020), <https://apnews.com/article/mt-state-wire-spokane-wa-state-wire-environment-id-state-wire-319eafaed72f6f06d1de5c5c59d63eeb>; Courtney Flatt, *Inslee Calls On State Wildlife Agency To Significantly Reduce Lethal Wolf Actions*, KUOW (Oct. 2, 2019), <https://kuow.org/stories/inslee-calls-on-state-wildlife-agency-to-significantly-reduce-lethal-wolf-actions>.

456. Nichols, *supra* note 455.

457. Nicholas K. Geranios, *Washington To Manage Wolves Within Borders After Federal Delisting*, OPB (Nov. 2, 2020), <https://www.opb.org/article/2020/11/02/bc-wa-washington-wolves-management/>.

noting it is “tremendous victory for Washington’s wolves and all of us who have been speaking out against the states relentless wolf killing.”⁴⁵⁸

Wolf delisting generated a conflict in Washington. The Director of WDFW supported federal delisting, while 72% of Washington residents opposed the proposal.⁴⁵⁹ Governor Inslee disagreed with federal delisting because “in all of the lower 48 states [because] there are many areas where wolves have not yet been recovered.”⁴⁶⁰

2. Oregon

Wolves in the eastern third of Oregon were federally delisted as part of NRM DPS in 2011.⁴⁶¹ Wolves were considered an endangered species under state law until being delisted by the Oregon Department of Fish and Game (ODFG) in 2015.⁴⁶² Conservation groups challenged state delisting, arguing it was premature.⁴⁶³ While the litigation was underway, the Oregon legislature passed HB 4040 in 2016, which removed wolves from the state’s endangered species list.⁴⁶⁴ The Oregon Court of Appeals dismissed the case, holding the statute ratifying delisting made the challenge to the ODFG rule change moot.⁴⁶⁵ Wolves are classified as special status game animals in Oregon.

Oregon’s wolf management plan, which was developed in 2005, was revised in 2019.⁴⁶⁶ The conservation objectives in the plan call for “four breeding pairs of wolves present for three consecutive years” in western Oregon.⁴⁶⁷ The plan’s management objective calls for “seven breeding pairs of wolves present for three consecutive years.”⁴⁶⁸ Neither has been met in western Oregon.⁴⁶⁹ Conservation

458. Nicholas K. Geranios, *Environmentalists Say Washington’s Wolf Program Is Broken*, OBP (Sept. 7, 2020), <https://www.opb.org/article/2020/09/07/washington-state-wolf-wolves-killing-rules-requirements/>.

459. *Washington Fish and Wildlife Head Kelly Susewind Recommends Delisting Wolf From Federal Protection*, THE INDEPENDENT (May 16, 2019), <https://chewelahindependent.com/washington-fish-and-wildlife-head-kelly-susewind-recommend-de-listing-wolves-from-federal-protection/>.

460. Karina Brown, *Inslee Breaks With State Officials, Opposes Removing Protections For Gray Wolf*, COURTHOUSE NEWS SERVICE (Jul. 10, 2019), <https://www.courthousenews.com/inslee-breaks-with-state-officials-opposes-removing-protections-for-gray-wolf/>.

461. Reissuance of Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and to Revise the List of Endangered and Threatened Wildlife, 76 Fed. Reg. 25590 (May 5, 2011) (codified at 50 C.F.R. pt. 17).

462. Monica Samayoa, *Court Dismisses Lawsuit Against Oregon Wolf Delisting*, OPB (Nov. 27, 2019), <https://www.opb.org/news/article/oregon-wolf-delisting-lawsuit-dismissed-court/>; Michael Kohn, *Environmental Groups Lose Lawsuit Against Wolf Delisting*, THE BULLETIN (Nov. 29, 2019), https://www.bendbulletin.com/localstate/environmental-groups-lose-lawsuit-against-wolf-delisting/article_93c26250-12f3-11ea-9e69-4743ce78e0d6.html.

463. *See id.*

464. *Id.*

465. *Id.*

466. Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. 69778, 69835 (Nov. 3, 2020) (to be codified at 50 C.F.R. pt. 17).

467. *See* OREGON DEPARTMENT OF FISH AND WILDLIFE, OREGON WOLF CONSERVATION AND MANAGEMENT 2020 ANNUAL REPORT 2 (2020).

468. *Id.*

469. *Id.*

groups criticized the plan, alleging that the ODFW was proposing to kill too many wolves in response to livestock depredations.⁴⁷⁰ Governor Brown also attacked the plan because it failed to protect the future health of Oregon's wolf population and opens the door to the possibility of a wolf hunt.⁴⁷¹ Nevertheless, Oregon counted 173 wolves in 2020, which was a 9.5 percent increase over the 158 wolves last year.⁴⁷²

Federal delisting generated a controversy in Oregon, similar to that in Washington. The Director of ODFG supported federal delisting.⁴⁷³ Oregon Governor Brown took the opposite position, stating: "the state of Oregon and its agencies do not support the delisting of wolves from the federal ESA across their range in the 48 contiguous states."⁴⁷⁴ However, Governor Brown does support delisting wolves in Oregon.⁴⁷⁵

3. California

Wolves from Oregon have migrated to California.⁴⁷⁶ Wolves were listed as a state endangered species in 2014.⁴⁷⁷ The California Farm Bureau Federation and California Cattlemen's Association brought suit, challenging the designation.⁴⁷⁸ They alleged that the state is only allowed to list native wildlife. Wolves are not native wildlife.⁴⁷⁹ Only one wolf had been sighted in state, a migrant from Oregon (OR-7), so the listing was premature.⁴⁸⁰ California court in 2019 rejected the suit, ruling that the state had the right to list wolf as endangered species.⁴⁸¹

Wolves continue to be listed as endangered species under state law in California after delisting.⁴⁸² California adopted its management plan in 2016, so its effectiveness is uncertain. California has implemented a three-phased management

470. Kale Williams, *Oregon Wildlife Commission Adopt Hotly Contested Wolf Management Plan*, THE OREGONIAN (Jun. 8, 2019), <https://www.oregonlive.com/environment/2019/06/oregon-wildlife-commissioners-adopt-hotly-contested-wolf-management-plan.html>.

471. Danielle, *Governor Kate Brown Trashes Her Own Wolf Plan*, OREGON WILDBLOG (Jun. 12, 2019, 11:49 AM), <https://oregonwild.org/about/blog/governor-kate-brown-trashes-her-own-wolf-plan>.

472. *Oregon Has At Least 173 Wolves, a 9.5 Percent Increase Over Last Year*, OREGON DEPARTMENT OF FISH AND WILDLIFE (Apr. 30, 2021), https://www.dfw.state.or.us/news/2021/04_Apr/042121.asp.

473. Andrew Selsky, *Oregon Wildlife Head Backs Delisting of Wolves as ENDANGERED*, REG. GUARD, May, 15, 2019.

474. Andrew Selsky, *Rift Exposed Among Oregon Leaders on Wolf Protections*, U.S. NEWS AND WORLD REP., May 15, 2019.

475. Karina Brown, *Gray Wolves Find Rocky Footing in Oregon*, COURTHOUSE NEWS SERV., May 17, 2019.

476. Maanvi Singh, *Rare Gray Wolf Pack Makes its Home in Northern California*, GUARDIAN, June 24, 2021 (Three wolf packs have resided in the state).

477. *Removing the Gray Wolf (Canis lupus) From the List of Endangered and Threatened Wildlife*, 85 Fed. Reg. 69778, 69835 (Nov. 3, 2020) (to be codified at 50 C.F.R. pt. 17); Kenneth Artz, *California Judge Upholds State Protection for Gray Wolves*, HEARTLAND INST., (Mar. 12, 2019), <https://www.heartland.org/news-opinion/news/california-judge-upholds-state-protections-for-gray-wolves>.

478. Kenneth Artz, *supra* note 477.

479. *Id.*

480. *Id.*

481. *Id.*

482. *Removing the Gray Wolf (Canis lupus) From the List of Endangered and Threatened Wildlife*, 85 Fed. Reg. 69778, 69835 (Nov. 03, 2020) (codified at 50 C.F.R. pt. 17).

plan. The gray wolf's endangered species status under state law will be reconsidered at Phase 3, after there are at least eight breeding pairs for two consecutive years.⁴⁸³ The expected population at that time is estimated to be in the range of 153-190 wolves.⁴⁸⁴

California opposed federal wolf delisting. California Director of Fish and Wildlife stated: "We believe it's an amazing ecological story that wolves have returned to their historic habitat in our state . . . , but California's fledgling population still remains vulnerable."⁴⁸⁵

D. Central Rocky Mountains

The FWS declared that wolves in central Rocky Mountains (CRM) will be protected by state laws after delisting.⁴⁸⁶ The FWS conclusion is problematic. The FWS failed to examine the existing regulatory frameworks in Colorado and Utah. Wolf recovery is just beginning in the region.

1. Colorado

Wolves are protected as an endangered species under state law.⁴⁸⁷ Colorado voters in 2020 approved Proposition 114, which authorized the reintroduction of wolves into the state.⁴⁸⁸ Proposition 114 requires the Colorado Park and Wildlife Department to develop a plan to reintroduce wolves west of continental divide by December 31, 2023.⁴⁸⁹ Governor Polis believes this can be done in 2022 rather than 2023.⁴⁹⁰ However, wolf reintroduction on the western slope is facing opposition from several counties, hunters and livestock industry. Legislation has been proposed to delay reintroduction until 2024, only allow reintroduction into consenting counties, and fund reintroduction through state general revenues.⁴⁹¹

483. *Id.* at 69837; CAL. DEP'T OF FISH AND WILDLIFE, CONSERVATION PLAN FOR GRAY WOLVES IN CALIFORNIA, Part 1, at 22 (2016).

484. Ashley Arey, *CDFW releases final management plan for California*, LASSEN COUNTY TIMES, Dec. 19, 2016, <https://www.lassennews.com/cdfw-releases-final-wolf-management-plan-california>.

485. Ryan Sabalow & David Lightman, *Trump Remove Gray Wolf from Endangered Species List. What that Means for California*, SACRAMENTO BEE, Oct. 29, 2020.

486. Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. 69778, 69843 (Nov. 3, 2020) (to be codified at 50 C.F.R. pt. 17).

487. COLO. REV. STAT. § 33-6-109.

488. Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. at 69837; Douglas Main, *Gray Wolves to be Introduced to Colorado in Unprecedented Vote*, NAT'L GEOGRAPHIC, Nov. 5, 2020, <https://www.nationalgeographic.com/animals/article/colorado-approves-gray-wolf-reintroduction>.

489. Jason Blevins, *Proposition 114 Explained: What's at Stake with the Effort to Reintroduce Gray Wolves in Colorado*, COLO. SUN, Sept. 24, 2020, <https://coloradosun.com/2020/09/24/proposition-114-explained-wolf-reintroduction/>.

490. Dan West, *Gov. Urges CPW to Move Quickly on Wolf Reintroduction*, DAILY SENTINEL, Jan. 15, 2021, https://www.gjsentinel.com/news/western_colorado/gov-urges-cpw-to-move-quickly-on-wolf-reintroduction/article_12bce676-56cc-11eb-b39e-73451d0c78e7.html.

491. Charles Ashby, *Bill: Reintroduce Wolves Only in Counties that said OK*, DAILY SENTINEL, Feb. 21, 2021; Thy Vo, *Will Opponents of Gray Wolf Reintroduction Largely End Up Paying for Program*, THE JOURNAL, Apr. 26, 2021, https://www.gjsentinel.com/news/western_colorado/bill-reintroduce-wolves-only-in-counties-that-said-ok/article_15173b0a-72f2-11eb-aacb-7bee12d1c4b6.html.

The litigation over wolf delisting could complicate reintroduction because authority over wolf management has already been handed over to Colorado. If delisting is stopped, wolves will return to federal management. Colorado will need FWS permission to proceed with the reintroduction of the threatened species.⁴⁹² Wolves are already living in northwest Colorado.⁴⁹³ However, 3 of the 4 wolves sighted in northwest Colorado were killed when they crossed over into Wyoming's predator control zone.⁴⁹⁴ This demonstrates the weakness of Wyoming's wolf management program.

2. Utah

Utah does not welcome wolves.⁴⁹⁵ The Utah Wildlife Board approved the Utah Wolf Management Plan in 2005, which is designed to conserve wolves, prevent livestock depredation, and preserve the wild ungulate population.⁴⁹⁶ The Utah legislature in 2010 directed the Utah Department of Wildlife Resources to prevent establishment of any packs in delisted portion of Utah's until wolves are federally delisted across the entire state.⁴⁹⁷

The north-central portion of Utah was delisted as part of the NRM DPS in 2011.⁴⁹⁸ Wolves were protected as Tier 1 sensitive species under Utah law in the delisted portion of the state, so could not be taken without authorization from the wildlife board.⁴⁹⁹ Wolves were also considered furbearers and could only be taken with a state license.⁵⁰⁰ Lethal control was permitted in the federally delisted area to address livestock depredation.⁵⁰¹

492. 16 U.S.C. § 1535 (1988); Marianne Goodland, *Grey Wolves Reintroduction to Colorado May Have Hit a Snag*, COLO. POL., Nov. 16, 2020, https://www.coloradopolitics.com/denver-gazette/gray-wolves-reintroduction-to-colorado-may-have-hit-a-snap/article_9ca995e0-284c-11eb-a323-c75c0cb50ec2.html; James Anderson, *Litigation Might Complicate Colorado's Gray Wolf Plan*, COLUMBIAN, Jan. 19, 2021, <https://www.columbian.com/news/2021/jan/19/litigation-might-complicate-colorados-gray-wolf-plan/>.

493. Bruce Finley, *DNA Tests Confirm 4 Wolves are Living in Northwestern Colorado*, DENVER POST, Feb. 13, 2020, [https://thehill.com/changing-america/sustainability/environment/557739-colorado-has-first-litter-of-gray-wolf-pups-in-80/](https://www.denverpost.com/2020/02/13/colorado-wolves-dna-tests/#:~:text=PUBLISHED%3A%20February%2013%2C%202020%20at,2020%20at%206%3A27%20p.m.&text=Colorado%20Parks%20and%20Wildlife%20unveiled,northwestern%20part%20of%20the%20state; Jenna Romaine, Colorado has First Litter of Gray Wolf Pups in 80 Years, HILL, June 10, 2021, <a href=).

494. Sam Brasch, *There's Probably Only One Wolf Left in Far Northwest Colorado. Can the State Protect it?*, CPR NEWS, Oct. 6, 2021, <https://www.cpr.org/2021/10/06/theres-probably-only-one-wolf-left-in-far-northwest-colorado-can-the-state-protect-it/>.

495. Jennifer Sherry, *Six of the Worst States to Be a Wolf*, NRDC, May 17, 2021, <https://www.nrdc.org/experts/jennifer-sherry/six-worst-states-be-wolf> ("In Utah, the state legislature scandalously steered millions of public tax dollars to an anti-wolf nonprofit to advocate for eliminating federal protections for 'out of control' wolf populations—to make it easier to kill lone dispersing wolves that find their way into Utah from neighboring states.").

496. Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. 69778, 69838 (Nov. 3, 2020) (to be codified at 50 C.F.R. pt. 17).

497. *Id.*

498. *Id.*

499. *Id.*

500. *Id.*

501. *Id.*

Utah lawmakers in 2020, fearing a repeat of the Colorado's wolf reintroduction, voted to approve a resolution prohibiting the "artificial" reintroduction of wolves into Utah.⁵⁰²

The Utah wolf management plan will go into effect post-delisting.⁵⁰³ The gray wolf will be removed from sensitive species list, but will remain classified as furbearer with closed season. The regulated taking of wolves may be considered after at least two breeding pairs for two consecutive years are present in the state. Lethal control could be allowed to deal with livestock depredation.⁵⁰⁴

Utah supported federal wolf delisting. The Utah legislature quietly authorized the expenditure of large amounts of taxpayer dollars to private groups to lobby for the delisting of wolves.⁵⁰⁵

E. Northeast

In the Northeast, wolves are only protected in New York⁵⁰⁶ and New Hampshire, but these states lack state management plans.⁵⁰⁷ The only hope for wolf recovery in the Northeast is through federal protection.

VI. Other Manmade Factors

The ESA requires the FWS to consider other natural and manmade factors that may adversely affect the gray wolf.⁵⁰⁸ The FWS dismissed the impact of climate change, asserting that the gray wolf is "highly adaptable."⁵⁰⁹ The FWS failed to consider how climate change will alter the current range of the wolf and its prey base, as well as any state protections that will be afforded to the wolf in these new areas.⁵¹⁰ Dr. Carroll noted that climate change "can accentuate the rate of change in a species range . . . [which can affect the] "conservation of ecotypic variation and adaptive potential within the species."⁵¹¹ Dr. Carroll explained that "wolf populations are

502. Amy Joi O'Donoghue, *House Votes to Ban Introduction of Wolves in Utah*, KSL, Feb. 28, 2020, <https://www.ksl.com/article/46723678/house-votes-to-ban-introduction-of-wolves-in-utah>; Concurrent Resolution Opposing the Introduction of Wolves, Utah Leg. H.C.R. 19 (Utah 2020).

503. O'Donoghue, *supra* note 503.

504. *Id.* (the resolution calls for the federal government to block efforts to force wolves on the state of Utah)

505. Brian Maffly, *Anti-Wolf Groups Goes to Court to Keep Utahns From Knowing How It Spends Tax Money*, SALT LAKE TRIB., July 17, 2020, <https://www.sltrib.com/news/environment/2020/07/17/anti-wolf-group-goes/>; Brian Maffly, *For Utah, the War on Wolf Protections Seems to Never End*, SALT LAKE TRIB., July 30, 2021, <https://www.sltrib.com/news/environment/2021/07/30/utah-war-wolf-protections/>.

506. Rick Karlin, *NY lawmakers want to save the wolf, even if they are extinct here*, TIMES UNION, Jan. 5, 2021.

507. CENTER FOR BIOLOGICAL DIVERSITY PETITION, *supra* note 223, at 26.

508. 16 U.S.C. § 1533(b).

509. Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. 69778, 69821-20 (Nov. 3, 2020) (to be codified at 50 C.F.R. pt. 17); *see generally*, CONG. RSCH. SERV., NO. 45926, THE ENDANGERED SPECIES ACT AND CLIMATE CHANGE: SELECTED LEGAL ISSUES (2019).

510. W. Env't l L. Ctr., Notice of Intent to Sue for Violations of the Endangered Species Act, at 19 (Nov. 6, 2020), <https://westernlaw.org/wp-content/uploads/2020/11/2020.11.06-Wolf-Delisting-NOI.pdf>.

511. CARROLL, *supra* note 69, at 9.

known to be associated with specific ecosystems . . . shifts in ecosystems caused by climate change may be expected to alter distribution and viability of certain wolf ecotypes.”⁵¹²

The FWS asserted that any threats to the gray wolf will be addressed during its five-year post-delisting monitoring.⁵¹³ The FWS Post-delisting Monitoring Plan Guidance declares that the program should collect and evaluate data “most likely to detect increased vulnerability of the species following removal of ESA protections.”⁵¹⁴ The Guidance also points out that different monitoring protocols will be necessary in different locations because of differences in threats and population dynamics.⁵¹⁵ However, the FWS five-year post-delisting monitoring will only occur on the wolf populations in the WGL states, not on wolf populations in the peripheral areas.⁵¹⁶

CONCLUSION

The FWS’s delisting of the gray wolf is premature. The FWS’s interpretation of the significant portion of the gray wolf’s range is unreasonable and inconsistent with best available science.⁵¹⁷ The FWS focused solely on WGL and NRM wolf populations but discounted the importance of the peripheral wolf populations in the Pacific Northwest, Central Rocky Mountains, and Northeast—which are important for the recovery of the species.

The FWS failed to analyze the five delisting factors on gray wolf populations in the peripheral areas of the wolf’s current range. The FWS dismissed the importance of these wolves, which have unique genes and phenotypes, are discrete; occupy unique habitats; and are important for future adaptability, the performance of vital ecological functions, and closing gaps in the taxon.

The FWS definition of the significant portion of the range was dubious. Equating the significant portion of the range with all of the range is redundant and makes the statutory language superfluous. This interpretation has been rejected by the courts.

The FWS analysis of the significant portion of range focused on the gray wolf’s current range. The FWS relied on D.C. Circuit decision in *HUS v. Zinke*, which is dubious on this point. The D.C. Circuit decision is inconsistent with text, legislative history, and statutory purposes of the ESA. The D.C. Circuit accepted the FWS 2014 definition of the current range, but this same position had consistently been rejected by the courts. Almost all prior cases accepted the historic range where

512. *Id.*

513. Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. 69778, 69894 (Nov. 3, 2020) (to be codified at 50 C.F.R. pt. 17).

514. U.S. FWS & NAT’L MARINE FISHERIES SERV., POST-DELISTING MONITORING PLAN GUIDANCE UNDER THE ENDANGERED SPECIES ACT (2008) https://media.fisheries.noaa.gov/dam-migration/final_pdm_guidance-fws_and_nmfs-updated_7-2-18_508_compliant.pdf.

515. *Id.*

516. Memorandum from Western Environmental Law Center, to Aurelia Skipwith & David Bernhardt (Nov. 6, 2020) (on file with author).

517. All of the peer reviewers found that the FWS did not rely on the best available science. *Id.* at 22-23.

suitable habitat is present as basis for determining the significant portion of the wolf's range.

The FWS amalgamation of the peripheral populations with the core populations and its failure to consider the impact of the creation of the WGL DPS on the remaining gray populations were flawed strategies to delist the gray wolf. Both strategies have been rejected by the courts.

The FWS failed to acknowledge that the gray wolf is still missing from significant portions of its current range. In addition, the FWS did not examine the importance of the lost historic range on the current status of gray wolf. The D.C. Circuit in *Humane Society v. Zinke* and the district court in *Desert Survivors v. Interior* stressed the importance of this factor.

The FWS's determination that state management plans are adequate was dubious. Recent actions by Wisconsin, Montana, and Idaho call into question the adequacy of these state management plans. State management plans in the peripheral areas are weak, but there is great support for wolf recovery in most of these areas.

The gray wolf is not ready for delisting. There are approximately 7500 wolves in U.S.⁵¹⁸ The gray wolf is still missing from 90% of its historic range. The NRM and WGL regions contain the only recovered gray wolf populations. There is significant habitat in the gray wolf's historic and current range that is unoccupied or insufficiently occupied. The Center has identified 538,000 square miles of suitable wolf habitat in lower 48 states, of which approximately 171,000 square miles are occupied. Wolves have only recovered in 30% of the known suitable habitat. More wolves can occupy the Pacific Northwest, Central Rocky Mountains, and Northeast. Even the FWS recognizes that gray wolves have not recovered in areas that could support them. Areas of unoccupied, but suitable wolf habitat, could be reoccupied, if wolves are granted continued federal protection.⁵¹⁹

After taking office, President Biden issued an executive order to review President Truman's anti-conservation policies.⁵²⁰ Nevertheless, the FWS was reluctant to reverse the gray wolf delisting. The FWS stated: "Our delisting action recognizes the successful recovery of one of the most iconic species."⁵²¹

518. There are 369 gray wolves in the Pacific Northwest, 2716 in the Northern Rocky Mountains, 4460 in Western Great Lakes, 186 in Southwest. *How many wild wolves are in the United States?*, WOLF CONSERVATION CTR., <https://nywolf.org/learn/u-s-wolf-populations/>.

519. CENTER FOR BIOLOGICAL DIVERSITY PETITION, *supra* note 223, at 29.

520. *U.S. Fish and Wildlife Service Ignores Biden Executive Order to Review Trump Wolf Delisting*, CTR. FOR BIOLOGICAL DIVERSITY (Feb. 1, 2021), <https://biologicaldiversity.org/w/news/press-releases/us-fish-and-wildlife-service-ignores-biden-executive-order-review-trump-wolf-delisting-2021-02-01/>.

521. Zach Budryk, *Gray wolves may be relisted as endangered after Trump removed protections*, THE HILL, (Sept. 16, 2021, 10:08 AM), <https://thehill.com/policy/energy-environment/572555-fish-and-wildlife-service-to-review-trump-era-removal-of-gray-wolf>.

The Biden Administration's stance has generated a great deal of criticism.⁵²² Scientists,⁵²³ conservation groups,⁵²⁴ legislators,⁵²⁵ and Native American tribes⁵²⁶ have implored the Biden administration to terminate delisting and restore ESA protection to the gray wolf.

On September 17, 2021, the FWS responded to two petitions filed by conservation groups requesting the relisting of gray wolf in the NRM. The FWS determined that "the petitioners presented substantial information that potential increases in human caused mortality may pose a threat to the species in Montana and Idaho."⁵²⁷ The FWS noted that "the new regulatory mechanisms" in these two states "may be inadequate to address this [potential] threat . . . " therefore gray wolves in the western U.S. may warrant relisting.⁵²⁸ Furthermore, sufficient evidence was presented "suggesting that habitat modification due to a reduced prey base[], disease[], and loss of genetic diversity caused by isolation and small population size[]

522. See Rebecca Beitsch, *Fish and Wildlife Service defends gray wolf delisting from endangered list* (Feb. 2, 2021, 1:08 PM), <https://thehill.com/policy/energy-environment/536971-interior-declines-to-reverse-trump-wolf-delisting>.

523. See Susan Bence, *Wisconsin's Wolf Management Debate Continues As Scientists Call To Restore Federal Protection*, WUWM (May 26, 2021, 1:06 PM), <https://www.wuwm.com/2021-05-26/wisconsins-wolf-management-debate-continues-as-scientists-call-to-restore-federal-protection>; see also WCCO-TV, *Scientists Urge Biden Administration To Restore Federal Gray Wolf Protections*, CBS MINNESOTA (May 13, 2021, 7:40 PM), <https://minnesota.cbslocal.com/2021/05/13/scientists-urge-biden-administration-to-restore-federal-gray-wolf-protections/>; Roz Brown, *Biden Administration Urged to Restore Gray Wolf Protections*, PUBLIC NEWS SERVICE (May 14, 2021), <https://www.publicnewsservice.org/2021-05-14/endangered-species-and-wildlife/biden-administration-urged-to-restore-gray-wolf-protections/a74303-1>; Charlie Schill, *Wildlife experts oppose wester wolf eradication policies*, CACHE VALLEY DAILY (July 6, 2021), <https://www.cachevalleydaily.com/news/archive/2021/07/06/wildlife-experts-oppose-western-wolf-eradication-policies/#.YiJOo3rMJyw>.

524. See *Forest Service Protections Sought for Wolves in Idaho, Montana Wilderness*, CTR. FOR BIOLOGICAL DIVERSITY (June 9, 2021), <https://biologicaldiversity.org/w/news/press-releases/forest-service-protections-sought-for-wolves-in-idaho-montana-wildernesses-2021-06-09/>; see also Steve Kirch, *More than 50 Conservation Groups Want Federal Protections Restored to Protect Wolves: New Wolf Killing Laws in Idaho, Montana Prompt Renewed Push to Restore Wolves' Federal Safeguards*, KMTV (June 16, 2021 9:22 PM), <https://www.kmtv.com/2021/06/17/more-than-50-conservation-groups-want-federal-protections-restored-protect-wolves/>; EARTH JUST., *Groups File Legal Notice Over Montana Wolf Trapping's Threat to Grizzlies, Lynx* (June 23, 2021), <https://earthjustice.org/news/press/2021/groups-file-legal-notice-over-montana-wolf-trappings-threat-to-grizzlies-lynx>.

525. Laura Lundquist, *Petition ask feds to review wolf population status to prevent decimation*, MISSOULA CURRENT (Aug. 26, 2021), <https://missoulacurrent.com/outdoors/2021/08/petition-wolf-population/>; Karl Evers-Hillstrom, *Activists pushing Interior for emergency protections for gray wolves*, THE HILL (Nov. 2, 2021, 6:01 AM), <https://thehill.com/policy/energy-environment/579523-activists-pushing-interior-for-emergency-protections-for-gray>.

526. AP, *Native American tribes demand emergency protection for wolves: Gray wolves, part of many tribes' culture, were taken off the endangered species list in January*, WASHINGTON POST (Sept. 15, 2021, 6:02 PM), https://www.washingtonpost.com/lifestyle/kidspost/us-tribes-demand-emergency-protection-for-wolves/2021/09/15/e7debca4-0c33-11ec-aea1-42a8138f132a_story.html.

527. 90-Day Finding for Two Petitions to List the Gray Wolf in the Western United States, 86 Fed. Reg 51857 (Sept 17, 2021) (to be codified at 50 C.F.R. pt. 17). See also Budryk, *supra* note 521.

528. Budryk, *supra* note 521.

may be threats to the gray wolf.”⁵²⁹ All of these factors will be evaluated in the new 12-month status assessment.⁵³⁰

Nevertheless, the Biden administration continued to defend gray wolf delisting in the court.⁵³¹ Earth Justice commented: “The Biden administration has betrayed its duty to protect and recover wolves, . . . The FWS has the power to stop the immoral killing of wolves right now, and its refusal to act violates the law and the best science, as well as treaty obligations to tribal nations.”⁵³² The fate of gray wolf is being decided by the U.S. District Court for Northern District of California,⁵³³ which should conclude that the premature delisting of the gray wolf violates the ESA.

POSTSCRIPT

On February 10, 2022 the U.S. District Court for the District of Northern California vacated the Trump administration’s delisting rule and restored ESA protections for the gray wolf across the U.S.⁵³⁴ The court concluded the FWS could not use the creation of the WGL DPS to delist the entire species. The FWS must consider the impact of the proposed WGL DPS on the entire listed species.

The court held that FWS failed to consider the status of gray wolves in the Pacific Northwest (PNW). The FWS did not explain why gray wolves in the PNW were distinct from wolves in the NRM when establishing the NRM DPS. In addition, the FWS ignored the importance of the acknowledged genetic difference between wolves in the PNW and NRM.⁵³⁵

The Court concluded the FWS did not adequately consider the impact of the delisting regulation on the peripheral populations in PNW and CRM but confined its analysis to wolf populations in the WGL and NRM.⁵³⁶ The Court held the FWS failed to consider the impact of lost historic range on gray wolf’s current status.⁵³⁷

The Court determined that the FWS interpretation of the significant portion of the range was arbitrary and capricious.⁵³⁸ The court acknowledged that the definition fell within agency discretion.⁵³⁹ The court held the FWS definition was deficient because it failed to establish any threshold for determining when all or each of the 3rs reached the point of significance. The FWS interpret lacks any objective

529. 90-Day Finding for Two Petitions to List the Gray Wolf in the Western US, 86 Fed. Reg. at 51857

530. *Id.*

531. EARTH JUSTICE, *Biden Administration Defends Trump Delisting of Gray Wolf: Feds ignore science, allow wolf slaughter to continue* (Aug. 20, 2021), <https://earthjustice.org/news/press/2021/biden-administration-defends-trump-delisting-of-gray-wolf>.

532. *Id.*

533. Matthew Brown, *Fight over US wolf protections goes before federal judge* (Nov. 12, 2021), <https://apnews.com/article/science-montana-billings-wolves-animals-b30ea97cd47b7cbe387e114d6dbfab4a>.

534. Order Resolving Cross-Motions for Summary Judgment, *Def. of Wildlife v. F.W.S.* (No. 4:21-cv-00344-JSW), (Feb. 10, 2022).

535. *Id.* at 12-14.

536. *Id.* at 10-12, 18.

537. *Id.* at 18-19.

538. *Id.* at 14-18.

539. *Id.*

guideposts against which to judge the FWS exercise of discretion.⁵⁴⁰ The court also determined that the FWS consideration of the significance of wolves in PNW and CRM was inconsistent.⁵⁴¹ However, the court failed to recognize that the FWS definition was contrary to *DOW v. Secretary of Interior* and *NWF v. Norton*, which held that the “significant portion of the range” is the area within the wolf’s historic range where suitable habitat is present. It was also contrary to the ruling in the aforementioned cases, *Desert Survivors v. Department of Interior*, and *CBD v. Zinke*, which found the FWS definition, equating the “significant portion of the range” with “all of the range,” made the statutory text superfluous.

The court upheld the FWS determination that state management plans were adequate.⁵⁴² The court refused to consider recent changes in wolf management plans in Minnesota and Wisconsin.⁵⁴³ The court also failed to acknowledge hostility toward wolf recovery, particularly in Michigan and Utah.⁵⁴⁴

Conservation groups applauded the decision.⁵⁴⁵ Earth Justice declared: “wolves need federal protection, period. The FWS should be ashamed of defending the gray wolf delisting, and it should take immediate action to restore [ESA] protections to all gray wolves, including those in Idaho, Wyoming, and Montana.”⁵⁴⁶

540. *Id.*

541. *Id.*

542. *Id.* at 19-22.

543. *Id.* at 21, n.12.

544. *Id.* at 21-22.

545. Earth Justice, *Gray Wolves Regain ESA Protections*, (February 10, 2022), <https://earthjustice.org/news/press/2022/gray-wolves-regain-federal-endangered-species-act-protections>.

546. *Id.*