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Edward A. Fitzgerald Dr.
Wright State University

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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


⁵ Id.
faced no danger in the WGL and NRM metapopulations. Gray wolves in the peripheral regions are not important to the survival of the species, according to the FWS.

Gray wolves have recovered in the WGL and NRM regions, but are still facing threats under aggressive state management. 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. 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." 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." 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.wikimacnypedia.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 alsoDefs. 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).


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

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.” 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.” This analysis must be made “soley on the basis of the best scientific and commercial data available.”

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

Federal courts review FWS listing and delisting decisions under the Administrative Procedures Act (“APA”). Pursuant to the APA, agency action must not be “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.” The APA requires the court to conduct “a through, probing, in-depth review” of the challenged action. The court must ensure the agency “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action.” Agency action must not “be inconsistent with the governing statute.” 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.” Contradictory statements by the agency also constitute arbitrary and capricious action. 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).
15. 16 U.S.C. § 1533(g).
16. Id.
17. Id.
19. Id.
22. Defs. of Wildlife v. EPA, 420 F.3d 946, 959 (9th Cir. 2005).
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. Courts will “not rubber stamp . . . administrative decisions that [they] deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying the statute.”

II. The Battle to Delist the Gray Wolf

The gray wolf at one time occupied most of the continental U.S. 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. By the 1970s, the gray wolf had been extirpated from more than 95% of its historic range. The only remaining substantial wolf population was located in Minnesota. 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. 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.

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. Minnesota gray wolves also dispersed to North and South Dakota, Illinois, and Missouri. Gray wolves from Canada naturally recolonized northwest Montana. FWS reintroduced gray wolves into Wyoming and Idaho in 1995-1996 as a nonessential experimental population under the ESA. These wolves prospered,

25. Greater Yellowstone Coal. v. Servheen, 665 F.3d 1015, 1028 (9th Cir. 2011).
28. Id.
29. Id.
30. Id.
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.”

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. 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. The U.S. District Court for the District of Montana and the Ninth Circuit upheld the constitutionality of the appropriation rider. In 2012, the FWS delisted gray wolves in Wyoming. The U.S. District Court for the District of Columbia invalidated the rule, but the D.C. Circuit reversed the district court. 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. The U.S. District Court for the District of Columbia reviewed and rejected the proposal in 2014. The D.C. Circuit upheld the district court decision in 2017.

The FWS proposed delisting all gray wolves on March 15, 2019. 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


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. 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” or the “lower 48 United States entity.” Conservation groups have filed lawsuits in the U.S. District Court for the District of Northern California, alleging the delisting rule violates the ESA.

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. The FWS determined that the gray wolf’s significant portion of range to be the proposed WGL and NRM DPSs. According to the FWS, these were the only areas necessary for the survival of the species. 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”). 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. 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.” And it is

49. Id. at 69886.
50. Id. at 69893.
52. 16 U.S.C. §1532.
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 species’ range.” Representation is defined as “the ability of a species to adapt to changing environmental conditions over time.” It is dependent upon “the breadth of genetic and environmental diversity within and among populations.”

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.” Wolves in these peripheral areas only occur in small numbers and contain few breeding pairs.

But the FWS decision was inconsistent with the Shafer and Stein model. Shafer and Stein assume the species should be present with many populations arrayed across a range of ecosystems to ensure survival. 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. Wolves play an important role in managing the ecosystem. Premature delisting will preclude wolves from performing their ecological functions in various habitats because of state sanctioned human-caused mortality.

Representation and resiliency also depend on taxonomic and genetic diversity. 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.” Efficient wolf management within an ecosystem helps preserve genetic possibilities. Protecting gray wolves until they are able to occupy

58. Id.
59. Id. at 12.
60. Id.
62. Id.
64. Letter, supra note 63.
65. Id.
66. Id.
67. Id.
68. Id.
70. Id.
unoccupied suitable habitat in their historic range will help to conserve biodiversity and meet the 3rs for the species.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{73} The FWS presumes the gray wolf population is single metapopulation with little significant variation across the country.\textsuperscript{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.\textsuperscript{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”\textsuperscript{76} that is “driven by historical biogeographic factors, isolation by distance and associated with particular ecosystems.”\textsuperscript{77} Studies show that North American wolves vary morphologically and genetically on local scale.\textsuperscript{78} The unique local environment allows wolves to adapt to changing conditions.\textsuperscript{79} Such local factors must be considered before delisting.\textsuperscript{80} Furthermore, the severity of genetic threats differs between large and small populations.\textsuperscript{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.”\textsuperscript{82} Yet, the FWS determined these wolves were not “meaningful” to the 3rs.\textsuperscript{83} This conflates two

\textsuperscript{71} Id.
\textsuperscript{73} CARROLL, supra note 69, at 6, 17.
\textsuperscript{74} Id. at 17.
\textsuperscript{75} Id.
\textsuperscript{76} CARROLL, supra note 69, at 17.
\textsuperscript{77} Id. at 7.
\textsuperscript{78} 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).
\textsuperscript{79} CARROLL, supra note 69, at 9.
\textsuperscript{80} Id. at 17.
\textsuperscript{81} Id. at 7-8.
\textsuperscript{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.\(^\text{84}\)

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.\(^\text{85}\) 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.\(^\text{86}\)
DOW brought suit, arguing that the lizard’s private land habitat constituted a
significant portion of its range where its survival was in jeopardy.\(^\text{87}\) 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.” \(^\text{88}\) The Secretary “assume[d] that
species is endangered in a significant portion of its range only if endangered
everywhere.” \(^\text{89}\) This interpretation became known as the clarification
interpretation.\(^\text{90}\)

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.” \(^\text{91}\) 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.” \(^\text{92}\)

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.\(^\text{93}\) The court

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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.


93. Defs. of Wildlife, 258 F.3d at 1142.
followed “a natural reading . . . which would give effect to all of the [the statutes] provisions.”

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.” 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.

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. The U.S. District Court for Arizona in Tucson Herpetological Society v. Salazar, 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. On appeal, the Ninth Circuit reaffirmed its earlier decision that the Secretary must explain why unoccupied areas of lizard’s historic range are insignificant. The court stated: “It is insufficient under Defenders of Wildlife, to point to one area or class of areas where [a species’] population persists to support a finding that threats to the species elsewhere are not significant . . .” 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.


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.


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

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103. Id. at 956 (emphasis in original) (quotingDefs. of Wildlife, 258 F.3d at 1142).
104. Id. at 956-57.
105. Id. at 958.
106. Id.
110. Survivors, 336 F. Supp. 3d at 1132.
111. SeeDefs. 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.

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.

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."

### B. Significance of Lost Historic Range

The FWS limited its delisting analysis to the significant portions of the gray wolf’s current range. The FWS attempted to do this in all prior delisting efforts. 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. This long-standing position was affirmed in *Humane Society v. Jewell*, but was reversed by the D.C. Circuit in *Humane Society v. Zinke*.

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. 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. The D.C. Circuit, ignoring precedent, held the FWS change in

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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.
123. Humane Soc’y of the U.S. v Zinke, 865 F.3d 585.
124. Id. at 592.
policy was reasonable. 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.

The D.C. Circuit adopted a constrained textual analysis, which ignored the text, legislative history, and statutory purposes of the ESA. Statutory interpretation begins with the text, which has been enacted into law through constitutionally prescribed process. 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. 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. Further guidance and clarification of statutory meaning are found in the statutory purposes.

The two statutes preceding the ESA described endangered species as those facing complete extinction. The ESA of 1973 expanded the definition of endangered species to those facing “extinction throughout all or a significant portion of its range.” 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

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125. Id.
132. Id.
133. Id.
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." The amendment was rejected by the conference committee. The failure of Congress to adopt this amendment represented an explicit rejection of Interior’s definition of “significant portion of its range.”

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. 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. The committee bill amended section 4(c)(1) to require the Secretary to include critical habitat designations on endangered and threatened species lists. The committee stated that “the term ‘range’ is used in the general sense and refers to the historical range of the species.”

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.” 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. Congress found “the two major causes of extinction are hunting and destruction of natural habitat.” The most crucial was the destruction of natural habitat. 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.”

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.”

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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).


147. Id. at 4-5.
All organisms rely on a healthy ecosystem, which depends upon the viability of species whose interactions regulate the system. 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. All species are interconnected, so the removal of one species can lead to population changes or severe physical disturbances. 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. Robert Constanza estimated the value of ecosystem services in the range of sixteen to fifty-four trillion dollars per year. 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.

Ecosystem maintenance requires biodiversity, which relies on a diverse gene pool. The degree of complexity necessary for healthy maintenance is unknown. 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. The gray wolf plays an important role by balancing the ecosystem and preserving biodiversity, which are among the central purposes of the ESA.

149. Id.
150. Id.
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.
156. Ehrlich & Ehrlich, supra note 151, at xii-xiii.
The wolf provides sustenance for the entire food chain. After the wolf makes a kill, other scavengers take their share, insects clean the carcass, and birds feed on the insects. The wolf also maintains the balance between predators. The wolf limits the coyote population, which expands in their absence. This replenishes the coyote’s prey, mainly rodents, for predatory birds, such as hawks, eagles, and owls. The reduction in the coyote helps the fox, which coexists with the wolf. 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. This “top-down” effect, which is known as a trophic cascade, varies across ecosystems because of food web complexity, diversity, productivity, and other factors. A balanced ecosystem provides goods and service beneficial to man.

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. The court held that the FWS failed to acknowledge how the loss of historic range affected the current status of the gray wolf. The court determined that the FWS can’t just write off substantial loss of historic range as irrelevant to species status. 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.” 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.”

159. *See id.*
160. *See id.*
161. *See id.*
162. *See id.*
163. *See id.*
164. *See id.*
166. *See id.*
168. *Id.* at 605-607.
169. *Id.* at 605.
The D.C. Circuit stressed that an adequate evaluation of the threats within the current range requires more than just look at current time.\textsuperscript{172} The gray wolf is in danger in the lower forty-eight states because 95\% of historic range has been lost.\textsuperscript{173} The FWS failed to consider the loss historic range and its impact on the survival of the gray wolf within its current range.\textsuperscript{174} Such a failure was arbitrary and capricious.\textsuperscript{175}

\textbf{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.\textsuperscript{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. \textit{Defenders of Wildlife (DOW) v. Secretary of Interior}

The U.S. District Court for the District of Oregon in \textit{DOW v. Secretary of Interior} \textsuperscript{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)\textsuperscript{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.\textsuperscript{179}

\textsuperscript{172} \textit{Id.} at 605-606.

\textsuperscript{173} \textit{Id.}

\textsuperscript{174} \textit{Id.} at 605-606.

\textsuperscript{175} \textit{Id.} at 606.

\textsuperscript{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).


\textsuperscript{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.” \textit{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.” \textit{Id.} at 4724-25.

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. 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 .”

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.”


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

Environmental groups criticized the proposal. 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.”

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. 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. 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.”

181. Id. at 15825.
184. Id.
185. Id.
186. Id.
187. Id.
188. Id. at 15818.
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. 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* dealing with the flat-tailed horned lizard and the federal district court in *DOW v. Norton* 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.

On May 5, 2011, the Obama administration published a Proposed Rule establishing the WGL DPS, which separated the WGL wolves from other Northeast wolves. 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. Humane Society of U.S. (HUS) brought suit.

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. The FWS must consider the impact of DPS designation on the status of the entire listed species.


The D.C. Circuit also rejected FWS effort to delist the WGL DPS. 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...
original listing.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{208}

\textbf{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.\textsuperscript{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.

\textit{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.”\textsuperscript{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.”\textsuperscript{211} These wolves don’t contribute to the 3rs of the species.\textsuperscript{212}

The FWS conclusion is contrary to the best available science.\textsuperscript{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.\textsuperscript{214} This will be

\textsuperscript{204} Id.
\textsuperscript{205} Id.
\textsuperscript{206} Id.
\textsuperscript{207} Id. at 602.
\textsuperscript{208} Id.
\textsuperscript{210} See Removing the Gray Wolf (Canis lupus) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. at 69855.
\textsuperscript{211} Id.
\textsuperscript{212} Id.
\textsuperscript{214} CARROLL, supra note 69, at 16.
determined by habitat and other factors. 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. Consequently, population abundance alone is not a determining factor.

Gray wolves in the PNW are unique. The FWS acknowledged that wolves in Washington are descended from both Canadian and NRM wolves. These wolves have “markedly different genetic or phenotypic traits.” 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.”

Wolves in Washington and Oregon have a dominant coastal ancestry that must be conserved because of its unique evolutionary heritage and adaptations. 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.”

Gray wolves in the PNW occupy a unique habitat, which contains different types of forests and a temperate climate. 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 CFR 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).
221. CARROLL, supra note 69, at 17 (citing Hendricks et al. 2018).
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.\textsuperscript{224} In addition, coastal wolves feed on fish, which is a unique adaptation not found in other regions.\textsuperscript{225} The FWS asserted that wolves in PNW are simply dispersers from NRM DPS.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{229} Genetic differences are “driven more by climate and ecological factors” than by “isolation and distance.”\textsuperscript{230} There are distinct climate and ecological differences between the PNW and NRM.\textsuperscript{231} The FWS asserted delisting will not affect connectivity from the NRM DPS to PNW.\textsuperscript{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 \textit{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 . . .”\textsuperscript{233}

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

\textsuperscript{224} Id.
\textsuperscript{225} Id.
\textsuperscript{226} CENTER FOR BIOLOGICAL DIVERSITY PETITION, supra note 223 at 17.
\textsuperscript{227} Id.
\textsuperscript{228} Id.
\textsuperscript{229} CENTER FOR BIOLOGICAL DIVERSITY PETITION, supra note 223 at 17.
\textsuperscript{230} Id.
\textsuperscript{231} Id.
\textsuperscript{232} CENTER FOR BIOLOGICAL DIVERSITY PETITION, supra note 223 at 17.
\textsuperscript{233} Id.
\textsuperscript{234} Id.
\textsuperscript{235} 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” and also faced greater threats from human-caused mortality. 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.”

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.”

The CRM, which extend from south-central Wyoming to northern New Mexico, contain some of greatest potential wolf habitat in U.S. This forty-one million-acre region includes twenty-five million acres of public lands and has abundant elk and deer populations. 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. 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.

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

238. Id. at 69885.
239. Id. at 69892.
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).
create “a spatially segregated population of wolves that extended from the Arctic to Mexico.”

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.”

FWS studies showed the CRM area can support 1,000 wolves. 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.”

C. Northeast

The FWS failed to analyze the impacts of wolves delisting in the Northeast because the area is not permanently inhabited by wolves. 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.” Wolves from Canada have been sighted in the Northeast, where there is adequate habitat and prey base for wolf recovery.

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. All of the peer reviewers who commented on the proposed 2000 rule supported the establishment of the Northeast DPS.

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245. Id. at 244.
246. Id. at 244-45.
247. CENTER FOR BIOLOGICAL DIVERSITY PETITION, supra note 223, at 19-20.
249. CENTER FOR BIOLOGICAL DIVERSITY PETITION, supra note 223, at 27.
The final regulation published in 2003 during the Bush administration eliminated a separate Northeast DPS. 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. The federal district court rejected the FWS decision on several grounds. First, the FWS abandonment of the Northeast DPS in the Final Rule deviated too much from Proposed Rule. Second, the FWS declared that the Northeast wolves could be a different subspecies from the Midwest wolves. Nevertheless, the FWS combined the two subspecies into a single DPS, which was based on geography not biology. 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. Finally, the Secretary did not analyze the five downlisting factors across a significant portion of the gray wolf’s range.

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.'" 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." Colorado, Utah, and the Northeast were under consideration for wolf recovery because they hold substantial suitable wolf habitat.

The FWS proposed to establish and delist the WGL DPS in May 2011. 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

259. Id. at 561-62.
260. Id. at 557, 563-64 (citing 68 Fed. Reg. at 15810, 15814).
262. Id. at 564-65.
263. Id. at 558, 565-66.
265. CARROLL, supra note 69, at 14.
266. Id. at 18-20.
endangered and threatened species in those areas. It would elevate the gray wolf sub-species, Canis lycaon, to full species status pending a status review. A New National Wolf Strategy (“NNWS”) would be established that is based on changes to long standing principles of wolf taxonomy. All of the peer reviewers who commented on the 2013 proposal issue supported the establishment of the Northeast DPS.

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. However, according to the New York Department of Environmental Conservation, there was documented evidence that the gray wolf occasionally entered the Northeast. The elimination of the Northeast from the gray wolf’s range would remove all federal protection for wolves entering the Northeast. The proposal to elevate gray wolf sub-species, Canis lycaon to full species status was not supported by scientific evidence. The most recent genetic study supported the retention of Canis lupus on the endangered species in the Northeast. 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.

The FWS published the Proposed Rule establishing and delisting the WGL DPS on May 5, 2011. The Final Rule, which was published on December 28, 2011 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.” 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.

Further decision on the status of remaining eastern wolves would be made at a later date.

268. Id.
269. Id.
270. Id.
271. WES ENVIRONMENTAL LAW CENTER, supra note 111 at 22-23.
273. Id.
274. Id.
275. Id.
276. Id.
277. Id.
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. The listing decision was supported by science like a recent in-house study that reviewed the existing scientific literature defining wolf taxonomy. 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*. Scientists, who were critical of the FWS proposal, argued that the status of the Northeast wolf is under investigation. The Northeast wolf may be a gray wolf subspecies. This uncertainty warrants protection for any wolf that may colonize suitable habitat in the region, whether it is *Canis lupus* or *Canis lycaon*. The 2013 proposed delisting rule was never finalized because peer reviewers found treatment of the wolf’s taxonomy in Northeast was flawed.

The Northeast contains suitable wolf habitat from upstate New York to Maine, with a prey base that could sustain a wolf population of 1,312. 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. These wolves may differ genetically from other wolves in the continental U.S. Wolves in the Northeast would perform vital ecological functions and close a vital gap in the taxon.

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 possible. The states have been proactive in wolf management, with state management plans and initiatives. The collaborative approach between federal and state agencies is crucial for the recovery and conservation of wolves in the Northeast. The plans address habitat restoration, population monitoring, and conflict resolution, aiming to promote coexistence and sustainable management of wolves within their natural range.
possible to achieve recovery and authorizes the FWS to enter into cooperative agreements with the states. Section 4 of the ESA requires as a delisting criteria that the species must not be at risk from human-caused mortality and an adequate regulatory framework must be in place. 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. Federal courts have insisted that “regulatory mechanisms” essential to species viability must consist of specific legal mandates with “some method of enforcing compliance.” 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.” The Ninth Circuit noted that “state management plans may be considered adequate regulatory mechanisms, but only if they work.” Additionally, the D.C. Circuit noted that such state plans must be “sufficiently certain and effective to alleviate a threat of endangerment . . . after delisting.”

The transfer of authority over endangered and threatened species from the federal government to state governments has been viewed with great skepticism. 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.” 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.”

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

297. 16 U.S.C. § 1535(b).
303. Crow Indian Tribe v. United States, 965 F. 3d 662, 680 (9th Cir. 2020).
306. Alejandro E. Camacho et al., supra note 305, at 10838.
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. The FWS determined that state plans “would ensure the wolf’s continued survival by requiring populations to exceed the Recovery Plan goals.”

The plans contain conservation objectives like managing populations above 350. They allow state managers to set future goals in light of the expansion of wolf populations and diverse stakeholder views.

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. 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. The D.C. Circuit in Humane Society v. Zinke reversed, upholding the wolf management plans in the WGL states. Any problems will be addressed in the FWS’s 5-year post-listing monitoring.

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. Quotas were established in various zones, which once met ended the season. The WDNR authorized three wolf hunts. Hunters and trappers killed over 500 wolves.

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310. Id.

311. Id.


315. Id. at 611.

316. Id.


318. 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).\(^ {322}\)


322. Id. at 14-16; WISCONSIN DEPARTMENT OF NATURAL RESOURCES, WISCONSIN WOLF MANAGEMENT PLAN 3 (Oct. 27,1999) https://p.widencdn.net/hspl5b/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.).


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 though 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.


327. See id. (stating that politics relies on the outdated 1999 wolf management plan).
group, brought suit demanding that the wolf hunt go forward. The Wisconsin Court of Appeals upheld the lower court decision, declaring that it “lacks jurisdiction over direct appeal at this time.” The WDNR established a hunting quota of 200 wolves. The state’s Chippewa tribes, which opposed the hunt, claimed 81 wolves of the quota. Treaty rights grant the tribes 50% of the quota on Ceded Territory in northern Wisconsin (effectively 40% of the total quota). This left 119 wolves to be taken. The WDNR sold 1,547 tags, 13 per animal. Wisconsin hunters exceeded the 119 quota and harvested 218 wolves in less than 72 hours at the 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.

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.” Dr. Adrian Treves, an environmental studies professor, noted that “there’s simply no evidence for public hunting and trapping in reducing losses . . .

The WDNR initially planned another hunt for November 2021 with a quota of 130 wolves. The politically-appointed Wisconsin Natural Resources Board (“Board”), which establishes policy for WDNR, overturned the state biologists and
authorized the killing of 300 wolves. Scientists complained the Board is not utilizing good science. The scientists argued that non-lethal methods are more effective than hunting and trapping to reduce wolf depredation. Furthermore, Wisconsin’s aggressive action might cause the FWS to review the state’s wolf management plan.

The WDNR, which has final authority, defied the Board and set the quota at 130. 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. 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.

The Board plans to appeal the decision but wants the appointment of outside counsel. 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. Attorney General Kaul lost the case, but is appealing the decision.

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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.*


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. Federal judge James Petersen refused to issue the injunction but expressed “deep misgivings” regarding how state sets the wolf hunt quota.

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. Wolves provide advantages to rural counties by killing deer, which eat crops, and harbor ticks, which cause lime’s disease. Wolves also have a positive impact on deer and elk populations in the region by killing ungulates infected with chronic wasting disease.

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. 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.

Minnesota Department of Natural Resources announced that it will cull its wolf population by 40%, liberalize the private killing of depredating wolves, and consider restarting trophy hunting and trapping seasons post-delisting. 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


352. Id.


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.
365. Id.
367. See, Glen Wunderlich, supra note 364.
lower court and held the SFWCA was unconstitutional. 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.” 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.

Again, the Republican Legislature responded by passing SB 1187, which mirrored the earlier defeated Proposition 2. 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.

The Humane Society of the U.S. commented: “Governor Snyder has affirmed the Michigan legislature’s elaborate game of voter circumvention.”

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. The Michigan Senate passed a bill that only allows Upper Peninsula (“UP”) residents to serve on the Wolf Management Advisory Council (“WMAC”). The Director of MDNR is being sued for appointing hunting advocates to seats on WMAC that are reserved for agricultural and conservation groups. Native American leaders criticized the MDNR’s decision to appoint a Wisconsin resident to a seat on the WMAC reserved for tribal

371. Id.
373. Id.
374. Id.
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


379. White, supra note 375.


382. Id.

383. Id.

384. Id.


386. Id.


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. The FWS’s conclusion is problematic, particularly in light of Idaho and Montana’s recent actions.

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. 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. 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.

The Obama administration resurrected the Bush administration’s proposal and established the NRM DPS. 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*. 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. The court found that the SPR language could not be utilized to change the definition of an

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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.


397. *See Def’s of Wildlife v. Salazar 729 F. Supp. 2d at 1228 (D. Mont. 2010).*
endangered or threatened species. 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.

Congress intervened. Section 1713 attached to the Department of Defense and Full-Year Continuing Appropriations Act of 2011 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.

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.” The Ninth Circuit upheld the lower court decision.

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. 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, which conservation groups allege inflates wolf numbers. Aggressive wolf hunting and trapping laws instituted since 2017 have adversely affected the wolf population. In 2019, 583 wolves were killed, which exceeded 50% of the state’s population.

398. See id. at 1223.
399. See id. at 1218.
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).
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.
After delisting, Idaho Governor Brad Little signed SB 1211 into law, which is designed to kill 90% of 1556 wolves in Idaho. 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. Individuals with tags can kill unlimited number of wolves employing hounds, using night vision googles, 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.

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. HB 225 extends wolf trapping season by a month from the first Monday after Thanksgiving until March 15. SB 267 grants individuals and entities the right to reimburse hunters or trappers for their costs incurred in the hunting or trapping of wolves. 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.”

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

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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.


413. *Id.*

414. *Id.*

415. CENTER FOR BIOLOGICAL DIVERSITY PETITION, supra note 223, at 16.
at night using artificial light. The Montana Fish, Wildlife, and Parks Commission has enacted regulations implementing these laws.

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. 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.”

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. 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.” This effort is supported by former FWS Director, Dan Ashe.

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


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%20are%20required; see also Scott Shindledecker, FWP Commission Approves More Liberal Wolf Hunting, Trapping Regs, DAILY INTER LAKE (Aug. 25, 2021, 6:25 AM), 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.


recreation projects.\textsuperscript{423} PRA funding is designed to ensure sound conservation policies for the benefit of a diverse array of wildlife.\textsuperscript{424} States, which adopt or implement policies contrary to the conservation purposes of act, are not eligible for funds.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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...”\textsuperscript{429} Recently, three Yellowstone wolves were killed during Montana’s wolf hunting season.\textsuperscript{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

\textsuperscript{423} 16 U.S.C. §§ 669-669i (2019); Zaccardi, supra note 416.
\textsuperscript{424} Zaccardi, supra note 416.
\textsuperscript{425} Id.
\textsuperscript{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).
\textsuperscript{428} Id.
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.”

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. The Commission has also prohibited the use of snares on public lands in lynx protection zones.

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. 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. 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. 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. Conservation groups accuse Wyoming of waging war on wolves.

432. Id.
434. Id.
438. WYOMING GAME AND FISH DEP’T., supra note 436.
Wyoming’s wolf management plan has been controversial. Congress delisted gray wolves in the NRM DPS in 2011, except Wyoming. Congress instructed the FWS to reconsider Wyoming’s management plan. 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. 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. Subsequently, the D.C. Circuit, reversing the district court, determined that the Wyoming plan has adequate regulatory provisions. 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. 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. 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.” 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.” Washington’s plan “gives public scant recourse” to comment or influence “changes or additions [] by the WDFW.”

440. Edward A. Fitzgerald, supra note 42 at 10447.
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.
446. Plaintiffs’ Joint Motion, supra note 75 at 37-38.
447. Id. at 37, n. 24.
448. Id. (citing Cascadia Wildlands v. Woodruf, 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.”

Washington’s wolf population has continued to prosper. Washington has a population of 132 wolves with another 46 on the Colville Indian Reservation. Furthermore, gray wolves continue to remain protected as an endangered species under state law after delisting.

There is, however, growing concern that too many wolves are being killed in northeast Washington, ostensibly to stop livestock depredation, particularly on one farm. The Center for Human Economy has filed suit to curtail the killing wolves in the region. Governor Inslee, echoing similar concern, stated: “The potential for future predations 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.” 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.

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.” However, they praised Governor Inslee’s recent efforts,


456. Nichols, supra note 455.

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

Wolf delisting generated a conflict in Washington. The Director of WDFW supported federal delisting, while 72% of Washington residents opposed the proposal. 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.”

2. Oregon

Wolves in the eastern third of Oregon were federally delisted as part of NRM DPS in 2011. Wolves were considered an endangered species under state law until being delisted by the Oregon Department of Fish and Game (ODFG) in 2015. Conservation groups challenged state delisting, arguing it was premature. While the litigation was underway, the Oregon legislature passed HB 4040 in 2016, which removed wolves from the state’s endangered species list. The Oregon Court of Appeals dismissed the case, holding the statute ratifying delisting made the challenge to the ODFG rule change moot. Wolves are classified as special status game animals in Oregon.

Oregon’s wolf management plan, which was developed in 2005, was revised in 2019. The conservation objectives in the plan call for “four breeding pairs of wolves present for three consecutive years” in western Oregon. The plan’s management objective calls for “seven breeding pairs of wolves present for three consecutive years.” Neither has been met in western Oregon.

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463. Id. See id.

464. Id.

465. Id.


groups criticized the plan, alleging that the ODFW was proposing to kill too many wolves in response to livestock depredations. 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. Nevertheless, Oregon counted 173 wolves in 2020, which was a 9.5 percent increase over the 158 wolves last year.

Federal delisting generated a controversy in Oregon, similar to that in Washington. The Director of ODFG supported federal delisting. 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.” However, Governor Brown does support delisting wolves in Oregon.

3. California

Wolves from Oregon have migrated to California. Wolves were listed as a state endangered species in 2014. The California Farm Bureau Federation and California Cattlemen’s Association brought suit, challenging the designation. Only one wolf had been sighted in state, a migrant from Oregon (OR-7), so the listing was premature. California court in 2019 rejected the suit, ruling that the state had the right to list wolf as endangered species.

Wolves continue to be listed as endangered species under state law in California after delisting. California adopted its management plan in 2016, so its effectiveness is uncertain.

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


479. Id.

480. Id.

481. Id.

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. The expected population at that time is estimated to be in the range of 153-190 wolves.

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.”

D. Central Rocky Mountains

The FWS declared that wolves in central Rocky Mountains (CRM) will be protected by state laws after delisting. 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. Colorado voters in 2020 approved Proposition 114, which authorized the reintroduction of wolves into the state. Proposition 114 requires the Colorado Park and Wildlife Department to develop a plan to reintroduce wolves west of continental divide by December 31, 2023. Governor Polis believes this can be done in 2022 rather than 2023. 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.

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


487. COLO. REV. STAT. § 33-6-109.


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.\textsuperscript{492} Wolves are already living in northwest Colorado.\textsuperscript{493} However, 3 of the 4 wolves sighted in northwest Colorado were killed when they crossed over into Wyoming’s predator control zone.\textsuperscript{494} This demonstrates the weakness of Wyoming’s wolf management program.

2. Utah

Utah does not welcome wolves.\textsuperscript{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.\textsuperscript{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.\textsuperscript{497}

The north-central portion of Utah was delisted as part of the NRM DPS in 2011.\textsuperscript{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.\textsuperscript{499} Wolves were also considered furbearers and could only be taken with a state license.\textsuperscript{500} Lethal control was permitted in the federally delisted area to address livestock depredation.\textsuperscript{501}


\textsuperscript{495} Jennifer Sherry, \textit{Six of the Worst States to Be a Wolf}, \textit{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.”).

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.\textsuperscript{502} The Utah wolf management plan will go into effect post-delisting.\textsuperscript{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.\textsuperscript{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.\textsuperscript{505}

E. Northeast

In the Northeast, wolves are only protected in New York\textsuperscript{506} and New Hampshire, but these states lack state management plans.\textsuperscript{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.\textsuperscript{508} The FWS dismissed the impact of climate change, asserting that the gray wolf is “highly adaptable.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{511} Dr. Carroll explained that “wolf populations are

\begin{itemize}
  \item 503. O’Donoghue, \textit{supra} note 503.
  \item 504. \textit{Id.} (the resolution calls for the federal government to block efforts to force wolves on the state of Utah)
  \item 506. Rick Karlin, \textit{NY lawmakers want to save the wolf, even if they are extinct here}, TIMES UNION, Jan. 5, 2021.
  \item 507. CENTER FOR BIOLOGICAL DIVERSITY PETITION, \textit{supra} note 223, at 26.
  \item 508. 16 U.S.C. § 1533(b).
  \item 511. CARROLL, \textit{supra} note 69, at 9.
\end{itemize}
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.  

The FWS asserted that any threats to the gray wolf will be addressed during its five-year post-delisting monitoring. 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.” The Guidance also points out that different monitoring protocols will be necessary in different locations because of differences in threats and population dynamics. 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.

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. 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.
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.


The Biden Administration’s stance has generated a great deal of criticism. Scientists, conservation groups, legislators, and Native American tribes 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.” 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. 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[

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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/e7debca4-0633-11ec-aeae-f2a8138f132a_story.html.


528. Budryk, supra note 521.
may be threats to the gray wolf."\textsuperscript{529} All of these factors will be evaluated in the new 12-month status assessment.\textsuperscript{530}

Nevertheless, the Biden administration continued to defend gray wolf delisting in the court.\textsuperscript{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.”\textsuperscript{532} The fate of gray wolf is being decided by the U.S. District Court for Northern District of California,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{536} The Court held the FWS failed to consider the impact of lost historic range on gray wolf’s current status.\textsuperscript{537}

The Court determined that the FWS interpretation of the significant portion of the range was arbitrary and capricious.\textsuperscript{538} The court acknowledged that the definition fell within agency discretion.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{529} 90-Day Finding for Two Petitions to List the Gray Wolf in the Western US, 86 Fed. Reg. at 51857
\item \textsuperscript{530} Id. 
\item \textsuperscript{532} Id. 
\item \textsuperscript{534} Order Resolving Cross-Motions for Summary Judgment, Def. of Wildlife v. F.W.S. (No. 4:21-cv-00344-JSW), (Feb. 10, 2022).
\item \textsuperscript{535} Id. at 12-14.
\item \textsuperscript{536} Id. at 10-12, 18.
\item \textsuperscript{537} Id. at 18-19.
\item \textsuperscript{538} Id. at 14-18.
\item \textsuperscript{539} Id.
\end{itemize}
guideposts against which to judge the FWS exercise of discretion.\textsuperscript{540} The court also determined that the FWS consideration of the significance of wolves in PNW and CRM was inconsistent.\textsuperscript{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.\textsuperscript{542} The court refused to consider recent changes in wolf management plans in Minnesota and Wisconsin.\textsuperscript{543} The court also failed to acknowledge hostility toward wolf recovery, particularly in Michigan and Utah.\textsuperscript{544}

Conservation groups applauded the decision.\textsuperscript{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.”\textsuperscript{546}